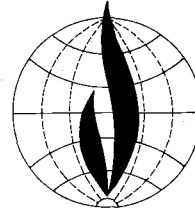


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No. 9

December 1972

Editor: Niall MacDermot

THE INTERNATIONAL COMMISSION OF JURISTS

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

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

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

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

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

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Editorial

In the last number of our REVIEW we published a short article on Uruguay which provoked some strong reactions. Unfortunately, owing to the delay in publication of the Spanish edition, the full text of the article was not available in Spanish in Latin America. Instead a shortened, and in some important respects inaccurate, account of it distributed by one of the press agencies was published in a number of Latin American newspapers.

Dr. Hector Gros Espiell, the Representative of Uruguay to the U.N. in Geneva, replied to our article in a letter to the Commission dated July 28, which he also released to the press in Uruguay. A shortened version of this reply, as agreed with Dr. Espiell, appears at the end of this editorial.

A large part of the reply is devoted to establishing that the measures taken to counter the guerrilla movement were in accordance with the Uruguayan Constitution. Our article did not suggest otherwise, though many important Uruguayan jurists have done so, including Dr. Alberto Ramon Real, Professor of Constitutional Law and Dean of the Faculty of Law at the University of Uruguay.

We do not propose to publish a detailed answer to Dr. Gros Espiell's letter, since the letter contained an invitation from the Government of Uruguay to the International Commission of Jurists to send an impartial mission to Uruguay to ascertain the truth. The Commission has responded to this invitation, suggesting terms of reference and procedures, and the Commission is now awaiting confirmation from the Government that these suggestions are acceptable. The problem of terrorism and the Rule of Law is a world-wide one, and we believe that a careful impartial study of the problem in Uruguay would be of great value.

We would only make two comments upon Dr. Gros Espiell's letter. Firstly, we did not suggest in any way that the lawful use of force by the authorities is to be equated with illegal violence. Secondly, we did not suggest that the Government of Uruguay have authorised the use of torture. However, we are not alone in suggesting that there has been illegal use of torture against suspects in Uruguay.

We regret that the newspaper report of our article also led Dr. Sebastian Soler, the greatly respected professor of penal law in Argentina, to resign from the Commission and to announce his resignation to the press. Dr. Soler has been asked to reconsider his decision in the light of the explanations he has been given and the publication in this issue of the Uruguayan Government's reply. As a result of the publicity given to Dr. Soler's resignation, we have received many messages of support from jurists in Uruguay and Argentina.

Dr. Hector Gros Espiell's reply for the Uruguay government:

The pattern, which your REVIEW describes as 'typical', of a government seeking to maintain order and the authority of the state at the expense of its fundamental liberties and finding itself in a more and more disturbed situation as its fundamental liberties disappear, is not to be found in Uruguay.

On the contrary, the situation has been and remains quite different. Totalitarian and anti-democratic subversion, seeking to destroy the constitutional system of the Republic by violence, appeared in a state where the full exercise of fundamental rights was a reality forming part of the very life of the country.

The country reacted only slowly to this terrorist offensive, which constituted a new and inexplicable phenomenon in Uruguay. Public opinion did not readily understand why an urban guerilla movement broke out precisely in a state where the law was respected and—subject to the limitations of all things human—was a model from the democratic and social point of view. People did not understand, at first, that what made the country such an attractive target for seditious elements was precisely the attachment of Uruguay to democracy and liberty, as well as the social progress obtained as a result of the peaceful revolutionary experiment which started at the beginning of the century.

The first decisions of a defensive nature taken by the Government were limited to the adoption of 'urgent security measures' envisaged and provided for by the Constitution of the Republic (Article 168, para 17) and which could be terminated either by the General Assembly or by the Permanent Commission. It was necessary to have recourse to these security measures for a long period and to give them at times a content which was novel in the theory of Uruguayan constitutional law.

Given the increase in subversive measures (assassination of a foreigner, kidnapping of diplomats and persons holding official positions, etc.) it was seen to be necessary to go a step further while still remaining within the framework of the Constitution. By virtue of Article 31 of the Constitution, since the necessary elements to constitute a 'conspiracy against the country' were present, it was decided to suspend the guarantee of individual security for a period determined in advance, with the authorization of the General Assembly or the Permanent Commission.

Since a real state of war existed, as was shown by the use by seditious groups of homicidal violence in its most extreme forms, a 'state of internal war' had to be proclaimed with the approval of parliament under Article 253 of the Constitution, and Article 31 of the Constitution was applied, so as to make possible sure, speedy and effective countermeasures, by giving specific powers to the armed forces to combat subversion (under the decree of 9 September 1971).

Finally, the promulgation on July 10, 1972, of the Law on the Security of the State, which parliament adopted with an overwhelming majority, made available an effective legal instrument adapted to the

particular needs of present circumstances and inspired by the norms of democratic comparative law for the protection of freedom, and this made possible the termination of the state of internal war (which was done on 11 July).

Democracy was preserved without departing from the Constitution and all Uruguayans are proud that constitutional continuity has been maintained; the public authorities have acted in an independent way, each within its respective sphere; parliament, the judiciary and the administrative tribunal have discharged their functions without any interruption; elections have taken place on the date and in the manner laid down in the Constitution and by the law.

Certainly it was necessary to act with energy, to have recourse to constitutional provisions which had not previously been used and to give to some articles of the Constitution an interpretation which was wide, but no wider than the gravity of the situation demanded.

My country does not think that repressive measures resolve all problems. On the other hand, no-one doubts that crime must be combatted and criminals arrested and punished in accordance with the law in order to guarantee public order, which is the basis of liberty.

Subversive violence has nothing to do with force placed at the service of law in a democratic state in order to assure effectively the Rule of Law. Nevertheless, the article which appeared in your REVIEW seemed to put on the same footing subversive violence and the legitimate use of force by the state, a dangerous confusion which I do not think the International Commission of Jurists would wish to encourage.

It is untrue that opposition and criticism have been suppressed.

In Uruguay opposition, criticism and non-conformism are looked upon as the necessary stimulus to progress and change. No-one seeks to defend the social, political or economic *status quo*, but everyone devoted to democracy strives to ensure that the changes to be made should be the outcome, as is our tradition, of free discussion, of the peaceful confrontation of conflicting ideas and of a fruitful dialogue governed by the law and respecting the legitimate will of the majority and all the rights of minorities.

On the parliamentary level, opposition and criticism have been expressed with complete and absolute freedom, both before and after the 1971 elections. Outside parliament, opportunities for opposition and criticism have been preserved within the natural limits of what is reasonable in the very special situation which Uruguay is going through. These limits are laid down in laws brought into force by the Government in accordance with constitutional provisions defining their powers. The relevant sanctions have been applied only in those cases where people have made an apologia for crime, supported subversive action, or advocated the use of violence.

It is not correct that the Government, the police or the armed forces have encouraged, directly or indirectly, the creation or the activity of paramilitary forces of repression (death squads etc.). The authorities have, on the contrary, been at pains to ensure full respect for law and order, by applying the law to all those who have wished to impose arbitrary and irrational use of force as a method of political action.

The Government has not ordered the use of ill-treatment or torture, which would have been contrary to the Constitution (Article 25, alinea 2) and irreconcilable with the traditions of the nation.

Uruguay has not sacrificed its liberties. On the contrary it carries on a struggle all the time against totalitarian subversion, in order that its liberties can survive and remain as the basis of its political life as well as its economic and social development. And if present trends continue, the moment is very near when it will be possible to proclaim the victory in Uruguay, which one can already see emerging, of Justice and Law over violence and crime.

Switzerland's First Ombudsman

The first Ombudsman in Switzerland took office on 1 November 1971 in the City of Zürich. He is Dr. Jacques Vontobel, and his title is The Commissioner for Complaints for the City and Canton of Zürich. To establish clearly his independence, he has set up his office well away from the local authority offices in the former consulting rooms of a retired doctor.

His functions are:

- 1) to protect individuals against unauthorised acts or maladministration by the local authority;
- 2) to advise on differences and conflicts between individuals and the local authority in order to arrive at a just settlement;
- 3) to clear up misunderstandings between individuals and the local authority due to ignorance or misconception of the law;
- 4) to put people who feel aggrieved in touch with other agencies who can help them to get speedy advice and remedies;
- 5) to draw the attention of the local authority to what appear to him to be defects in their decrees and laws, and to make suggestions for their improvement.

Dr. Vontobel normally acts only on specific complaints, unless a problem appears to him to be one of general importance. Between 1 November and 31 December, 1971, 154 cases were brought to his attention, of which 30 were found to be outside his jurisdiction. Cases he investigated included complaints about housing problems, wrongful dismissal, pension rights, inflated charges, excessive noise and pollution, and complaints against the police.

We warmly welcome this development and hope that the experience of the Zürich Ombudsman may prove useful to other countries, such as the United Kingdom, who are considering introducing Ombudsmen at local government level.

Disappointing Start to New U.N. Procedure on Human Rights

At its forty-eighth session in 1970 the UN Economic and Social Council laid down in Resolution 1503 a new procedure for dealing with communications to the Secretary-General alleging violations of human rights and fundamental freedoms.

Under this new procedure there are three stages. First, the Sub-Commission on Prevention of Discrimination and Protection of Minorities is authorised to appoint a Working Party ' to consider all communications, including replies of governments thereon... with a view to bringing to the attention of the Sub-Commission those communications, together with the replies of governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms '. Secondly, the Sub-Commission is requested to consider the communications brought before it by the Working Group, and any replies of governments and any other relevant information, ' with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission '. Finally, the Commission on Human Rights, after examining any situation referred to it, is asked to determine (a) ' whether it requires a thorough study by the Commission and a report and recommendations thereon to the Council ', or (b) ' whether it may be a subject of an investigation by an *ad hoc* committee to be appointed by the Commission, which shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it '.

On 14 August 1971 the Sub-Commission adopted Resolution 1 (XXIV) setting out the procedures for dealing with the question of the admissibility of communications, and laying down the standards and criteria, and rulings relating to the sources of communications, the contents and nature of allegations, the existence of other remedies, and their timeliness. Admissible communications may originate from individuals or groups who are victims of violations, persons having direct knowledge of violations, or non-governmental organisations acting in good faith and not politically motivated and having direct and reliable knowledge of such violations.

This new procedure constitutes a landmark in the history of the implementation of human rights. For the first time within the framework of the United Nations there is a procedure under which private individuals and non-governmental organisations, as well as governments, can raise complaints about violations of human rights within a state and have those complaints investigated and reported upon by an impartial international body.

By its constitution the Sub-Commission on Discrimination and Minorities is intended to be a body of independent experts. They are appointed by governments, but to act in their individual capacity and not as representatives of or spokesmen for their governments. Some governments adhere to the spirit of this procedure, but unfortunately in many cases the persons appointed are government employees and even members of official government missions to the U.N. It is inevitable in these circumstances that political considerations will tend to affect unduly the work of the Sub-Commission, thus following the pattern of its parent body, the Commission on Human Rights, whose members are explicitly government representatives.

The new procedure came into operation for the first time in 1972. The Working Group met in New York for the 10 days immediately preceding the meeting of the Sub-Commission in August. According to a report in the New York Times on September 21, 1972, the Working Group singled out for consideration by the Sub-Commission communications relating to three countries, Greece, Iran and Portugal.

The communication concerning Greece was a very complete dossier filed on May 19 and June 20, 1972, by Professor Frank Newman of the University of California as Counsel for the International Commission of Jurists, the International League for the Rights of Man, the Fédération internationale des Droits de l'Homme, the International Association of Democratic Lawyers, Amnesty International and seven Greek exiles who have personally suffered violations of their human rights; one of them was Lady Amalia Fleming. The communication included a large number of reports and personal affidavits by individuals who had been subjected to arbitrary arrest and detention, torture or cruel or inhuman treatment, persons who had been denied fair trials, who had been denied their right to freedom of opinion, expression, peaceful assembly and association, who had been deprived arbitrarily of their nationality, who had been prevented from expressing their will in genuine elections or in other respects subjected to violation of their human rights.

The Sub-Commission spent two days in private session considering the report of the Working Group and the communications referred to the Sub-Commission. Regrettably they failed to decide whether or not to refer to the Commission on Human Rights

the communications brought to their attention by the Working Group. Instead they referred them back to the Working Group for another year. The reason put forward for this was that the Governments of the countries concerned had not replied to the communications. The official report of the Sub-Commission records the decision 'that the Working Group shall consider at its next session those communications it was not able to examine at its last session, as well as communications received thereafter, and that *it may reexamine the communications singled out in its report, in the light of replies of governments, if any*' (italics added). The effect of this decision is that the consideration of allegations of gross violations of human rights, involving the liberty, the safety, the freedom from torture and even the lives of many individuals has been shelved for a whole year.

There appears to be no justification for this long delay. The governments concerned had ample opportunity to reply to the communications if they had wished to do so. Under the procedure for dealing with these communications the Secretary-General furnishes each Member State concerned with a copy of any communication concerning human rights which refers explicitly to that state or to territories under its jurisdiction, and the governments are asked when sending replies to say whether they wish their replies to be presented to the Commission in summary form or in full. If the governments concerned had not replied to the communications singled out by the Working Group, the reasonable inference is that they did not wish to do so.

The terms of the resolutions adopted by ECOSOC and by the Sub-Commission also clearly contemplate the reference to the Commission of communications to which there has been no governmental reply. As has been seen, ECOSOC Resolution 1503 (XLVIII) speaks of the Working Group bringing to the attention of the Sub-Commission 'those communications, together with the replies of governments, *if any...*' and the Sub-Commission are asked to consider those communications 'and *any* replies of governments relating thereto'. The Sub-Commission's Resolution 1 (XXIV) says that 'Communications shall be admissible only if, after consideration thereof, together with the replies, *if any*, of the governments concerned, there are reasonable grounds to believe...' (all italics added).

In view of these clear provisions in the Resolutions laying down the procedure, it is difficult to avoid the conclusion that the decision of the Sub-Commission was affected by undue regard for the susceptibilities of governments.

It is to be hoped that the Commission on Human Rights and the ECOSOC will give clear directions to ensure that this new procedure is not brought into contempt by prevarication and delay.

The Aftermath of the war in Bangladesh

The aftermath of the civil war in East Pakistan, the war between India and Pakistan, and the establishment of the independent People's Republic of Bangladesh have, as was to be expected, produced many grave problems affecting human rights and the rule of law.

It is greatly to be credit of Bangladesh that the widespread massacres of Biharis and collaborators which many people anticipated at the end of the hostilities did not in fact occur. The initial acts of vengeance were quickly brought under control, with the help of the Indian army, and thereafter, apart from one grave outburst of mob violence at Khulna in March 1972, there has been remarkably little violence. One of the reasons for this restraint is that firm pledges were given that those who had committed war crimes and crimes against humanity would be brought to justice.

To honour this undertaking, one-man special tribunals have been constituted under the Bangladesh Collaborators (Special Tribunals) Order, 1972. This Order has a number of unsatisfactory features. The definition of 'collaborators' is very widely drawn and includes any person who has '(i) participated with or aided or abetted the occupation army in . . . furthering the illegal occupation of Bangladesh by such army; (ii) rendered material assistance in any way whatsoever to the occupation army by any act, whether by word, signs or conduct . . .'. The order is retrospective so as to make collaboration an offence punishable with a minimum of 3 years and a maximum of 5 years rigorous punishment in respect of acts which were not illegal at the time they were committed. It is, however, a defence if the accused was performing 'in good faith functions which he was required by any purported law in force at the material time to do'. Much heavier sentences apply to collaborators who have committed offences under the penal code.

Persons suspected of collaboration may be arrested by the police without warrant and held for 6 months or for such further period as the Government authorises for completion of police inquiries. Habeas corpus has been suspended. There are no preliminary proceedings, but there is a right of appeal to the High Court.

The accused is entitled to be defended by 'a legal practitioner of his choice' but, contrary to earlier assurances, this does not extend to Counsel from outside Bangladesh. Sir Dingle Foot, the former British Solicitor-General, was refused permission to enter Bangladesh to defend Dr. Malik, the civilian administrator of East Pakistan under President Yahya Khan's martial law regime.

In October 1972, the Government stated that 42,000 persons had been arrested as suspected collaborators. It is said that proceedings have begun against some 2,000 of these. Of the remainder, it is believed that very large numbers are persons who were denounced, or who for their own protection surrendered, to the police in the very early days after the war, and against whom there is no or no sufficient evidence.

It must be recognised that the Bangladesh Government was faced with an exceptionally difficult problem following the struggle for independence. Terrible crimes against the population had been committed on a massive scale, and wholesale reprisals could only be avoided by assurances that those responsible would be brought to justice. The Government were determined that the accused should be accorded a fair trial with proper safeguard. However, there was a severe shortage of experienced police officers and the difficulties of proper investigation and collection of evidence were immense. To release large numbers of suspects in the early days would have been politically unacceptable and would probably not have been in the interests of the suspects themselves. Now, however, that time has elapsed and, it is to be hoped, the more violent passions have been assuaged, it is urged that those against whom there is insufficient evidence should be released.

Apart from the persons in custody, the situation of the many hundreds of thousands of Biharis¹ remains precarious. In a few places they are being re-integrated into the community, but for the most part they remain herded together in over-crowded settlements living in fear and poverty. Many would like to return to India or emigrate to Pakistan but these countries are not willing to receive them.

A similar problem arises for the East Bengalis in Pakistan, who number about 300,000 and include many members of the armed forces and civil servants. Most of them would like to return to Bangladesh but are unable to do so. Disturbing reports are received of the conditions in which they are living. Pakistan is unwilling to discuss their return until the return to Pakistan of the 94,000 prisoners of war and civilian detainees who were taken to India from Bangladesh at the end of the war.

As the International Commission of Jurists stated publicly in August 1972, there is no justification in international law for their continued detention. The third Geneva Convention of 1949 clearly provides that there is a duty on the parties to repatriate POW's without delay after cessation of active hostilities. This duty is imposed unilaterally on each party and does not depend on the conclusion of any treaty or agreement. In accordance with this obligation, Pakistan has decided to repatriate all Indian POW's

¹ Urdu-speaking moslems, most of whom migrated from India at the creation of Pakistan in 1947.

taken on the western front, but India and Bangladesh refuse to return those who surrendered to their joint command in Bangladesh. India will not return them without the consent of Bangladesh, and Bangladesh will not consent until Pakistan recognises their new State. In this way the POW's are being used as a political bargaining counter, the very thing which the Geneva Convention was designed to avoid.

As a matter of policy, Pakistan would be wise to recognise Bangladesh, and President Bhutto has for some time been trying to persuade his fellow countrymen to accept that course. But recognition of other states is not a matter of obligation under international law, and Pakistan's failure to recognise Bangladesh cannot, therefore, justify the continued detention of the Pakistani POW's. It is to be hoped that this deadlock will before long be resolved by a general agreement covering Pakistan's recognition of Bangladesh, the return of the Pakistan POW's, the return of the Bengalis in Pakistan and, perhaps, agreement to resettle some of the Biharis in Pakistan or India.

The only prisoners of war whose repatriation may lawfully be delayed are those against whom there is prima facie evidence of their having committed war crimes or crimes against humanity during the period of the hostilities. In the view of the International Commission of Jurists, the Government of Bangladesh is entitled to bring such persons to trial, but if world opinion is to be satisfied that these are fair trials, and not mere acts of vengeance, the accused should be tried before an International Tribunal under international penal law. The Government of Bangladesh have been urged to set up a tribunal with a majority of judges from neutral countries, in order to avoid the charge levelled at the war crimes trial held in Nuremberg after World War II, that it was a trial of the victors over the vanquished.

At the time of writing there are reports that the Government of Bangladesh are intending to start proceedings shortly against a number of Pakistan POW's before a purely Bangladesh tribunal constituted under a special decree. The precedent of the Collaborators Order and the exclusion of foreign Counsel from the Special Tribunals do not augur well for the acceptability of such a tribunal under international law, or under the principles of the Rule of Law.

The International Commission of Jurists welcomes the decision of December 7, 1972, by the Pakistan High Court (Chief Justice Abdur Rahman and Mr. Justice Fakhruddin) under habeas corpus proceedings ordering the release of the editor of the newspaper *Dawn*, Mr. Altaf Gauhar. Mr. Gauhar had been illegally detained for 10 months, purportedly under the Defence of Pakistan Rules. The decision serves to confirm reports that a number of political opponents of the Government have been held in illegal detention. If true, it is to be hoped that any others will be released without the necessity for such protracted proceedings.

Northern Ireland - A New Preventive Detention Procedure

The British Government has recently introduced a novel and interesting experiment in the procedure for making orders for preventive detention in Northern Ireland. For the first time, as far as is known, the decisions whether or not to make a detention order is to be taken by a quasi-judicial body instead of by a Minister or other executive authority.

The introduction of preventive detention is, of course, an admission of failure to maintain law and order under a system complying with the principles of the Rule of Law. International Law recognises that this may be necessary and justifiable on a temporary basis in certain emergency situations. The criteria which require to be satisfied under the European Convention on Human Rights, to which the United Kingdom is a party, are that there must be an imminent or actual danger affecting the whole nation and threatening the continuance of the organised life of the community, and of such a nature that normal measures or restrictions are plainly inadequate. The burden of proving these factors lies upon the government derogating from the normal provisions of the Convention. The measures taken must not go beyond those strictly required by the exigencies of the situation, and persons detained must be treated with humanity and respect for the dignity of the human person. International Law is silent, however, as to the procedures to be adopted for making detention orders.

The fact that detention without trial is incompatible with the principles of the Rule of Law has previously led to the conclusion that the making of a detention order must be a purely executive act, made on political and security grounds, in which judicial or quasi-judicial institutions have little or no part to play. In many countries there is some review procedure, under which a detention order is considered by a review tribunal after an interval of, say, 3, 6, or 12 months. Usually these tribunals are purely advisory and the decision whether or not to release a detainee remains with the Executive. In some countries, however, the review tribunal has power to order the release of a detainee. This applies, for example, in the Republic of Ireland where the detainee has to be released if the tribunal (known as The Commission) reports that 'no reasonable grounds exist' for his continued detention¹.

This treatment of the making of a detention order as a purely executive act tends to find favour both with administrators and with judges; with administrators because they then retain complete

¹ Offences Against the State Amendment Act, 1940

control and are not restricted by judicial or quasi-judicial bodies whom they may regard as too lenient; with judges because they dislike having to decide the issue whether a person is a terrorist whose detention is necessary for the protection of the public other than under normal criminal law procedures. Almost universal experience, including that in Northern Ireland, indicates however, that where all judicial control of the executive is abandoned, there follow widespread allegations of torture or ill-treatment of suspects, of excessively strict detention policy by the executive, and of persons being detained on wholly inadequate evidence, including mistakes in identity. Public confidence in the detention procedures may thus be lost.

The difficulty about subjecting detention orders to even quasi-judicial control is that normal court procedures are inapt. Much of the evidence against the respondent is from people who are unable to give their evidence in public or even in the presence of the accused or his representatives for fear of reprisals. If the tribunal is to be able to assess the evidence, it must be able to hear the witness in person. To do so in the absence of the respondent offends against normal trial procedures. But the only practical alternative is to compel the tribunal to act on hearsay evidence obtained by the security authorities from unidentified confidential sources. It is suggested that this is the greater evil, since the reliability of the evidence cannot then be assessed by the tribunal.

The new procedure for Northern Ireland is contained in the Detention of Terrorists (Northern Ireland) Order 1972². It provides that the Secretary of State may make an 'interim custody order' valid for 28 days for the temporary detention of a person suspected of terrorism. After that time he must be released unless his case has been referred to a commissioner for determination. The reference must be in writing and a copy must be served on the detainee. The commissioner must hold or have held judicial office in the United Kingdom or be a barrister or solicitor of at least 10 years standing. The commissioner inquires into the case 'for the purpose of determining whether or not he is satisfied that (a) that person has been concerned in the commission or attempted commission of any act of terrorism or the direction, organisation or training of persons for the purpose of terrorism; and (b) his detention is necessary for the protection of the public'. Terrorism is defined as 'The use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear'. If the commissioner is satisfied on these two points he makes a detention order, which continues until discharged. The detention order must state the grounds upon which it is made. The Secretary of State may at any time order the discharge of an order

² SI No. 1632 (N.I. 15)

either absolutely or subject to recall. The Secretary of State may also refer a case to the commissioner for review at any time, and if the commissioner considers it is no longer necessary for the protection of the public he must discharge the order. A person may appeal against a detention order within 21 days to an appeal tribunal.

Proceedings both before the commissioner and the tribunal are in private. The commissioner may receive any evidence, written or oral, can question any person, including the respondent, and can cause inquiries to be made in relation to any matter. At least 3 days before the hearing the respondent must be served with a written statement of the nature of the terrorist activities which are to be the subject of the inquiry. The respondent must be present at the inquiry and may be legally represented, but if the commissioner considers the respondent's presence for any part of the proceedings would be 'contrary to the interest of public security or might endanger the safety of any person' he may exclude the Respondent and his advocate from that part of the proceedings. Where he does so he must 'in so far as the needs of public security and the safety of persons permit, inform the respondent and his representatives of the substance of the matters dealt with during that part of the proceedings'. The same provisions apply on appeal. These provisions will be repugnant to lawyers used only to fair trial procedures, but it may be that they are the best that can be achieved in the peculiar circumstances of prevention detention proceedings.

It is understood that this new procedure has been introduced as a temporary measure pending the report of a Committee presided over by Lord Diplock. It will be interesting to see what lessons are learned from the procedure, and whether the adoption of a similar solution is recommended by the Diplock Committee.

Some improvements to the procedure can obviously be suggested, such as a periodic right to review not subject to the discretion of the Secretary of State, and a requirement to bring the detainee before the Commissioner within the 28 days of the interim custody order, in order to avoid long periods of detention while awaiting the inquiry. It would then be for the Commission to decide what delay in the hearing should be allowed. At first sight, however, the procedure appears to constitute a considerable advance in subjecting preventive detention to quasi-judicial control.

Another approach to this problem is contained in the recent Offences Against the State (Amendment) Act in the Republic of Ireland. This enables the ordinary courts to convict a person of membership of an illegal organisation on the evidence of a senior police officer. His evidence would presumably be based upon information from unidentified sources. It would, therefore, not be capable of cross-examination or scrutiny. It is difficult to see how the courts would be able to assess the weight of such evidence when it was denied on oath by the defendant.

Police Powers in Portuguese Africa

The General Assembly of the United Nations by 98 votes to 6, with 8 abstentions, and the Security Council unanimously have called upon the Government of Portugal to enter into negotiations with a view to permitting the peoples of Angola, Guinea-Bissau, and Mozambique to exercise their right to self-determination and independence. The rejection of this proposal by the Government of Portugal is not surprising in the light of recent decrees defining the powers of the security authorities in their overseas territories.

On July 18, 1972, in Decree No. 239, the powers of the police to take 'administrative security measures' were redefined. Under this Decree the security police — formerly the P.I.D.E., now called the General Security Administration (D.G.S.) — have the power to order preventive detention in an 'agricultural colony' or forced residence in a particular locality for up to three years, renewable by a further 3 years. From the wording of the Decree it appears that this police power is not subject to any form of judicial appeal or control. The police can make these orders against any person who they consider has committed, or collaborated in, any acts 'contrary to the territorial integrity of the nation'. As Portugal maintains the legal fiction that her colonies form provinces of Portugal, this means that anyone who takes any action in support of the right of self-determination and independence of these territories is liable to be detained for up to six years by order of the security police alone. Orders for internment or forced residence outside the province in question require the approval of the Overseas Minister.

The unique powers of the security police (D.G.S.) were defined in a Decree in the Official Journal on October 1, 1972. According to this Decree :

'The administrative, judicial, military, naval and police authorities shall give to the D.G.S. any cooperation which it requires.

'The Minister of the Interior has, in relation to the DGS, the same powers as the law gives to the Minister of Justice in relation to the Judicial Police. For the Overseas Provinces these powers belong to the Overseas Minister.

'The D.G.S. is a body independent of the Judicial Police.

'During the preliminary examination [i.e. the "instruction"] :

— orders for arrest can be made by [officers of the rank of inspector and above].

— the powers which the law confers on the judge during the preliminary examination in relation to interrogation, approval and time of arrest, and bail will be exercised by [officers of the rank of inspector and above].

'The powers of the Public Prosecutor's Office during the preliminary examination will be exercised by inspectors of police.

'The presence of the defence lawyer at interrogations may be prohibited when it is inconvenient for the investigation or is justified by the nature of the crime; in this case he may be replaced by an "ad hoc" defender or by two qualified witnesses pledged to judicial secrecy.

'The officers and members of the D.G.S. may enter freely any place of entertainment, recreational clubs, local public meetings, rail and river stations, quays, commercial or private airports, camping sites or other places where police supervision or control is considered necessary.

'In any place where there are no forces of the D.G.S., the public security police or other police forces should assume responsibility and communicate with the Director-General of the D.G.S.'

By this parade of legality the Government have excluded all normal judicial procedures and all judicial control in relation to the security police. There could not be a clearer prescription for a police state.

In spite of these repressive measures, the liberation forces continue to gain in strength in the Portuguese African territories. To counter them, the security and military forces resort to indiscriminate killings and other reprisal measures. Repression of church authorities has also increased.

Father Luis Afonso da Costa, a Portuguese missionary expelled from Lourenço Marques, has made a report describing massacres and tortures carried out by Portuguese troops in an area representing a small part (one tenth) of the Tete Province. This is in the region of Caborra Bassa, where an international consortium is building a dam which is the target of much guerrilla activity. This report gives, with dates and places, the names of 92 Africans murdered in the area between May 1971 and March 1972. The district of Tete has become a veritable network of concentration camps known as 'aldeamentos'. In the zones where the guerrillas operate all Africans are invited to leave their villages to go to the nearest 'administrative post'. If they fail to comply, the village is burnt to the ground. Those who move are herded together behind barbed wire fences and no-one is allowed to leave without a permit from the army. Some hundreds of 'aldeamentos' are reported to have been constructed, each containing about 300 people.

In January 1972, four missionaries (two Portuguese and two Spanish) were arrested by the D.G.S. near Beira in Mozambique. They have been held since then without trial. In June 1972, 31 members of the Presbyterian Church of Mozambique, among them the President of the Synod Council, M. Zedequias Manganhela, were arrested and interrogated by the D.G.S. Mr. Manganhela and another detainee, Mr. Sidumo, have committed suicide in prison. The rest are still awaiting trial by a military tribunal.

Military Justice in Turkey

In July 1961 Turkey adopted a most liberal constitution. The Preamble set out the principles on which it was based: 'Guided by the desire to establish a democratic rule of law based on juridical and social foundations, which will ensure and guarantee human rights and liberties, national solidarity, social justice, and the welfare and prosperity of the individual and society...'

Article 2 of the Constitution states: 'The Turkish Republic is a national, democratic, secular and social state governed by the rule of law, based on human rights and the fundamental tenets set forth in the Preamble.'

Article 11 subjects even national security to the fundamental rights and freedoms: 'The fundamental rights and freedoms shall be restricted by law only in conformity with the letter and the spirit of the Constitution. The law shall not infringe upon the essence of any right or liberty not even when it is applied for the purpose of upholding the public interest, morals and order, social justice or national security'.

Yet, since June 1971 the most distressing reports of repression, arbitrary imprisonment, and torture have reached the outside world. Military tribunals have been created with jurisdiction over security offences and over any civilians who are alleged to have committed any offence against the military. Even a taxi driver who insults a soldier because he refuses to tip adequately will be charged before a military tribunal.

The Constitution has, of course, been amended. The legal formalities necessary for amendments appear to have been observed, but the spirit of the Constitution so proudly set out in Article 11 is dead. It is no coincidence that Article 11 was one of the first to be amended in September 1971. Truly democratic rights have been abrogated, and defence lawyers are impeded in their work, imprisoned, and even tortured.

The case of Professor Mumtaz Soysal of the University of Ankara, a universally respected lawyer and one of the founders of the Turkish Constitution, indicates the hazards to which intellectuals are subjected. His prosecution was based on his 'Introduction to the Constitution', which had been an official textbook at the University for two years. He was charged with spreading communist propaganda. It was alleged that the book, which contained references to the writings of Karl Marx and other authors, was written 'with a purpose of diverting the minds of students to dangerous ideologies'. Tried before a military tribunal in 1971, Professor Soysal was sentenced to 6 years and 8 months imprisonment, with 2 years residence in the countryside and a lifelong ban

from public service. The military court of cassation set aside the conviction and Professor Soysal was released in March 1972. On 26 April, the same military tribunal retried the case and confirmed its original decision. On July 14, the military court of cassation set aside the second conviction and ordered a further retrial by the same tribunal, but requiring that it be supplied with a report on Professor Soysal's textbook by a committee of five experts 'from the same field of specialisation as the author or from similar fields'.

The five experts nominated appear to have been chosen for their extreme right wing views. Professor Aytan Onder, professor of Penal Law at Istanbul, was at the time performing his military service and is a legal advisor to the Martial Law Commander in Istanbul; the only specialist in Constitutional Law, Professor Selcuk Ozcelik of the same faculty, is a well-known writer in the right-wing religious press; Professor Nevzat Yalcintas of the Faculty of Economics at Istanbul is the present Secretary-General of the Employers Federation; Professor Sabahattin Zaim is the author of a book published by the Nationalist Youth Movement; and Professor Amiran Kurtkan is a sociologist described as an 'ultra-nationalist'.

These experts reported unfavourably on Saturday, 21 October, in a 22-page report which Professor Soysal had little time to answer. On Tuesday, 24 October, Professor Soysal was again convicted and condemned to the same sentence, except that the period of forced residence was increased from 2 to 3 years. He is appealing against the decision.

Professor Soysal's wife was convicted on 26 April, 1972, to one year's imprisonment and 4 months forced residence for having insulted the honour of the army in a conversation in a restaurant while her husband was in custody. On appeal the sentence was reduced by one sixth.

Professor Soysal's conviction for matters written long before the declaration of martial law is not an isolated case. Representatives of the International Federation of Journalists recently visited four journalists in Samalçilar Prison in Istanbul. One of them, Cetin Altan, a former deputy of the National Assembly, was sentenced to one year's imprisonment for insulting the Head of State in a speech in the Assembly in 1967, also published as an article, in which he said that the President's election was the result of a political manoeuvre. Another, Alpay Kabacali, was imprisoned as editor of a weekly paper for an article written in 1968 by the publisher, who has since gone abroad. A third, Dogan Kologlu, was sentenced to one year and one month for insulting the President in an article written 3 years before the institution of martial law.

Uganda - A Lawless State

The wholesale expulsion of Asians from Uganda, with expropriation of their property, has profoundly shocked world opinion. The legality of the expulsion is discussed in an article by Mr. Plender on another page. The expulsions are bound to do substantial and lasting damage to the economy of East Africa. The damage will not be confined to Uganda. The vigorous denunciations of General Amin's racialism by African leaders in Kenya, Tanzania, Zambia and elsewhere are no doubt in part an expression of their concern at its effects upon the future of the area as a whole.

Evil as are these expulsions, they have served to distract attention from the lawlessness and brutality with which the Ugandan Government and armed forces have been acting towards their fellow-Africans. The arrest by soldiers of Chief Justice Benedicto Kiwanuka in the Supreme Court building at Kampala was an outrage against the Rule of Law. There are persistent reports that he was beheaded within two hours of his illegal arrest. No reasons have been given for his arrest. It may be that as a former Prime Minister and as a person of stature and recognised integrity, he was thought to be a possible alternative head of state. It may be that his independent judgment in a habeas corpus application shortly before he was seized incurred the wrath of the authorities.

In addition to the Chief Justice, other prominent personalities have simply disappeared and are believed to have been murdered by army personnel immediately after their detention. President Amin's standard explanation for such disappearances is that the persons concerned have fled to Tanzania. In addition to prominent personalities, hundreds of suspected opponents of the regime have disappeared and are believed to have been murdered in all parts of the country, especially in the northern districts of Acholi and Lango, as well as in Buganda.

This defiance of the Rule of Law extends to the treatment of common criminals. On July 28, 1972, three suspected thieves, known locally as 'kondos', were publicly executed in a field at Lugazi, a small town near Kampala. The executions were carried out by members of the so-called Public Safety Unit, comprised of selected police officers. There was no trial, no conviction and no sentence. This is but one example of a practice that has been continuing indiscriminately elsewhere, including at the police barracks at Naguru, another small town near Kampala. It seems that the senior Superintendent of the Public Safety Unit has been given unlimited power of execution.

THE UGANDAN CRISIS AND THE RIGHT OF EXPULSION UNDER INTERNATIONAL LAW

by Richard PLENDER *

It is widely recognised that under international law each state has the right to expel aliens from its territory.¹ Equally, it is widely recognised that in the case of such an expulsion, the aliens may be reconducted to their state of nationality ('home state').² Recent events in Uganda have attracted attention to the power of expulsion, and have invited us to ask whether the power is subject to significant limitation. A little reflection will lead us to conclude that although international law probably confers on the individual no right to reside outside his home state, there are limitations on the power to expel alien residents. Such limitations will provide protection for the alien—at least, if they are duly observed.

I The Ugandan Decrees

In the strict terms of domestic law, a citizen of the United Kingdom and Colonies, or of Bangladesh, India, Kenya or Tanzania is not an 'alien' in Uganda. Since Uganda continues to subscribe to the Common Code of nationality in the Commonwealth, the term 'alien' refers only to those persons who are citizens of independent countries outside the Commonwealth and Ireland (such as Pakistan) and to stateless persons.³ Nevertheless, the common status of British subjects now has relatively little effect on the law governing transactions between Commonwealth Governments⁴ with the result that the right under international law to expel aliens embraces the right of a Commonwealth country to expel those who are exclusively citizens of other Commonwealth countries. For these reasons, Uganda has *prima facie* the right to expel those Asians who are not her citizens.

In fact, the vast majority of the Asians resident in Uganda are not citizens of that country. For present purposes it must suffice to summarise the cause of this state of affairs. When the Ugandan Protectorate became independent on October 9th, 1962, Ugandan

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citizenship was extended automatically to all those persons who had been British protected persons or citizens of the United Kingdom and Colonies on the eve of independence, provided that they and at least one of their parents had been born in Uganda.⁵ It is estimated that 14,451 Asians claim to have obtained Ugandan citizenship in this way. Those who were born in Uganda of parents born overseas had the right under article 8 of the independence Constitution to register as citizens within two years. According to Ugandan sources, 8,791 Asians claim to have obtained Ugandan citizenship by registration. Those who failed to obtain Ugandan citizenship have in many cases obtained citizenship of the United Kingdom and Colonies by association with Imperial India, or citizenship of Bangladesh, India, Kenya, Pakistan or Tanzania by birth or descent. The total number of Asians in Uganda in these six categories can be estimated only very cautiously; the figure of 70,000 is widely quoted.

The decision to expel the Asians appears to have been made on August 3rd, 1972.⁶ The decision was communicated to the public in speeches made by the President on August 4th, 7th, 12th, 13th and 29th. It was explained further in the speech of Hon. Wanume Kibedi at the summit conference of East and Central African Governments in Dar-es-Salaam on 7th-9th September, and in the address of General Amin to Ugandan Ambassadors and High Commissioners in Entebbe on September 21st. It has been implemented by two main decrees, the Immigration (Cancellation of Entry Permits and Certificate of Residence) Decree 1972 (No. 17) and the Declaration of Assets (Non-citizen Asians) Decree 1972 (No. 27).

Under section 9(1) of the Immigration Act 1969 (No. 19) no person may remain in Uganda unless he is in possession of a valid entry certificate, a certificate of residence or pass. There are several exceptions to this rule, but no such exception has any longer the effect of relieving a non-citizen Asian from the obligation to hold an appropriate entry certificate or pass, unless the Asian has been exempted by the Minister. Certificates and passes are issued by the Immigration Control Board in accordance with the Immigration Regulations 1969 (No. 165). The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree 1972 was issued on August 9th. Its effect is to cancel most of the permits and certificates which had been issued to citizens of the United Kingdom and Colonies of Asian origin, and nationals of India, Pakistan and Bangladesh. Subsequent announcements indicated that Asians from Kenya and Tanzania will also be expelled, and it is expected that the Decree will soon be amended accordingly. Holders of cancelled permits and certificates must leave Uganda within 90 days from Wednesday August 9th. However, a person is exempt from this Decree if he is in Government service or if he falls within a number of professional classes, or if he is an owner of ' industrial and agricultural enterprises ' or the owner or manager of ' banks and insurance companies ' and the like.

The Declaration of Assets (Non-citizen Asians) Decree 1972 purports to have been made on October 4th, 1972 and published on October 6th. Some agencies have reported that the Decree was not in fact published until October 18th. In any case, it is provided in article 9 that ' this Decree shall be deemed to have come into force on the 9th day of August, 1972 '.

By article 1:

' No person leaving Uganda by virtue of the provisions of the Immigration (Cancellation of Entry Permits and Certificate of Residence) Decree 1972 (in this Decree referred to as the departing Asian) may, (a) transfer any immovable property, bus company, farm including livestock, or business to any other person... '

Nor may any such Asian mortgage his property, issue new shares in his company, change the salaries of his staff or in any way vary the remuneration or terms of service of his company's directors. Every departing Asian must make a declaration of his assets and surrender it to the Minister for Commerce and Industry. Failure to comply with the Decree invites the imposition of a fine of 50,000 shillings or imprisonment for a maximum of two years, or both. It is difficult to escape the conclusion that the Decree renders void an agreement to purchase property of a departing Asian, even if the contract was concluded between August 9th and October 6th.

On several occasions the Ugandan Government has stressed that its present policy is not motivated by ' racist ' sentiment but is dictated by the need to ensure that national wealth is taken into national hands. The same Government has emphasised that the treatment accorded to the Asians is moderate. In a note-verbale dated October 3rd, 1972 President Amin assured the Secretary-General of the United Nations that

' All those people who are going are being allowed to take their personal belongings as well as reasonable amounts of cash with them... there has not been any single instance of confiscation of property... The alleged harassment and maltreatment which might have reached you [sic] have been entirely unfounded, or at any rate grossly exaggerated '.

Despite earlier reports to the contrary, it now appears clear that the policy of expulsion will not be extended to the refugees living in Uganda under the aegis of the United Nations High Commissioner for Refugees. These groups consist of some 75,300 Sudanese, 72,000 Rwandese and 33,600 Zairians, most of whom live independent lives in Uganda.⁸ Some Sudanese have already been repatriated as a result of the Sudanese Peace Agreement, and others are expected to follow them, but in these cases repatriation is by no means enforced.

II United Nations Involvement

The Government of the United Kingdom requested an urgent debate in the General Assembly of the United Nations on the question of the expulsions, but subsequently withdrew that request. Thus, the main debate on the subject before a U.N. organ is that which was held before the United Nations Sub-Committee on Human Rights. A proposal that the Sub-Committee should send to General Amin a telegram expressing concern at his proposed action was defeated by fourteen votes to one, with six members abstaining. A proposal to add the words 'and expulsion' to a motion condemning racial discrimination in immigration policies was defeated with only three votes in favour. However, a draft resolution referring to the Human Rights Commission the international legal protection of human rights of non-citizens was carried by a small majority (12-1-10).

The most active aspect of United Nations involvement in the affair has been the work undertaken by the U.N.H.C.R. That organization has not only communicated regularly with the Ugandan Government in order to secure the well-being of the refugees under U.N. mandate, but has also taken steps to ease the condition of the persons expelled. On October 19th, 1972 it communicated with sixteen states with a view to securing the temporary or permanent settlement there of expellees who appear to be stateless. From the beginning it has co-operated with the Intergovernmental Committee on European Migration with a view to facilitating the travel of Asians expelled from Uganda.

III Limitations on the Power of Expulsion

While expulsions on the Ugandan scale are rare, the expulsion of aliens singly or in small groups is a common, if not daily event. It is not surprising, therefore, that some authorities suggest that the power of expulsion is unlimited. In 1886 Prussia expelled from her territory large numbers of Polish Jews. The Austrian diplomat Count Kalnoky was requested to give his opinion on the legality of the Prussian action. The Count concluded that the expulsions, though regrettable, were lawful.⁹ His passivity in this regard may be attributed in part to the fact that very few Austrian citizens or interests were involved. Furthermore, his willingness to concede a large measure of discretion to the expelling state was not typical of contemporary diplomatic comment as a whole.

In 1879, for example, the American Secretary of State wrote to one of his ambassadors as follows:

' While there may be no expedient basis on which to found objection, on principle and in advance of a special case thereunder, to the constitutional right [of expelling aliens] thus asserted by Mexico, yet the manner of carrying out such asserted right may be highly objectionable... ' ¹⁰

Those nineteenth-century sources which do suggest an unlimited right of expulsion frequently rely on assertions made by the early theorists.

For example, Blackstone subscribed to the view that since a state has no duty to admit aliens, it may expel them from its territory at any time. According to this reasoning, alien friends resident in Britain were liable to be sent home whenever the King saw occasion.¹¹ Blackstone himself cited as authority for this argument not domestic but international law—more particularly, the writing of Vattel. The latter had deduced the right of expulsion from the existence of a state's general right to deny admission to aliens:

*' Puisque le Seigneur du Territoire peut en défendre l'entrée quand il le juge à propos... il est sans doute maître des Conditions auxquelles il veut la permettre... '*¹²

Similar reasoning was employed by Ambassador Marcy in a letter to the American Secretary of State as late as 1855¹³ and Vattel's very words were cited with approval by Sir Thomas Erskine in *In Re Adam*—a case in which the Privy Council considered the legality of the expulsion from Mauritius of a French subject.¹⁴ Nevertheless, it should be observed that such an argument contains a *non sequitur*. It is conceded that each state has in general the right to decline to admit aliens to its territory; but it is manifest that if a state admits the alien, it thereby undertakes certain obligations in his regard. These obligations may imply limitations on the right to expel. In effect, Vattel undermined his own statement, by adding that the admission of the alien is not to be a ground for trapping him.¹⁵

The practice of states and the jurisprudence of international tribunals lead us to distinguish between the expulsion of individual aliens and mass expulsions.

IV Expulsions of Individuals

It appears to have been in the second half of the last century that limitations on the right to expel individual aliens came to be firmly recognized and expressly discussed by theorists and practitioners of international law. A somewhat vague perception of limitations of this kind was, however, shown in 1842, in the *Orazio de Attellis Case*.¹⁶ In that case a citizen of the United States had been expelled from Mexico for publishing subversive matter. The arbitral tribunal held that Mexico was liable to make reparation, but it is not clear whether this was because the tribunal considered the grounds of expulsion insufficient, or whether it objected to the manner in which it was accomplished.¹⁷

It might appear at first sight that modern perceptions of the limitation are scarcely more precise. The Covenant on Civil and Political Rights states that

‘ An alien lawfully in the territory of a state party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ’.

It is true that there is a certain imprecision in this statement, and it is clear that there is room for debate about the effects of the Covenant on states like Uganda which have failed to ratify it. However, a closer examination will enable us to find in the agreement undertakings far less vague than those to which the tribunal referred in the *Orazio de Attellis Case*. For example, the mere application of first principles will lead us to conclude that in the passage cited above the word ‘ lawfully ’ and the phrase ‘ in accordance with law ’ refer *prima facie* to domestic law. Principle will demand, nonetheless, that these terms should be construed as relating to international law when the domestic and international rules are in conflict. Secondly, the Covenant imposes on its parties obligations of a kind to which reference is not made in the *Attellis* judgment. By article 13 the alien

‘ shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority ’.¹⁸

Indeed, the obligations contained in this article constitute at best the source of one set of limitations on the power of expulsion. An examination of diplomatic and judicial practice, principally during the last century, permits us to identify four main sets of limitations of this kind. The first group relate to the grounds of expulsion; the second relate to the manner of its achievement; the third relate to acquired rights; and the fourth to the frontier of expulsion.

The capricious or arbitrary expulsion of an alien (that is, his expulsion without cause or reasonable excuse) may amount to an *abus de droit*¹⁹ or a violation of the ‘ minimum standard ’.²⁰ In either case it may constitute a delict under international law.²¹ In the *Boffolo Case* the precise point at issue was whether Venezuela enjoyed an absolute right to expel an Italian national. The Umpire ruled that

‘ The Country exercising the power must, when occasion demands, state reasons for such expulsion before an international tribunal, and an insufficient reason or none being advanced, accepts the consequences ’.²²

Remarks to a similar effect were made in the *Maal*²³ and *Chase*²⁴ cases. The Institute of International Law attempted in 1892 to state exhaustively the grounds which might justify the expulsion of an alien.²⁵

The effort was justly attacked by Bonfils, who considered it not only futile but also unnecessary, since all of the criteria specified by the Institute could be subsumed within the general principle that

expulsion is justified only when the interests of the state's security or welfare outweigh the interest of the alien.²⁶ The principle enunciated by Bonfils was substantially reiterated by Shigeru Oda sixty years later. The latter conceded that the grounds for expulsion of an alien may be determined by each state by its own criteria; but he added that the right must not be abused. 'In time of peace... aliens may be expelled only in the interests of public order or welfare or for reasons of state security, internal or external'.²⁷

An examination of the opinions of the Law Officers confirms this proposition. In advising on expulsions from Turkey, the Officers accepted that the Turkish Government had 'the inherent sovereign right of expelling foreigners' but added that the right must be exercised 'not indeed capriciously without any cause whatsoever but upon reasonable cause, the existence of which is a matter for discussion and settlement with the Government of the foreigner'.²⁸ Claims Commissioners investigating expulsions from South Africa during the Boer War were advised in similar spirit.^{28a} We thus conclude that under customary international law a state may not expel an alien from its territory without due cause.²⁹

An expulsion amply justified in principle is nevertheless delictual under international law if it is conducted without proper regard for the safety and well-being of the alien. Once again, this is so either because the expulsion would amount to an abuse of rights, or because it would amount to violation of the 'minimum standard'. The proposition is so clear that it scarcely needs justification, although it is stated with particular lucidity by Professor Agrawala.³⁰ When Ben Tillett, the dockers' leader, was expelled from Belgium in 1896, the Law Officers accepted that the Belgian Government had the right to insist on his departure. Nevertheless, they recommended that the British Government should seek reparations on Tillett's behalf, because the manner of his detention and deportation were objectionable.³¹ Similar examples could be multiplied.³² Diplomatic practice, too, demonstrates amply the principle that an expulsion contravenes international law if it is achieved without due regard for the alien's welfare. In one case the American Secretary of State advised his Ambassador in Haiti that since the right of expulsion is created by international law, it is also limited by that same law. The Secretary then cited the following passage from Calvo's *Dictionary of International Law*:

'Every state is authorized, for reasons of public order, to expel foreigners who are temporarily residing in its territory. But when a state expels a foreigner without cause, and in an injurious manner, the state of which the foreigner is a citizen has the right to prefer a claim for this violation of international law'.³³

A graphic demonstration of this restriction on the power of expulsion is provided in the policy of the United Kingdom. In 1895 the British Government complained that sixteen British subjects in

Nicaragua had been 'arrested... imprisoned and expelled from Nicaragua... without any form of trial'. The British demanded 'liquidated' damages, the unconditional cancellation of the expulsion decrees and the establishment of a mixed commission to assess the full indemnity. On Nicaragua's refusal to accede to these demands, a British naval force occupied the port of Corinto on April 27th. It withdrew on May 5th on receipt of assurances that the demands would be met.³⁴

The writer has argued elsewhere that the expulsion of a foreigner may in certain circumstances amount to a divestment of acquired rights.³⁵ Indeed, the practice of states and general principles of law demonstrate a principle akin to an 'acquired right of residence'. In the *Expulsion of Foreign National (Germany) Case* the German court observed that an alien may, by long residence, obtain the freedom to remain in a state in which he is never naturalized. Once the state has permitted such an alien to reside in its territory 'the foreign national acquires a certain status of which he cannot be deprived without some reason'.³⁶ This view is supported by reference to those numerous domestic provisions in politically and geographically diverse states which forbid the expulsion of persons who have satisfied substantial residence requirements.³⁷ Even if this were not so it would be surprising if the expulsion had been conducted without any individual violation of those acquired rights which may have survived the constitutional changes in Uganda in 1962.

Even the briefest mention of the principle of acquired rights, in the present context, should observe that an important modification of that principle is contained in article 2(3) of the Covenant on Economic, Social and Cultural Rights. That article provides that

'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant'.

The object of this provision is to prevent foreigners from retaining the 'economic dominance which they had arrogated to themselves in the colonial period'.³⁸ Article 2 of this Convention can scarcely be said to apply to the situation in Uganda. Firstly, Uganda has failed to ratify the Convention, and therefore she cannot be bound by it in the ordinary way. Secondly, the second article was approved by only 41 votes to 38, and therefore it can scarcely be said to represent a general principle of international law. Subject to these two qualifications, article 2 has hortatory value in Uganda.

So far as concerns the frontier of expulsion, the policies adopted by the Government of Uganda appear to have been consonant with international law. While international practice demonstrates that a state may not lawfully expel an alien to a country which is unwilling to admit him, the same practice demonstrates that if none will admit him he may be sent to his state of nationality.³⁹

V Mass expulsion

It is patent that those factors which limit a state's competence to expel aliens individually must, where appropriate, limit its competence to expel aliens *en masse*. If this were not so a state could, by compounding its crime, absolve itself from liability. There are, however, certain additional considerations which apply exclusively to mass expulsions.

As a general rule, a state is competent under international law to expel aliens *en masse*, but it follows from our remarks in the previous paragraph that the expulsion may be delictual if it is not justified in the national interest.⁴⁰ When in 1934 Yugoslavia expelled a great number of Hungarian subjects as a reprisal against the alleged complicity of the Hungarian authorities in terrorist acts, she purported to justify the expulsion by reference to the widespread unemployment in Yugoslavia and the consequential need to take drastic action for the public welfare.⁴¹ If the justification for the expulsion is disputed, the disagreement must be settled by negotiation between the expelling state and the foreign country; if such negotiations fail, the dispute is to be determined by the umpire or other arbitral or judicial body to which it may be referred.⁴² In such cases the expelling state may not claim the *exclusive* right to determine its own national interests, although a margin of appreciation would probably be permitted.⁴³

Mass expulsions are now very uncommon. Professor Agrawalla,⁴⁴ adapting the words of Professor Oppenheim⁴⁵ explained the decreasing use of expulsion by reference to 'the gradual disappearance of totalitarian ideologies and... the advent of true constitutionalism'. This analysis seems unduly optimistic, but there are now some principles of international law which militate against resort to expulsion *en masse*.

Firstly, the expulsion of large numbers of foreign nationals constitutes a breach of the principles of good neighbourliness, enshrined in the Charter of the United Nations.⁴⁶ These principles are not justiciable,⁴⁷ except to the extent that their breach demonstrates an inability or unwillingness to accept Charter obligations⁴⁸ and might possibly justify expulsion from the Organization. Nevertheless it may be presumed that the inclusion of these principles in the U.N. Charter exerts some influence on all but the most recalcitrant members.⁴⁹ The Universal Declaration of Human Rights does not prohibit mass expulsions, although it does proscribe arbitrary arrest, detention and exile,⁵⁰ arbitrary deprivation of nationality,⁵¹ arbitrary interference with the family,⁵² and arbitrary deprivation of property.⁵³ It is possible that the prestige which this Declaration enjoys occasionally inhibits states from violating its provisions.⁵⁴

Secondly, an unprovoked mass expulsion is an unfriendly act, especially if it discriminates against the nationals of one state. According to Amerasinghe, 'the principle of non-discrimination is in

general a sound one, for it rests on a fundamental principle of justice and is vital to ordered relations based on mutual respect as between all States.'⁵⁵ The expulsion may be considered particularly obnoxious if it is based on a racially discriminatory policy.⁵⁶ In *Patel et al v. United Kingdom* the European Commission on Human Rights commented that "a special importance should be attached to discrimination based on race, and that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity".⁵⁷ Although the mere adoption of a racially discriminatory policy in regard to the conduct of foreign affairs may not necessarily amount to a justiciable wrong, there is an international norm or climate of opinion in which such policies are regarded with particular distaste.⁵⁸ Moreover, while this climate of opinion is current, it is not exclusively modern. A century ago the United States resolved to remonstrate vigorously if Spain should introduce in Cuba racially discriminatory expulsion laws.⁵⁹

VI Expulsion of former Citizens

President Amin announced on August 9th that he had directed his Ministry of Internal Affairs to verify the claims to Ugandan citizenship made by Asians resident in that country. In the course of this policy of verification the Ugandan authorities claim to have found defects in the titles of many thousands of Asians. The Ugandan authorities declare that such persons will no longer be regarded as citizens of Uganda, but will be liable to be expelled.

Only a factual examination can determine in each case the national status of an Asian whose claim to Ugandan citizenship is rejected by the Ministry of Internal Affairs in Kampala. It is difficult to envisage a situation in which a formal defect may have arisen so as to vitiate the automatic acquisition of Ugandan citizenship by an Asian who has been born in the Protectorate of parents born there. On the other hand, it is less difficult to conceive of formal defects which may have invalidated a claim to citizenship by registration.

A person who was formerly a citizen of the United Kingdom and Colonies retains his former citizenship if he has attempted to renounce it for the purpose of being registered as a citizen of Uganda, but has failed to become a Ugandan citizen within six months of the attempted renunciation.⁶⁰ Thus, where the U.K. authorities determine that there was a genuine defect in the registration process of such a nature as to invalidate the claim to Ugandan citizenship, they will also conclude that the *de cuius* remains a citizen of the United Kingdom and Colonies and must be admitted to the United Kingdom. Where, on the other hand, the U.K. authorities determine that there was no such defect, they will presumably conclude that the Ugandan action amounts to deprivation of nationality, and that the individual

is a stateless person. The Home Secretary has stated that the United Kingdom will not undertake responsibility for the settlement of stateless persons; ⁶¹ reports in the British press indicate however that the same Government is likely to make a contribution towards the cost of resettling such persons through the agency of the United Nations High Commissioner for Refugees.

For present purposes we may assume that there have been cases in which former Ugandan citizens have been rendered stateless by the revocation of their former citizenship. We must ask whether any special principles govern the expulsion of such persons. Some writers argue that a deprivation of nationality will not be recognized if it imposes statelessness on a racial minority group and so prevents members of the group from returning home.⁶² Professor O'Connell has cast doubt upon this proposition, and on the equally popular proposition that the denaturalizing state must admit its former nationals.⁶³ The uncertainty about a general rule of international law on this point is mitigated by the Convention Relating to the Status of Stateless Persons, adopted at a Conference convened by E.C.O.S.O.C. in 1954.⁶⁴ By article 31 of that Convention it is agreed that

' Contracting states shall not expel a stateless person lawfully in their territory save on grounds of national security or public order. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law... The contracting states shall allow such a stateless person a reasonable period within which to seek legal admission into another country '.

By article 3 parties undertake to apply the terms of the Convention without discrimination on grounds of race. Uganda is a party to the Convention.

VII Conclusions

The foregoing brief summary demonstrates, at least, the existence of a corpus of existing laws limiting a state's right under international law to expel aliens from its territory. It is hoped that the codification of these laws will be one of the functions undertaken by the United Nations Human Rights Commission when it considers the international legal protection of human rights of non-citizens. Equally, the foregoing remarks demonstrate that the existence—or even the clarity—of a principle of international law is no guarantee of its observance, even when it concerns an issue of human rights. Indeed, the reluctance of certain states to ratify the basic human rights conventions is in itself a matter for concern. For example, Uganda has not ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Economic, Social and Cultural Rights or the Covenant on Civil and Political Rights.

Speaking in 1968 Professor C. C. Ferguson observed that the promulgation of the human rights conventions constitutes completion of the United Nations' task of formulating the international standards of human rights of individuals. He added that the challenge of the future in the existing law of human rights lies in the creation of institutions and procedures whereby the declared rights can be preserved.⁶⁵

¹ See P. Van Panhuys, *The Role of Nationality in International Law*, 1959, 56 and sources cited there.

² *Infra*, note 39. This duty of admission is normally categorised as the corollary of the foreign state's right of expulsion. For the right of expulsion in general see Darut, *De l'Expulsion des Etrangers*, 1902 and Rolin Jacquemyns, 'Right of Expulsion of Foreigners', 20 R.D.I. (1888) 498.

³ Citizenship Ordinance 1962, section 2(1); cf. Constitution of Uganda, section 16(1). The Constitution is no longer in effect. See Y. P. Ghai, 'Constitutions and Political Order in East Africa', 21 I.C.L.Q. (1972) 403; George W. Kanyeihamba and John W. Katende, 'The Supranational Adjudicatory Bodies and the Municipal Governments, Legislatures and the Courts', [1972] Pub. L. 107.

⁴ Cuthbert Joseph, *Nationality and Diplomatic Protection*, 1969, 221.

⁵ Article 7 of Constitution of Uganda, in schedule to Uganda (Independence) Order in Council 1962 (1962/2175).

⁶ According to General Amin, President of Uganda: 'Even in this case the decision was given by God. When I had travelled to South Karamoja to open the District Show at Iriri, I, on Thursday night, the 3rd August, 1972 had a dream that the Asian problem was becoming extremely explosive and that God was directing me to act immediately to save the situation'. Speech of August 12th, 1972.

⁷ U.N. Office of Public Information, NV/318, October 10th, 1972.

⁸ Some 63,000 live in settlements organized by the U.N.H.C.R.

⁹ IV Moore Int. Arb. Aw. para 550 (page 80).

¹⁰ IV Moore Int. Arb. Aw. para 550 (page 76).

¹¹ *Commentaries*, 1765, Vol. I, 259, 260.

¹² *Droit de Gens*, Tome II, Chap. VIII, s. 100.

¹³ IV Moore Int. Arb. Aw. para. 550 (page 72).

¹⁴ (1837) 1 Moo. P.C. 460, 471.

¹⁵ *Loc. cit.*

¹⁶ I Moore Int. Arb. Aw. 3333.

¹⁷ D. P. O'Connell, *International Law*, 1970, 707, 1032.

¹⁸ Res. 2200 (XXI) of 1966. See A. H. Robertson, *Human Rights in the World*, 1972, 98, 101.

¹⁹ Oppenheim, *International Law*, 1952, Vol. I, 632; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, 32-36.

²⁰ Kelsen, *Principles of International Law*, 1967, 366; De Visscher, *Theory and Reality in International Law*, trans. Corbett, 1968, 280.

²¹ Brownlie, *Principles of Public International Law*, 1966, 420-421.

²² X U.N.R.I.A.A. 528.

²³ X U.N.R.I.A.A. 730.

²⁴ I Moore Int. Arb. Aw. 3336.

²⁵ 12 *Annuaire de l'I.D.I.* (1892) 223.

- ²⁶ *Manuel de droit international public*, 1908, 255, para. 442.
- ²⁷ 'The Individual in International Law' in Max Sørensen (ed.) *Manual of International Law*, 1968 at 482.
- ²⁸ McNair, *International Law Opinions*, 1956, Vol. II, 110.
- ^{28a} *Ibid*, 112.
- ²⁹ See generally F. G. Dawson, 'International Law and the Procedural Rights of Aliens before National Tribunals', 17 I.C.L.Q. (1968) 404; P. Weis, 'Diplomatic Protection of Nationals and International Protection of Human Rights', 4 *Revue des droits de l'homme* (1971) 643; T. C. van Boven, 'Some Remarks on Special Problems Relating to Human Rights in Developing Countries', 3 *Revue des droits de l'homme* (1970) 383.
- ³⁰ *International Law: Indian Courts and the Legislature*, 1965, 186.
- ³¹ McNair, *International Law Opinions*, 1956, Vol. II, 112.
- ³² See in particular *Boffolo Case*, IX U.N.R.I.A.A. 528; *Cheverau Claim*, II U.N.R.I.A.A. 1113; cf. *Rebrin v. Bird*, 32 West W.R. (1961) 400, 403.
- ³³ IV Moore Int. Arb. Aw. para. 550.
- ³⁴ IV Moore Int. Arb. Aw. para. 551; once again, examples could be multiplied. See the other cases cited by Moore in the same section.
- ³⁵ *International Migration Law*, 1972, 94-98.
- ³⁶ 32 I.L.R. (1961) 255.
- ³⁷ Zambia: Immigration and Deportation (Amendment) Act 1967, section 2(b); Canada: Immigration Act 1952, section 4(1); United States: Immigration and Nationality Act 1952, section 101(a)(27)(B); Brazil: *In Re Alexandre Selim*, 88 R.D. (1929) 320; South Africa *Van Rensberg v. Balinger*, (1950)4 S.A.L.R. 427; Costa Rica: *Hearn v. Consejo de Gobierno*, 32 I.L.R. (1962) 257; Australia: Constitution, section 51 (xxxii), interpreted in *Ex parte Walsh and Johnson*, 37 C.L.R. (1925) 36; Barbados: Immigration Act 1952, section 5 and 6; United Kingdom: Immigration Act, 1971, section 2(1)(c); Switzerland: Decree of March 26th, 1969.
- ³⁸ G.A.O.R. 17th sess., 3rd Comm. 336.
- ³⁹ *Rv. Governor, Brixton Prison, ex parte Soblen*, [1962] 3 All E.R. 641,661; *Ying et al v. Kennedy*, 292 F.2d. 740 (1961); *Moore v. Minister of Manpower and Immigration*, [1968] Can. Sup. Ct. 839; I. A. Shearer, *Extradition in International Law*, 1971, 76-91.
- ⁴⁰ Bonfils, *Manuel de droit international public*, 1908, 255, para. 442.
- ⁴¹ Toynbee, *Survey of International Affairs*, 1934, 573.
- ⁴² The Umpire in the Boffolo case thus claimed the competence to determine whether an insufficient reason had been advanced: *supra*, note 22.
- ⁴³ A claim to an exclusive right in such cases would amount to an assertion of sovereignty to determine one's own sovereignty, whereas refusal to admit a margin of appreciation would extend the principle of *abus de droit* into a strict principle of *ultra vires*.
- ⁴⁴ *International Law: Indian Courts and Legislature*, 1965, 186.
- ⁴⁵ *International Law*, Vol. I, 633.
- ⁴⁶ Preamble, paragraph 5; articles 1(3), 74.
- ⁴⁷ L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations*, 1969, 35, 462.
- ⁴⁸ Article 4(1).
- ⁴⁹ See generally V. Pechota, 'Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', 37-38 *Annuaire de l'A.A.A.* (1967-8) 36.
- ⁵⁰ Article 9.
- ⁵¹ Article 15.
- ⁵² Article 12.

⁵³ Article 17 (2).

⁵⁴ Pieter N. Drost, *Human Rights as Legal Rights*, 1965.

⁵⁵ *State Responsibility for Injuries to Aliens*, 1967, 139.

⁵⁶ In order to determine whether a policy is racially discriminating, reference may be made to its 'pith and substance' rather than its form: *Pillai v Mudayanake*, [1953] A.C. 514; *Guinn v. Beal*, 238 U.S. 1(1915).

⁵⁷ X(1) I.L.M. (1971) 6, 44.

⁵⁸ See generally R. Hauser, 'U.N. Law on Racial Discrimination', 64 A.J.I.L. (1970) 114; E. R. Richardson, 'Will the Rapidly-Accumulating Body of U.N. Law on Racial Discrimination truly be Effective?' 64 A.J.I.L. (1970) 110; *Hitai v. Immigration and Naturalization Service*, 343 F. 2d. 466 (1965); O.Y. Asamoah, *The Legal Significance of Declarations of the General Assembly of the United Nations*, 1966, 197-200.

⁵⁹ IV Moore Int. Arb. Aw. para. 552.

⁶⁰ Uganda Independence Act 1962, section 2; British Nationality Act 1964, section 2.

⁶¹ 843 H.C. Deb., col. 263 (18th October, 1972).

⁶² See generally Hufmann, 'Duty to Receive Nationals?' 24 Fordham L.R. (1955). Denaturalization of persons with no other present or prospective nationality is prohibited under the New York Convention on the Reduction of Statelessness. Uganda is not a party to that Convention.

⁶³ *International Law*, 1970, Vol. II, p. 684.

⁶⁴ 360 U.N.T.S. 117.

⁶⁵ C. C. Ferguson, 'The United Nations Human Rights Covenants: Problems of Ratification and Implementation', 62 Proc. A.S.I.L. (1968) 83, 95. See also L. O. Adegbite, 'African Attitudes to the International Protection of Human Rights' in *International Protection of Human Rights*, 1969.

CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AS A HUMAN RIGHT

by

PATRICIA SCHAFFER

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'We consider that the exercise of conscientious judgment is inherent in the dignity of human beings and that, accordingly, each person should be assured the right, on grounds of conscience or profound conviction, to refuse military service, or any other direct or indirect participation in wars or armed conflicts. The right of conscientious objection also extends to those who are unwilling to serve in a particular war because they consider it unjust or because they refuse to participate in a war or conflict in which weapons of mass destruction are likely to be used. This Conference also considers that members of armed forces have the right, and even the duty to refuse to obey military orders which may involve the commission of criminal offences, or of war crimes or of crimes against humanity.'

World Conference on Religion and Peace
Kyoto, Japan — October 16-21, 1970

On March 18, 1971, at its twenty-seventh session the United Nations Commission on Human Rights took the initial steps towards considering whether conscientious objection to military service should be officially declared a human right. The Commission requested the Secretary-General of the United Nations to prepare a report containing 'up-to-date information on national legislation and other measures and practices relating to conscientious objection and alternative service'. (E/CN.4/L.1176) Accordingly, the Secretary-General on November 11, 1971, sent a letter to the permanent representatives of the Member States of the United Nations requesting any pertinent information, bearing in mind such questions as: 'whether there is any national legislation, other measure or practice relating to conscientious objection to military service and alternative service; the grounds upon which conscientious objection to military service may be claimed; the authorities competent to determine exemptions from military service on grounds of conscientious objection, and the procedures applicable, including any provisions for appeal; the penalties and sanctions applicable to conscientious objectors; the forms of alternative service required or permitted, and the conditions of such alternative service in relation to military service; and whether national legislation or other measures and practices relating to these matters apply equally in peacetime and emergency situations.'

The Secretary-General's report will be issued in January, 1973, and submitted to the Commission on Human Rights when it meets in Geneva from February 26 to April 6, 1973, for its twenty-ninth session. Under Resolution 11 B (XXVII) the Commission 'Decide[d] to study the question of conscientious objection to military service when the report of the Secretary-General is available for consideration'. In preparation for this and later possible discussion, the present article has been prepared to supplement the Secretariat's forthcoming report and to trace briefly the increasing recognition of conscientious objection as a human rights concern of youth, the increasing acceptance of conscientious objection in international law and human rights instruments, and the use of conscientious objectors for development service. The article also discusses various aspects of national provisions for conscientious objection, including the possible grounds for conscientious objection, the procedures utilised by countries in handling conscientious objector claims, and the national constitutional questions raised by conscientious objection. Finally, the article presents a table on the military service and conscientious objection provisions in the national legislation of 151 countries and twelve selected non-independent territories.

Conscientious Objection as a Human Rights Concern of Youth

It is appropriate that the question of conscientious objection arose in the February-March 1971 session of the United Nations Commission on Human Rights under the agenda item 'Study of the Question of the Education of Youth all Over the World for the Development of its Personality and the Strengthening of its Respect for the Rights of Man and Fundamental Freedoms'. As several non-governmental organisations stated at that time, 'The education of youth to respect human rights and freedoms cannot be achieved without according full respect to the rights and freedoms of youth. Large numbers of young people around the world are committed to the U.N. aim of a warless world.' (E/CN.4/NGO/160, 9 March 1971, p. 2) During the previous year the World Youth Assembly, convened under the sponsorship of the United Nations, had recommended, 'Conscientious objection should be treated as a human right; this subject would be on the agenda of the next (27th) Session of the U.N. Commission on Human Rights'. (56/WYA/P/10) In addition, an organisation of conscientious objectors, War Resisters International, collected 40,000 signatures from 27 countries in 1970 to call upon the Commission on Human Rights to recognise conscientious objection as a human right, and Pax Romana brought this petition to the attention of the 26th Session of the Commission in a statement on conscientious objection. (E/CN.4/NGO/153)

After the Commission on Human Rights decided at its 27th Session to ask the Secretariat for a report on conscientious objection, a Youth Symposium, sponsored by the United Nations Social Development Division concluded in the section of its report dealing with human rights, that 'the question of conscientious objection to military service directly affect[s] young people in some countries'. The Symposium urged the United Nations 'to bring to the notice of governments the possibility of permitted exceptions to bearing arms for active military service on grounds of conscientious objection, religious belief or moral conviction,

of making provision for such persons to enter non-military social service, and of granting the status of conscientious objector not only to those who adhere to particular religious groups but to all who genuinely object to bearing arms'. (United Nations, Youth in the Second Development Decade, United Nations Centre for Economic and Social Information, New York, 1972, pp. 36-37)

Conscientious objection is a human right particularly applicable to youth because on most occasions only youth are called upon to do military service. Registration for military service usually takes place between the 16th and 18th years, and a few countries, including the German Democratic Republic, South Africa, and the Philippines, start military training in the school system with children as young as 10 or 12. The question must arise as to the motives of governments who feel they must train youth in military skills and thinking at so susceptible an age. It seems at the least a strange way to prepare the people of the world for peace. Furthermore, in many nations — including eight in Western Europe alone — the duty of youth to perform military service, possibly to kill and to die in war, arises before the legal right to vote or take part in the decisions that affect their own lives.

Religious Views on Conscientious Objection

Until relatively recently conscientious objection to military service was a significant concern of only a few smaller religious groups, particularly the historic peace churches, notably the Brethren, Quakers, and Mennonites. Today, conscientious objection has received increasing recognition from some of the major religions. Over the past few years there have been documented cases of conscientious objectors from every major and most minor religions.

In October 1970, delegates from the ten major living religions, including Christians, Buddhists, Hindus, Muslims, Shintoists, Jews, Sikhs, Jains, Zoroastrians, Confucians, and members of eleven other religions, met at the World Conference on Religion and Peace in Kyoto, Japan, and issued the statement on 'The Rights of Conscientious Objectors' which appears at the beginning of this article. (The Findings of the World Conference on Religion and Peace, p. 41, October 16-21, 1970) A nearly identical text was adopted by 'The Consultation on Christian Concern for Peace' which was held at Baden, Austria, under the auspices of SODEPAX (Committee on Society, Development and Peace of the World Council of Churches and the Pontifical Commission Justice and Peace) and which also 'urged that the Churches should use their best endeavour to secure the recognition of the right of conscientious objection as hereinbefore defined under national and international law' (Peace — The Desperate Imperative, pp. 57-58, 1970) Most recently, in June 1972, the Commission on Human Rights of the 12th Conference of Non-Governmental Organisations in Consultative Status with ECOSOC adopted the same Kyoto - Baden definition for the purpose of inviting NGOs to consider and, where appropriate, give support to the rights of conscientious objectors.

In 1965, the Second Vatican Council stated 'we cannot fail to praise those who renounce the use of violence in the vindication of their rights' and 'it seems right that laws make humane provisions

for those who for reasons of conscience refuse to bear arms, provided however, they accept some other form of service to the human community'. (The Church in the Modern World, Pastoral Constitution *Gaudium et Spes*, nn. 78-79) The Second General Assembly of the Synod of Bishops declared in 1971, 'Let a strategy of non-violence be fostered also, and let conscientious objection be recognised and regulated by law in each nation'. (Justice in the World, p. 22, 1971)

The First Assembly of the World Council of Churches in 1948 issued a provisional statement of principles with respect to conscientious objection, followed in 1951 by a recommendation of the Central Committee of the World Council, which stated, 'A conscientious objector shall be entitled to exemption from the normal requirements of the laws of military training and service', and which included detailed suggestions for procedure and the requisities of alternative service. In 1968, the Fourth Assembly of the World Council of Churches, whose members include many Protestant and Orthodox churches, declared, 'Protection of conscience demands that the churches should give spiritual care and support not only to those serving in armed forces, but also to those who, especially in the light of the nature of modern warfare, object to participating in particular wars they feel bound in conscience to oppose, or who find themselves unable to bear arms or to enter the military service of their nations for reasons of conscience'. (Towards Justice and Peace in International Affairs, sec. II A, para. 21, 1968)

In addition, religious bodies and organisations from the following Christian churches have made statements supporting conscientious objection or have given support to members of their faith who have become conscientious objectors: Anglican Churches, Assemblies of God, Baptist Churches, Church of the Brethren, Christadelphians, Christian Church (Disciples of Christ), Church of Christ, Scientist, Church of God, Church of the Nazarene, Religious Society of Friends (Quakers), Jehovah's Witnesses, Kimbanguist Church, Lutheran Churches, Mennonite Church, Methodist Churches, Moravian Church, National Conferences of Catholic Bishops, National Councils of Christian Churches, Presbyterian and Reformed Churches, Unitarian Churches, United Church, and United Church of Christ.

There is no single religious authority which speaks for the Muslim world, and thus the teaching of Islam concerning war and conscientious objection must be sought in the writings of the classical scholars and modern thinkers on the subject. Islam has not historically been a pacifist religion, but has always put strict limits upon the waging of war. War may only be fought in self-defense, the enemy may not be deprived of sustenance, and non-combatant populations must not be harmed. The Koran (2, 190/186) says, 'Fight those who are fighting with you (in order to deprive you of your liberty of conscience) but do not commit any excesses. Allah does not love those who do so.' War must not be waged against fellow Muslims, and there are well-known cases in which Muslims in the British army refused to fire on an enemy who was Muslim because of the injunction of religious leaders. Thus the teaching of Islam clearly supports conscientious objection to particular wars. Some modern scholars have suggested that modern warfare, in which the chance that nuclear weapons will be

used is always present, in which even conventional tactics have destroyed the distinction between soldier and non-combatant and which consistently requires the excesses forbidden by the Koran, may be completely unacceptable to Islam. The very concept of jihad, which requires individual Muslims to strive for good and resist evil, may be seen on occasion to necessitate objection on grounds of conscience to a wrongful decision of government, including a call to war.

Since there exists no world-wide religious, as distinguished from political, organisation of Jews, the Jewish attitude towards conscientious objection may be sought from such statements as was made in January 1971 by the Synagogue Council of America, which is a body representing religious Orthodox, Conservative, and Reform Jews in the United States: 'Jewish faith, while viewing war as a dehumanising aberration and enjoining a relentless quest for peace, recognises that war can become a tragic, unavoidable necessity. Judaism is therefore not a pacifist faith in the sense that this term is generally used. However, this fact does not preclude the possibility of individuals developing conscientious objection to war based on their understanding of and sensitivity to the moral imperatives of the Jewish tradition. In other words, Jewish faith can indeed embrace conscientious objection, and Jewish religious law makes specific provision for the exemption of such moral objectors.'

A statement which expresses Hindu thinking on conscientious objection was issued in April 1972 by the Guyana Sanatan Dharma Maha Sabha, a religious and cultural organisation representing the three hundred thousand Hindus of Guyana, in which it was stated: 'The Sabha feels that it is wrong for a country to force an individual to perform military service and to kill, or be killed by a total stranger. A man's love of himself should, like a stone cast upon placid water, give way to ever widening circles of love. ... The Sabha's loyalty and patriotism to Guyana is second to that of no other organisation but we do not believe in settling of arguments with bullets. It is time that the nations of the world wake up or they shall sleep on — in the eternal sleep of death. The Sabha's stand against all war, and for conscientious objection must not be misconstrued as one of cowardice. After all any coward can be compelled to drop a plane load of lethal bombs, but it takes a brave man to resist compulsion. ... If man is to serve himself, if he is to serve his family, his community, his country and the world he needs to drink deep at the fountain of "Ahimsa". He needs to preach and practice non-violence as it was taught and tried in the East for thousands of years. Accordingly, we support the concept of Conscientious Objection.'

Recognition of Conscientious Objection in International Law and Human Rights Instruments

The case for conscientious objection as a human right finds a basis in customary international law, as it is restated in the Universal Declaration of Human Rights, which declares in Article 3, 'Everyone has the right to life', and in its necessary corollary 'the right not to take life'. Additional support is, of course, found in Article 18 of the Universal Declaration, which provides, 'Everyone has the right

to freedom of thought, conscience and religion; this right includes freedom to ... manifest his religion or belief in teaching, practice, worship and observance'. Furthermore, a recognition of the primacy of conscience is inherent in the Nuremberg Principles which state that a person who is asked under military authority to commit 'crimes against humanity', 'crimes against peace', or 'war crimes' (for example, violations of the 1949 Geneva Conventions) would be punishable for such crimes under international law and would thus have a right and duty to refuse any such military acts. Similarly, a person may have the legal right and conscientious duty to refuse to take part in wars which have as their purpose genocide, the promotion of apartheid, or denial to countries and peoples of their right to self-determination. Finally, in a world faced with the ever-present danger that civilian populations and, perhaps, all humanity will be annihilated by nuclear weapons, a youth may refuse to take part in military preparations for such a war on the ground that it would necessarily violate the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1929 and 1949, the customary international law of warfare, and every tenet of morality and rationality.

Indeed, conscientious objection has already received some recognition in international law and human rights provisions. Under the Forced Labour Convention of 1930 (No. 29, entered into force May 1, 1932) forced labour as defined in Article 2, does not include 'any work or service exacted in virtue of compulsory military service laws for work of a purely military character'. The International Labour Organisation Committee of Experts have made the following observations concerning alternative service for conscientious objectors under this provision: 'Many countries provide in their compulsory military service laws for the exemption from military service of conscientious objectors, but may require them to perform alternative service of a non-military character. While the 1930 Convention — unlike certain subsequent international instruments — does not refer specifically to this matter, the Committee has considered that in such cases conscientious objectors are in a more favourable position than in countries where their status is not recognised and where refusal to serve is punishable with imprisonment.' (International Labour Office, *Forced Labour*, Geneva, pp. 189, 241, 1968 (footnotes omitted))

Some conscientious objectors who have departed from their country of origin to avoid service have been considered refugees under the Convention Relating to the Status of Refugees of July 28, 1951 (189 U.N.T.S. 137), in that they may have a 'well-founded fear of being persecuted for reasons of ... religion ... or political opinion'. (See generally A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1, sections 88-89, at pp. 217-218, 1966)

The International Covenant on Civil and Political Rights, which was adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200 A (XXI) of December 16, 1966, but which has not yet come into force, refers to conscientious objection in Article 8 (3) (c). The Covenant forbids 'forced or compulsory labour', but excludes from this prohibition 'any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors'. While

considering Article 18 of this Covenant, which *inter alia* protects 'freedom of thought, conscience and religion', the representative of the Philippines proposed an addition: 'Persons who conscientiously object to war as being contrary to their religion shall be exempt from military service.' (E/CN.4/353/Add. 3, p. 7, January 16, 1950) The proposal was withdrawn before any vote, but after the representative of Uruguay noted that 'military service was mentioned in Article 8, where provision had already been made for the exemption of conscientious objectors', and the representative of India observed that 'those who were opposed to war on religious grounds constituted only one category of conscientious objectors; there were others which should also be mentioned if the Commission were to decide to consider those questions in detail.' (E/CN.4/SR.161, pp. 11-12, April 28, 1950)

In preparation for a possible declaration and convention on the elimination of all forms of religious intolerance, which have not yet been completed, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a Study of Discrimination in the Matter of Religious Rights and Practices, prepared by Arcot Krishnaswami, which considered conscientious objection. After devoting two paragraphs to a brief discussion of legal provisions for conscientious objection, Mr. Krishnaswami concluded: 'Some conscientious objectors do not believe in performing any services which are even remotely connected with a military effort; in the present circumstances hardly any society can afford to recognise this stand. Others are prepared and even willing to perform alternative compensatory national services, often in conditions of considerable hardship and of danger to their lives; and wherever possible such alternative avenues of service should be explored. But whether an individual belongs to the first or second category, the population of the country as a whole may feel that any exemption creates a privilege entailing discriminatory treatment of others. As a rule, it may be stated that where the principle of conscientious objection to military service is recognised, exemptions should be granted to genuine objectors in a manner ensuring that no adverse distinction based upon religion or belief may result.' (A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, United Nations, E/CN.4/Sub.2/200/Rev. 1, 60. XIV. 2, pp. 43-44, 1960)

The European Convention for the Protection of Human Rights and Fundamental Freedoms explicitly refers to conscientious objection in Article 4 where it prohibits 'forced or compulsory labour', but exempts from this interdiction 'any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service'. Article 9 (1) of the European Convention also assures everyone's 'right to freedom of thought, conscience and religion; this includes freedom to . . . manifest his religion or belief, in worship, teaching, practice and observance'. Having regard to Article 9, the Consultative Assembly of the Council of Europe on January 26, 1967, adopted Resolution 337 'on the right of conscientious objection'. This Resolution declared two basic principles: '1. Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from

the obligation to perform such service. 2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.' In addition, the Resolution contains several procedural suggestions for the treatment of conscientious objector claims and the provision of alternative service, which will be treated in another section of the present article. The Consultative Assembly in Recommendation 478 (1967) asked the Committee of Ministers 'to instruct the Committee of Experts on Human Rights to formulate proposals to give effect to the principles laid down by the Assembly in its Resolution 337 by means of a Convention...'. The Parliamentary Conference on Human Rights, convened October 18-20, 1971, under the auspices of the Consultative Assembly of the Council of Europe, noted that Article 4 of the European Convention does not require states to introduce substitute civilian service for conscientious objectors. 'In the countries which are Members of the Council of Europe, there is, however, a clear trend towards recognition of conscientious objection as a ground for exemption from armed service. In Resolution 337 (1967) and Recommendation 478 (1967), the Consultative Assembly of the Council of Europe expressed itself in favour of such recognition. We might now ask ourselves if any further action could be taken with a view to furthering the aim already set up by the Assembly in this matter.' (Council of Europe, Parliamentary Conference on Human Rights, Theme No. 1, What Rights Should be Protected?, Report, AS/COLL.DH(71)3, p. 4, Strasbourg, 1971)

Having reviewed the present status of conscientious objection in international law and human rights instruments, it is clear now, if it was not previously, that conscientious objection has received sufficient recognition to be viewed as a serious matter of human rights concern. One possible step at this juncture would be a declaration from the United Nations Commission on Human Rights that conscientious objection should be considered a fundamental human right and what that right should entail.

Development Service and Conscientious Objection

The discussion of conscientious objection has on many occasions in the past been phrased in terms of the objectors' personal right not to kill and thus not to perform military service for reasons of conscience. Over the past few years, however, many conscientious objectors and some governments have recognised an important new dimension in the desire of youth to do civilian work for peace, social justice, the environment, and development, as an alternative to military service. For example, the United Nations Symposium on the Participation of Youth in the Second Development Decade, held in Geneva from September 27 to October 7, 1971, recognised the tremendous need for a youth role in the general popular participation in the development process and stated that 'In some countries where there is obligatory military service, attempts are made to offer alternative forms of service that contribute to development. The non-military utilisation of the physical and mental capacity of youth is certainly

to be preferred to their utilisation for useless or destructive military purposes.' The Symposium also noted that development work might be performed within the structure of the armed forces, but questioned whether the military structure created and organised for military purposes would be the best way of involving youth in the development process.

Army personnel are used for development work in a large number of countries, including Bulgaria, China, Ecuador, Greece, Iran, and the Ivory Coast. In African countries there appears to be a particular trend toward increasing militarisation of youth corps originally designed purely for civilian development work, such as in Guinea and Zambia during the last year. It seems quite unfortunate that many countries have not organised a service dedicated to the building of the country apart from the military administration and that modern youth, who are eager to serve their country, are forced to do so in an organisation primarily created for war. Furthermore, in many countries — both highly developed and developing — disadvantaged youths find in the military the only possible means for education, economic well-being, and social advancement. Even Algeria, whose far-sighted 'national service' was so named to differentiate it from the old negative tradition of 'military service', requires its youth to undergo some military training. It must be pointed out that for the some 100 nations which have ratified the Forced Labour Conventions of 1930 and 1957, there may be some difficulty in the use of conscripts for civilian development work and also for development work within the military, which might be considered not 'of a purely military character'.

The use of conscientious *objectors for civilian development projects* in lieu of military service, however, would clearly not violate the forced labour conventions. (See generally, International Labour Organisation, Forced Labour, Geneva, 1968) Furthermore, for those countries which already have a civilian-directed development program, such as the Services Civiques and Young Pioneers in several African countries, recognition of conscientious objection would not entail any difficulties. Young people opposed to military service could be allowed to serve their country creatively in these development agencies with very little administrative change. Those programs which include military training could quite easily accept conscientious objectors for development work, while exempting them from the purely military aspects.

Some industrialised countries accept service overseas in development work as a substitute for military service or as an alternative service for conscientious objectors. These programs generally require that participants possess specialised training or particular experience in order to be sent abroad. Both the United Nations Seminar on the Participation of Youth in the Second United Nations Development Decade of 1971 and the United Nations Seminar on the Role of Youth in the Protection of Human Rights of 1970 called upon the United Nations to further United Nations volunteer programs in which youths could contribute concretely to better understanding among people and to the imperative needs of development. (Seminar on the Role of Youth in the Promotion and Protection of Human Rights, Belgrade, Yugoslavia, organised by the Division of Human Rights and the United Nations, ST/TAO/HR/39, p. 21, 1970; United Nations,

Youth in the Second Development Decade, pp. 36-37, 42, 1970)
Conscientious objectors might well perform their alternative service within such a United Nations development service programme.

National Provisions for Conscientious Objection — Possible Grounds for Conscientious Objection

Having set forth the various facets of international concern and support for conscientious objection, it is now necessary to discuss several selected aspects of national provisions for military service and conscientious objection, with particular reference to the experience of those countries which have recognised conscientious objection.

Historically, recognition of conscientious objection was limited to those who based their stand on religious grounds, and who were mostly adherents of 'peace churches' whose doctrine was completely pacifist. Today, exemption in Bolivia and Mexico is reserved legally to members of the Mennonite Church, while Paraguay also recognises similar immigrant groups. South Africa and Rhodesia accept only religious conscientious objectors. The United States statute requires conscientious objection to arise from 'religious training and belief', and explicitly rejects those based upon political, sociological or philosophical ideas or upon a purely personal moral code. However, the American courts, in response to the requirements of the first amendment, have interpreted religion so broadly that atheists may be accepted under the statute. Religion is mentioned as one of several possible grounds for objection in most European countries, as well as Brazil. These countries place the emphasis on the personal conviction of the individual which need not correspond to the doctrines of the religion he may profess. The only exception to this occurs in cases in which the applicant bases his claim solely on his adherence to a particular religion which as a matter of public fact does not teach objection to war. Otherwise religious applicants may be accepted because the personal conclusions they derived from their faiths cause them to oppose military service, even though this position is not required or even supported by their church. On the other hand, the South African law requires that the tenets of the objector's religion forbid him to participate in military service, thereby making the doctrines of the church a matter to be proved. The Rhodesian law is subject to a similar interpretation.

For most countries which recognise conscientious objection, the important question is whether the person's opposition is based upon grounds of conscience. Though the word 'conscience' is rarely defined in the law, practice makes clear that it refers to the personal determination of the individual that a particular action would be morally wrong. The reasoning by which such an ethical determination is reached may be based upon religious belief, or humanitarian views, it may be intellectually reasoned, or founded largely on emotion. The important factor is the strength of the subjective view that to serve in the military would be wrong. Since in most cases the person called upon to defend his decision is a young man of only 18 or 19 years of age, the intellectual sophistication of his reasoning should not be

the test, but rather the sincerity of his inner conviction. Many countries today are faced with an increasing number of applicants whose convictions arise from political grounds. Most often, these applicants are rejected, because political objectors are considered outside the scope of most statutes. Political objectors are recognised in Denmark, Germany, Norway, Sweden, and historically in the United Kingdom, when the objector can show that his political views result in a conscientious conviction that would forbid him to take part in military service. Since the purpose of recognising conscientious objection is to protect the right of persons to choose between right and wrong, and since in a democracy the citizens are expected to be informed on political issues and to take responsibility for the political acts of their government, there seems no reason to treat convictions derived from political ideas differently from convictions based on religion or other areas of human endeavour.

Part of the mistrust of political objection is expressed in the failure of every nation except the United Kingdom and possibly New Zealand to exempt those who object not to war in general, but to the unjust war. The concept that war may be morally acceptable only in certain circumstances has been a doctrine of religious and ethical thought for centuries, from the concept of the 'just war' detailed by St. Augustine to the attempt by the Nuremberg Tribunal to punish crimes against peace. Law makers have opposed the recognition of objectors to particular wars on the ground that the nation rather than the individual citizen must decide whether a war is morally acceptable. This view, however, ignores the fact that ultimately the individual must determine the moral quality of his own participation in the common effort, and that it is this moral determination which is protected by laws recognising conscientious objection. The same argument applies to objection concerning the use of particular weapons, such as napalm and nuclear weapons, or to war against a particular enemy such as against people of the same religion, people struggling for their right of self-determination, or fellow citizens in a civil war. It is interesting to note that Panama recognises only the latter form of objection, exempting naturalised citizens from the duty of fighting against their country of birth. The German Constitutional Court has held that objection to nuclear warfare entitled a young man to exemption from military service because of his belief that the danger that nuclear weapons would be used was so great as to make any war in the modern world morally indefensible. Jurisprudence in a number of countries holds that objection to all war refers only to all wars likely in the present historical circumstances in which the conscript finds himself, not any theoretically possible conflict.

In some countries, a conscientious objector must be a complete pacifist, rejecting all use of violence, in personal situations as well as in war. Thus the law of Belgium requires the conviction 'that one may not kill a fellow-human being, even for the purpose of national or collective defence'. Most nations put the priorities the other way, requiring only objection to organised military killing in war, and not necessarily to personal violence in self-defence.

Procedure for Conscientious Objector Claims

To judge the content of a person's conscience and whether he is in fact acting according to its dictates is one of the most difficult if not impossible tasks for any human tribunal to perform. However, almost every nation which has granted exemption to conscientious objectors has sensed the need to protect itself from impostors whose motives for avoiding military service spring more from cowardice or personal convenience than from conscience. To this end, procedures have been adopted which attempt to determine the sincerity of the claim that the applicant is a conscientious objector. The almost universal practice among nations is to set up some special tribunal to determine whether an applicant is entitled to conscientious objector status, at the time he makes his claim. An alternative method to allow conscientious objection as a defence in a criminal prosecution or court-martial for failure to accomplish his military obligations, is occasionally also available for those who did not make use of the ordinary recognition procedure. A detailed description of the various procedures which have evolved in different countries is not possible here. An attempt can only be made to outline some of the basic elements of such procedures. The first issue is, of course, how the prospective applicant is informed of his right to claim conscientious objector status and the proper procedure to be followed. No country has an adequate information-giving system. The inescapable inference arises that no administration in charge of conscription wishes to facilitate the use of conscientious objection laws. This is unfortunate for a lack of information often results in the conscription of sincere conscientious objectors who then cause difficulty in the armed services because of their beliefs. France has gone one step further with a remarkable provision forbidding the incitement of young men to make use of the provisions of the recognition law. This provision has resulted in the arrest of numerous persons whose only crime was the propagation of a law, thereby making it more difficult for sincere conscientious objectors to be informed of the legal provisions made on their behalf.

Many laws require that application for exemption be made before a certain point in the call-up procedure. This enables those who claim exemption to be selected out for special treatment without interfering with the efficient operation of the conscription process, but it also fails to provide a remedy for the true conscientious objector who lacked information or whose beliefs did not crystallise until a later date. Sweden, Norway, the Federal Republic of Germany, Belgium, and Australia permit the use of their normal exemption procedure even after the claimant has entered the armed forces. In the United Kingdom and the United States a special administrative procedure exists for soldiers who claim to have become conscientious objectors.

The composition of the body which determines the acceptability of the application varies greatly. It can be the decision of a government ministry, such as the Minister of Justice in Norway, or that of a tribunal composed of members of the judiciary, as in Belgium, or a mixed tribunal whose composition is chosen with an eye to representing various social interests as in Italy and Austria. In the United States and Denmark the decision is made by the same people who administer the conscrip-

tion law in general. In France the Minister of the Armed Forces appoints officers for three of the seven seats. In Sweden, church officials and representatives of peace organisations are included. In Switzerland, the whole process from the recognition and assignment of certain objectors to the judging and sentencing of refusers is done by the military authorities. As a general rule, the use of military personnel to judge the sincerity and content of a claimant's conscience is improper, since in such cases the military itself is necessarily an interested party in the decision, and men who have chosen military service as a career do not often understand the possibility that one may object to that service as a matter of conscience.

Procedural rights granted to the applicant vary, but all grant the right to be heard, and most grant the minimal right to be represented by counsel or a friend, and to present witnesses. The rules of evidence and the extent to which an investigation of the claimant's life is actively carried out by the tribunal or government agent varies, of course, a great deal. Most regulations provide for some kind of appeal either to an administrative body or to the ordinary courts. Most systems suspend the duty of military service until at least the first decision is reached, but this is less common during appeal or if the claimant is already in the armed forces.

One example of the sort of basic procedural requirements necessary for conscientious objector cases might be found in the recommendations of the Consultative Assembly of the Council of Europe:

- ' 1. Persons liable for military service should be informed, when notified of their call-up or prospective call-up, of the rights they are entitled to exercise.
2. Where the decision regarding the recognition of the right of conscientious objection is taken in the first instance by an administrative authority, the decision-taking body shall be entirely separate from the military authorities and its composition shall guarantee maximum independence and impartiality.
3. Where the decision regarding the recognition of the right of conscientious objection is taken in the first instance by an administrative authority, its decision shall be subject to control by at least one other administrative body, composed likewise in the manner prescribed above, and subsequently to the control of at least one independent judicial body.
4. The legislative authorities should investigate how the exercise of the right claimed can be made more effective by ensuring that objections and judicial appeals have the effect of suspending the armed service call-up order until the decision regarding the claim has been rendered.
5. Applicants should be granted a hearing and should be entitled to be represented and to call relevant witnesses.'

(Resolution 337, 1967)

National Constitutions and Conscientious Objection

There are several provisions which appear frequently in national constitutions and which have some bearing upon the possibility of establishing national legislation to recognise the position of conscientious objectors and, perhaps, upon the willingness of these nations to

accept an international convention on conscientious objection as a human right.

The constitutions of some 65 countries create a duty on the part of the people to defend their nation. A great many of these constitutions contain clauses which seem more hortatory than prescriptive. The Constitution of Albania is typical — Article 36 provides: 'Protection of the Fatherland is the supreme duty and the highest honour of every citizen.' — as is that of Dahomey — Article 14: 'The defence of the nation and of the territorial integrity is a sacred duty for every Dahomean citizen.'

Thirty-five of these constitutions proceed explicitly to establish military service as an obligation. Five nations which have such clauses — Haiti, Honduras, Nicaragua, Rwanda and Zaire — do not in fact have compulsory military service. Seven others — Bolivia, Brazil, Italy, Mexico, the Netherlands, Paraguay, and Switzerland — have laws or regulations exempting conscientious objectors from all or part of military service. The Swiss Government has taken the position that Article 18 of its constitution, which states, 'Every Swiss male is liable for military service' (see also Article 49), permits the exemption of conscientious objectors from armed service, as long as they do unarmed service within the military, but does not allow the replacement of military service with purely civilian alternative service. About half of the clauses requiring military service continue with some phrase concerning the law. Either this is general '... conscription is obligatory in accordance with the law...' (Constitution of Egypt, Article 43) or it is more clearly limiting '... military service is compulsory, within the limits and in the manner laid down by law...' (Italy, Article 52). The addition of such phrases indicates a constitutional power on behalf of the legislating body to limit and regulate the execution of an otherwise universal obligation. Four out of the five countries without conscription limit the constitutional requirement of military service in this way, but only three of the seven countries which recognise conscientious objection use this phrase in their constitutions. In fact, probably all nations in their laws on military service, exempt the physically unfit and most conscript only men, although the constitutions speak of *all* citizens, and only Brazil, Paraguay, and Switzerland explicitly exempt women from this duty in the constitution. These apparently inflexible constitutional requirements of universal military service should be seen as the expression of a general norm, capable only of such application and limitation as the needs of the nation and its people require.

Three countries — Ethiopia, the Philippines, and Somalia — provide by constitution that military service may be required by law. Such permissive clauses would not seem to limit the right of legislatures to recognise such exemptions as conscientious objection should they enact a conscription law.

The constitutional phrases exhorting citizens to serve and defend the nation rarely make explicit the means to be used. Only eight countries which mention the duty of defence link it with the 'bearing of arms', raising the question of whether conscientious objectors could be exempt from such armed service in time of defensive war. Five of these clauses look to the ordinary law to define and limit

the duty to bear arms, and one, Article 248 of the Constitution of Panama, refers to public necessity. Six of these countries have conscription at present, of which Denmark recognises the right of exemption from military service for conscientious objectors, with no distinction between war time and peace.

Most conscientious objectors would claim that their stand against war and their work for peace, when accepted and encouraged by their government, is in fact service to their nation and a greater defence against the scourge of war than military activity. It is certainly true that in modern war, the defence of the nation depends as much upon the production and maintenance work of civilians as upon the killing-power of the military machine. A constitutional provision requiring all citizens to defend the country should prove no barrier to the legal recognition of conscientious objectors any more than it requires universal conscription or that women and children be placed on the battle front in war.

Almost every country in the world guarantees in some form freedom of conscience and religion. Most constitutions subject this freedom to the needs of public order, especially in the area of religious practice. The constitution of only one nation, the Federal Republic of Germany, explicitly requires that conscientious objection be recognised as an extension of the general right of freedom of conscience — Article 4 (3) provides: 'No one may be compelled against his conscience to render war service involving the use of arms', and Article 4 (1) states: 'Freedom of faith and of conscience, and freedom of creed, religious or ideological, shall be inviolable.' A substantial minority of opinion in Germany holds that Article 4 (3) is merely an expression of a right already guaranteed in Article 4 (1), but the jurisprudence of the courts is not clear on this point. Austria bases its legal recognition of conscientious objection on Article 14 (1) of the State Basic Law which states: 'Complete freedom of religion and conscience is guaranteed to everyone.' The other nations which recognise conscientious objection do so by statute, or constitutional provision other than that concerned with religious liberty. The courts of the United States, for example, have held that the recognition of conscientious objection is not required by the first amendment to the Constitution which guarantees religious freedom. What does seem possible to deduce from constitutional provisions on freedom of religion and conscience is a commitment on the part of those nations to the general principle that individual conscience should be respected by the law and the requirement of public order in the collective society must be tempered by the needs of individual conviction. Such provisions thus have strong persuasive value in urging legislative recognition of conscientious objection but probably cannot be considered as requiring such recognition.

In connection with guarantees of religious freedom, the constitutions of six European countries — Austria, Czechoslovakia, Greece, Iceland, Portugal and Switzerland — and of one in South America — Venezuela — add a proviso to the effect that no one may be exempted from any civic obligation on the grounds of religious belief. Despite this clause, the Government of Austria exempts conscientious objectors from armed military service. Because of this clause, the Government

of Switzerland will not allow the substitution of civilian service for conscientious objectors, without a change in the Constitution, and because of this clause, the Government of Greece refuses to recognise conscientious objectors at all. Whether such a general provision should prevent the recognition of conscientious objectors has been a matter for lively discussion by legal theorists in Austria and Switzerland. A strict reading of such a clause would seem to prevent any legal allowances for conscience sake, whether in the area of military service, day of rest, taking of oaths, medical care, etc. Such an interpretation would seem to be unduly rigid, for those articles are found in the context of articles protecting freedom of conscience which enshrine the principle that individual conscience, however diverse, should when possible be respected. The principle of equality of treatment which the clauses in question counterpose would seem to be satisfied in the area of conscientious objection by alternative service of equal duration to military service.

A similar constitutional objection to recognition of conscientious objection is based on its alleged incompatibility with provisions guaranteeing the *equality* of all citizens before the law, a guarantee made in some form by almost every nation. This argument is weakened by the fact that 25 nations have found the principle of equality to be in fact no barrier to the recognition of conscientious objection, and that among these 25 are the nations with the longest tradition of working democracy and egalitarianism. In practice no government can treat all its citizens in the same way. The typical conscription law exempts the physically unfit, those with criminal records and those with families to support. Normally, only a portion of those theoretically subject to military service are in fact called-up, the rest being exempted by lot, or because of their studies or the importance of their civilian employment. Even those who do serve in the armed forces experience great differences in the difficulty of their service, depending on rank, assignment, area, etc. And of course, although most countries forbid discrimination on the basis of sex, only a handful of countries conscript women. It is not illegitimate to take into account differences in people when determining their duties, and there is no reason that differences in conviction should not be taken into account on the same basis as differences in physical ability. The principle of equality does not demand uniformity of treatment. Why should a conscientious objector who does alternative service be considered unfairly favoured over someone doing similar work in a military uniform? From the point of view of conscience, each person is treated equally. Those who feel it right to use arms in the defense of their country are obeying their conscience in fulfilling their military service just as much as the objector is by refusing. It is not within the province of the state to say which position is morally of greater worth.

Conscientious objection is mentioned in the constitutions of several other states in contexts other than that of religious freedom. Article 196 of the Constitution of the Netherlands limits the duty of military service set out in the previous article as follows: 'The conditions upon which exemption from military service may be granted on account of serious conscientious objections shall be stated by law.' Panama recognises a limited form of conscientious objection in its provision on armed service in Article 17 by exempting naturalised Panamanians

from the duty of taking up arms against their nation of birth. Ten nations formerly under British rule have a provision on conscientious objection as part of their guarantee against forced labour. The Constitution of Kenya, Article 17 (3) (c), is typical: 'Forced Labour does not include... (c) ... in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service...'. None of the countries with such a provision have conscription at this time, so it is difficult to evaluate its legal consequences. Placed as the reference is in the middle of a section on forced labour, and being framed not in terms of a command or guarantee would seem to diminish its force. On the other hand, the provision has no limiting phrase such as 'if exempted by law' as is found in Article 8 of the Covenant on Political and Civil Rights, and seems to assume that as a matter of course a person with conscientious scruples to military service will not be forced into that service. Since all the countries with this provision follow the British practice and can amend this law in the same manner as any other act of the legislature, the question of the weight to be given to those words is less important than it might have been in countries with a non-British constitutional system.

Explanation of Table on National Provisions for Military Service and Conscientious Objection

The following information concerning national legislation constitutes the preliminary findings of a world-wide survey on compulsory military service and conscientious objection¹ conducted with the generous

¹ There have been several previous comparative surveys of national legislation concerning military service and conscientious objection: Conseil Œcuménique du Christianisme Pratique, *Les Objecteurs de Conscience Devant les Lois*, Geneva, 1935 (17 countries); Service Civil International, *Documentation on the legislative and administrative provisions regarding Conscientious Objectors*, E/CN.4/NGO/1/Add. 1, 30 March, 1950 (39 countries); Hellmuth Hecker, *Die Kriegsdienstverweigerung im deutschen und ausländischen Recht*, Heft XIII, published by the Forschungsstelle für Volkrecht und ausländisches öffentliches Recht der Universität Hamburg, pp. 1-64, Alfred Metzner Verlag, Frankfurt/Main, 1954 (20 countries); War Resisters International, *The War Resister*, pp. 9-15, First Quarter 1957 (79 countries); *De militaire dienstdwang, (conscriptie) in de wereld van heden*, Documentatie nr. 6 van Algemene Nederlandse Vredesactie, Rotterdam, 1957 (78 countries); War Resisters International, *The War Resister*, pp. 5-9, First Quarter 1962 (89 countries); Guy F. Hershberger, *Military Conscription and the Conscientious Objector*, A World-Wide Survey, Peace Section, Mennonite Central Committee, Akron, Pennsylvania, 1962 (96 countries); Council of Europe, Consultative Assembly, *The Right to Conscientious Objection*, Document 2170, Strasbourg, 1967 (15 countries; presented by the Max-Planck Institute for Comparative Public Law and International Law, Heidelberg); Devi Prasad and Tony Smythe, *Conscription, A World Survey*, War Resisters International, London, 1968 (101 countries; this book is periodically supplemented by War Resisters International in *Compulsory Military Service and the Objector*, Nos. 1-12, 1970-1972); International Institute for Strategic Studies, *The Military Balance, 1970-1971, 1971-1972*, London, 1970 and 1971 (89 countries); Friends World Committee for Consultation, *The Right of Conscientious Objection*, Report Submitted to the U.N. Division of Human Rights, March 1972 (17 countries; previous reports 1960-1962 (17 countries), 1963-1965 (21 countries)).

assistance of the International Commission of Jurists, its National Sections, and the University of California Law School at Berkeley. Many other international non-governmental organisations have also given invaluable assistance in distributing questionnaires, providing suggestions as to sources of information, and sending useful material. They include Amnesty International, European Centre of the Carnegie Endowment for International Peace, Friends World Committee for Consultation, International Fellowship of Reconciliation, International Peace Bureau, International Student Movement for the United Nations, Lutheran World Federation, Pontifical Commission Justice and Peace, Salvation Army, Seventh Day Adventist Church, War Resisters International, World Council of Churches, World Muslim Congress, World Student Christian Federation, and World Union of Jewish Students. In addition, individuals and organisations from all over the world, unfortunately too numerous to mention by name, completed over two hundred questionnaire responses, sent legislative texts, and helped in many other ways.

Because of the broad scope of the survey and the brevity of this article it is impossible to present here more than the summary findings in tabular form. Furthermore, because of the broad scope of the survey and the extent to which national legislation may change, it is quite possible, in fact almost inevitable, that even these tabular findings contain some errors. The authors of the article take full responsibility for any such errors in these preliminary conclusions and hope that any inaccuracies will be brought immediately to their attention for correction. It is hoped that this article will be followed by more profound and analytical articles on such important issues as the activities and positions of the world's religions with respect to conscientious objection; asylum, refuge, and extradition of conscientious objectors; the utilisation of youths of military age in international and national service for development, environment and peace; and procedural provisions for determining the validity of conscientious objector claims.

The following table presents the most recent available information on 151 independent nations, including all 132 members States of the United Nations and 12 selected non-independent territories. The countries are arranged by region, because there appears to be considerable regional similarity with respect to military service and conscientious objection provisions. Non-independent territories are listed separately and are not counted in totals representing 'all countries'.

The table includes under numbered headings information on seven subjects: (1) Existence of conscription; (2) Age of liability; (3) Length of service; (4) Recognition of conscientious objection; (5) Known conscientious objection cases in the country; (6) Alternative and development service; (7) Possible penalties.

The table includes under the heading 'conscription' all compulsory military service or training, whether full-time or part-time. Hence, this category includes military training within or outside the general educational system and compulsory service or training in the militia and military reserves. Wherever possible the table lists primarily the age at which liability for active military service ordinarily begins and ends. According to the availability of information, the table also

indicates the age of call-up for active military service, the age at which reserve liability begins, and the age at which legal liability for any form of military service ends. The length of military service stated in the table is the period of months which the average soldier spends in the army or land forces; most nations require somewhat longer service for officers and navy or air force personnel, and demand shorter or longer periods of service from persons according to such factors as their family responsibilities, educational attainments, or specialised training. The table includes information as to any laws, regulations, ad hoc arrangements, or informal procedures in which the position of conscientious objectors may be recognised. For example, a conscientious objector may be totally exempted from all forms of national service; he may be allowed to perform non-combatant or unarmed service within the army, but not permitted alternative service outside the structure of the military; or there may be provision for both civilian alternative service and non-combatant military service, according to the requirements of the objector's conscientious beliefs.

The table also indicates in which countries there have been recent reports of persons who have refused military service on the basis of conscientious belief, whether or not their position or even existence has been recognised by the government, and whether or not they have been subjected to prison sentence or other sanction. The table's heading for 'Alternative and development service' includes information concerning non-combatant or civilian alternative service provisions for conscientious objectors. In addition, the category contains some data on the use of the army for development work — building roads, teaching people how to read, etc. It also indicates whether the country has some non-military development corps in which a youth might serve in lieu of military service without requesting conscientious objector status, or in which he may be compelled to serve.

Finally, the table indicates what possible penalties or sanctions a conscientious objector might suffer if his position is not recognised by the government. Even in many countries which possess some provision for conscientious objection, there are often youths in prison because their reasons for objection are not accepted, because their substantiation for their objection is found insufficient, because they apply for conscientious objector status at the wrong time, or because their conscience does not permit them to accept whatever alternative service possibilities may be offered. In countries where conscientious objection has not been recognised, there is often no defined manner of refusing military service and no particular criminal offence with which the objector may be accused. In countries where no particular offence has been defined for refusing military service, such refusal may be considered as a simple failure to obey orders, absence without leave, desertion, or anti-state activity, with the consequent uncertainty as to the possible penalty and with the risk of repeated sentences.

Of the 151 countries reviewed in this study, there are 84 nations which presently have compulsory military service or compulsory military training and 66 which now have no form of conscription. No information was available for Southern Yemen. The majority of countries in Central and Southern Africa do not require compulsory military service to raise their armies, while in Asia, Australia,

and the Pacific the number of countries with conscription almost equals the number without. In most other regions the majority of nations have compulsory military service, and in Eastern Europe every country conscripts its citizens for the army.

There have been recent reports of conscientious objectors in 48 countries of the world, of which 15 nations are in Western Europe, 9 are in Eastern Europe, 10 in the Americas, 6 in Asia, Australia and the Pacific, and 8 in Africa and the Middle East. Eighteen of these nations in which conscientious objector cases have occurred might be considered to be developing countries. The distribution of conscientious objectors throughout the world is explained at least partially by the fact that conscientious objector claims generally occur only where there is compulsory military service.

Under 'Known c.o. cases' the table indicates only whether or not conscientious objector cases have recently arisen and does not indicate the number of conscientious objectors in each country. There is often extreme variety between the governmental and non-governmental estimates of the number of conscientious objectors; the government may use one definition and the others may use some different definition. This study, however, has utilised the Kyoto-Baden definition quoted at the beginning of this article for determining whether there are any conscientious objector cases. Furthermore, the statistics that do exist are not very comparable in that some indicate the number of conscientious objectors which have made claims in certain selected years, others note the number of claims which have been granted, others state only the number of conscientious objectors in prison, and yet others indicate the number of conscientious objectors which are registered as such rather than the number whose claims have been granted in a particular year. Although the number of conscientious objector claims which arise in each year vary from several persons in some countries to many thousands in others, there is no country in which the number of conscientious objectors has risen above a few per cent of the people who are eligible for military service nor, in fact, is there any nation in which the number of conscientious objectors has risen to such large proportions that it has hampered any country's ability to maintain its military forces.

In dealing with requests for conscientious objector status, 24 countries have provided at least partial legal recognition so as to permit some form of alternative service or complete exemption. In addition, 12 countries have established administrative, sometimes ad hoc or informal, means of exempting objectors or allowing them to do work which is not in conflict with their conscience.

Table on National Provisions for Military Service and Conscientious Objection

Abbreviations for the table :

C.o. — conscientious objector
m — month(s)
yrs — years
wks — weeks

Statistical Summary

(expressed in number of countries)

<i>Regions</i>	<i>Coverage of study</i>	<i>Countries with conscription, i.e., compulsory military service or training</i>	<i>Countries without conscription</i>	<i>Countries with at least partial legal recognition of conscientious objection</i>	<i>Countries with ad hoc administrative recognition of conscientious objection</i>	<i>Countries in which conscientious objection cases are known to have occurred recently</i>
All countries	151	84 1 - no information	66	24	12	48
Central & Southern Africa	35	14	21	2	1	4
North Africa & Middle East	22	13 1 - no information	8	2	0	4
The Americas	26	16	10	7	2	10
Asia, Australia & Pacific	32	14	18	2	2	6
Eastern Europe	11	11	0	1	5	9
Western Europe	25	16	9	10	2	15
Selected Non-Independent Territories	12	5	7	1	0	3

CENTRAL AND SOUTHERN AFRICA

Botswana (1) No.

Burundi (1) No; (4) No; (6) No.

Cameroon (1) No, Decree No. 67-DF-185, J.O. May 1, 1967, p. 700, modified by Decree No. 72-287, J.O. June 15, 1972, p. 41, establishes military training scheme for certain civil servants. Unclear whether or not compulsory; (6) No.

Central African Republic (1) Not in general, for public employees, Décret No. 64-019, J.O. 15 février 1964 p. 151, modifié par Décret No. 67 - 302, J.O. 1 décembre 1967, p. 621, Décret No. 68 - 300, J.O. 1 décembre 1968, p. 542; (2) 18-30 for public employees; (3) 4 m for public employees; (5) No; (6) No alternative service; voluntary Jeunesse Pionnière Nationale.

Chad (1) Yes, Ordonnance No. 2, P.C.C.M., J.O. 15 juin 1961, p. 253, modifiée par Ordonnance No. 5 PR-MD-AC, J.O. 1 avril 1972, p. 131; Décret No. 9 PG-CM, J.O. 1 février 1962, p. 76, modifié par décret No. 260 PR-MD-AC, J.O. 1 janvier 1971. No enlistment; (2) 20; (3) 3 yrs active service; (4) No; (5) No; (6) No alternative service; (7) Prison.

Congo Brazzaville (1) Loi No. 17-61, J.O. 1 février 1961, p. 90 & Décret No. 62-127, J.O. 15 mai 1962, p. 413 set up conscription, but this apparently was abandoned. See Loi No. 11-66, J.O. 15 juillet 1966, p. 421, modifiée par Ordonnance No. 1-69, J.O. 15 février 1969, p. 60, which reorganises national defence without mentioning conscription.

Dahomey (1) Yes, Constitution of January 11, 1964, art. 14 & 61; Loi No. 62-10, J.O. Spécial 1 mars 1962, p. 286, Loi No. 63-5 of 26 juin 1963, p. 411. These laws provide for the drafting of women as well as men but apparently at this time only men are conscripted; (2) 18 - women, 18 or 20 - men; (3) Active service: 12 m women, 18 m men. Availability: 4 yrs women, 3 yrs 6 m men. 1st reserves: 10 yrs men & women. 2nd reserves: 10 yrs men only; (4) No; (5) Yes; (6) No alternative service; Décret No. 71-43 CP/DN, J.O. 15 avril 1971, p. 134, Service Civique. However, military training and participation in national defence is an integral part of this program which is under the High Authority of National Defence; (7) For fraud or manoeuvres to avoid military service, prison 1-12 m.

Equatorial Guinea (1) Yes; (2) 21 - 25, normally; (3) 24 m; (4) No; (6) No.

Ethiopia (1) No, see however Constitution of November 4, 1955, Chpt. III.

Gabon (1) Décret-Loi No. 4 PM, J.O. 1 janvier 1961, p. 4, modifié par Décret No. 00205/PR-DN, J.O. 15 février 1972, p. 115. Unclear whether this law enforced; (2) 20; (3) 24 m active

Headings: (1) Existence of conscription; (2) Age of liability; (3) Length of service; (4) Recognition of conscientious objection; (5) Known conscientious objection cases in the country; (6) Alternative and development service; (7) Possible penalties.

service, 3 yrs availability, 10 yrs reserves; (4) No; (5) No; (6) No.

Gambia (1) No.

Ghana (1) No.

Guinea (1) Apparently: Constitution of November 10, 1958, art. 48; (6) Service Civique - merged with the armed forces in 1971.

Ivory Coast (1) Yes, Loi No. 61-209, J.O. 13 juin 1961, p. 857; Loi No. 61-210, J.O. 26 juillet 1962, p. 851; (2) Registration at 18, call-up at 19-21; (3) 24 m active service, 23 yrs reserve; (4) No; (5) No; (6) No alternative service. Service Civique; participation of military in rural development; (7) Loss of right to public employment for failure to fulfill military obligation. Prison from 1-12 m for fraudulent avoidance.

Kenya (1) No; (6) No.

Lesotho (1) No.

Liberia (1) No.

Madagascar (1) Loi No. 68-018, J.O. 14 décembre 1968, p. 2321; Décret 69-155, J.O. 3 mai 1969, p. 916; Loi No. 69-020, 30 janvier 1970, p. 9; (2) 20-30 active service, 50 maximum liability; (3) 18 m; (4) Government says yes; no legal provision found; (5) No; (6) No alternative service; National Service accomplished in Service Civique or in posts outside the armed forces, although all are subject to military regulation & discipline; (7) Loss of civil rights, including right to study for 5-20 yrs, prison 1-12 m.

Malawi (1) No; (6) No development service.

Mali (1) Ordonnance No. 72, J.O. 1 janvier 1970. (Art. 2 requires a décret to set up the administrative details, which apparently had not been promulgated as of November 15, 1971); (2) 18-22; (3) 24 m; (4) No; (5) No; (6) Service Civique under authority of Haut-Commissaire à la Jeunesse et aux Sports, by Décret No. 247, J.O. 15 janvier 1964, p. 48.

Mauritania (1) No.

Niger (1) Loi No. 61-35, J.O. Spécial 1 janvier 1962, p. 3, Loi No. 61-36, J.O. Spécial 1 janvier 1962, p. 4; Loi No. 64-035, J.O. 1 novembre 1964, p. 5; (2) 20-55; (3) 24 m active service, 5 yrs availability, 12 yrs reserves; (4) No; (5) No; (6) No.

Nigeria (1) Not at present; (6) mandatory development service of 24 m proposed for university graduates to commence June 1973 or 1974; some discussion of requiring 6 m military training as part of development service.

Rwanda (1) No, but see Constitution of November 24, 1962, art. 35.

Senegal (1) Loi No. 70-21, J.O. 27 juin 1970, p. 605, Décret No. 71-131, J.O. 27 février 1971, p. 183. However, some information indicates this law is not being applied at present; (2) 20-60; (3) 18 m active service, 3½ yrs availability, 20 yrs reserves; (4) Not official; (5) Yes; (6) No alternative service; Loi No. 68-29, J.O. 17 août 1968, p. 1034 instituted a national civic service

of a military orientation for youth in some trouble with the public authorities or without regular employment. May not be applied at present.

Sierra Leone (1) No.

Somalia (1) No, but see Constitution of July 1, 1960, Second part, art. 15.

South Africa (1) Yes, Defense Act of 1957, as amended; (2) Cadet training between 12 & 17, registration for military training January of year reach 17, maximum age of liability 65; (3) Continuous military training of 9-12 m & non-continuous training all spread over a 4-yr period; (4) Partial, Defense Act, section 67(3) & 97(3); (5) Yes; (6) Unarmed service only; no development service; (7) Prison 12-15 m, no repetition.

Swaziland (1) No.

Tanzania (1) No.

Togo (1) No, but see Constitution of May 5, 1963, art. 19.

Uganda (1) No.

Upper Volta (1) Loi No. 49-62-AN, J.O. 31 décembre 1962, p. 11, modifiée par Ord. No. 44, J.O. 6 octobre 1966. Not usually enforced because the needs of the military are met by volunteers. Has been used for punitive purposes against students expelled from the University of Dakar. Décision No. 928 PM.MA, J.O. 8 juillet 1971, p. 495; (2) 20; (3) 18 m active service, 5 yrs availability, 21½ yrs reserve; (4) No; (5) No; (6) No; (7) Prison, 3-12 m.

Zaire (1) Not generally. Some information suggests the conscription of university students only. Constitution of May 30, 1964, art. 171 provides for obligatory military service; (4) Partial; for certain denominations; (5) Yes; (6) Unarmed service.

Zambia (1) Yes, Zambia National Service Act No. 35, 1971, p. 609, men and women; (2) 18 - 35; (3) 3 m military training, 4 m for students with minimum Form V education, 20 m service after training; (4) Not explicitly. May be possible under Part IV, art. 16. See Constitution of October 24, 1964, art. 16(3); (5) No; (6) No alternative service; National Service replaces Zambia Youth Service; intent to continue development aspects of former with addition of military training & discipline.

NORTH AFRICA AND MIDDLE EAST

Afghanistan (1) Yes, Constitution art. 39; (3) 24 m; (7) None.

Algeria (1) Yes, Ordonnance No. 68-82, J.O. 19 avril 1968, p. 302 modifiée par Ordonnance No. 69-48, of 25 avril 1969; (2) 20; (3) 24 m; (4) No; (5) No; (6) No alternative service; National Service only partially military training; mostly time spent in civilian projects of development nature, such as road building, work in local administration, health work. Administered by a civilian commission.

Bahrein (1) No.

Iran (1) Yes, Loi du 2 avril 1971 (13 Ordibekecht 1350) applies also to women who have finished their secondary studies; (2) 18 - 25 women, 19 - 54 men; (3) 24 m active service; (4) No; (5) Yes; (6) Women work in cultural & health services, and teaching. The men can continue their service in teaching, public health, development, etc., after military training of 4 - 6 m; (7) Extended service. For continued refusal, prison.

Iraq (1) Constitution of April 19, 1964, Part III, art. 37; (2) 18 - 25; (3) 2 yrs active, 4 yrs 1st reserve, 4 yrs 2nd reserve; (4) No; (5) No; (6) No alternative service; 40 % of military training devoted to primary education and other non-military activities; (7) Double period military service or prison for extensive periods.

Israel (1) Yes, for Jews; Defense Service Law, 5719-1959 (Sefer Ha Chukkim No. 296 of September 24, 1959; 13 Laws of State of Israel 328, 1959); Druzes and Circassians volunteer as communities; (2) 18 - 45 men, 18 - 38 women; (3) 36 m men, 20 m women, plus up to 31 days per yr reserve duty until 39 for men and 34 for women; afterwards 14 days per yr; (4) Yes; women co's by law; men occasionally by ad hoc arrangement; (5) Yes; (6) For women outside army in hospital or education, for men only ad hoc within the army in non-combatant positions; (7) Maximum 2 yrs and/or fine for failure to fulfill duty; 5 yrs for failure with intent to avoid service; average sentence is 35 days repeated 2 or 3 times, about 1 yr if the case becomes a cause celebre. Failure to do military service may result in difficulty in obtaining employment, driver's license, etc.

Jordan (1) Yes, Law of 1 December 1967; (2) 18 - 40; (3) 2 yrs.

Kuwait (1) No.

Lebanon (1) Compulsory military training for students in 2 final yrs of secondary school. Full military service is reported to be presently under consideration; (2) 17 - 20; (3) 6 wks total over 2 yr period; (4) Yes, for two denominations only; (5) Yes; (6) Alternative service.

Libya (1) No.

Morocco (1) Yes, especially for university students; (2) 18; (3) 18 m; (4) Not in law; (5) Yes; (6) No alternative service; a special military service for teaching 'in desert', i.e. in underdeveloped areas for those who do not want to do military service; (7) Prison, civil or military.

Oman (1) No.

Qatar (1) No.

Saudi Arabia (1) No.

Sudan (1) No.

Headings: (1) Existence of conscription; (2) Age of liability; (3) Length of service; (4) Recognition of conscientious objection; (5) Known conscientious objection cases in the country; (6) Alternative and development service; (7) Possible penalties.

- Syria* (1) Yes, Constitution of April 25, 1964, art. 21(2). Jewish population exempted; (2) 18; (3) 30 m; (4) No; (5) No; (6) No.
- Tunisia* (1) Yes, Décret, J.O. 22 janvier 1957, p. 83; (2) 20; (3) 1 yr active, 4 yrs availability, 15 yrs 1st reserve, 10 yrs 2d reserve; (4) No; (5) No.
- Turkey* (1) Yes, Constitution of May 27, 1961, art. 60; Law No. 1111 of June 21, 1927; (2) 19 for life; (3) 20 m; (4) No, Code Pénal Militaire Turc; (7) Failure to enroll, a fine; refusal to do military service in war, prison or death, Penal Code (Ordinary); Law No. 765 of March 1, 1926, art. 135, public incitement to become c.o. is offense punishable by prison for 2 m - 2 yrs & fine of 25 - 200 liras.
- United Arab Emirates* (1) No.
- U.A.R.* (1) Yes, Constitution of 1964, Part III, art. 43, Loi 140, J.O. 8 septembre 1947, p. 1, Loi No. 505, 1955. Jewish population exempted; (2) 18 - 30; (3) 3 yrs, may have changed recently to 18 m; (4) No; (6) No; (7) Prison or fine.
- Yemen Arab Republic (North)* (1) Yes, Constitution of 1962, ch. III, art. 41, ch. III(c), art. 136; (3) 3 yrs.
- Southern Yemen* No information.

THE AMERICAS

- Argentina* (1) Yes, Constitution of May 1, 1857, art. 21; La Ley Orgánica del Ejército No. 12913; (2) Registration at 18, call-up at 20; (3) 12 m active service; (4) No legal provision; (5) Yes; (6) Ad hoc administrative provision for alternative service; (7) Failure to appear - extended service; desertion - extended service & prison.
- Barbados* (1) No.
- Bolivia* (1) Yes, Constitution of February 2, 1967, art. 213; Law of January 22, 1927; (2) 19 - 50; (3) 12 m; (4) Partial exemption for members of Mennonite Church only, Supreme Decree No. 06030 March 16, 1962; (5) Yes; (6) No; (7) Loss of civil rights; extended service 2 times ordinary length.
- Brazil* (1) Yes, Constitution of June 24, 1967, art. 93; (2) 18 - 30 liable for training; 31 - 40 available for manoeuvres; 40 - 46 general reserve duty; 46 - 62 liable in time of war; (3) 12 m service; (4) Yes, Constitution, arts. 144, 150; Internal Bulletin of Director of Military, No. 109 of June 12, 1967; exemption from military service with loss of civil rights; informal arrangements by discretion of local commanders; (5) Yes; (6) No alternative service; some army units work on civil construction; (7) Loss of civil rights; special taxation; prison 4 m - 1 yr in peace; 2 - 5 yrs in war.
- Canada* (1) No; conscription by government order in emergency situations; (4) Historically yes, nothing in emergency statute precluding or granting exemption of c.o.'s; (5) Not at present; (6) No.

- Chile* (1) Yes, Constitution of 1925, art. 10(9); (2) 18 registration; 19 call-up; 60 maximum age for liability; (3) 12 m; (4) No; (5) No; (6) No alternative service; (7) Failure to register - fine & extended service; failure to appear - extended service (double); desertion - prison.
- Colombia* (1) Yes, Constitution of August 4, 1886, art. 165; law of February 1945, Acto Legislativo y Leyes pp. 32-45 (1945); (2) 19 registration; 20 liable for active service; 21-30 reserves; 31-40 national guard; 41-50 territorial guard; (3) 12 m; (4) No; (5) No; (6) No; (7) Fines, or prison for failure to pay fines; loss of right to be public employee.
- Costa Rica* (1) No, Constitution of November 7, 1949, art. 12. No army, but see art. 18 - duty to defend country.
- Cuba* (1) Yes, Constitution of 1959, art. 9; (2) 15-27; (3) 24-36 m; students may serve part-time; (4) Informal; (5) Yes; (6) Ad hoc, informal alternative service; army works for development.
- Dominican Republic* (1) No (some evidence of selective military service).
- Ecuador* (1) Yes, Constitution of May 25, 1967, art. 251; Ley de Servicio Militar Obligatorio of 1935; (2) 18 register; 19 service; (3) 12 m (some information indicates 24 m); (4) No; (5) Yes; (6) No alternative service; army does road building & literacy education; (7) Loss of civil rights.
- El Salvador* (1) Yes, Constitution of January 8, 1962, art. 113; Military Service Law of 1941; (2) 18-30; (3) 12 m; (4) No; (5) No; (6) No alternative service; (7) Prison; treated as deserters.
- Guatemala* (1) Yes, Constitution of September 15, 1965, art. 11(1), Basic Law of the Army, General Regulations, June 1965; (2) 18-30 active service; 30-50 reserves; (3) 24 m; (4) No; (5) No; (6) No alternative service, but possibility of paying tax in lieu of service; (7) Failure to appear - extended service, 36 m.
- Guyana* (1) In time of emergency, The National Service Ordinance, vol. VI, The Laws of Guyana, ch. 358; (2) Not applicable at present; (4) Yes, but not in National Service Ordinance; see Constitution of May 16, 1966, art. 6(3)(c); (5) No; (6) Both alternative & development service; (7) Maximum 6 m prison and/or fine.
- Haiti* (1) Constitution of May 25, 1964, art. 186 provides for compulsory military service, but conscription is not in effect.
- Honduras* (1) Constitution of June 3, 1965, arts. 35(d) and 321; provide for duty of military service, but few, if any, conscripted because there are sufficient volunteers; (2) 18; (3) 24 m; (4) No; (5) Yes; (6) No alternative service.
- Jamaica* (1) No.
- Mexico* (1) Compulsory military training - Constitution of January 13, 1917, arts. 5, 31; law of April 19, 1940; Decree of Ministry of National Defense September 8, 1942; (2) 18 - Military training; 19-30 first reserve; 31-40 second reserve; 41-45 Home

Guard; (3) Drilling for 5 hrs every Sunday for 12 m. Frequently training is only 7 m; (4) Presidential Decree of February 25, 1921, reaffirmed in 1936; exempts Mennonites; occasional ad hoc exemption for others by paying small fine; (5) Yes; (6) No alternative service; medical doctors and other professionally trained persons perform 6 m civil service; (7) Refusal to appear - loss of civil rights; refusal to register - 1 - 12 m prison.

Nicaragua (1) Constitution of November 1, 1950 art. 320 authorizes compulsory military service; apparently not in force.

Panama (1) Constitution of March 1, 1946, art. 248, authorizes conscription, but not in force; (4) Constitution, art. 17, provides that naturalised citizens may not be asked to take up arms against their countries of origin.

Paraguay (1) Yes, Constitution art. 125; Law No. 194 of February 19, 1916 (Registro Oficial, p. 76 (1916)); (2) 18 active service; 20 - 29 reserve of permanent army; 29 - 39 national guard; 39 - 45 territorial reserve; (3) 24 m; (4) Mennonites and similar immigrant religious groups in Chaco area are exempted, Law No. 514 July 26, 1921 (Registro Oficial pp. 336-337 (1921)). Law No. 914, August 29, 1927 (Registro Oficial pp. 595-596 (1927)), Decree No. 43,561, May 4, 1932 (Registro Oficial p. 406 (1932)); (5) Yes; (6) No alternative service; (7) Failure to perform service - loss of right to public employment or public contract; failure to appear - extended service, 12 additional m for persons 18 - 26, over 26 fine or prison.

Peru (1) Yes, Constitution of April 9, 1933, art. 214; (2) 18 - registration; 19 - call-up; (3) 24 m; 12 m for those who complete studies; (4) No; (5) No; (6) No alternative service; (7) Extended service.

Trinidad and Tobago (1) No.

Uruguay (1) Civil servants must agree to do military training by law, but they have not been called upon for several years; otherwise there is only voluntary military service; (2) 18 - 30; (3) 160 - 480 hrs per yr for 3 yrs; (4) Yes, art. 14, Reglamentación de la enseñanza militar obligatoria; (5) Yes; (6) Non-military or non-combatant alternative service.

U.S.A. (1) Yes, Military Selective Service Act of 1967 as amended Public law 92 - 129 (September 28, 1971); (2) 18 - 26; (3) 24 m; (4) Yes, Military Selective Service Act of 1967, § 6(j); 50 U.S.C. App. § 456(h)(z); see § 6(g), exempting ministers for part-time religious activity; in addition, possible discharge from armed forces on ground of conscientious objection; (5) Yes; (6) Alternative 24 m in civilian service, but not necessarily within the government; (7) 5 yrs maximum; extreme variety in sentencing; average is approx. 29.1 m prison; progressively more probation being given.

Venezuela (1) Yes, Constitution of 1961, arts. 51, 53; coverage is very haphazard; (2) 18 - 45; (3) 24 m; (4) No; (5) No; (6) No alternative service.

ASIA, AUSTRALIA AND PACIFIC

Australia (1) Commonwealth National Service Act 1951-1971, not being applied presently pending new legislation; (2) 20-26; (3) 18 m; (4) Yes, art. 29 of National Service Act 1951-1971; in-service c.o. as well as c.o. stated before entering military service; (5) Yes; (6) Unarmed service or complete exemption; (7) Failure to obey call-up - fine \$200; failure to appear 2d time - 18 m; failure to register \$ 40-200 fine; cannot leave Australia without permission of Dept. of Labour & National Service.

Bangladesh (1) No.

Bhutan (1) No.

Brunei (1) No.

Burma (1) Yes; (3) 24 m.

China (1) Yes, Constitution of September 20, 1954, art. 103; massive group enlistments result in more than enough recruits; (2) 18; (3) 24 m; (4) No; (5) No; (6) No alternative service; after several months of military training, most recruits spend remainder of service in agricultural work.

Fiji (1) No.

India (1) No compulsory military service, but National Cadet Corps provides compulsory military education for students.

Indonesia (1) No; Constitution of 1945, art. 30(i) provides for compulsory service and university men & women students have at times been the only group subjected to compulsory military training, but not apparently at present; (2) 18-45; (4) No; (5) No; (6) No alternative service.

Japan (1) No, Constitution of November 3, 1946, art. 9.

Khmer Republic (Cambodia) (1) Yes, Proposed Constitution, art. 21; Kram 851, N.S. of February 22, 1954; Decree of General Mobilization. Previously enlistments far exceeded needs of army; (2) 18-60; (3) In 1969 was 15 m but can be longer under Decree of General Mobilization; (4) No; (5) No; (6) No alternative service; the Decree of General Mobilization provides for all forms of service, not just military service; (7) Military court martial.

Democratic People's Republic of Korea (North) (1) Yes, Constitution of September 9, 1948, art. 28 (new constitution pending); (3) 36 m; (4) No; (5) No; (6) No alternative service.

Republic of Korea (South) (1) Yes, Constitution of July 17, 1948, art. 34 (new constitution pending); (2) 18-40; (3) 33 m; (4) No legal provision, only occasional informal placement; (5) Yes; (6) Informal non-combatant service within army; (7) 1-3 yrs prison in peace; 1-10 yrs in war.

Headings: (1) Existence of conscription; (2) Age of liability; (3) Length of service; (4) Recognition of conscientious objection; (5) Known conscientious objection cases in the country; (6) Alternative and development service; (7) Possible penalties.

- Laos* (1) Yes, Constitution of Kingdom of Laos, May 11, 1945 preamble.
- Malaysia* (1) No, Armed Forces Act, 1972 (Government Gazette May 4, 1972).
- Maldives* (1) No.
- Mauritius* (1) No.
- Mongolia* (1) Yes, Constitution of July 6, 1960, art. 89(h).
- Nauru* (1) No.
- Nepal* (1) No.
- New Zealand* (1) National Military Service Act No. 116, 1961 amended No. 9, 1968; No. 60, 1969; compulsory military training not applied after January 1973; (2) 19 - 30; (3) Active service up to 14 wks and reserve duty for 36 m part-time, of which 2 m in training; (4) Yes, sections 28 - 42; (5) Yes; (6) Non-combatant service in army or exemption and reduction of wage of c.o. to that of private in army for 158 days and remainder goes to government; (7) Refusal to register - £ 50 fine per day of refusal, magistrate may impose up to 1 year of civil work.
- Pakistan* (1) No.
- Philippines* (1) Yes, Constitution of February 8, 1935, art. 2, sec. 2 (proposed constitution pending) National Defense of 1935 tit. I, art. II, sec. 3, Commonwealth Act No. 1, December 21, 1935, tit. III, art. 1, sec. 5; (2) 10 - 18 preparatory military training in school, 18 - 21 junior reserve, 21 call-up, 21 - 30 active service, 31 - 50 inactive service; (3) 10 - 12 m.; (4) Youths who do not register may be ignored; (5) No; (6) No alternative service; (7) 6 m prison and/or fine.
- Sikkim* (1) No.
- Singapore* (1) Yes, may apply only to graduates; (2) 18 - 40; (3) 24 m; (4) No; (5) Yes; (6) No alternative service; (7) 6 m in prison and/or fine; some missionaries who advocated conscientious objection were expelled.
- Sri Lanka (Ceylon)* (1) No compulsory military service, but compulsory public service, Act No. 70 of 1971 provides that all university graduates must perform 5 yrs public service; (6) Development service.
- Taiwan* (1) Yes, Constitution of December 25, 1946, art. 20; Military Service Law promulgated June 7, 1933, amended 1935, '43, '46, '51, '54, '59; Law giving Application to Military Service Law, promulgated February 9, 1947, amended 1954, '55, '59, '60; (2) 19 - 45; (3) 24 m, 12 m for university graduates; (4) No; (5) No; (6) No alternative service.
- Thailand* (1) Yes; (2) 21; (3) 24 m; (4) No; (5) No; (6) No alternative service; (7) Maximum 3 yrs prison and/or fine.
- Tonga* (1) No.
- Democratic Republic of Vietnam (North)* (1) Yes, Constitution of December 31, 1959, art. 42; (3) 36 m minimum; (4) No; (5) Yes; (6) No alternative service.

Republic of Vietnam (South) (1) Yes, Constitution art. 27; General Mobilization Law No. 003/68 of June 19, 1968; (2) 18 - 39 active service, 16 - 17, 29 - 50 self-defense forces; (3) At least 9 m active military service, then return to previous work whilst still in army; (4) No; (5) Yes; (6) No alternative service; (7) Indefinite imprisonment unless they accept non-combatant military service on the front-lines.

Western Samoa (1) No.

EASTERN EUROPE

Albania (1) Yes, Constitution of March 14, 1946, revised July 4, 1950, art. 36; (3) 24 m plus active 'citizen-soldier' reserve program; (4) No; (5) No; (6) No.

Byelorussia (1) Yes, Constitution of February 19, 1937, arts. 107-108; compulsory military service in the army of the U.S.S.R.; (2) 18 - 27; (3) 24 m; (4) see U.S.S.R.; (5) No.

Czechoslovakia (1) Yes, Constitution of July 11, 1960, art. 37; (2) 18; (3) 24 m, 12 m for University graduates who have done military service at University; (4) No; (5) Yes; (7) 1 - 5 yrs prison.

Bulgaria (1) Yes, Constitution of 1971; (3) 24 m; (4) No, but some c.o.'s have been ignored; (5) Yes; (6) Reports of possibility of working in mines; conscripts receive a few months of military training and then work on bridges, dams, and roads; (7) Prison.

German Democratic Republic (1) Yes, Constitution of October 7, 1949, art. 22, Defense Law of January 24, 1962, Gesetzblatt der D.D.R., 8 September 1964, compulsory military service - compulsory pre-military training in schools beginning before 14 yrs; also compulsory civil defense work, 16-65 men, 16-60 women. Gesetzblatt der D.D.R., 1 Oktober 1970; (2) 18 - 26 active service, reserves to 50; (3) 18 m; (4) Partial; (5) Yes; (6) Yes, Anord. Nationalen Verteidigungsgesetz, 7 September 1964, provides for unarmed service within army in construction unit; (7) Average sentences 18 - 21 m.

Hungary (1) *Yes, Constitution of August 20, 1949, art. 60 - 61; (2) 18 - 20; (3) 24 m; (4) No legal provision; (5) Yes; (6) Reports of non-combatant service in hospitals and sanitary divisions of army in some areas.

Poland (1) Yes, Constitution of June 23, 1952, art. 78, secs. 1 & 2; (2) 18 - 50; (3) 24 m; (4) No; (5) Yes; (6) No; (7) 6 m - 2 yrs in prison are average sentences.

Romania (1) Yes, Constitution arts 40-41; (3) 16 m; (4) No; (5) Yes; (6) No; (7) Prison.

Ukraine (1) Yes, Constitution of January 30, 1937, arts. 112 & 113; compulsory military service in the army of the U.S.S.R.; (2) 18 - 27; (3) 24 m; (4) See U.S.S.R.; (5) Yes.

U.S.S.R. (1) Yes, Constitution of December 5, 1964, arts. 132-133; Law of October 12, 1967; preinduction compulsory military training in schools and factories between 16 - 17 yrs; (2) 18 - 27;

(3) 24 m; (4) No legal provision; some local commanders assign c.o.'s to non-combatant posts, e.g. in hospitals; others simply send c.o.'s home and ignore them; others refer c.o.'s for prosecution; (5) Yes; (6) see (4); (7) 1-3 yrs prison; average sentence 2½ yrs.

Yugoslavia (1) Yes, Constitution of April 17, 1963, art. 60; (3) 18 m; (4) No; (5) Yes; (7) 6 m - 10 yrs prison; possibility of repeated sentences.

WESTERN EUROPE

Andorra (1) No.

Austria (1) Yes, Wehrgesetz vom 7. September 1955; (2) 18 - 50; (3) 6 m; (4) Partially, Wehrgesetz vom 7. September 1955, art. 25; (5) Yes; (6) 12 m unarmed service; non-governmental development service substitute for military service; (7) For failure to perform military service, prison 6 - 12 m.

Belgium (1) Yes, Loi du 30 avril 1962, Moniteur 9 mai 1962. Constitution art. 1 provides that conscripts may not be sent to overseas territories; (2) 18 registration, 19 - 23 liable for active service, 45 maximum; (3) 12 m; (4) Yes, Loi du 23 juin 1964, Moniteur 19 juin 1964, modifiée par Loi du 22 janvier 1969; (5) Yes; (6) Unarmed service 12 m, civilian service 24 m; development service as substitute for military or alternative service; (7) For refusal of alternative service, prison 3 - 36 m & possible loss of civil rights. In war 2 - 5 yrs prison, repetition possible.

Cyprus (1) Yes, see Constitution of April 6, 1960, art. 129; (2) 18; (3) 12 - 18 m; (4) No; (5) No; (6) No alternative service; army participates in development work.

Denmark (1) Yes, Constitution of June 6, 1953, Part VIII, art. 81; Lov om Vaerneplikt of June 11, 1954, Lovtidende Danmark, p. 473; (2) 18 enrollment, 19 - 30 active service; (3) 12 m; (4) Yes, Lov om vaernepliktiges anvendelse til civilt arbejde, of May 20, 1952, Lovtidende Danmark 1952, p. 344; (5) Yes; (6) Yes, unarmed service and civilian service; Yes, development service substitutes for military or alternative service, 2 yrs; (7) For refusing alternative service, prison up to 15 m.

Finland (1) Yes, Conscription art. 75 sec. 1; law on military service 452/50; Inhabitants of the Aaland Islands excepted; (2) 17 - 60, active service usually starts at 20 and ends at 30; (3) 240 days; (4) Yes, in peace only. Law 132/69 of November 3, 1967; (5) Yes; (6) Unarmed service 90 days longer than military service; civilian service 120 days longer; no development service; (7) For refusal to do military service: prison, repetition possible; for refusal to do alternative service: 1 yr prison.

France (1) Yes, Code du Service National, annexé à la Loi No. 71/424, J.O. 12 juin 1971, mise en vigueur par le décret d'application du 72-806, J.O. 2 septembre 1972; (2) 18 registration, up to 29 active service, 50 maximum; (3) 12 m; (4) Yes, Code du Service National arts. 41-50; (5) Yes; (6) Unarmed service authorized

but not established, civilian service 24 m; development service substitutes for military service; (7) Prison for maximum 3 yrs, repetition possible.

Germany (1) Yes, not including residents of West Berlin. Constitution of May 23, 1949, art. 12a, Wehrpflichtgesetz BGBl. IS 1773, amended 23 September 1969; (2) 18 - 25 active service, 26 - 45 reserves; (3) 18 m; (4) Yes, Constitution art. 4(3); Wehrpflichtgesetz, art. 25; (5) Yes; (6) Yes, Constitution art. 12(3), Ersatzdienstgesetz of July 16, 1965, BGBl. IS 984, unarmed service & civilian service 18 m. Development service substitutes for military and alternative service; (7) Maximum 5 yrs prison.

Greece (1) Yes, Constitution of 1968, art. 3; Decree N.D. 3850 of 1958; (2) 18 registration, 21 call-up, 40 maximum; (3) Usually 24 m; (4) No; (5) Yes; (6) No alternative service; within the army some soldiers are permitted to teach in secondary schools, work in construction projects, act as translators and perform other civil tasks; (7) Death penalty in case of war, armed revolt or mobilization. With extenuating circumstances the sentence may be life, or a term of yrs with a minimum of two yrs imprisonment. Refusal to obey an order punished by 3 - 10 yrs, when in front of enemy. Minimum 2 yrs in time of war, and otherwise 6 m. Average sentence is 5 yrs, often repeated until the c.o. is 40 or has been pardoned.

Holy See (1) No.

Iceland (1) No, no armed forces but Constitution of June 17, 1944, art. 75, authorizes conscription.

Ireland (1) No, but may be created in emergency - Defense Act 1954, § 4(1); (4) No; (6) No.

Italy (1) Yes, Constitution of December 27, 1947, art. 52; (2) 20 - 55; (3) 15 m; (4) Yes, Law of December 1972; (5) Yes; (6) Unarmed service, 15 m; alternative service, 23 m; development service: Law No. 1222 of December 15, 1971 (Gazzetta Ufficiale Anno 113°, January 21, 1972, p. 536) permits 24 m service in lieu of military service; (7) Prison, 6 m - 2 yrs; possibility of repeated sentences, but after 2 or 3 sentences of, for example, 2 m - 6 m and then 1 yr, the c.o. is often dismissed for health reasons; military age youths may not leave the country without permission.

Liechtenstein (1) No, Constitution, chapter IV, art. 44.

Luxembourg (1) No, Army abolished June 29, 1967; (4) Historically c.o. was recognised from 1963.

Malta (1) No.

Monaco (1) No.

Netherlands (1) Yes, Constitution 194 - 195 Dienstplichtwet Staatsblad 1948 No. I 284; (2) 18 - 35; (3) 12 m; (4) Yes, Wet gewetensbezwaren militairedienst of 7 September 1962, Staatsblad No. 370.

Headings: (1) Existence of conscription; (2) Age of liability; (3) Length of service; (4) Recognition of conscientious objection; (5) Known conscientious objection cases in the country; (6) Alternative and development service; (7) Possible penalties.

Besluit gewetensbezwaren militairedienst of 29 October 1964, Staatsblad No. 404, Constitution art. 196; (5) Yes; (6) Unarmed service same duration as military service, civil service 21 m, no development service; (7) For failure to do alternative service maximum 2 yrs prison, or labour service from 3 m - 3 yrs.

Norway (1) Yes, Constitution 109; Lov om verneplikt 17/7/53; Norsk lovtidend 2 avd, p. 560; (2) 20 - 44; (3) 12 m; (4) Yes, Lov om frikating for militaer tjeneste av overbevisningsgrunner, Norsk loventided 1ste adv. p. 483 of March 19, 1965; (5) Yes; (6) Yes, civilian service, length that of military service & additional period of up to 180 days. At present 4 m longer; Home Defense, additional period up to 50 % more; now $\frac{1}{3}$ more; can be recalled for repetition service to correspond to reserve exercises; no development service; (7) Up to 3 m prison or compulsory labor in special camp for failure to do alternative service; for failure to do military service 3 m to 2 yrs prison.

Portugal (1) Yes, Constitution of 1933, art. 54, Law 2034 of July 18, 1949; Law 2060 of 1953; and Law 2084 of August 16, 1956; (2) 18 - 45; (3) 48 m with quite possible extension of 12 m for poor discipline; (4) No; (5) Yes; (6) Possibility of doing unarmed service in medical corps within army; (7) 2 - 4 yrs in military prison in peace, 5 - 6 yrs or death in war; some are sent to Mozambique and Angola in corps disciplinaire.

San Marino (1) Compulsory service in the militia, no standing army; (2) 16 - 55; (3) reserve duty only; (4) No; (5) No; (6) No.

Spain (1) Yes, Charter of Spanish People of July 16, 1945, art. 7; Decreto num. 3,087 of November 6, 1969; (2) 21 - 38; (3) 18 m; (4) No; (5) Yes; (6) Red Cross and Spanish Government agreed on April 1, 1971, to permit Spanish youth to undertake unarmed service with the Red Cross; no development service; (7) Prison 6 m & 1 day to 6 yrs & 1 day; typically youths receive a first sentence of 6 m & 1 day followed by successive sentences of 3 yrs and 1 day until at least age 30 and possible to 38; c.o.'s may be sent to disciplinary batallion in the Spanish Sahara or Canary Islands.

Sweden (1) Yes, Värnpliktslagen 1941-1967, of December 30, 1941, as amended by Law No. 1954-479 of June 4, 1954 and 1966-432 of June 3, 1966; (2) 18 - 47; (3) 394 days; (4) Yes, Lag om Vapenfritjänst 1966-413, of June 4, 1966. (5) Yes; (6) Unarmed service & civilian service 457 days, certain total objectors are exempted from all service on a case-by-case basis; development service exists, does not count as substitute for alternative service; (7) For failure to do military service 1 m prison, repetition common; for failure to perform alternative service, prison for up to 304 days.

Switzerland (1) Yes, Constitution of May 29, 1874, art. 18, Federal Law of April 12, 1907, Bereinigte Sammlung 1848-1947, vol. 5, pp. 1 *et seq*; Amtliche Sammlung 1965, pp. 88 *et seq*; (2) 19 active service, 17 wks, 20 - 32 annual 3 wk courses, 33 - 50, 4 - 6 courses of 1 or 2 wks; (3) total 49 wks; (4) Ordonnance of August 20, 1951, art. 26, sec. 2 permits only unarmed service;

(5) Yes; (6) Unarmed service, same duration as military service; no development service; (7) Prison or detention from 3 days to 3 yrs, fine, tax, loss of civil rights. Average 3-6 m prison, repetition common.

United Kingdom (1) No; (4) Historically recognised whenever conscription introduced, administrative procedures for in-service c.o. at present; (5) Yes; (6) No.

SELECTED NON-INDEPENDENT TERRITORIES

Angola (1) Yes, under Portuguese Law 2060 of 1953; blacks are conscripted; see Portugal for details; (5) Yes.

Antigua (1) Not at present, vol. III Laws of Antigua, tit. XX, ch. 185, p. 1501 (September 5, 1939) authorizes national service; (2) 18-55; (3) None specified; (4) No; (5) No at present; (6) No.

Bahamas (1) No.

Curaçao (1) No.

French Territories in Pacific and Indian Oceans, e.g. New Caledonia, Réunion, French Polynesia (1) Yes, same law as in Metropolitan France; see France for details.

Guinea Bissau (1) Yes, under Portuguese Law 2060 of 1953; blacks are conscripted; see Portugal for details.

Hong Kong (1) Not at present; Compulsory Service Ordinance Chap. 246 of the Laws of Hong Kong has been suspended since 1961, but could be reinstated by proclamation; (2) 21-60 men, 21-50 women.

Mozambique (1) Yes, under Portuguese Law 2060 of 1953; blacks are conscripted; see Portugal for details; (5) Yes.

Namibia (1) No, military forces are brought from South Africa including most recently black police officers.

New Hebrides (1) No.

Rhodesia (1) Yes, Defense Act No. 23, 1955, Cadet Corps, Act No. 22, 1955; non-whites exempted; (2) 17 registration, 18-25 active service, 60 maximum age; (3) 12 m continuous training + 40 hrs per yr non-continuous for 3½ yrs; (4) Partial, Defense Act, art. 40(3); (5) Yes; (6) Unarmed service only; no development service; (7) Fines up to R\$ 200 or up to 1 yr prison.

Surinam (1) No.

PREVENTIVE DETENTION IN NIGERIA

by
D. O. AIHE *

Constitutional safeguards against preventive detention

The liberty of the subject if it is to be meaningful at all must be protected against arbitrary arrests. In order to achieve this purpose, the Nigerian Constitution entrenches certain fundamental rights of which freedom of personal liberty is one. Section 21(1), of the Republican Constitution, 1963, provides that no person shall be deprived of his personal liberty except in six cases¹ and in accordance with a procedure permitted by law. A person may, however, be deprived of his personal liberty in the following cases :

- (1) if he is unfit to plead to a criminal charge or in the execution of the sentence of a court of law,
- (2) if he fails to comply with the order of a court or fails to fulfil any obligation imposed upon him by law,
- (3) for the purpose of arresting him on reasonable grounds of having committed a criminal offence or to prevent him from committing a criminal offence,
- (4) if he is under twenty-one years, for the purpose of his education,
- (5) for the purpose of curing him if he suffers from infectious or contagious disease, or he is of unsound mind, and in protecting the community against those addicted to drugs or alcohol,
- (6) for the purpose of preventing unlawful entry into Nigeria or expelling those who are to be lawfully removed.

The above exceptions appear to be exclusive and in no other circumstances may a citizen be deprived of his personal liberty. Any action of the executive contrary to this provision would be null and void and the victim will be entitled to compensation.

Apart from emergency cases which we shall discuss later, the Executive cannot promulgate any law to detain citizens. The late Prime Minister Alhaji A.T. Balewa while arguing in favour of amending the Nigerian Constitution to enable the government to deal with subversive elements in the country said :

'under our present arrangement... We cannot deal with any serious situation. We cannot deal with groups of individuals who engage in subversion. We cannot stop and we cannot forestall people who are planning evil... This is a very difficult situation in which we in the government find ourselves. That was why the suggestion was made that we should find some means... to curtail the liberty of a Nigerian citizen.'²

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¹ S.21(1)(a) - (f) of the Nigerian Constitution 1963.

² Federal Parliament Debate, 7th August, 1963, Col. 2681.

The Prime Minister's speech was received with mixed feelings in Parliament and the matter was shelved as a result of public outcry.³

In our examination of the Constitutional safeguards we shall examine first the powers of the executive to detain citizens during peace time, and secondly during emergency or war periods.

(a) *Peacetime Preventive Detention*

There are some occasions during which the administration is empowered to detain citizens in the interest of the state. An example of such power is to be found in the provisions of the Immigration Act, 1963, which empowers the Minister (now Commissioner) for Internal Affairs to deport undesirable and prohibited immigrants from Nigeria when it *appears*⁴ to the Commissioner that the conduct of such a person has been such that he should not be permitted to remain in Nigeria.⁵ A citizen of Nigeria cannot be deported out of the country but there are wide powers vested in the Commissioner to order the deportation of non-citizens. Any person who has been ordered to be deported may be arrested and detained pending deportation. The Commissioner's order cannot be challenged on any ground whatsoever.⁶

An alien against whom a deportation order has been made may, instead of being actually deported, be detained in custody if the Commissioner considers his deportation to be impracticable or prejudicial to the efficient prosecution of any war in which Nigeria may be engaged and that the detention is necessary or expedient for securing public safety, the maintenance of public order or defence of the realm.⁷

Under the Ex Native Office Holders Removal Ordinance⁸ the Governor was empowered to remove and detain any person who has held an office under the Native Authority Ordinance, 1933, in the interest of peace, order and good government in any part of Nigeria.⁹ In *Arzika v. Governor, Northern Region*,¹⁰ an order of *certiorari* was sought to quash the Ex-Native Office Holders Removal order made by the Governor in exercise of his powers under section 2(1) of the said Ordinance. The grounds of the order were that the removal of Mallam Arzika as the District Head of Arewa Gabas, and his detention in another district were necessary in the interest of peace order, and good government in the area for which he was appointed. The application was dismissed on the ground that the governor was, while

³ The West African Pilot of 20th July, 1963 and 3rd August, 1963, had earlier carried the news of the government's plan to amend the Constitution in order to allow detention of persons in peace time.

⁴ Emphasis supplied.

⁵ S.17(2) and 18(3) of the Immigration Act, 1963. Between 1960 and 1964, 18 persons were deported and between 1966 and 1967 during the civil war 42 persons were deported under the powers conferred on the Minister (now Commissioner) for Internal Affairs.

⁶ S.18(2), Immigration Act, 1963.

⁷ S.44 *ibid.*

⁸ S.2(1) Cop. 68, Laws of Nigeria, 1948 ed.

⁹ Two ex office holders — Abubakare, The Emir of Katsina, and Mamudu, Sarkin Nirigi — were removed and detained in Kano and Gombe respectively under S.2(1) of the ordinance. The action of the Governor was validated retrospectively by S.4 of the Ordinance.

¹⁰ [1961] 1, All N.L.R. 379.

making the order removing and detaining the applicant, acting administratively and not judicially. This was a matter affecting the liberty of the subject and the attitude of the court in drawing a distinction between executive actions which are judicial and those which are not, gives room for some concern. The Nigerian Constitution guarantees the liberty of the subject and in order to ensure that this is protected from executive encroachment, the Constitution gives special jurisdiction to the High Courts to grant appropriate remedies. Under s.31(2) of the Independence Constitution, 1960 (now s.32(2) of the Republican Constitution) the High Courts are given power to make such orders or issue such writs that may be appropriate in respect of acts concerning the infringement of fundamental human rights. It is therefore submitted that the High Court was wrong in dismissing the application of Mallam Arzika.

(b) *Preventive Detention During Emergency*

The powers of the government to deal with emergency situations are contained in the Emergency Powers Act, 1961.¹¹ The provisions of this Act cannot come into operation unless there is either a resolution by Parliament that a state of public emergency exists or the Federation is at war.¹² However, the Federal Government's power in time of emergency is derived from the provisions of S.65 of the Independence Constitution (now S.70 of the Republican Constitution, 1963).¹³ Period of emergency is defined under section 70(3) as any period during which

- (a) The Federation is at war;
- (b) there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists, and
- (c) there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion.

The second meaning of a period of emergency has been the subject of much comment — whether the existence of a state of public emergency is an exclusive matter for Parliament, or, whether it can be reviewed by the courts. It is not inconceivable that a declaration of emergency by Parliament might be made in order to achieve certain political advantage even when, *prima facie*, emergency conditions do not appear to exist.¹⁴

Under the Emergency Powers Act, 1961, the Governor-General (later the President) was empowered to make regulations providing for the detentions of persons whose activities are prejudicial to the interest of the state. In the crisis of Western Nigeria in 1962, the provisions of the Emergency Powers Act were invoked. The most drastic of the

¹¹ S.3(2)(a).

¹² S.70(3) Republican Constitution, 1963.

¹³ The section provides that Parliament may at any time make laws for Nigeria or any part thereof with respect to matters which appear to Parliament to be necessary or expedient for the purposes of maintaining or securing peace, order and good government during any period of emergency.

¹⁴ See S.G. Davis, Nigeria — 'Some Recent Decisions on the Constitution' (1962) 11. *I. C. L. Q.* 919; Professor D.C. Holland, 'Human Rights in Nigeria' 1962. *Current Legal Problems* 145.

measures taken during this period was the detention of certain persons without trial. The Emergency Powers (Detention of Persons) Regulation, 1962, was promulgated by the Governor-General, and under it the Administrator of Western Region was empowered to make orders for the detention of any person anywhere in Nigeria if he was satisfied that such a person was or recently had been concerned in acts prejudicial to the public safety or in the preparation or instigation of such acts and by reason thereof it was necessary to exercise control over him.

In addition to this, special regulations were made to restrict the movement of any person in the emergency area and this was done under the Emergency Powers (Restriction Orders) Regulations 1962. Any person whose movement has been so restricted could be arrested for the purposes of being removed to the area of his restriction.

There is no doubt that the legislative power given to the President-in-Council is of great potency. Section 6 of the Act provides that any regulation or order made thereunder shall have the force of law notwithstanding the fact that such regulation or order is inconsistent with any other law. Thus the President-in-Council was empowered to make regulations suspending or modifying any law enacted by any legislature in the Federation. The power vested in the President-in-Council to make regulations virtually constituted him into a legislature and this power appears to have gone beyond a mere delegation.

The limits on the powers of the administrator during the crisis of Western Nigeria in 1962 can well be seen from the decision of the Supreme Court in the case of *Rotimi Williams v. Majekodunmi*.¹⁵ In this case the plaintiff's movement was restricted to a three-mile radius of Abeokuta during the political crisis in Western Nigeria in 1962. The restriction order was challenged on the ground that it was violative of the plaintiff's constitutional rights of freedom of movement. It was held by the Supreme Court that the restriction of the plaintiff was not reasonably justifiable and the restriction order was set aside.

Since 1966 when Nigeria was engulfed in a military *coup d'état* and civil war, the liberty of the subject has been interfered with by the Federal Military Government for the purposes of securing peace, order and good government. It is a cardinal principle of law that every interference with the liberty of the individual is unlawful unless it can be justified by reference to specific statutory or common law rule. However, where the liberty of the subject comes into conflict with the safety and the corporate existence of the state, the liberty of the individual must give way to the latter,¹⁶ *salus populi suprema lex*, particularly during times of war or national emergency. The Federal Military Government has not been slow in detaining persons whose conduct were inimical to the very existence and survival of the Federal Republic of Nigeria during the last civil war. In this connection Detention Decrees were promulgated.¹⁷ The detention of persons under

¹⁵ [1962] 1, All N.L.R. 413.

¹⁶ *R. v. Halliday ex parte Zadig* [1917] A.C. 260, *Liversidge v. Anderson* [1942] A.C. 206.

¹⁷ Between 1966 and 1967, 85 persons were detained under various Decrees by the Federal Government. For example see State Security (Detention of Persons) Decree Nos. 3, 8, 10, and 77 of 1966.

the various Decrees was, according to the Federal Military Government, necessary in the interest of peace, order and good government. Section 6 of the State Security (Detention of Persons) Decree 1966,¹⁸ suspended Chapter III of the Republican Constitution of Nigeria dealing with fundamental human rights in respect of the individuals named in the schedule to the Decree.¹⁹ The various Decrees deprive the court of jurisdiction to enquire into any question as to whether fundamental human rights provisions of the constitution 'have been, or is being or would be contravened' for the purpose of the various Decrees.²⁰

Apart from these Decrees promulgated for the detention of citizens in times of emergency, the Federal Military Government promulgated the Armed Forces and Police (Special Powers) Decree, 1967, (hereinafter to be referred to as Decree No. 24, 1967) to deal with person or persons concerned with acts prejudicial to public order of the state. Under section 3(1) of the Decree the Inspector-General of Police is empowered to make orders for the arrest and detention of any person or persons if the Inspector-General of Police is satisfied 'that any person is or recently has been concerned in acts prejudicial to public order, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him.'

These appear to be wide and arbitrary powers and tend to derogate from the entrenched clauses of the Federal Constitution relating to fundamental human rights in Chapter III. Two important cases have so far come to light as a result of the wrongful exercise of the powers conferred on Army and Police Officers by section 3(1) of Decree No. 24, 1967. In *Alhaji Mojeed Agbaje v. the Commissioner of Police Western State*,²¹ the applicant was detained under the orders of the Inspector-General of Police in pursuance of the powers conferred on him by section 3(1) of Decree No. 24, 1967. The reason and authority for the applicant's detention were not disclosed to him in spite of his repeated demand, and he therefore applied to the High Court for a writ of *habeas corpus*. It was held that the order was null and void as it was not in conformity with section 3(1) of Decree No. 24, 1967, and that the arrest and detention carried out under the order of the Inspector-General of Police were illegal.

The decision of the High Court was on appeal affirmed by the Western State Court of Appeal. It was held that for the order to acquire any legal validity the Inspector-General of Police must satisfy himself that the applicant (a) is concerned with acts prejudicial to public order or (b) has been recently concerned in acts prejudicial to public order or (c) was preparing or instigating acts prejudicial to public order. But the order of the Inspector-General of Police did not disclose any of the above grounds in detaining the applicant; it stated merely that the Inspector-General of Police was:

¹⁸ No. 3 of 1966.

¹⁹ This provision has been extended to other cases of detention by a provision in the various Decrees.

²⁰ S.6(a) of the State Security (Detention of Persons) Decree No.3, 1966.

²¹ Suit No. CAW/81/69 of 27th August 1969 (unreported), but see D.O. Aihe and P.A. Oluwede *Cases And Materials On Constitutional Law In Nigeria* 1971, pp. 352-367.

'Satisfied that the arrest and detention of the persons specified in the Schedule hereto as at the date shown against each person are in the interest of the security of the Federation of Nigeria.'

It must be emphasised that those who are empowered to interfere with the personal liberty of others in the discharge of their duty must strictly and scrupulously observe the provisions of the enabling statutes.²² This point was correctly emphasised by Aguda J. when he said :

'In a democracy like ours, even in spite of the national emergency in which we have been for over 3 years... it is... high handed, for the police to hold a citizen of this country in custody in various places without, for over ten days, showing him the authority under which he is being held.'²³

The detention of the applicant for so long a period is a flagrant disregard of the provisions of section 21(1) of the Republican Constitution of Nigeria, 1963. This section provides that any person who is arrested or detained shall be promptly informed in the language that he understands of the reasons for his arrest and detention.

The second decision arising from the wrongful exercise of powers conferred on the Army and Police officers under the Decree is *In re Mohammed Olayori & ors.*²⁴ In this case Mohammed Olayori & ors. entered into a contract to supply foodstuffs to the Armed Forces. They were in breach of their obligations under the contract and they were therefore arrested and detained under section 3(1) of Decree No. 24, 1967. The accused persons applied for and were granted a writ of *habeas corpus* for their immediate release. It is difficult in this case to see anything in the conduct of the applicants which constitutes any act which was prejudicial to public order of the state. The rule of law which forms the basis of our society demands that whatever status or post we hold in the society, our actions must be guided by law and law only. The alternative would be arbitrariness and anarchy, and the whole purpose of Decree No. 24, 1967, would be defeated.

It is perhaps pertinent to note that under section 6 of the Constitution (Suspension and Modification) Decree 1966, the courts are excluded from enquiring into the validity of any Decree or Edict. But the court in the above two cases did not enquire into the validity of the Decree under which the executive exercise its powers but enquired into the validity of the orders made thereunder.

Remedies

The only remedy available to a person detained unlawfully is contained in section 32(1) of the Republican Constitution 1963. The section provides that any person who alleges that his rights under Chapter III of the Constitution have been contravened may apply to the high court which has original jurisdiction to hear and determine any application

²² *Singh v. Delhi* 16, Sup. Ct. Journal 326.

²³ *Mojeed Agbaje v. Commissioner of Police Western State* Suit No. M./22/69 (unreported).

²⁴ Suit No. M/196/69 of 17th November 1969 (unreported). — See D.O. Aibe and P.A. Oluyede *Cases and Materials On Constitutional Law in Nigeria* 1971, pp. 367-380.

made to it in pursuance of this section and may make such order, issue such writs and give such directions as it may consider appropriate.

Where an alleged detention of a citizen is proved to be illegal the High Court under the special jurisdiction contained in section 32(1) of the Republican Constitution can issue a writ of *habeas corpus* for the immediate release of the person detained. The efficacy of this writ is well illustrated by the decision in *Agbaje* and in *Re Olayori* cases.

However, special provisions excluding fundamental human rights provisions of the Constitution have been made in respect of persons detained under the various State Security (Detention of Persons) Decrees.²⁵ In particular, an application for a writ of *habeas corpus* shall not lie at the instance of persons detained under the various Decrees or on their behalf.²⁶ Thus those affected are not protected either under the general laws or under the Constitution.

Conclusion

There is no doubt that the liberty of the subject can be preyed upon by the executive by virtue of the powers conferred on it by the various provisions of the Criminal Procedure Act, the Emergency Powers Act, 1962, and the various Decrees discussed in this paper. The powers conferred on the President by the Emergency Powers Act, 1961, to make regulations that could override any existing law that is in conflict with it, is a matter that one must view with some concern.

Judging from what we have discussed in this paper one may conclude that in Nigeria the individual is protected against preventive detention in three principal ways. First, by civil process for unlawful arrest or imprisonment. Second, by the prerogative writ of *habeas corpus* and third by fair trial in a legal manner before an ordinary court. However, these protections become meaningless during emergency — a time when the need for personal liberty is mostly desired. Yet, it is important to remember that if Nigeria is to survive as a democracy it must be able to protect itself from any disruptive forces that may make its government ineffective. However, there must be a measure of respect for the liberty of the subject. At periods of national emergency such as exists in Nigeria today, the need for peace, order and good government is of vital importance to the corporate existence of the State. According to Lord Atkinson in *R. v. Halliday*,²⁷

‘However precious the personal liberty of the subject may be, there is something for which it may well be . . . sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement.’

This dictum is very true of the position in Nigeria under a Federal Military Government.

²⁵ S.6 of the State Security (Detention of Persons) Decree No. 3, 1966. The provision of this section has been incorporated by reference to other Decrees dealing with the same subject matter.

²⁶ S.6(b) *ibid.*

²⁷ [1917] A.C. 260.

Judicial Application of the Rule of Law

Contempt of Court in South Africa

Arising out of a speech made at a meeting in Durban City Hall on November 9, 1971, to protest against the Terrorism Act, 1967, Professor Barend van Niekerk of Natal University was charged with (1) contempt of court and (2) attempting to defeat or obstruct the course of justice by calling upon judges not to admit or attach credence to evidence given or statements made by persons detained under the Terrorism Act.

The indictment referred in particular to three passages in the speech. All three passages were the subject of the first count, and the third passage alone was the subject of the second count. The three passages were as follows:

(1) I have just said that the legal profession could have done so much to avoid the tragedies inherent in the application of the Terrorism Act. Allow me to explain. The Terrorism Act is a negation of what any true lawyer with a basic awareness of decent standards would regard as justice in any accepted sense of the word.

(2) The Terrorism Act, as I have said, is a negation of what any true lawyer would ever call justice. And yet our lawyers, the guardians of our nation's legal heritage, have done so very little to mitigate its crudities. What then, you ask, can our lawyers do? In the very first place our lawyers, all our lawyers from judges downward, can make their voices heard about an institution which they must surely know to be an abdication of decency and justice. No doubt, they will tell you, it is not their function to criticize the law but to apply it. This is the very understandable retort of our judges to the demand sometimes made upon them to have their influential voices heard when the rule of law is trampled into the dust. But, we may surely ask these lawyers, when will a point ever be reached when their protest would become justified? Will they still make this facile excuse for abject inactivity if it is decreed that public flogging be introduced for traffic offences, the burning at the stake for immorality and decapitation for the use of abusive language? Surely we have reached the stage that we are no longer merely dealing with a nicety of jurisprudence but with the essential quality and survival of justice itself! Surely also lawyers should realize that by remaining silent at the helm of their linking cash registers they are not only perpetuating these palpable injustices but that they are indeed also lending them the aura of respectability. Above all, they should realize that by remaining silent in the face of what they know to be inherently unjust, cruel and primitive, they are indeed sullyng themselves and the reputation of their profession.

(3) Cannot our judiciary even go further and in effect kill one aspect of the usefulness of the Terrorism Act for our authorities? They can do so by denying, on account of the built-in intimidatory effect of unsupervised solitary confinement, practically all creditworthiness to evidence procured under those detention provisions.

Fannin J. held that Professor van Niekerk was guilty on count 1, and not guilty on count 2. On appeal the Supreme Court upheld the conviction on count 1, though on different grounds, and also convicted the appellant on count 2.

The prosecution argued on count 1 that (1) the appellant was guilty of the form of contempt known as 'scandalising the court', and (2) the words used were intended to refer to the trial of *S v Hassim and Others*, a prominent case under the Terrorism Act then being tried in Pietermaritzberg (see ICJ REVIEW No. 7, pp 30-31), and had a tendency to influence the court in that trial and thus obstruct the course of justice. The Supreme Court rejected the first argument. The Chief Justice, while he disagreed with the appellant's concept of the duty of a judge and found some of his phraseology 'bordering upon the deliberately offensive', did not consider it amounted to scandalising the courts. 'First, it is important to bear in mind', he said, 'that the true basis of punishment for contempt of court lies in the interests of the public, as distinct from the protection of any particular injured judge or judges... Secondly, unless those last mentioned interests clearly so require, genuine criticism, even though it be somewhat emphatically or unhappily expressed, should... preferably be regarded as an exercise of the right of free speech rather than as scandalous comment falling within the ambit of the crime of contempt of court.'

On the second argument, the Supreme Court held that the meaning of the words used, particularly in the third passage, 'plainly constitutes an exhortation... to all judges that—contrary to their obvious duty to consider all evidence on its merits—they should, in effect, ignore the testimony of all witnesses who have previously been detained under the Terrorism Act', and that 'for a judge to deny creditworthiness to evidence irrespective of its intrinsic merits... would be grossly improper'. The court (overruling Fannin J.) rejected the appellant's contention that he did not intend to refer to this trial. Even though Hassim's trial was not mentioned in the speech, the Chief Justice said he was led beyond reasonable doubt to the conclusion that the appellant's remarks were made with reference to it from the circumstances that (1) the appellant must have known from the wide publicity that the trial was in progress and was concerned with the Terrorism Act, (2) the appellant had invited defence counsel in the trial to sit on the platform at the meeting and (3) he must have appreciated that some if not most of the audience would associate his remarks with the Pietermaritzberg proceedings. The Court also rejected the argument advanced for the defendant, supported by recent authorities in English law, that the words used must constitute a real risk, as opposed to a remote possibility of prejudice in order to amount to contempt of court. The court 'unhesitatingly... assumed' that the judge and his assessors in the Hassim trial 'would in fact not have been in any way whatever influenced by appellant's above-mentioned exhortation'. It nevertheless held that this consideration was irrelevant and that the only question was whether the words tended to prejudice the proper hearing of the case. The test to be applied for this purpose was whether, if the court in Hassim's case had followed the appellants exhortation, it would have influenced those proceedings. On this footing the court upheld the conviction for contempt of court.

On count 2, the court held that the appellant intended his exhortation to be acted upon by the Judiciary and for the reasons already given it plainly constituted an attempt to defeat or obstruct the course of justice.

SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

(Ogilvie Thompson, C. J., Botha and Holmes JJ. A.)

BAREND VAN NIEKERK v. THE STATE

Judgment delivered: June 2, 1972

Note: This case has been the subject of careful analysis and weighty criticism by Professor John Dugard in the South African Law Journal, Vol. 89, p. 271. The case itself is reported in 1972 (3) SALR, p. 711 (AD).

We would only make the following comments upon the decision:

(1) The narrow definition of obstructing the course of justice adopted by the Court has frightening implications for academic and press freedom. The judgment provides that critical comment upon the administration of justice can amount to criminal contempt even though the Court finds that the words used would never, in fact, have influenced the course of justice in any way. It is sufficient that the words used would, if accepted by the judges, tend to influence their decisions. On the face of it such a test renders nugatory the passage in another part of the Chief Justice's judgment about 'the right of free speech'. To quote Professor Dugard, 'it is to be hoped that the answer to this is that the statement will only be construed as contempt where it seeks *improperly* to influence the Court by calling upon the judicial officer to do something contrary to his duty, as the Court held to be the position in van Niekerk's case'.

(2) The Court's finding that the third passage contained a clear exhortation to judges to act contrary to their duty to consider all the evidence on its merits, ignored the legal argument advanced by the appellant, on the authority of the American decision in *Miranda v Arizona*, that 'the built-in intimidatory effect of unsupervised solitary confinement' deprived it of 'practically all creditworthiness'. This argument has been used before by South African academic writers, and has not resulted in any prosecution. For example, Professor A.S. Mathews in *Law, Order and Liberty in South Africa, 1971*, Juta & Co. Ltd, at p. 139, argued 'with all this evidence in mind [of the unreliability of confessions by solitary confinement detainees] it is reasonable to conclude that the Courts should regard a detainee's statement amounting to a confession or an admission as having been coerced unless there is acceptable and convincing evidence to the contrary'.

(3) It is hard to see what Chief Justice Ogilvie Thompson means by 'the intrinsic value' of evidence obtained by improper means. Confessions obtained by threats or promises or torture should be rejected, however convincing the confession may seem.

(4) It is difficult to believe that Professor van Niekerk would have been prosecuted, or if prosecuted would have been convicted, if his argument had been put forward in less rhetorical form in a law book or legal journal. (In 1970, Professor van Niekerk was unsuccessfully prosecuted for contempt arising out of an article in the South African Law Journal; see ICJ REVIEW No. 7, p. 25.) If this is not so, it means that any writer, including any academic lawyer, in South Africa now faces prosecution for obstructing the course of justice if he argues that the Courts should apply the strictest possible interpretation of repressive legislation in the interests of upholding traditional and basic freedoms.

Extradition by Executive held unconstitutional in Costa Rica

On December 12, 1971, three Nicaraguan nationals hijacked a Nicaraguan passenger plane. They forced the crew to fly to Costa Rica, where they intended to refuel before continuing to Cuba. One of the hijackers seriously wounded a passenger. On arrival in Costa Rica, they threatened to attack the other passengers if their demands were not satisfied and the plane refuelled. This was refused and when a fire broke out in the plane the hijackers were forced to surrender. Permission to enter and remain in Costa Rica was denied them. They were returned by an order of the Costa Rica Government to Nicaragua.

An action to establish the right of asylum of the hijackers was brought on their behalf against the President of the Republic and the Minister of Public Safety in Costa Rica. The following is a summary of the decision of the Supreme Court.

Extradition should be carried out in accordance with the provisions of paragraph 2 of Article 31 of the Constitution, The Hague Agreement for the Suppression of Hijacking¹, which was ratified by Costa Rica, and the Law on Extradition (No. 4795 of 16/7/71). Under the terms of the Hague Agreement the offence in question came under the jurisdiction of the Republic of Nicaragua. By Article 4 of Law No. 4795, 'the power of requesting, offering, granting or refusing extradition falls to the judiciary, but its decisions shall be made known to the foreign state by the Executive'. Article 31 of the Constitution provides in paragraph 1 that 'the territory of Costa Rica shall provide asylum for any person persecuted for political reasons. In such a case, if the person is ordered to be expelled in accordance with the law, he shall in no case be sent to the country where he was persecuted'. Paragraph 2 provides 'the extradition shall be determined by the law or by international agreements and no-one shall ever be extradited for political or related offences as defined by Costa Rica'.

Both under the Penal Code of Costa Rica and under The Hague Agreement, hijacking is regarded as a purely criminal and not as a political offence. Consequently there was no violation of paragraph 1 of Article 31 of the Constitution. However as the decision to extradite was taken by an executive act, without any extradition proceedings having been instituted and without any decision of the judiciary, the extradition was a breach of Article 31 (2) of the Constitution and of Article 4 of the Law on Extradition, and also of the provisions of The Hague Agreement. Extradition cannot be granted at the discretion of the Executive but only by a specific order of a court.

Consequently the Court held that the expulsion of the hijackers was illegal. As the individuals concerned had already been handed over to the Nicaraguan authorities, the legal effect of the decision was limited to its effect as a precedent.

When the President of the Republic, Sr. José Fugueres, was advised of the Supreme Court's decision he stated 'This government respects the Supreme Court. We shall abide by its decision'.

¹ See ICJ REVIEW No. 6, p. 38.

ICJ News

COMMISSION

Four new members have been elected :

Mr. Allah-Bakhsh K. BROHI (Pakistan), former Law Minister, former High Commissioner of Pakistan in India and former President of the Pakistan Bar Association.

Mr. Justice Haim H. COHN (Israel), Judge at the Supreme Court, former Minister of Justice and Attorney General, former Israeli representative on U.N. Commission on Human Rights, and Chairman of the Israeli National Section of the ICJ.

Professor John Peters HUMPHREY (Canada), Professor of Law and Political Science, McGill University, former Director, Division of Human Rights, U.N. Secretariat, and former member of U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

Justice Keba M'BAYE (Senegal), President of the Supreme Court of Senegal, Vice President of the International Committee of Comparative Law, representative of Senegal to numerous U.N. Committees and meetings.

The ICJ deeply regrets to announce the death of the Honourable Terje Wold, former Chief Justice of the Supreme Court of Norway, and Mr. René Mayer (France), former Prime Minister.

The following members have resigned as full members and have agreed to continue as Honorary Members :—

Judge Isaac Forster (Senegal), Judge of the International Court of Justice at The Hague; Lord Shawcross (United Kingdom), former Attorney-General; the Honourable Joseph T. Thorson (Canada), former President of the Exchequer Court.

A new National Section has been formed in Bangladesh entitled the Bangladesh Rule of Law Society.

Books of Interest

LAW, ORDER AND LIBERTY IN SOUTH AFRICA

by Anthony Mathews, Juta and Company, Ltd, Cape Town, 1971
318 p.

A critical analysis of South Africa's internal security laws by the Dean of the Faculty of Law at the University of Natal, Durban.

TRADITION FOR THE FUTURE

by Mirrit Boutros Ghali, The Alden Press, Oxford, 1972, 281 p.

A remarkable study on human values and social purpose by the Professor of Political Science at Cairo University.

LA DEFENSA JUDICIAL DE LA CONSTITUCION

by Jaime Sanin Greiffenstein, Libreria Editorial Temis, Bogota, Colombia

An analysis of the Rule of Law and its application in Columbia by the former Dean of Medellin University.

THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

Preface by W. Friedmann, Martinus Nijhoff, The Hague, 274 p.

A UNITED NATIONS COMMISSIONER FOR HUMAN RIGHTS

by Roger Stenson Clark, Martinus Nijhoff, The Hague, 1972, 186 p.

A history and assessment of this proposal before the United Nations by an Associate Professor of Law at the University of Iowa.

THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT

by Dharma Pratap, Clarendon Press: Oxford University Press, England, 1972, 292 p.

An examination of the Court's procedure and the nature, reception and effect of its advisory opinions.

THE SITUATION OF THE INDIAN IN SOUTH AMERICA

edited by Professor Dr. W. Dostal, World Council of Churches, Geneva, Switzerland, 1972.

Contribution to the study of inter-ethnic conflict in the non-Andean regions of South America.

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