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REV. MONS. SEBASTIAO FRANCISCO XAVIER DOS REMEDIOS MONTEIRO
v.
STATE OF GOA
March 26, 1969

(M. Hidayatullah, C.J., S. M. Sikri, R.S. Bachawat,
G. K. Mitter and K.S. Hegde, JJ.)

Geneva Conventions Act Fourth Schedule, Arts. 6, 47, 49. Occupation under Art. 47 whether continues after annexation and subjugation. True annexation distinguished from premature annexation. Art. 47 refers to premature annexation only. Goa annexed by India after swift military action. Benefit of Arts. 47 and 49 whether available to Portuguese nationals in Goa. Court's power to give remedy.

The Geneva Conventions Act 6 of 1960 was passed by the Indian Parliament to enable effect to be given to the International Conventions done at Geneva in 1949. India and Portugal have both signed and ratified the Conventions. The four Conventions were adopted in as many Schedules to the Act. The Fourth Convention was meant to apply to all cases of partial or total occupation of the territory of the contracting parties and gave protection to persons who found themselves in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they were not nationals. *In the case of occupied territory* the Convention applies under Art. 6 for a period of one year after the general close of Military operations, but during the period of occupation the Occupying Power is bound by certain Articles including, *inter alia.* Arts. 1-12, 47 and 49. By Art. 47 protected persons in occupied territory can not be deprived of the benefits of the Convention despite any change introduced as a result of the occupation or even annexation of whole or part of the territory by the Occupying Power. Art. 49 forbids the deportation of protected persons from the occupied territory. There is no definition of the term "occupied" in the Geneva Conventions but the Hague Regulations to which the Conventions are made supplementary defined a territory as occupied when it finds itself "in fact placed under the authority of a hostile Army".

The territory of Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by Indian Armed Forces following a short military action. It then came under Indian Administration from December 20, 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India. The Ordinance was replaced on March 27, 1962 by Act 1 of 1962. The same day the Constitution (Twelfth Amendment) Act 1962 was enacted and was deemed to have come into force on December 20, 1961. By this amendment Goa was included in the Union Territories and a reference to Goa was inserted in Art. 240 of the Constitution. Indian laws including the Citizenship Act of 1955, the Foreigners Act 1946 and the Registration of Foreigners Act 1939 were extended to Goa. The Central Government also promulgated under s. 7 of the Citizenship Act, 1955, the Goa Daman and Diu (Citizenship) Order 1962. The second paragraph of the order conferred Indian Citizenship on certain classes of persons in these territories, giving an option to those desirous of retaining their previous citizenship or nationality of another country to make a declaration to that effect within one month of the Order.

The appellant who was a resident of Goa made pursuant to the above Order his declaration of Portuguese nationality. He was allowed to stay in India under a temporary residential permit till November 13, 1964. After that date he did not ask for a renewal of the permit. The Lt. Governor of Goa empowered under Art. 239 of the Constitution ordered him to leave India. For disobeying the order he was prosecuted under s. 14 read with s. 3 (2)(c) of the Foreigners Act. Being convicted he appealed unsuccessfully to the Court of Session. His revision petition being rejected by the Judicial Commissioner, he appealed by special leave to this Court.

The contention on behalf of the appellant were based on the Geneva Conventions which it was said had become a part of the law of India under Act 6 of 1960. It was urged that after the United Nations Charter the acquisition of territory in International Law by force of arms could not confer title. The amendment of the Constitution only legalised the annexation so far as India was concerned but in International Law the territory remained occupied because it had neither been ceded, nor had the Occupying Power withdrawn. As a result, it was contended, the protection of Arts. 47 and 49 continued to be available to the appellant and by disobeying the deportation order he did not commit any offence.

HELD : (i) The appellant's argument overlooked the cardinal principle of international law that the reception and residence of an alien is a matter of discretion and every State has by reason of its own territorial supremacy not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. Accordingly every country has adopted the passport system which document certifies nationality and entry into any State is only possible with the concurrence of the State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens, and can make laws for regulating the entry, residence

and eviction of aliens. Therefore the application of the Foreigners Act, the Registration of Foreigners Act and Orders passed under them, to the appellant who had chosen Portuguese nationality was legally competent. There is authority for the proposition that an alien excluded from the territory of a State cannot maintain an action in a Municipal Court to enforce his right. (92 II - 93 C)

Oppenheim *International Law* (Vol. I) pp. 675/676, Brierly Law of Nations p. 217, and *Musgrove v. Chun Teeong Toy,* (1891) A.C. 272, referred to.

(ii) The Geneva Conventions Act also gives no specific right to anyone to approach the Court. By itself it gives no special remedy. It does give indirect protection by providing for penalties for breach of Convention. The Conventions are not made enforceable by Government against itself, nor does the Act give a cause of action to any party for the enforcement of the Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and has to leave the matter to the "indignation of mankind". (97 B-C)

(iii) The Geneva Conventions too did not support the appellant's claim to the benefit of Art. 49 of the Fourth Convention on the basis that Goa continued, even after its annexation by India, to be occupied territory within the meaning of Art. 47.

(a) In the Hague Regulations to which the Geneva Conventions were supplementary the definition of "occupation" shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities i.e. belligerent occupation. Under belligerent occupation, which is a *de facto* situation, the Occupied Power is not deprived of its sovereignty or its statehood. All that happens is that *pro tempore* the Occupied Power cannot exercise its rights, its Government cannot function and authority is exercised by the occupying force. In this connection the courts must take the Facts of State from the declaration of the State authorities. (99 C-F)

United States v.Attstoeter (1947) U.S. Military Tribunal, Nuremberg I.R. 3 T.W.C. vi, 34, referred to.

(b) Annexation as distinguished from belligerent occupation occurs when the Occupying Power acquires and makes the occupied territory its own. Annexation gives a *de jure* right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. (99 F-G)

Greenspan, The Modern Law of Land Warfare, p. 215, referred to.

There is however difference between true annexation on the one hand and premature annexation or "anticipated annexation" on the other. Annexation is premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. (99 G-H: 100 A-B)

Oppenheim : International Law (7th Edn.) pp. 846-847 (Vol. I), 566 (Vol. I), pp. 846-847 (Vol. II), 430-439 (Vol. II) and 599 *et seq.* (Vol. II); Greenspan pp. 215 *et seq.* 600-603; Gould : Introduction to International Law pp. 652-656, 662-663; Brierly : Law of Nations, p. 155, referred to.

(c) When Conventions lays down that annexation has no effect they speak of premature or anticipated annexation. It was so held by the Nuremberg Tribunal and the experts who drafted the Convention where inclined to add the word "alleged" before "annexation" in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities were going on subjugation puts an end to the State of war and destroys the source of authority of the existing Government. In subjugation which is recognised as one of the modes of acquiring title not only the *de facto* but also the *de jure* title passes to the conqueror. After subjugation the inhabitants must obey the laws such as they are and not resist them. (100 C-D)

(d) Under Art. 6 the Convention continues to apply to occupied territory for one year after the general close of hostilities for the reason that if the Occupied Power turns victorious the land would be freed in one year, and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. *Otherwise also,* occupation, which means belligerent occupation comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. (100 F-G)

(e) Title to new territory is not dependent on recognition. Despite the Stimson doctrine the conquest of Abyssinia by Italy was recognised because it was thought that the State of affairs had come to stay. Even after the adoption of the United Nations Charter events since the Second World War have shown that transfer of title to territory by conquest is still recognised. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same result. (100 11-101 B)

(f) In the present case the military engagement was only a few hours duration and there was no resistance at all. It was hardly necessary to try to establish title by history traced to the early days nor any room for Schwarzenburger's thesis that title is relative and grows with recognition. True annexation followed here so close upon military occupation as to leave no real hiatus. True annexation by conquest and subjugation was complete on December 20, 1961 and the Geneva Convention ceased to apply from that date. It was not disputed that the annexation was lawful. Therefore since occupation in the sense used in Art. 47 had ceased the protection must cease also. (101 C-F)

Minquiers and Ecrenos, 1953 (I.C.J.) 47 and Schwarzenegger : A Manual of International Law, 5th Edn. p. 12, referred to.

(iv) The national status of subject of the subjugated State is a matter for the State and courts of law can have no say in the matter. Having chosen Portuguese nationality the appellant could only stay in India on taking out a permit. He was therefore rightly convicted under the law applicable to him. (101 H-102 B)

Oppenheim *International Law,* Vol. I, p. 573, referred to.

(On the view taken it was not considered necessary to decide the question whether deportation was an Act of State and the Municipal Courts could therefore give no remedy.) (101 G)

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 50 of 1968.

Appeal by special leave from the judgement and order dated August 7, 1967 of the Judicial Commissioner Court, Goa, Daman and Diu in Criminal Revision Petition No. 55 of 1966.

Edward Gardner, Q.C., A. Bruto Da Costa, M. Bruto Da Costa, P.C. Bhartari, A.K. Varma and J.B. Dadachanji, for the appellant.

Niven De, Attorney-General, G.R. Rajagopaul, J.M. Mukhi and R.JJ. Dhebar for the respondent.

The Judgment of the Court was delivered by

Hidayatullah, C.J. The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He choose the latter and was registered as a foreigner. He also obtained a temporary residential permit which allowed him to stay on in India till November 13, 1964. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. The Lt. Governor is empowered by a notification of the President of India issued under Art. 239 of the Constitution to discharge the functions of the Central Government and his order has the same force and validity as if made by the Central Government. Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted under s. 14 read with s. 3 (2)(c) of the Foreigners Act. He was convicted and sentenced to 30 days simple imprisonment and a fine of Rs. 50/- (or 5 days' further simple imprisonment). He appealed unsuccessfully to the Court of Session and his revision application to the Court of the Judicial Commissioner, Goa also failed. He now appeals by special leave of this Court against the order of the Judicial Commissioner, Goa dated August 7, 1967.

The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was *ultra vires* the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q.C. appeared for Rev. Father Moneiro with the leave of this Court.

To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration from December 20, 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India. Under the Ordinance all authorities were to continue performing their functions and all laws (with such adaptations as were necessary) were to continue in force and power was conferred on the Central Government to extend to Goa other laws in force in India. The Ordinance was later replaced by an Act of Parliament bearing the same title and numbered as Act I of 1962. It was enacted on March 27, 1962 and came into force from March 5, 1962. It re-enacted the provisions of the Ordinance and in addition gave representation to Goa in Parliament amending for the purpose the Representation of the People Act. The same day (March 27, 1962), the Constitution (Twelfth Amendment) Act, 1962 was enacted and was deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Art. 240 of the Constitution. Many Acts in force in India were then extended to Goa and many Regulations and Orders were promulgated. Among the Acts so extended were the Citizenship Act of 1955, the Foreigners Act 1946 and the Registration of Foreigners Act, 1939. The Central

Government also promulgated under s. 7 of the Citizenship Act, 1955, the Goa, Daman and Diu (Citizenship) Order 1962 and as it directly concerns the present matter we may reproduce the second paragraph of the Order (in so far as it is material to our purpose) here:

> "2. Every person who or either of whose parents or any of whose grand-parents was born before twentieth day of December, 1991, in the territories now comprised in the Union Territory of Goa, Daman and Diu shall be deemed to have become a citizen of India on that day:
>
> Provided that any such person shall not be deemed to have become a citizen of India as aforesaid if within one month from the date of publication of this Order in the Official Gazette that person makes a declaration in writing to the Administrator of Goa, Daman and Diu or any other authority specified by him in this behalf that he chooses to retain the citizenship or nationality which he had immediately before the twentieth day of December, 1961.
>
> Provided further .....".

Pursuant to this Order, on April 27, 1962, Rev. Father Monteiro made his declaration of Portuguese nationality and on August 14, 1964 applied for a residential permit. On his failure to apply for a renewal of the permit the order of the Lt. Governor was passed on June 19, 1965. Prosecution followed the disobedience of the order.

At the outset it may be stated that Mr. Gardner concedes that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

The argument overlooks one cardinal principle of International Law and it is this. Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. This proposition is so well-grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens and can make laws for regulating the entry, residence and eviction of aliens. Therefore, the application of the Foreigners Act, the Registration of Foreigners Act and the Orders passes under them, to Rev. Father Monteiro was legally competent. A considerable body of writers on International Law support the proposition and it is sufficient to refer only to Oppenheim (Vol. I) pp. 675/676 and Brierly Law of Nations p. 217. If authority were needed the proposition would be found supported in the decision of the Privy Council in *Musgrove v. Chun Teeong Toy* (1). The Lord Chancellor in that case denied that an alien excluded from British territory could maintain an action in a British Court to enforce such a right.

This proposition being settled, Mr. Gardner sought support for his pleas from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr Gardner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. He refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Arts. 1 and 2 there is an undertaking to respect and ensure respect for the Conventions in all circumstances of declared war or of any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operations. In the case of occupied territories it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation, to the extent that such Power exercises the functions of Government in such territory, by Arts. 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and 143.

We next come to Arts. 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr. Gardner points out that under Art. 48 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore, depends on whether Arts. 47 and 49 apply here. We may now read Arts. 47 and 49:

> "47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement

concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

"49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuation may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the danger of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

The point of difference between the parties before us in relation to Art. 47 is whether the occupation continues, the annexation of the territory notwithstanding; and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person.

Mr. Gardner's submissions are : the order that has been made is a deportation order and it is therefore *ultra vires* the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of *terra nullius,* not now possible. He invokes the rule in *Heydon's* (2) case and says that the history of the making of the Geneva Conventions shows that this was precisely the mischief sought to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the territories of Goa with India. If India did not care to be bound by the Conventions, there was a method of denunciation in Art. 158 but since the convention is registered under Art. 159 even denunciation at a late stage was not possible. He relies upon Art. 77 and says that "Liberated" means when the occupation comes to an end. The amendment of the constitution only legalises annexation so far as India is concerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47 themselves are clear enough to establish this. In short, the contention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of the territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. In support of this propositions he relies upon Dholakia (International Law) pp. 180, 181, 293; Oppenheim International Law (Vol. I) 7th Edn. pp. 574 *et seq.*; R.Y. Jennings : The Acquisition of Territories in International Law pp. 53-56, 67.

The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation. Reference is made to many works on International Law. We have to decide between these two submission.

This is the first case of this kind and we took time to consider our decision. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes dispunishable the conduct of Rev. Father Monteiro, must fail.

To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. The Act was passed under Art. 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal Court is not very clear but we need not consider the point because of our conclusions on the other parts of the case. We shall consider the

Conventions themselves. Before we consider the Geneva Conventions, which form Schedules to the Act, it is necessary to look at the Act itself to see what rights it confers in relation to the Conventions, and whether it gives a right to Rev. Father Monteiro in the present circumstances to invite the Court's opinion. Being a court of law, this Court must be satisfied about its own jurisdiction, the foundation for which must be in some enforceable law.

Prior to the Geneva Conventions Act of 1960 there were the Geneva Convention Act of 1911 and the Geneva Conventions Implementing Act of 1936. We need not consider them because by the twentieth section of the present Act, the former ceases to have effect as part of the law of India and the latter is repealed. The Act is divided into five Chapters. Chapter I deals with the title and extent and commencement of the Act and gives certain definitions. Of these, the important definition is that of "protected internee" as a person protected by the Fourth Convention and interned in India. Chapter II then deals with punishment of offenders against the conventions and the jurisdiction of courts to deal with breaches by punishing them. Chapter III lays down the procedure for the trial of protected persons, for offences enabling a sentence of death of imprisonment for a term of two years or more to be imposed and for appeals etc. Chapter IV prohibits the use of Red Cross and other emblems without the approval of Central Government and provides for a penalty. Chapter V gives power to the Central Government to make rules. The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.

The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. The four Conventions came at different times, the oldest in 1864 and the last in 1949. The Fourth Hague Convention of 1907 contained Arts. 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the "forward areas of war" and did not apply when "total war" took place and the civilian population was as much exposed to the dangers of war as the military. The example of the First World War showed that civilian population was exposed to exactions. At the time when the Hague Regulations were done, it was thought that such matters as non-internment of the nationals of the adversary would be observed. But the First World War proved to the contrary. It was in 1921 that the International Committee of the Red Cross produced a draft Convention which among other things enjoined that the inhabitants of the occupied territory should not be deported and civilians in enemy territory must be allowed to return to their homes unless there were reasons of state security and the internees must receive the same treatment as prisoners of war. The Diplomatic Conference of 1929 and the Red Cross Conference of 1934 made useful studies but action scheduled to take place in 1940 could not be implemented as the Second World War broke out. Although the belligerent countries had accepted that the 1929 Convention regarding prisoners of war was applicable to civilians, the lessons of the Second World War were different. We know the treatment of civilians by Germany and the horried deaths and privations inflicted on them. War, though outlawed, continues still and as President Max Huber said:

> "War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger."

At the termination of the last war the International Red Cross Conference at Stockholm prepared a draft in 1948, which became the basis of the deliberations of the Diplomatic Conference which met at Geneva from April 21 to August 12, 1949 and the present Convention was framed. The Regulations were not revised or incorporated. The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Art. 154 of the Geneva Conventions.

The Hague Regulations, Arts. 42-56, contained some limited and general rules for the protection of inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counter-part in the Geneva Conventions must be read. They are not relevant here. Similarly, as there is no definition of "occupation" in the Geneva Conventions, Art. 42 of the Regulation must be read as it contains a definition:

> "42. A territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army".

The Regulations further charge the authority having power over the territory to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and

property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that it is claimed in this case that occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions obtains. However, Art. 6, which provides about the beginning and end of the application of the Conventions throws some light on this matter.

The question thus remains, what is meant by occupation ? This is, of course, not occupation of *terra nullius* but something else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations. Article 154 of the 4th Schedule reads:

> "154. *Relation with the Hague Conventions* : In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29th July, 1899, or that of 18th October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of the Hague."

The definition of "occupation" in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. In the *Justice* case (3) it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally deleted those laws do not apply to the ensuing occupation.

The question thus resolves itself into this: Is occupation in Art. 47 belligerent occupation or occupation which continues after the total defeat of the enemy ? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is a temporary *de facto* situation which does not deprive the Occupied Power of its sovereignty nor does it take away its statehood. All that happens is that *pro tempore* the Occupied Power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a *de jure* right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. As Greenspan (4) put it (p. 215) military occupation must be distinguished from subjugation, where a territory is not only conquered, but annexed by the conqueror.

There is, however, a difference between true annexation on the one hand and premature annexation, or as it is sometimes called "anticipated annexation", on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated (see Oppenheim International Law. (7th Edn.) pp. 846-847. (Vol. I) 566 (Vol. I), pp. 448/52 (Vol. II), 430-439 (Vol. II) and 599 *et seq.* (Vol. II), Greenspan (ibid) pp. 215 *et seq.* 600-603; Gould: Introduction to International Law pp. 652-656, 662-663; Brierly: Laws of Nations p. 155.

The Conventions rightly law down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word "alleged" before "annexation" in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the *de facto* but also the *de jure* title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims *during conflict* to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be asked why does Art. 6 then mention a period of one year ? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation, comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. Annexation may sometimes be peaceful, as for example, Texas and Hawaiian Islands were peacefully annexed by the United States, or after war, as the annexation of South Africa and Orange Free State by Britain.

The question, when does title to the new territory begin, is not easy to answer. Some would make title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a state of things has been brought about contrary to the Pact of Paris was intended to deny root of title to conquest but when Italy conquered Abyssinia, the conquest was recognised because it was thought that the state of affairs had come to stay. Thus,

although the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art. 2 para 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. Prof. R.Y. Jennings poses the question: "What is the legal position where a conqueror having no title by conquest is nevertheless in full possession of the territorial power, and not apparently to be ousted ?" He recommends the recognition of this fact between the two States. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

In the present case the facts are that the military engagement was only a few hours' duration and then there was no resistance at all. It is hardly necessary to try to establish title by history traced to the early days as was done in the *Minquiers and Ecrenos* (5) case. Nor is there any room for the thesis of Dr. Schwarzenberger (A Manual of International Law, 5th Edn. p. 12 that title is relative and grows with recognition. True annexation followed here so close upon military occupation as to leave no real hiatus. We can only take the critical date of true and final annexation as December 20, 1961 when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardner concedes that the annexation was lawful. Therefore, since occupation in the sense used in Art. 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions.

We were invited to look at the matter from another point of view, namely, even if the protection against deportation envisaged by Arts. 47 and 49 were taken to be continued, what is the remedy which the Municipal Courts can give ? It was said, the act was an Act of State. In view of what we have already held it is not necessary to pronounce our opinion on this argument.

The national status of subjects of the subjugated state is a matter for the State, and courts of law can have no say in the matter. As Oppenheim (Vol. I p. 573) puts it:

> "The subjugating state can, if it likes allow them to emigrate, and to renounce their newly acquired citizenship, and its Municipal Law can put them in any position it likes, and can in particular grant or refuse them the same rights as those which its citizens by birth enjoy.

The Geneva Conventions ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him. Since no complaint is made about the trial as such, the appeal must fail. It will be dismissed.

G.C.

Appeal dismissed

(1) (1891) A.C.2.
(2) (1581) 3 Rep. 76.
(3) United States v. Attstoetter, et. al. (1947) U.S. Military Tribunal, Nuremberg, *I.R. 3 T.W.C*. vi, 34.
(4) The Modern Law of Land Warfare
(5) 1953 (I.C.J.) 47