

INTERNATIONAL COMMISSION OF JURISTS

COMMISSION INTERNATIONALE DE JURISTES - COMISION INTERNACIONAL DE JURISTAS
INTERNATIONALE JURISTEN-KOMMISSION

109, ROUTE DE CHÊNE, 1224 CHÊNE-BOUGERIES / GENEVA, SWITZERLAND - TEL. 35.19.73
CABLE ADDRESS: INTERJURISTS, GENEVA

MEMORANDUM

by

THE INTERNATIONAL COMMISSION OF JURISTS

Library
International Commission
of Jurists (ICJ)
Geneva, Switzerland

to the

U.N. SUB-COMMISSION ON PREVENTION OF
DISCRIMINATION AND PROTECTION OF MINORITIES

concerning

"THE HUMAN RIGHTS OF PERSONS IN DETENTION OR IMPRISONMENT"



JUST-TOR * MEM

May 1975

C. 2733

JUST-TOR*MEM

I N T R O D U C T I O N

In response to Resolution 7 (XXVII) (of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), the International Commission ... of Jurists submits the attached summary of developments in the field of the human rights of persons subjected to any form of detention or imprisonment.

The object of this material is not to suggest material for findings as to whether or not the rights of detainees and prisoners are being or have been violated in any particular country. Rather, the aim is to aid the Sub-Commission in determining the patterns of violations that have developed in several countries and the conditions which permit such violations, with a view to recommending measures which would prevent their occurrence.

Information compiled by the International Commission of Jurists in recent years shows that the most frequently violated rights of detained persons are in fact those listed in the preamble of Sub-Commission Resolution 7 (XXVII). In Part I we draw attention to certain problems relating to the enjoyment of these rights which, according to our files, seem to arise repeatedly in many countries in all regions and under all régimes. Examples are provided, but they are only illustrative and in no way indicate that only in those countries are such problems known to occur. Some of the situations mentioned have changed considerably and the practices described have ceased in those places; however, such information about the recent past can be of assistance in determining what measures could correct or prevent similar occurrences today and in the future.

Part II contains suggested measures which the Sub-Commission may wish to consider in connection with these materials. Included are proposals for judicial and administrative procedures which, if adopted, might help to prevent the occurrence of torture and other violations of detainees' and prisoners' rights; these proposals have also been submitted to the Fifth U.N. Congress on Prevention of Crime and Treatment of Offenders.

Further details on questions discussed below can be made available by the International Commission of Jurists; in particular, documents mentioned in the footnotes contain much relevant information.

* * *

P A R T I

PROBLEMS RELATING TO THE HUMAN RIGHTS OF PERSONS

SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

A. The Right not to be Subjected to Arrest or Detention Arbitrarily

(C)
1. Mass arrests and detentions. Violent upheaval and attempted or successful coups d'état have led to mass arbitrary arrests and detentions in a great many countries. If intolerable overcrowding and delays in judicial processing are to be avoided, the only solution in such situations is mass release. This is often not done, however, and even where it is, there may nevertheless remain hundreds or even thousands of persons in detention after the "mass release".

Indonesia may have the largest number of arbitrarily detained persons, although of course the country's population is also very high. Between 200,000 and 250,000 prisoners were arrested by the army in Indonesia in 1965-66, following an attempted coup. Only a few of those detained took any part in planning or carrying out the murder of the six generals which accompanied the attempted coup or in later armed resistance. The others were arrested because of their alleged support for the Communist Party (PKI), which was in fact not proscribed until several months after the coup. The detention was an arbitrary proceeding by local military commanders, and a high proportion of the prisoners may have had only the most marginal association with the PKI or its supporting trade union, cultural and student organisations. Not more than about 700 have been brought to trial. The government admits that it has evidence against only some 5,000. The others, it says, are either "suspects" who are merely in need of rehabilitation and will never be tried, or else are "traitors" who must be detained although there is not enough evidence to bring them before a court. Today in Indonesia at least 35,000, and possibly as many as 55,000 persons (no official figures are published) are still detained by the army since 1966, and the arrests continue. After anti-Japanese riots in January 1974, approximately 850 more persons were arrested. Most were released within a few weeks, but 42 remained, under a law permitting detention without charge for up to one year. More than one year later, only eleven of these have been released. Only one or two have been charged and tried. (1)

Similar mass arrests have occurred in many other countries, including Cuba, Sri Lanka, Bangladesh and Chile.

In Bangladesh, the government stated that as of October 1972, 42,000 persons had been arrested as suspected collaborators under the Bangladesh Collaborators (Special Tribunal) Order 1972. It was believed that, except for some 2,000 of these, there was no or no sufficient evidence to bring

(1) ICJ REVIEW No. 10 (June 1973), p. 15; ICJ REVIEW No. 13 (December 1974), p. 16; Speech by Indonesian Attorney-General to Jakarta Foreign Press Correspondents Club, September 20, 1971; Observer's Report on the Detention and Trial of Hariman Siregar (ICJ, 1974, unpublished).

them to court. The detention was designed to prevent wholesale reprisals for the crimes that had been committed against the population. After time had elapsed, however, the Bangladesh government decided to release under amnesty all those held or convicted under the Collaborators (Special Tribunal) Order, except for those charged with murder, rape or arson.

Similar mass releases were ordered in Sri Lanka, where large numbers of suspected persons had been interned during a period of emergency in 1971.

(2)

2. Lack of Judicial Control over Arrest and Detention Practices

(a) Where a government has delegated broad authority to the military or special police forces, without judicial control, large numbers of persons have often been arrested and detained arbitrarily.

From the very early stages of his administration, President Amin of Uganda has placed almost total reliance on the military for maintaining law and order. The Armed Forces Power of Arrest Decree (No. 13 of 1971) extends very broad powers of arrest to all the security forces. It states that "a soldier or a prison officer may, without an order from a court and without a warrant, arrest any person whom he suspects on reasonable grounds of having committed or being about to commit any of the following offences: an offence against the person; an offence relating to property; or malicious injury to property". The granting of these powers of arrest to the armed forces was the signal for unleashing a system of arbitrary repression by the army. As one former Ugandan minister writes, "Internal repression became the rule of the day. Officers and men of the Uganda Army and Air Force put themselves above the law. They can arrest and detain anyone as they wish ... The individual has no remedy for whatever suffering or indignity that may be caused to him by the mighty army. The police have been rendered powerless in dealing with ordinary cases of assault by members of the armed forces against civilians." The Detention Decree (No. 15 of 1971) allows detention by armed forces or police officers of any person who conducts himself in a manner dangerous to peace and good order, who endeavours to excite enmity between the people of Uganda and the government, or who intrigues against the lawful authority of the government. The safeguards provided by the law, such as limitation on the duration of detention and appointment of a review committee to hear the cases, have never been implemented. The mass arrests and killings of the Langi and Acholi tribes in July 1971, are an example of the actions which have been facilitated by this detention policy. (3)

(b) Blanket security powers may be misused if judicial review is not provided.

In Rhodesia, referring to Section 51 of the Law and Order Maintenance Act, Mr. Lardner-Burke, the Minister of Law and Order has remarked, "I can restrict (a person) for fifteen years ... Every time he comes out I can

(2) ICJ REVIEW No. 9 (December 1972), p. 8; ICJ REVIEW No. 11 (December 1973), p. 6.

(3) Violations of Human Rights and the Rule of Law in Uganda and Supplement (ICJ Study, 1974)

restrict him again for no reason whatsoever ... under that Section." The Act does require that the Minister ordering a detention be personally satisfied that it is necessary for security reasons. But since there is no effective judicial check on the reasons behind the order, Mr. Lardner-Burke's remark may be revealing as to how in fact the power has been exercised. The Minister once explained that he would not reveal the reasons for a restriction order because "it would be likely to disclose modes of inquiry which it is in the public interest to conceal and keep strictly secret and may result in the loss to the government of certain sources of security information". (4)

In the words of a detainee of eleven years in an independent Black African country, "It is a nightmare to live in a country where a man can be arbitrarily arrested on the whim of one man and be packed off to detention for an indefinite period". He gives the following example of such arbitrary detention and the other violations of human rights that can follow:

"In 1967 the President was addressing a public rally in his home area when one of the elders asked him what sort of independence did they have when their cattle were still being stolen. In majestic anger the President ordered that known cattle thieves be pointed out from among the gathered crowd. There and then, without resorting to courts of law, without even consulting his cabinet about the advisability of the action he intended to take, he ordered the arrest of all those pointed out at that meeting and their detention indefinitely. Thus a campaign of mass arrests of "cattle thieves" was launched on a nation-wide scale on the spur of the moment. The estimated number of arrests in this campaign ranged between six to ten thousand. This prison alone received about 1,500 of these unfortunates. The arrests were so extensive that the police failed to cope with them. They had to be aided not only by the Youth League but also by prison warders! Lorry loads of half naked emaciated hardsmen kept arriving for some weeks until the prison was choked with evil smelling humanity. The wards were filled to overflowing. One of the cells in our section originally meant for one to three prisoners was given to 28, and the cell including the w.c. measured 15 x 12 ft. The sewage system of the prison rebelled. The whole place was reeking with human sweat and human faeces. After a month or two a curious disease broke out. One developed oedema, and within a day or two died. Every day 3 or 4 of them died. No attempt was made to provide all this mass of humanity with a blanket or a mat. After eight months of such horrible conditions they began to release them, without sending them to court, or even interrogating them. They were as surprised when they were released as when they had been arrested. Not knowing what wrong one has done one never knows what to avoid on being let out. ... By the time I was to be freed most of them had been released. A few remained, and these were told by the Commissioner of Prisons that the President said he would not let them out until they were too old to run after people's cattle !"

3. Judicial Remedy. An effective judicial remedy is an essential instrument for the enjoyment of freedom from arbitrary arrest and detention as well as the other rights of a detained or imprisoned person. Without habeas

(4) The Scotsman, April 9, 1969.

corpus, amparo, or a similar method for enforcement the detainee's and prisoner's rights are often only theoretical.

Emergency laws in particular tend to exclude the enforcement procedures. A few examples are the Bangladesh Collaborators (Special Tribunal) Order of 1972; Presidential Order of August 15, 1973 under Article 233 of the Pakistan Constitution; the Emergency Regulations of Sri Lanka; and Brazil's Institutional Act No. 5 of December 13, 1968. Even where the enforcement procedures exist in law, they are sometimes ignored or delayed by the executive authority, as in Chile and Uruguay. (5) The importance of a habeas corpus or similar procedure is illustrated by the fact that before the suspension of those procedures in Pakistan, one court dealt with over 100 habeas corpus petitions in eighteen months and did not find a single case in which the grounds for detention could be upheld; many other detention orders were due to be heard, and the detainees were released. (6)

4. Disregard for Judicial Procedures. The power of detention is not infrequently used to imprison a person after a court has found him innocent of the charge made against him.

According to the same former African detainee quoted above, "there is the case of A. He was accused of instigating violence which resulted in death. The magistrate finding no case against him released him, but the President who did not like his caustic tongue detained both A. and the magistrate, and ordered another magistrate to commit him to the High Court. In due course, the Chief Justice acquitted him. Again, the President sent him back to detention where he stayed for two years. B., a youthful journalist, was charged with treason together with others, C., D. and E. C., D. and E. were given life sentences. A few months later, E. was released by Presidential Order. Immediately a Presidential Order sent him back to prison to be detained indefinitely. He is in his fourth year now."

In Rhodesia, the detention laws permit cases like that of Michael Holman, a student in Rhodesia who in 1967 was served with a restriction order just one day before he appeared in court on a charge of contempt of court. He was found innocent of the charge, but police took him into custody as he left the court and escorted him to the place of restriction. Under the law, such an order is renewable annually for fifteen years. (7)

In Uruguay, persons arrested by the armed forces on suspicion of having committed a security offence are often further detained under the emergency security measures after a judge has ordered their release. In those cases where they are released, a period of one to two months (and sometimes longer) elapses before their release, even though the judge orders them to be released immediately. (8)

(5) ICJ REVIEW No. 9 (December 1972), p. 8; ICJ REVIEW No. 10 (June 1973), p. 24; ICJ REVIEW No. 11 (December 1973), p. 7; ICJ REVIEW No. 12 (June 1974), p. 5; ICJ REVIEW No. 13 (December 1974), p. 4.

(6) ICJ REVIEW No. 11 (December 1973), p. 6.

(7) The Scotsman, April 9, 1969

(8) Report of Mission to Uruguay and Supplement (ICJ, 1974).

5. Illtreatment Resulting from Arbitrary Arrests. When large numbers of citizens are arbitrarily arrested and detained, they may be subject to severe illtreatment in places not designed to hold so many persons. In addition, when security is seen to be threatened and arrests are based on general suspicions and fears, interrogations are likely to be extensively conducted. The methods risk to become extremely cruel, as shown in the next section.

B. The Right not to be Subjected to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment; the Right to be Treated with Humanity and with Respect for the Inherent Dignity of the Human Person.

1. Torture for Confessions. Torture as a method of interrogation is often used to extract confessions for the sake of rapid and simplified prosecutions, and when used in court these have often led to harsh convictions. The following are only a few examples of the hundreds of cases that occur in a great many countries.

In South Korea, 32 students, arrested in 1974 and tried before a military court, indicated in court through their lawyers that their confessions had been extracted by torture. Methods used included the forcing of cold water down the noses of the defendants, prolonged standing against a wall with constant proddings when the detainee became tired, lack of sleep, the use of electric shock applied to the private parts of individuals, and the use of screams and yells from adjoining rooms. The court ignored their allegations, refused their witnesses on the grounds that they had confessed, and convicted them all. The national poet Kim Chi Ha, also arrested in 1974, gave evidence later of being tortured. Chang Chun Ha, a well-known Korean intellectual, testified that he was subjected to being hanged upside down and simultaneously burned with a flame on several parts of his body. Soh Sung, a Seoul National University student, was a handsome young man when he entered prison in 1971. He appeared in court several months later with a badly burned body and face. His ears and eyelids had disappeared and his fingers adhered together. The Korean government explained his obvious change in appearance by saying that he fell into burning oil on a stove. He was sentenced to life imprisonment on the basis of his confession. (9)

A Greek detainee in 1972, Dr. Stephanos Pantelakis, described how a confession was extracted from him by the security police: "They told me they knew everything, the cells were full of people who had made complete confessions and that the best thing for me to do would be to admit my guilt, and give the names of the others who were in it with me ... (Lieutenant Colonel) Favatas said to me: '... you'll say what we want you to say, whether you like it or not'. ... I continued to keep silent and I suddenly felt a pointed object scratching the skin of my lower abdomen. After a while, when someone gave the word, the machine was switched on and I started to feel excruciating pain. I thought that they were tearing my flesh ... At one point when I had completely dissolved, I shouted for them to stop, and said I would accept anything they wanted. ... But that was not the end of the torture. To get out of it I was saying that I had been with Minis, a fact which they knew already, and we did whatever they wanted us to have

(9) William J. Butler, "Political Repression in South Korea ... 1974", ICJ REVIEW No. 13 (December 1974), p. 38

done". Dr. Pantelakis was tried on the basis of the confession and sentenced to eight years imprisonment. (10)

2. Torture for Intelligence. Torture is also used as a means of obtaining information, when other methods of investigation are less fruitful and fast.

An ICJ Study on Brazil in 1970 reported:

"The scattered and disorganized nature of the struggle with the different guerilla groups makes police investigation difficult. Thus, the organs of repression often conduct roundups on university campuses, in students' cafes, in factories or in the outback of the country (in zones of alleged insecurity). The suspects are then systematically tortured in the hope that they will reveal a plan of action, a hiding place for arms, or an "apparelho" about which the torturers themselves have not the slightest idea". (11) Reports indicate that the use of torture in Brazil is greatly reduced today. It seems likely that the interrogation methods in fact proved effective, for the violent subversive groups are now largely under control or eliminated.

At the third session of the United Nations Committee on Crime Prevention and Control in January, 1975, it was noted that "while torture, as a form of official violence, was often politically motivated and intentional, in other cases it might derive from ... a lack of modern methods for criminal investigation. The latter factor points to the need for technical assistance in this respect". Although this point is frequently made, practice shows that even where the most advanced techniques of investigation are available, an existing practice of torture is usually continued for obtaining still more information. Technical assistance in investigation alone has proved insufficient to control torture when it is an effective device.

3. Torture for Intimidation. Dissuasion and intimidation are still other purposes for which torture is used. A citizen may well be discouraged from undesirable political activity or aid to rebel fighters if he knows that he risks suffering intolerable pain even before he has the opportunity of explaining himself before a judge.

The 1970 ICJ Report on Brazil cites the following example of dissuasion:

"The mother of a student leader who was able to visit her son several times at the camp on "Flower Island" testifies that the men in charge of the camp adopted the habit of leaving in the visiting room a mutilated boy, whose disjointed movements and marks of ill-treatment were to encourage visiting parents to advise their sons and daughters to cooperate promptly with the investigators". (12)

Wing Commander Anastasios Minis was tortured for 3½ months in the Military Interrogation Centre in Athens in 1972. He recorded in a diary that at the beginning one of his torturers, a man named Hatzissis, turned to Maja Theophiloyannakos, the head of the EAT/EAS Headquarters and a notorious torturer, and said, "As from the day after tomorrow we are going to start to torture this man". He then turned to Minis, "you can then go and tell every-

(10) Statement by Stephanos Pantelakis (ICJ press document, 1973)

(11) Report on Police Repression and Tortures Inflicted upon Political Opponents and Prisoners in Brazil (ICJ, 1970)

(12) Id.

one we tortured you. We want everyone to know. We want them to tremble, we want them to know that here in the ESA we torture". (13)

4. Lack of Judicial and Administrative Control. Lack of administrative and judicial control over detention practices frequently facilitate torture and other ill-treatment.

The experience of the British Government in Northern Ireland illustrates that although a country may pride itself on its rule of law and the humanity of its administration in normal times, a situation of violence may lead it to abandon all judicial control of the executive. Widespread allegations of torture and ill-treatment followed in Northern Ireland as they have in many other countries. (14)

A recently released detainee who was held in several prisons in an independent Black African country reports the following incident:

"I saw at Prison A when Superintendent X was in charge, prisoners who had been denied food and water for four days being taken to hospital with reports that they had been on hunger strike. At Prison B I used to hear of similar incidents. I "heard" as I could not see since a wall separated our detention section from the punishment cells. The culprit at Prison B was a Chief Officer nicknamed "Iron Face" because he was reputed never to have been moved by pity. The Senior Superintendent in charge ... left practically all internal administration in the hands of his assistant and the Chief Officer. The two of them made life intolerable to the prisoners. The regulation Saturday meetings when the Officer in charge would be listening to prison complaints ceased to exist. The routine monthly visits paid by Prison Visiting Justices stopped. Prisoners came and went without knowing that they had the right to correspond with their families. One must add that this deterioration of standards was not peculiar to Prison B. I had seen it also at Prison A. Prison C was better when I left, although it must be said that political leaders, such as Regional Commissioners and Ministers conspicuously avoided the insides of prisons. As to the President and the Vice-Presidents, I do not think that they have ever been inside a prison, far less talk to the men and women they have put in confinement. The situation at Prison B was aggravated by the callousness of "Iron Face" and the addiction to marijuana of the Assistant Superintendent. A plot was hatched to kill Iron Face. A prisoner somehow procured a knife and tried to stab him, but fortunately Iron Face fell with his head away from the prisoner who being entangled with his own leg irons also fell. He could thus only get hold of the legs of the Chief Officer, which he went on hacking at until he was overpowered and the knife was snatched from his hand. Beaten with clubs into abject submission and handcuffed, a warder was ordered to shoot at his legs. Thus thoroughly cowed and a bullet in his leg he was thrown into the punishment cell. A short while later the Assistant Superintendent came and gave him some more beatings. We could hear the screams from the punishment cells section, and we could see

(13) Summary of Handwritten Statement by Anastasios Minis Concerning His Interrogation from June 13 - October 4, 1972, (ICJ press document, 1973)

(14) ICJ REVIEW No. 9 (December 1972), p. 11

the warden on the watch tower turning his face away and saying: "They are killing a man !" The man was flung back into the cell and a tear gas bomb was thrown into the poorly ventilated tiny cell. The man died that very evening. Next morning all prisoners were assembled in the main yard and the corpse was brought before them completely naked, and the Assistant Superintendent using a cane poked at the dead body and said to it: "Stand up and tell your friends how brave you have been, and what was the end of your bravery". Then addressing the prisoners he said that a similar fate awaited any of them who misbehaved. All the prisoners were then locked up in their wards into which tear gas bombs were thrown. This was to extort from them "confessions". It was not long before a number of confessions and incriminations were obtained. But the process of torture continued for weeks. Rations were cut, including those of detainees. Everyone expected that the killing at least would bring about an open investigation and trial. The prison warders used to say openly that they would tell the Police the truth when investigations were instituted. But nothing happened. We heard on the wireless of a passing reference timidly made by an M.P. in Parliament that there were some sadistic officers who punished prisoners to the point of killing them. The only thing that happened was a departmental action of transferring all the senior staff to other prisons. The chapter was closed.

Having said all that I do not want to leave the impression that all or even the majority of prison officers in the country are cruel sadists. Not at all. In point of fact the kindness and humane treatment that was meted out to us by many of the officers was very touching. Some of them would bend regulations to breaking point in order to do us a favour".

5. International Inspection. When local or national authorities ignore ill-treatment in detention centres and prisons, visits by international humanitarian organizations may be necessary to point out the illegal practices.

It has often been seen that ill-treatment of prisoners, including torture, is significantly reduced after an inspection by the International Committee of the Red Cross. Although such visits do not result in the complete elimination of illegal practices, they are able to achieve noticeable improvement in the conditions for many prisoners.

6. Publicity on Torture. Repeated and detailed reports of torture publicized internationally may discredit or embarrass a regime. Thus a person who has sent information on torture abroad may in turn be imprisoned and tortured himself.

In South Korea, after the torture of 32 student detainees in 1974 was reported to foreign observers, the families of the defendants who issued the statements were arrested, as were some of the defence lawyers who raised the issue at the trials. Several prisoners released after the national referendum in early 1975, including the national poet Kim Chi Ha, have denounced the tortures they suffered during detention, and have since been sent back to prison. (15)

In Brazil, according to a 1970 report, Artur Gunha Neves and his wife, both 25 years old, were tortured for having allegedly sent abroad information.

(15) William J. Butler, "Political Repression in South Korea ... 1974", ICJ REVIEW No. 13 (December 1974), p. 38

about the tortures in that country. They were tortured for four consecutive days without a significant break. (16)

7. Self-Perpetuating Systems of Torture. Torture may become a self-perpetuating, self-nourishing practice. Civil servants and military officers who have incriminated themselves by torturing their fellow citizens may be able to avoid punishment or revenge only if they continue and even intensify the repression. Furthermore, once a police authority has developed the practice for a particular situation, there is a tendency to use it for other purposes once the original object has been achieved.

Urban guerilla warfare is a situation which frequently leads security forces to use methods of investigation and intimidation involving torture. Once the guerilla forces are mastered, however, the same methods have in many instances been continued for use in other matters, such as corruption or currency offences as in Uruguay or for common law suspects, as in Brazil.

8. Arbitrary Arrests and Ill-Treatment Resulting from Other Violation. Arbitrary arrest and detention, as well as torture and other ill-treatment, may be encouraged or at least permitted to continue by the non-enforcement of the many other rights listed in the preamble of Sub-Commission Resolution 7 (XXVII), as discussed in the following sections.

C. The Right to be Informed of the Reasons or Grounds of the Arrest or Detention.

1. Detention as Torture. A person arrested or detained without knowing the reasons already suffers a certain psychological torture.

One former detainee has described the effect of detention without an explanation as follows:

"Slavery and colonialism are certainly far lesser evils than detention, but few realise this. The sense of being forgotten is overwhelming. Once inside a detainee has not the foggiest idea as to when he would be released" Bernard Malamud describes the feeling of a detainee very well in his book "The Fixer":

"Thus the days went by. Each day went by alone. It crawled like a dying thing. Sometimes, if he thought about it, three days went by, but the third was the same as the first. It was the first day because he could not say that three single days counted, came to something they did not come to if they were not counted. One day crawled by. Then one day. Then one day. Never three. Nor five or seven. There was no such thing as a week if there was no end to his time in prison. If he were in Siberia serving twenty years at hard labour, a week might mean something. It would be twenty years less a week. But for a man who might be in prison for countless days, there were only first days following one another. The third was the first, the fourth was the first, the seventy first was the first. The first was the three thousandth".

2. No Provisions for Notice. Yet many detention laws expressly provide that a person may be detained for years without being told the reasons or grounds.

(16) Report on Police Repression ... in Brazil (ICJ, 1970)

For example, the Rhodesian Law and Order Maintenance Act permits restriction for up to fifteen years. No court can require the Minister who issues the order to divulge his reasons if he chooses not to do so.

3. Notice Provisions Not Applicable to Certain Offences. In other cases, the arrest and detention laws contain specific legal guarantees such as the right to be informed of reasons or grounds, but those provisions are expressly made not applicable to "offences against the security of the state", or "subversion", with these offences being broadly defined.

In Equatorial Guinea, for example, the new Constitution of 1973 provides in Article 31 that no one is to be detained except by a competent authority under laws in force at the time of the offence and subject to the formalities and guarantees established by law. The next article states, however, that this does not apply to persons accused of offences against the security of the state or subversion. (17)

The new Constitution of Pakistan requires in Article 10 that any law providing for preventive detention must contain safeguards including the obligation to inform the detainee of the grounds for detention within one week. But these safeguards were suspended by an order of the President made on August 15, 1973, the day after the new Constitution came into force. Action taken under the emergency powers was largely directed to suppressing internal opposition rather than to preparations to meet an external threat. (18)

4. Notice Provisions Not Applied. In many cases, the law does require that every detained or arrested person be informed of the grounds, but as there is no means of enforcement, the requirement is not carried out in practice.

For example, in Uganda, the Detention Decree (No. 15 of 1971) provided a number of important safeguards, including a requirement that the government specify the grounds on which the detention is based in a detailed statement within thirty days of the detention order. But in fact, this and the other safeguards have been ignored. The armed forces have been allowed to arrest and detain political suspects with no judicial control in effect. (19)

In India, however, the detention laws provide that the grounds for the detention must be disclosed to the detainee ordinarily within five days or, in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days after the detention. These safeguards are in practice applied. Furthermore, the Supreme Court, in a number of cases, has enforced strict standards in respect of precision in stating the grounds of detention and the relevance and sufficiency of each and every one of the grounds alleged for each detention. When these standards are not met, the Court has ordered the detainee's release. (20)

(17) ICJ REVIEW No. 13 (December 1974), p. 10

(18) ICJ REVIEW No. 11 (December 1973), p. 6

(19) Violations of Human Rights and the Rule of Law in Uganda and Supplement (ICJ Study, 1974)

(20) ICJ REVIEW No. 13 (December 1974), p. 13

5. Delayed Notice. It should be pointed out that the timing of the notice of the grounds for arrest and detention is also important.

In Indonesia, some forty persons were detained after anti-Japanese riots in January, 1974; very few knew of the charges against them, and most are still so detained. The first among them to have been brought to trial, Hariman Siregar, was not even told of the charges until the opening day of his trial, that is, after over six months of detention. These charges were serious, however, and resulted in a six year sentence. (21)

D. The Right to be Brought Promptly Before a Court and to Have a Trial Within a Reasonable Time.

1. Mass Arrests and Prompt Court Appearance. Delays in bringing detainees to court or to trial are particularly likely to result when large numbers are arrested and detained. If any of them are illegally detained, then the delays in turn aggravate the problem of arbitrary arrest and detention; and if the prisons are not prepared for such large numbers, the cases of ill-treatment are bound to increase with the delays. This of course lengthens the time in custody of persons wrongly or illegally detained. In addition, such overcrowding is a major cause of ill-treatment in prisons.

Indian authorities in 1974 announced that the total prison population of West Bengal was 25,000 of whom 17,500 were awaiting trial. They admitted that conditions were unsanitary and overcrowded, although they denied allegations of torture. (22)

In Tanzania, a former detainee reports, "Merely being remanded in custody is enough to bring about a complete change in the life of the person, for remand in Tanzania even for a petty offence such as pickpocketing or quarrelling in public may last for as long as six months to a year or more. There was a man /in our prison/ accused of homicide who after three years of remand had got so fed up that he agreed to plead guilty to a crime he had never committed. He just wanted to see the matter ending one way or the other. He got a six year sentence. The time you spend in remand however long is never taken into consideration".

In Indonesia, referring to the 5000, out of over 55,000 detained since 1965, who are scheduled to be brought to trial eventually, the Attorney-General remarked during a speech in 1971: "In the 6 years since 1965, we have tried about 200 people ... that is a rate of 30 a year. At this rate, it will take us 150 years to try 5000 people. Of course this is not possible. A few months ago, the Ministry of Justice announced that it was appointing 500 new judges. These judges can help speed up the trials". (23) In 1975, the number of these persons tried has reached 700. It is likely that many of the others have already served more time in prison than any future sentence would fix. Yet there has been no indication by the government that it has considered releasing these persons to reduce the congestion in the prisons and in the courts.

(21) Observer's Report on the Detention and Trial of Hariman Siregar, (ICJ, 1974, unpublished)

(22) ICJ REVIEW No. 13 (December 1974), p. 13

(23) Speech by Indonesian Attorney-General to Djakarta Foreign Press Correspondents Club, 20 September 1971

2. Prompt Court Appearance to Prevent Ill-Treatment. Delays in bringing a detainee before a court can have a direct effect on the incidence of torture and other mistreatment during investigation.

An International Commission of Jurists mission to Uruguay in 1974 reported:

"The general view among defence lawyers is that almost all persons detained in military barracks and some of those detained in police stations are still being severely ill-treated either during or as a preliminary to interrogations ... "The authorities told us that very strict instructions had been issued to all units forbidding any form of ill-treatment ... The military Judges of Instruction said that hundreds of complaints of torture had been made to them, but they had not found a single case proved ...

"By contrast, the President of the Supreme Court pointed out to us that this was not a new problem in the civil jurisdiction. It was not infrequent for a Civil Judge of Instruction to find a case proved against the police of ill-treatment during interrogation. He explained that when the Judge of Instruction received a complaint he had the complainant immediately examined by a doctor, and if the examination showed signs corroborating the complaint, the Judge would act upon it accordingly. It appeared to us noteworthy that there is this discrepancy between the findings of the civilian and military Judges of Instruction. We think the most likely explanation is that in the civilian jurisdiction defendants are brought before the Judge of Instruction within 48 hours (in accordance with Article 16 of the Constitution) when signs of any ill-treatment are likely to be still visible. We are assured by defence lawyers that in the military jurisdiction the normal period of delay before a person is brought before a military Judge of Instruction is now 2 to 3 months (previously it was 5 to 6 months), and sometimes the delay is considerably greater". (24)

- E. The Right to Communicate with Legal Counsel; the Right to be Tried in His Presence, and to Defend Himself in Person or through Legal Assistance of His Own Choosing.

1. Counsel Prohibited. Sometimes, especially in military procedures, the right to counsel is entirely excluded.

In Uganda, an accused brought before a military tribunal is not represented by counsel. Since 1973, the military tribunal has jurisdiction to try any person accused of a capital offence. The absence of counsel permits an accelerated trial of persons seen to be threats to security; President Amin has remarked that "the Military Tribunal takes a very short time to try anybody and bases its judgment on truth only". Many have been sentenced to death under these procedures. (25)

2. Counsel Restricted. Often, counsel is permitted, although subject to severe restrictions, which may have an effect on the conduct of the trial or the treatment of the detainee.

Persons charged under subversion laws in Indonesia are permitted limited access to lawyers. The student leader Hariman Siregar was tried in August, 1974, after 6 months of detention, but did not see his defence counsel until

(24) Report of Mission to Uruguay and Supplement (ICJ, 1974)

(25) Violations of Human Rights and the Rule of Law in Uganda and Supplement (ICJ Study, 1974)

the first day of the trial, and only saw them on two occasions between the first day and the adjourned hearing twelve days later. Yet this trial was apparently conducted as a model to outside observers of the administration of justice in Indonesia. (26)

The students tried in military courts under emergency decrees in South Korea in 1974 were able to have only sporadic visits from their lawyers and were otherwise held *incomunicado*. All of them alleged that they had been tortured into giving confessions during that time. (27)

In Uruguay, an ICJ mission in 1974 found that political suspects arrested by the armed forces are taken to the military barracks of the arresting unit where they are investigated. It is during this first stage that ill-treatment most frequently occurs. However, the detainee has no access to a lawyer during this time nor during the *Pre-Sumario* before the military Judge of Instruction, at which he is asked if he confirms his statement made to the first investigation judge. If he is indicted, then he is asked to name his lawyer or select one from a roster. But he will not see the lawyer until the *Sumario*, also before the military Judge of Instruction. This stage begins by the defendant being brought before the Judge and asked in the presence of his lawyer (but before he has been able to consult with him) whether he confirms or wishes to rectify his statement previously made to the Judge. Usually he confirms his statement, but afterwards tells his lawyer it is untrue, and that it was made as a result of torture. When asked why he did not rectify it, he says that he has to go back to the barracks where he received the torture and that he has been warned that he will receive more if he does not confirm his statement before the Judge. (28)

3. Interference with Defence. The right to communicate with and be represented by counsel may be effectively restricted by harrassing the defendants or their lawyers.

In Uruguay, especially since the assassination of the military attaché in Paris in 1974, defence lawyers are being hampered in the conduct of their defence. Professional secrecy is violated; their interviews with their clients have been conducted under surveillance and at times recorded; some detainees have had their visits from their lawyers suspended. In proceedings before the military tribunals, the Judge of Instruction often receives and acts upon a secret report on the case from the security intelligence authorities (the Defence Information Service), which the defence lawyer is unable to see or reply to. (29)

A Ugandan testifies that, "Lawyers in private practice ... can no longer conduct their defence as they plan or would have planned. A defence counsel could be in serious trouble, notably with the Public Safety Unit (PSU), if he successfully defended an alleged criminal."

(26) Observer's Report on the Detention and Trial of Hariman Siregar, (ICJ, 1974, unpublished)

(27) William J. Butler, "Political Repression in South Korea ... 1974", ICJ REVIEW No. 13 (December 1974), p. 38

(28) Report of Mission to Uruguay and Supplement, (ICJ, 1974)

(29) Id.

"To substantiate this, let me recall an incident relating to Mr. Samson Ddungu, a former President of the Uganda Guide Post and a businessman. During the allocation of businesses left behind by expelled Asians, he had acquired a cinema together with an army man. This man later alleged that Ddungu had stolen 50,000 shillings from the business.

"Mr. Ddungu was arrested by the PSU and taken to court for theft. He engaged the services of a Kampala lawyer, Mr. Enos Ssebunnya, who defended him and secured his acquittal, whereupon Senior Superintendent Ali Towilli, then head of the PSU, and his men attempted to arrest Ddungu in the court. The Magistrate warned that the acquitted man should not be arrested in the court.

"When his lawyer Ssebunnya left the court, he was arrested and taken to Naguru prison where, for some days he was interrogated as to why he had defended criminals. The advocate was badly tortured and beaten up. The Uganda Law Society protested strongly to the Attorney-General. Eventually Mr. Ssebunnya was released with serious bruises. Realising he would eventually be arrested and killed, he has since fled Uganda.

"Meanwhile, in Buganda Road court in the centre of Kampala, when Ddungu left the court, he was chased and fire was opened against him. He hid in the nearby YWCA hostel from where he was pulled and shot dead. When such things happen, many people who are taken to court these days prefer being sent to prison, even if they are found innocent. Otherwise they cannot survive". (30)

F. The Right not to be Compelled to Testify against Himself or to Confess His Guilt.

As already illustrated in Section B above, torture, or "Interrogation in depth", is often used to obtain confessions. Judicial procedure sometimes permit the use of these confessions in court and thus fail to protect the right not to be compelled to confess one's guilt and even encourage the use of torture in investigation.

Under procedures used in Uruguay, defendants often confirm false confessions in court. But at least one Uruguayan military Judge of Instruction, according to his own admission, would act upon a confession denied before him if he disbelieved the defendant's denial. This is clearly in conflict with Article 435 of the Code of Military Penal Procedure which says that a confession has no legal effect unless it is made before the competent Judge in the presence of his defender. Furthermore, this Article also requires that the existence of the offence be proved by other evidence and that the confession be consistent with the facts and circumstances of the offence. According to many defence lawyers, the military Judges frequently convict upon a confession in the absence of any other evidence. It should be pointed out that not all of the military Judges of Instruction are qualified lawyers. In 1974, when the International Commission of Jurists conducted its mission to Uruguay, it found that only one of the six was a lawyer. (All, however, were officers or retired officers of the armed forces). (31)

In many cases in Chile it is reported that Councils of War have convicted on the basis of confessions made in interrogation centres, which were denied

(30) Violations of Human Rights and the Rule of Law in Uganda and Supplement (ICJ Study, 1974)

(31) Report of Mission to Uruguay and Supplement (ICJ, 1974)

before the Fiscal as having been extracted under torture, or where there was no other evidence against the accused apart from his confession. This is in violation of Article 509 of the Code of Penal Procedure which provides that a confession shall not be admissible unless (1) it is made before the Judge of Instruction (or Fiscal in the military system), (2) it is made freely and consciously, (3) the confession is possible and plausible considering the personal circumstances of the accused, and (4) the fact of the crime is proved by other evidence and the confession is consistent with that evidence. Article 511 provides that if the defendant wants to retract his confession made before the Judge of Instruction (or Fiscal) under Article 509, he will not be heard unless he proves "unequivocally" that there was error, pressure, or that he was not in the free possession of his reason. This is, of course, a very heavy burden for the defendant to discharge, particularly when it is remembered that the Fiscal is the prosecutor before the Council of War. Moreover, the Councils of War will usually not allow the defendant to testify that he has been tortured, and defence lawyers who have alleged it have been ordered from the court, and in at least one case the lawyer was banned from further practice. (32)

G. The Right to Examine, or Have Examined, the Witnesses against Him and to Obtain the Attendance and Examination of Witnesses on His Behalf under the same Conditions as Witnesses against Him.

1. Witnesses to Refute Forced Confession. The obtaining of confessions by torture and the subsequent usefulness of the confessions in court can be supported by denial of the right to examine witnesses.

Fifty-five persons were tried last year in Korea, following student demonstrations, in three groups in three separate military courts. In all of the cases the defendants requested witnesses on their behalf; in all cases such witnesses were rejected by the courts on the ground that the defendants had confessed. On the other hand, the judges allowed several witnesses for the prosecution. (33)

2. Witnesses on Arrest and Detention Incidents. The testimony of the arresting or detaining officials may be vital to the defence, especially when a confession is presented in court; this may be difficult to obtain when the military or police authorities have been given a great deal of power independent of effective judicial control.

Members of the Uganda Judiciary, in a memorandum to President Amin, have charged that "members of the Security Forces turn up in court and demand that someone be sent to jail, or that someone be prosecuted. Very often members of the Security Forces, when called to give evidence, fail to turn up and no explanations are given. At times when they do turn up they refuse to answer questions put to them". The group suggested that improvements be made in the educational system of the military to eliminate the "lack of adequate knowledge of the court system". (34)

(32) Final Report of Mission to Chile to Study the Legal System and the Protection of Human Rights (ICJ, 1974)

(33) William J. Butler, "Political Repression in South Korea ... 1974", ICJ REVIEW No. 13 (December 1974), p. 38

(34) Violations of Human Rights and the Rule of Law in Uganda and Supplement

H. The Right to a Fair and Public Hearing by an Independent and Impartial Tribunal.

1. Interference with Independent Judiciary. In many cases persons are held in detention for years with no hearing and with no plans for a hearing ever announced. In those cases where detainees are brought before a tribunal, a judiciary which for many reasons does not feel itself to be independent is likely to hesitate to administer justice fairly or may even be physically prevented from exercising its duties. If detained persons are to receive fair treatment in the courts, the judiciary must be independent, and this independence must be respected by the executive.

An extreme example of interference with judicial independence was the abduction of the Chief Justice of Uganda, Benedicto Kiwanuka, from his chambers by members of the army on September 21, 1972.

"Kiwanuka had made several rulings against the government in the weeks before he was abducted. On August 28, 1972, one month before he was arrested, he granted bail to a man, warning "As I have said in many cases, the police should wake up and start to realise the importance of a citizen's freedom. Men should not be held in custody longer than is absolutely necessary".

"On September 8, Chief Justice Kiwanuka granted an application for a writ of habeas corpus for a detained British businessman, Mr. Donald Stewart. In issuing the order requiring the Attorney-General and the officer in charge of Makindye Military Prison to appear, the Chief Justice sated: "There was a prima facie case of wrongful detention that is required in a case of this kind".

He added: "The military forces of this country have no powers of arrest of any kind whatsoever". (President Amin subsequently signed a Decree on October 4, 1972, which retroactively granted broad powers of arrest to the military forces)".

Since the Chief Justice's disappearance, according to one Ugandan, the entire legal community "has been left to operate under great fear and difficulty. The Uganda Judiciary is no longer independent and judges and magistrates are very cautious about making legal rulings which may hurt the Government's interests ... The magistrates are also cautious about acquitting men accused of serious crimes, even if the men are innocent". The extension of the jurisdiction of the military tribunals has also affected the impartiality and fairness of hearings for many detainees. The military tribunals are known to sentence many persons to death after quick trials lacking basic judicial guarantees. (35)

2. Judicial Investigation of Torture Allegations. In situations where torture occurs as a systematic practice it is almost unknown for courts to conduct thorough investigations into allegations of its occurrence. Judges with the independence and courage to conduct such inquiries can be effective in stopping torture and preventing its further occurrence; otherwise they invite its continued use.

At a trial in Greece in 1972, the two defendants, Minis and Pantelakis, submitted to the court detailed reports on tortures they had undergone (parts of these reports are mentioned in Section B above). One of them also identified a torturer present at the trial. The presiding judge cut them off

(35) Violations of Human Rights and the Rule of Law in Uganda and Supplement (ICJ Study, 1974)

each time they repeated their allegations, and none of their reports were made the object of an investigation. The International Commission of Jurists' observer at the trial said: "The judges in this case were in effect accomplices in torture". (36)

I. The Right to be Presumed Innocent until Proved Guilty according to Law.

1. Presumption Resulting in Long Detention. For many detainees, a presumption of guilt means detention for years on that basis alone, especially when judicial and administrative procedures are such that their appearance before a tribunal may be entirely excluded or indefinitely delayed or a mere formality.

In Indonesia, the government has stated that thousands of its detainees are known to be guilty, although they will never be brought to trial for lack of evidence. They have been in prison since 1965-66. An example is Mr. Oei Tjoe Tat, an Indonesian lawyer and former minister. When the army seized power on March 11, 1966, Mr. Oei was arrested and detained with ten other ministers in a military camp. During his years of detention his case has been examined by three different interrogation teams, comprising military and civilian prosecution authorities. In each case the conclusion was that there was insufficient evidence on which to charge him with any offence. Mr. Oei has not, however, been released nor has he been permitted to go into exile abroad. (37)

2. Presumption Resulting in Ill-Treatment. A presumption of guilt may directly affect the treatment a detainee receives.

A mission for the International Commission of Jurists to Uruguay visited the "Libertad" military prison near Montevideo during 1974. It was quite apparent that prisoners, though still being processed, were subjected to a strict regime of punishment. Indeed, during the conversations the mission had with the prison staff, their guilt seemed to be taken for granted. Those who benefited from a laxer regime, in hutments rather than in the cell block, did so simply because they were considered to present less of a danger to security, not because their guilt was in doubt. (38)

J. The Right not to be Held Guilty of any Criminal Offence on Account of any Act or Omission which did not constitute a Criminal Offence, under National or International Law, at the time when it was committed, and not to Get a heavier Penalty than the one that was applicable at the time when the Criminal Offence was committed.

Retroactive punishment is sometimes used to control political activity after a change in regimes, and may then result in the detention, often arbitrary, of large numbers of persons long after the period of crisis has passed; it may also encourage the ill-treatment of political opponents.

(36) The Trial of Anastasios Minis and Stephanos Pantelakis: Report of the Observer (ICJ, 1973)

(37) ICJ REVIEW No. 13 (December 1974), p. 16

(38) Report of Mission to Uruguay and Supplement (ICJ, 1974)

Thousands of persons were arrested in Indonesia in 1965-66 on the basis of their alleged membership in or connections with the Communist Party (PKI). The party was outlawed after most of these persons had already been in detention for several months. Many of them are still in custody.

On September 11 and 12, 1973, Professor Nicolas Vega Angel, Vice-President of the University of Chile, Osorno, Professor Luis Freddy Silva Contreras, General Secretary of the University and 10 students of the same university were arrested. They were charged under Article 8, paragraph 2, of Law No. 17.798, on the Establishment of Weapon Control. The maximum penalty under that law at the time of the alleged offence (i.e. prior to their arrest on September 11 and 12) was 540 days. On September 22, 1973, Decree Law No. 5 was promulgated increasing the maximum penalties under this law. On November 7, 1973, a Council of War at Osorno (Case No. 1585/73, Fiscalía de Carabineros Osorno), condemned Professors Vega Angel and Silva Contreras to 15 years, and the 10 students to 3 years imprisonment. The defence advocate (de turno) pointed out the error in his written defence and in a submission to the reviewing authority. Nevertheless the sentences were confirmed. There is no means of appealing against this erroneous sentence. There are reports of many other similar cases, including even cases of death penalties for offences committed before the proclamation of a state of war, although no death penalty was applicable at the time of the offence. (39)

K. The Right to Equal Protection of the Law, without any Discrimination.

A general pattern of discriminatory laws often results in the internment and subsequent ill-treatment of many members of the disfavoured group, and in addition the laws relating particularly to detention and imprisonment deny those persons many of the rights discussed above.

The web of discriminatory laws in South Africa and Southern Rhodesia have in fact put a very large number of Africans in prison after sentence or in detention without trial. The relevant laws and procedures as well as the resulting torture and ill-treatment are well documented in many United Nations publications, such as the latest report of the Ad Hoc Working Group of Experts to the Human Rights Commission in UN Document E/CN.4/1159.

* * *

(39) Final Report of Mission to Chile to Study the Legal System and the Protection of Human Rights (ICJ, 1974)

P A R T I I

SUGGESTED MEASURES TO ENSURE THE ENJOYMENT OF THE HUMAN RIGHTS
OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

- A. Emergency laws, relating to arrest and detention powers and to judicial procedures, should be limited to the duration of the emergency and should apply only to the extent strictly required by the exigencies of the situation. A government should be encouraged to review its emergency laws and to return as soon as possible to a full system of civilian justice in which all civilians suspected of offences against the security of the state will be subject to civil process.
- B. Countries with large numbers of untried prisoners should be encouraged and aided to
- release those who have already been detained sufficient time to have "purged" their alleged offence;
 - release those against whom there is no or not sufficient evidence;
 - reintegrate prisoners in society rather than nourish resentment;
 - announce a definite programme for handling the untried prisoners;
 - permit exile, or at least provide decent conditions subject to international inspections, for those political prisoners still considered too dangerous to be set free in their own country.
- C. Certain basic legal safeguards should be provided for and applied at all times. Annex A contains suggested judicial and administrative practices and procedures which, if adopted, could effectively protect the rights of persons subjected to detention and imprisonment. The procedures are presented as proposed amendments to the Standard Minimum Rules for the Treatment of Prisoners in a document which the International Commission of Jurists has submitted to the 5th UN Congress on the Prevention of Crime and Treatment of Offenders.
- D. Codes of conduct for police and persons in the medical profession should be established and disseminated, as requested in General Assembly Resolution 3218 (XXIX), aimed at the prevention of torture and other violations of prisoners' and detainees' rights. Lawyers and their professional associations should also be aware of their professional obligations in this matter and should be prepared to support other lawyers who are victimized or penalized for fulfilling these obligations.
- E. Strong administrative action supported at the highest levels is needed to prevent abuses of prisoners' and detainees' rights, with disciplinary action taken against all offenders.

Geneva, May 31, 1975

Niall MacDermot
Secretary-General
International Commission of Jurists

Annex

* * *
* * *

S-3186