CONFERENCE
OF
EUROPEAN NATIONAL SECTIONS

AIDS AND HUMAN RIGHTS
EUROPEAN SOCIAL CHARTER

THE HAGUE
PEACE PALACE
20 to 22 September 1989

INTERNATIONAL COMMISSION OF JURISTS
NETHERLANDS COMMITTEE OF JURISTS FOR HUMAN RIGHTS
NJCM-BOEKERIJ 14

Published by

THE INTERNATIONAL COMISSION OF JURISTS (ICJ)
P.O. Box 120
CH-1224 GENEVA
Switzerland

and

THE NETHERLANDS COMMITTEE OF JURISTS FOR HUMAN RIGHTS
(NJCM) (DUTCH SECTION OF THE ICJ)/NJCM-BOEKERIJ
P.O. Box 9520
2300 RA LEIDEN
The Netherlands

ISBN 92-9037-0459

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PROGRAMME FOR THE MEETING OF THE EUROPEAN SECTIONS OF THE INTERNATIONAL COMMISSION OF JURISTS SEPTEMBER 20-22, 1989 - PEACE PALACE, THE HAGUE

WEDNESDAY, SEPTEMBER 20

As from 12.00	Arrival and check-in Flora Beach Hotel
13.45	Departure for Peace palace
14.15	**Opening session** Welcoming speeches by *Cecilia Thompson*, Assistant to the Secretary-General ICJ and *Herman von Hebel*, Chairman NJCM
14.45	**Topic one, session one** The problems of AIDS and human rights generally and in the Third World in particular - *Dr. Katarina Tomasevski*, WHO Global Programme on AIDS
15.30	Coffee and tea
16.00	Discussion
17.00	Close
17.30	Reception by the City of The Hague

THURSDAY, SEPTEMBER 21

09.00	**Topic one, session two** AIDS and human rights in Europe - *Aart Hendriks*, Erasmus Universiteit Rotterdam Followed by discussion
10.30	Coffee and tea
11.00	**Topic one, session three** AIDS in prisons - *Cecilia Thompson*, ICJ and *Dr. Michael Neider*, Austrian section of the ICJ Followed by discussion
12.30	Lunch

14.30	**Topic one, session four** Provision of legal services for people with AIDS - *Peter Ashman*, Justice Followed by oral reports by national sections of the ICJ
15.45	Tea and coffee
16.15	**Topic one, session five (closed session*)** Discussion on national policies and ICJ guidelines on AIDS
17.15	Close
18.15	Reception by Province Zuid-Holland
20.30	ICJ dinner

FRIDAY, SEPTEMBER 22

09.00	**Topic two, session one** European Social Charter - Austrian section ICJ Followed by discussion
10.30	Coffee and tea
11.00	**Topic two, session two** Human Rights in the EC - *Lammy Betten*, Rijksuniversiteit Utrecht
12.30	Lunch
14.30	**(Closed session*)** ICJ European policies - reports by Dutch and West German section Followed by discussion
16.00	Coffee and tea
16.30	**Closing session (closed session*)**
17.30	Close

SATURDAY, SEPTEMBER 23

10.00 **(closed session*)**
Meeting of follow-up and continuation committee
officers of national ICJ sections

Close

* Open to members of ICJ, ICJ sections and invited guests only

LIST OF PARTICIPANTS

ICJ

Niall MacDermot
Cecilia Thompson

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Dr. Peter Jann
Dr. Rudolf Machachek
Dr. Michael Neider
Dr. Manfred Nowak
Dr. Karl Piska

Britain

Elkan Abrahamson
Peter Ashman
Georgina Bowman
Dr. Alpha Connelly
Monica Dyer
Mr. and Ms. Philip English
Katherine Flynn
Sir William Goodhart
Leah Levin
Rosie Mannion
Dr. M. Rendel

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Federal Republic of Germany

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Mr. Per Boholm
Mr. Lennart Groll
Mr. Hans-Olof Krökstäde
Mr. Tomas Krüger
Mr. Alvar Nelson
Ms. Annika Wallin
Ms. Gunnila Wennerberg

Switzerland

Katharina Sameli

OPENING SPEECH

Cecilia Thompson
Assistant to the Secretary-General, ICJ, Switzerland

This meeting takes place just two and a half years after our last meeting in Strasbourg held in April 1987. It is a great pleasure for me to welcome so many members of our Sections and the distinguished guests who have come to the Hague to contribute to our discussions which I hope will prove fruitful.

Since our last meeting we are saddened by the loss of two very committed individuals who devoted themselves to the promotion and protection of human rights in Europe. These were:

Tom Sargant, former Secretary of Justice, our British Section, who was one of the splendid band of people who toiled hard for the cause of justice for the ordinary person. His main commitment was to help prisoners in jails whom he felt should justly not be there, including cases where judges and lawyers all agreed that there was no reason to doubt the correctness of the conviction.

And

Paul Sieghart who was the Chairman of Justice's Executive Committee. He was a true European at heart and he had a gift for clear exposition of complicated subjects in a manner comprehensive to all. Paul came to see the advent of AIDS as a serious threat to fundamental human rights, raising questions of discrimination, intrusion into individual privacy and coercive powers of the state. His last publication entitled "AIDS and Human Rights" reflects his continuing interest in the social and ethical implications of scientific advances and possibly provides one of the best insights into the human rights issues raised by the AIDS epidemic. It is a great tribute to Paul to use his book as one of the cornerstones of our discussion in the coming few days. During this meeting we will focus on two major issues: AIDS and human rights and human rights within the European context. The subject of AIDS and human rights has increasingly retained the ICJ's attention especially within a climate of increasing human rights violations in general and discrimination in particular of persons suffering from AIDS, infected with the virus or suspected of being infected because they belong to groups already stigmatized by society such as homosexuals, prostitutes, drug users, minorities and the homeless.

The message from all corners of the world is clear. For the effective containment of AIDS we must protect the human rights of those who are infected. Nothing else will work. Punitive strategies will drive the infected and those at risk of infection into an underworld of

disease and doom, and those who fear discrimination will fail to come forward for treatment and counselling. With the increase of infected persons, the number expected to be nine times greater in the 1990's than in the 1980's and an estimated 5 to 10 million currently infected, discrimination and human rights violations are reaching serious proportions.

Society's natural response is to introduce discriminatory measures in an abortive attempt to punish those who are infected, and exclude those who pose a threat, all in the name of society's strive for self-preservation. It is surely these specific responses to the crisis which prove counterproductive and rather than preserve society will contribute to its gradual decimation - the gradual destruction of a whole generation, a generation in whom we have all placed great hope in building a better future and a world of justice and peace. Responding with complacency will lead to increased stigmatization. Fatalism will only bring hopelessness and ineffective solutions. What is needed is the respect of human rights and tolerance, but above all solidarity - solidarity which is struggling to come forward but which is there, which needs to be nurtured and encouraged.

It proves timely for the ICJ European National Sections to come together and discuss the contribution lawyers can make to stem the tide of this insidious and destructive disease, and thereby not only provide examples for other groups of lawyers but also make a small contribution to those thousands of individuals who are infected but symptom-free for many more years to come but who face rejection and ostracism from employers, landlords, the medical corps and even friends and family.

The second important topic that we will be discussing is the European Social Charter. It is a well chosen subject not merely because it provides a challenge but also because the ICJ has over many years already stressed the increasingly important role of economic, social and cultural rights. The seminar on the International Covenant on Economic, Social and Cultural Rights (Maastricht 1986) and the Limburg Principles that were adopted are a case in point. Human rights, civil and political, and economic, social and cultural are interdependent and cover not only human security but also human survival and dignity. As Leopold Senghor, former President of Senegal, once mentioned with acute perception, "Human rights start with breakfast". In 1986, the Foreign Ministers of EEC Member States declared that: "The promotion of economic, social and cultural rights is of paramount importance for the full realization of human dignity and for the attainment of the legitimate aspirations of every individual".

We have to acknowledge that a great contribution has been made in the field of civil and political rights yet far less attention has been paid to economic, social and cultural rights. This is reflected at the European level with the European Convention of Human Rights and its complement, the European Social Charter which has neither attracted

as much attention nor has it caught the imagination of the public to the same extent.

Many reasons can be cited: economic, social and cultural rights are regarded as concerning issues of 'quality of life' rather than basic human rights; provisions are couched in general terms thereby raising problems of justiciability; and civil and political rights are regarded as being protected immediately by law whereas economic and social rights require programmes of action over time before they are fully realized.

Yet, the two part set-up of the Charter and the flexibility related to the scope of ratifications should lead to a greater acceptance of the Charter, the substance of which sufficiently qualifies for a worthwhile guarantee of economic and social rights.

The time is ripe for another closer look at the implementation of Economic and social rights in the light of the advent of 1992 and the optimism sweeping across Europe. With more states being drawn into the EEC, greater integration and economic and social cohesion, social rights must inevitably go hand in hand with the objectives of European revival.

The ICJ European National Sections can make a positive contribution to encourage ratification by all countries. This will boost the supervisory machinery and shift the focus from aspirations and good intentions through to concrete implementation of such rights. States need to come to the realization that action to ensure the observance of economic and social standards within Europe is a priority if peace, justice and harmony is to prevail.

OPENING SPEECH

Herman von Hebel
Chairman of the NJCM, Utrecht, Netherlands

Ladies and Gentlemen,

On behalf of the NJCM, the Dutch Section of the International Commission of Jurists, I warmly welcome you to this Conference. It is indeed a pleasure and a privilege for us, to have organized this conference and to have you all here present in this historic place, the Peace Palace.

And historic it is indeed. Numerous national and international conferences have taken place here in this building, ranging from the International Peace Conferences of 1899 and 1907, which led to the Hague Conventions concerning the law of war, to the recent international conference on the protection of the environment, and the conference of Non-Aligned Countries, which discussed, *inter alia*, the promotion of international law in international relations. The Peace Palace is of course also the seat of the International Court of Justice, the other famous ICJ.

Therefore, as historic as this site may be, it also provides a forum where discussions about serious world problems take place regularly and where solutions are sought and found.The topics of this conference are examples of such problems. This means that in the days to come there is no time to sit back, to relax, and to chat about the human rights problems which have already been solved. There is no time to look back, and say that we have done a good job, because the job is not accomplished. It will never be accomplished.

The topics of this conference are examples of new challenges to the present level of human rights protection. These topics show, that the protection of human rights demands a constant struggle to meet such new challenges.

This is especially the case with the first topic of this conference; the human rights aspect of the AIDS problem. First of all, this problem shows that, although present-day medical developments are impressive, there are still a lot of shortcomings.

This not only implies suffering for millions of people, who, knowing that there is no effective medical treatment available, are faced with the fact that their life is going to end quickly. The personal suffering of every individual, the decreasing hope that perhaps there might be a medical solution in time to save their lives or to stop at least

the process of decline, is of such magnitude, that as much effort as possible should be undertaken to stop this suffering.

However, until now, several sectors of society have reacted negatively. Extremely religious groups consider it a punishment of God for not having acted in conformity with their very strict norms. Others, prejudiced and ignorant, are in favour of rigorous measures, such as isolating persons with HIV/AIDS from society or prohibiting them from entering a country. Even policy-makers or legislators have sometimes taken such measures. As a result, AIDS patients are regularly confronted with disproportionate or discriminatory measures, which in no way contribute to the aim to be pursued, namely the prevention of the further spread of the disease and medical solutions to combat it.

This often leads to stigmatization or even direct discrimination of the victims concerned, for example in the areas of work, insurance, housing or even medical assistance. Especially when, as is the case in western Europe, most victims are homosexual or bisexual, discrimination is common and difficult to combat and prevent. In that respect, it is not only the duty of society to seek medical solutions to the AIDS problem, but also to prevent discrimination.

Moreover, it is also the duty of western European states, not only to try to find effective measures at the European level, but also on a world-wide level. After all, the devastating effects AIDS has already had in several Third World societies is of an enormous magnitude, incomparable with the relatively low number of persons with HIV/AIDS in Europe and America. Therefore, in the next two days, we will not only be talking about the AIDS problem in our own country and continent, but we will also discuss ways to contribute to a solution of the AIDS problem in other parts of the world.

Finally, with regard to this topic it should be noted that the developments as described cannot be considered in isolation from other developments in the medical sphere, namely of genetic research. To a large extent, the discussions taking place with regard to the AIDS problems, and the arguments used in these discussions, can also be applicable to genetic research and genetic manipulation. In that respect, for example, discrimination may occur towards people who, because of their genetic constitution and therefore their proneness of developing disease in the future, cannot obtain a job or are not accepted by insurance companies. The discussions at this conference may therefore also have a bearing on future activities of the ICJ and/or its national sections.

The second topic of our conference is also an example of a new development at the European level, which provides us with new challenges in the field of human rights protection.

The problem of the protection and promotion of social rights is not new; an issue which until now has not been tackled satisfactorily. The European Social Charter, unlike its well developed brother the European Convention on Human Rights and fundamental freedoms, has never been able to grow to maturity. Pessimists even say that it is

nothing more than a still-born child. Opinions differ as to why the European Social Charter has not met with more success: is it because of its weak implementation procedures or the serious shortcomings in the provisions themselves, or both. Although this topic has already been discussed in a number of fora, perhaps this conference will bring new views on it.

The problem of the protection of human rights within the European Communities is much more recent and indeed a very topical subject given the recent discussions and conflicts within the Communities about the establishment of a separate Social Charter. The fundamental question is whether one can avoid the protection of human rights from merely remaining an illusion in those fields where the organs of the European Communities have taken over competences from national authorities. Especially since this process has to be promoted in view of a united Europe in 1993. A process of economic integration, without at the same time social integration may seriously affect the present level of social protection. Furthermore, it may also seriously interfere with several classical rights. After all, the discussions within the Communities about human rights began with the protection of those classical rights. Hopefully, this conference may clarify this issue and shed new light.

Ladies and gentlemen, about a year ago, in Luxembourg, the initial steps were taken in the preparation of this conference. It was the passionate force of Paul Sieghart, in particular, which brought us to take these steps and to continue working. It was again Paul Sieghart, who provided us with the main topic of this conference: AIDS and human rights, and it is his paper, which is one of the basic documents for this conference. Unfortunately, because of his untimely death, we have to do it without him. However, his spirit will be present. The success of the ICJ and its British section can undoubtedly be largely attributed to him. In this spirit, I therefore hope that this conference will also be a successful one.

Let me conclude by saying that I wish everyone present here a successful conference and an enjoyable time in the Peace Palace and the Hague.

Thank you for your attention.

TOPIC ONE

AIDS AND HUMAN RIGHTS

HIV/AIDS AND HUMAN RIGHTS

Dr. Katarina Tomasevski
WHO, Switzerland

This text first outlines the main features of HIV/AIDS in the world today, as they have been determined by the epidemiological surveillance, and then goes to the global response to it, describing the Global AIDS Strategy and the inclusion of human rights in it. There is a collection of documents related to the human rights aspects of the Global AIDS Strategy (AIDS and Human Rights, Resource Material, Geneva, August 1989) hence these are not dealt with in the text itself.[1]

GLOBAL PATTERNS OF HIV/AIDS

As of 1 september 1989 a cumulative total of 177,965 cases of AIDS has been reported to WHO from 152 countries. The basic figures are given in the tables below.

The number of AIDS cases by continent and the number of countries reporting cases of AIDS reflect the officially reported cases; due to under-reporting, the total number of AIDS cases is much higher.

The number of AIDS cases, even if it were all-encompassing, would not reflect the scope of the problem: it refers to the final, clinically determined stage of the syndrome called "AIDS". The median interval between infection and the development of AIDS is estimated at 8-9 years, hence the figures relating to AIDS cases reflect infections acquired a decade ago. It is thus more accurate to consider the global spread of HIV infection as indicative of the problem posed by HIV/AIDS.

The AIDS pandemic is steadily expanding its geographical scope, now encompassing countries which were previously unaffected. The enclosed table shows that the number of countries which report no cases of AIDS is today 25, while AIDS cases are reported from 152.

1. These documents are available from any of the national sections or from WHO/GPA, 20 ave Appia, 1211 Geneva.

CUMULATIVE AIDS CASES BY CONTINENT

Continent	1980*	1981	1982	1983	1984	1985	1986	1987	1988	1989	total
Africa	0	0	2	16	98	781	4094	12362	27576	31146	31146
Americas	83	373	1456	4687	11115	23275	43232	73405	107452	119662	119662
Asia	1	1	3	11	17	48	92	209	363	413	413
Europe	18	43	124	400	1061	2754	6176	12450	20694	25219	25219
Oceania	0	0	1	7	52	177	418	811	1318	1525	1525
Total	102	417	1586	5121	12343	27035	54012	99237	157403	177965	177965

* includes cases reported prior to 1980

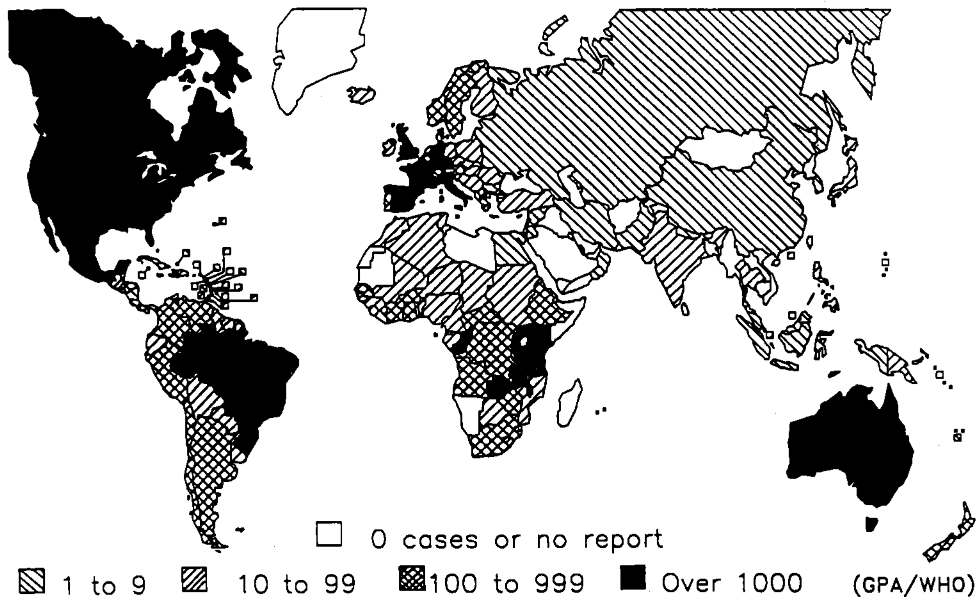
AIDS CASES BY THE NUMBER OF REPORTING COUNTRIES

Continent	Number of cases	Number of countries or territories reporting		
		Total	Zero cases	1 or more cases
Africa	31146	52	4	48
Americas	119662	44	1	43
Asia	413	37	12	25
Europe	25219	30	1	29
Ociania	1525	14	7	7
Total	177965	177	25	152

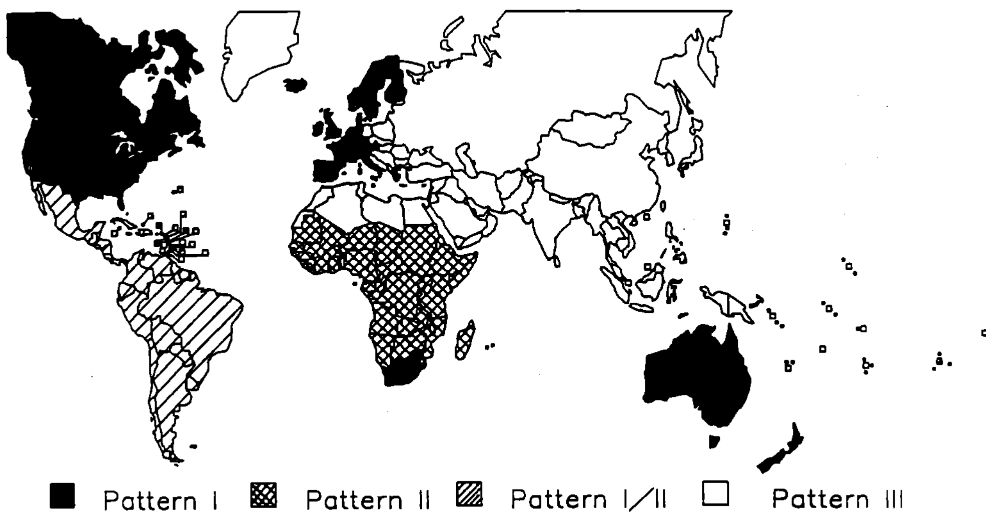
Source: Update: AIDS cases reported to Surveillance, Forecasting and Impact Assessment Unit (SFI) of the Global Programme on AIDS, 1 September 1989

REPORTED AIDS CASES

1 August 1989



GLOBAL PATTERNS OF HIV/AIDS



Boundaries on this map do not imply the expression of any opinion whatsoever on the part of WHO concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

SFI/GPA/WHO

The global spread of HIV/AIDS is portrayed at the two enclosed figures. The first one shows the global distribution of the reported AIDS cases, and the second one uses a more sensitive tool, the global pattern of his transmission.

WHO has identified four distinct patters of HIV transmission. These are summarized below. Western Europe is described as an example of Pattern I, and Africa as an example of Pattern II.

Pattern I: Western Europe

In the countries of Pattern I, most cases occur among homosexual or bisexual males and urban intravenous drug users. Heterosexual transmission is responsible for only a small percentage of cases, but it is increasing. Transmission due to blood and blood products occurred between the late 1970s and early 1980s, but has now been largely controlled in this part of the world which encompasses developed countries, through self-deferral of persons with known risk factors or behaviour and by routine blood screening for HIV antibodies. Inadequately sterilized injection equipment, other than those used by intravenous drug users, are not a significant factor in HIV transmission in most of pattern I countries. The male/female sex ratio ranges from 10:1 to 15:1. Mother-to-infant transmission does occur but the number of HIV-infected infants is low due to the relatively low number of women currently infected. The overall prevalence of HIV infection in the general population is estimated to be less than 1% but it has been reported to exceed 50% among persons who practice high-risk behaviours, such as men with multiple male sex partners and intravenous drug users who share injection equipment.

This first pattern is typical for industrialized countries with a large number of reported AIDS cases, including North America, most western European countries, Australia and New Zealand.

As of 31 August 1989 European countries reported to WHO 25,328 cases of AIDS. The largest numbers have been notified by France (7,149), Italy (4,158), Federal Republic of Germany (3,636), Spain (3.386) and United Kingdom (2,471). These figures, as mentioned already, represent just the officially reported final stage of HIV/AIDS. Nevertheless, the total number of AIDS cases in Europe in the period 1979-1986 was 6,222, and increased four times in the period 1986-1989. WHO estimated that the number of AIDS cases in Europe will reach 100,000 in the early 1990s.

Some of the existing data are given in the enclosed figures. The table reproduces the basic statistics as reported to WHO, and the two charts illustrate the scope of AIDS - the absolute number of AIDS cases and

EUROPEAN REGION

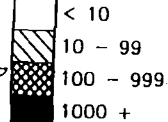
AIDS Cases Reported to WHO by Country
Based on Reports Received through 31/08/1989

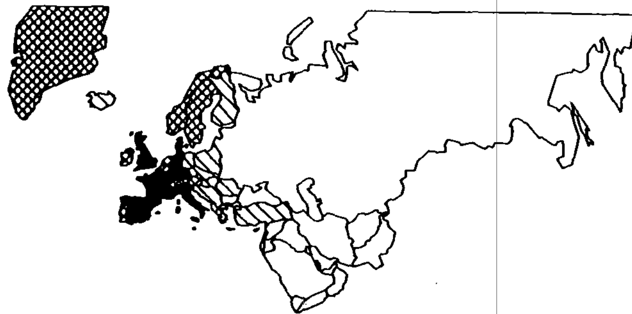
Country	1979-1986 Cases	<-- 1987 -> Cases	1987 Rate (a)	<-- 1988 -> Cases	1988 Rate (b)	1989 Cases to date	Last Report	Cumul. Cases
ALBANIA	0	0	0.0	0	0.0	0	31/03/89	0
AUSTRIA	55	85	1.1	117	1.6	50	31/07/89	307*
BELGIUM	236	101	1.0	114	1.2	68	30/06/89	519*
BULGARIA	1	2	0.0	0	0.0	0	31/03/89	3
CZECHOSLOVAKIA	6	2	0.0	4	0.0	5	30/06/89	17*
DENMARK	142	98	1.9	123	2.4	86	31/07/89	449*
FINLAND	17	7	0.1	17	0.3	5	30/06/89	46*
FRANCE	1917	1944	3.5	2318	4.2	970	30/06/89	7149*
GERMAN DEM. REPUBLIC	1	5	0.0	5	0.0	3	30/06/89	14*
GERMANY FED. REP.	1046	974	1.6	1077	1.8	539	31/07/89	3636*
GREECE	35	53	0.5	82	0.8	56	30/06/89	226*
HUNGARY	1	7	0.1	9	0.1	8	31/07/89	25*
ICELAND	4	0	0.0	6	2.5	2	30/06/89	12*
IRELAND	17	20	0.6	37	1.0	26	30/06/89	100*
ISRAEL	43	14	0.3	20	0.5	8	30/06/89	85
ITALY	657	995	1.7	1583	2.8	923	30/06/89	4158
LUXEMBOURG	6	3	0.8	4	1.1	5	30/06/89	18*
MALTA	5	2	0.6	7	2.0	0	31/03/89	14
MONACO	0	1	3.7	3	11.1	0	31/12/88	4
NETHERLANDS	241	236	1.6	287	2.0	154	31/07/89	918*
NORWAY	35	35	0.8	30	0.7	19	31/07/89	119*
POLAND	1	2	0.0	2	0.0	11	31/07/89	16*
PORTUGAL	52	47	0.5	79	0.8	97	31/07/89	275*
ROMANIA	2	1	0.0	7	0.0	0	31/03/89	10
SAN MARINO	0	0	0.0	0	0.0	1	30/06/89	1
SPAIN	604	801	2.1	1223	3.2	758	30/06/89	3386*
SWEDEN	101	77	0.9	82	1.0	52	31/07/89	312*
SWITZERLAND	192	163	2.5	347	5.4	219	30/06/89	921
TURKEY	3	7	0.0	7	0.0	7	30/06/89	24*
UK	791	594	1.0	639	1.1	447	31/07/89	2471*
USSR	3	1	0.0	3	0.0	0	30/06/89	7*
YUGOSLAVIA	8	18	0.1	39	0.2	21	30/06/89	86
Total for the Region	6222	6295	0.8	8271	1.0	4540		25328

(a) Rate: Reported cases / 100,000 Population
(b) 1988 Reporting generally incomplete
* Updated report

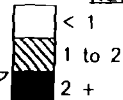
Reported AIDS Cases

1 September 1989





Cases per 100,000 Population: 1988



the rate of AIDS cases per 100,000 population - in the European region.

By the criterion of the relative number of AIDS cases (the number of cases per 100,000 population) the highest figures have been reported from Monaco (11.1), Switzerland (5.4), France (4.2), Spain (3.2), Italy (2.8), Iceland (2.5), Denmark (2.4), Netherlands (2.0) and Malta (2.0).

The response to AIDS began early in Europe. The first meetings were convened in 1983 and resulted in the emerging common European policy. Council of Europe began its work towards a common approach to AIDS-related problems by focusing on the transmission of HIV by blood and blood products. Its first three recommendations were aimed at the elimination of the possibility of HIV transmission through blood transfusion.[2] The legislation of individual countries also focused, first and foremost, on the prevention of the transmission of HIV through the public health systems, especially through blood transfusion.

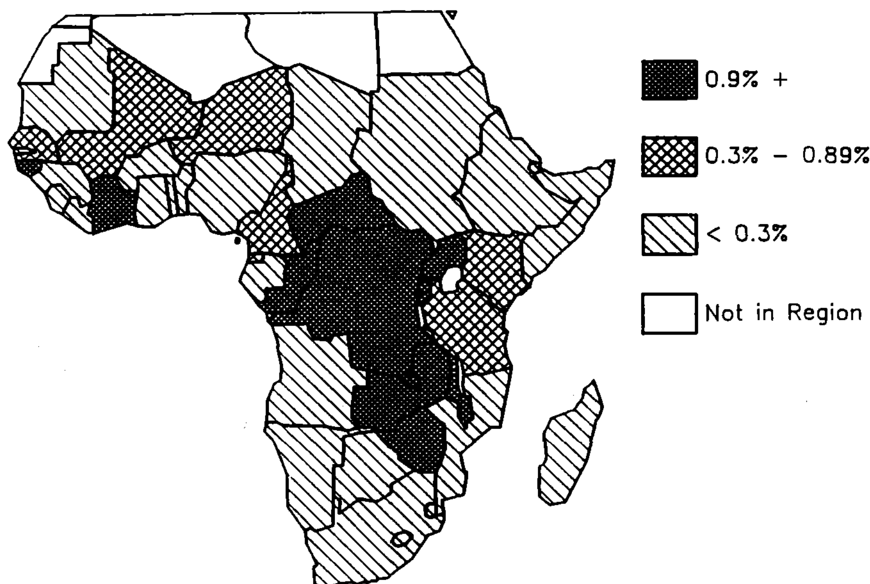
The principles of the European AIDS strategy were outlined in the Guidelines for the Drawing up of a Public Health Policy to Fight AIDS of 26 November 1987.[3] The Committee of Ministers invoked the European Convention for the Protection of Human Rights and Fundamental Freedoms and recommended governments to adopt programmes and measures which "do not interfere unnecessarily with individual rights to objective information, freedom and private life". These guidelines affirmed the need for consent and confidentiality in HIV-testing and recommend governments not to introduce compulsory screening for HIV, or restriction of movement, or isolation of HIV-positive persons. Further norms in regard to the protection of human rights are being elaborated in the Draft Recommendation on the Ethical Issues of HIV infection in the Health Care and Social Settings.

The European Parliament adopted a resolution on the struggle against AIDS on 26 May 1989 which reaffirmed the principle of non-discrimination against people affected by HIV/AIDS, demanded that states observe the existing prohibitions of discrimination contained in human rights law in their responses to AIDS, and that the Commission set up a database in regard to cases of HIV/AIDS-related discrimination.

2. Recommendation No. R (83) and one preventing the possible transmission of AIDS from affected blood donors to patients receiving blood or blood products of 23 June 1983; Recommendation No. R (85) 5 on a model curriculum for the training of specialists in blood transfusion of 26 March 1985; Recommendation No. R (85) 12 on the screening of blood donors for the presence of AIDS markers of 13 September 1985.

3. Appendix to Recommendation No. R (87) 25.

ADJUSTED HIV SEROPREVALENCE, 1987



AFRICAN REGION

AIDS Cases Reported to WHO by Country
Based on Reports Received through 31/08/1969

Country	1979-1986 Cases	<-- 1907 -> Cases	Rate (a)	<-- 1986 -> Cases	Rate (b)	1989 Cases to date	Last Report	Cumul. Cases
ALGERIA	3	5	0.0	5	0.0	0	26/03/88	13
ANGOLA	9	32	0.4	63	0.7	0	31/12/88	104*
BENIN	3	6	0.1	18	0.4	9	31/03/89	36
BOTSNANA	7	9	0.8	33	3.1	0	31/03/89	49
BURKINA FASO	10	21	0.3	394	5.0	130	31/03/89	555
BURUNDI	269	652	13.8	1054	22.3	0	31/12/88	1975
CAMEROON	21	20	0.2	33	0.3	4	31/03/89	78
CAPE VERDE	2	16	4.8	0	0.0	7	31/07/89	25*
CENTRAL AFRICAN REP.	254	178	6.9	230	6.9	0	31/12/68	662
CHAD	2	2	0.0	7	0.1	3	30/06/89	14
COMOROS	0	0	0.0	1	0.2	0	28/02/89	1
CONGO	250	1000	57.5	0	0.0	0	31/12/87	1250
COTE D'IVOIRE	118	132	1.3	0	0.0	0	20/11/87	250
EQUATORIAL GUINEA	0	1	0.3	1	0.3	1	27/06/89	3
ETHIOPIA	2	17	0.0	62	0.1	45	20/06/89	126
GABON	13	4	0.4	10	1.0	4	01/06/89	31
GAMBIA	13	22	3.0	27	3.6	0	31/12/88	62
GHANA	26	35	0.3	266	2.1	263	30/04/89	590
GUINEA	0	4	0.1	29	0.5	19	31/05/89	52
GUINEA-BISSAU	0	29	3.3	29	3.3	18	18/05/89	78
KENYA	274	1223	6.0	2817	13.8	1635	31/03/89	5949
LESOTHO	1	1	0.1	2	0.1	1	20/04/89	5
LIBERIA	0	2	0.1	0	0.0	0	11/03/86	2
MADAGASCAR	0	0	0.0	0	0.0	0	01/02/89	0
MALAWI	144	860	12.0	1582	22.2	0	30/06/88	2586
MALI	6	23	0.3	0	0.0	0	14/01/88	29
MAURITANIA	0	0	0.0	0	0.0	0	31/07/88	0
MAURITIUS	0	1	0.1	1	0.1	0	01/08/89	2*
MOZAMBIQUE	1	3	0.0	23	0.2	14	10/07/89	41*
NIGER	0	17	0.3	26	0.4	13	31/03/89	56
NIGERIA	0	10	0.0	3	0.0	2	09/05/89	15
REUNION	0	1	0.2	12	2.2	7	31/03/89	20
RWANDA	705	295	4.8	267	4.4	35	28/02/89	1302
SAO TOME & PRINCIPE	0	0	0.0	1	0.9	1	14/04/89	2*
SENEGAL	6	60	0.9	115	1.8	26	04/08/89	207*
SEYCHELLES	0	0	0.0	0	0.0	0	20/04/89	0
SIERRA LEONE	0	3	0.1	12	0.3	6	30/06/89	21
SOUTH AFRICA	46	38	0.1	86	0.3	61	22/06/89	231
SWAZILAND	1	6	0.9	7	1.1	0	16/06/88	14
TOGO	0	2	0.1	15	0.5	6	22/06/89	23
UGANDA	911	1789	11.5	4072	26.3	603	15/04/89	7375*
UNITED REP. TANZANIA	699	909	4.0	2550	11.2	0	31/12/88	4158
ZAIRE	0	335	1.1	0	0.0	0	30/06/87	335
ZAMBIA	288	345	4.9	1057	15.1	202	01/05/89	1892
ZIMBABWE	0	119	1.4	202	2.4	440	30/06/89	781*
Total for the Region	4084	8227	1.8	15112	3.4	3555		30978

(a) Rate: Reported cases / 100,000 Population
(b) 1988 Reporting generally incomplete
* Updated report

Pattern II: Africa

In the countries of Pattern II, most cases occur among heterosexuals. The male/female ratio is approximately 1:1, and as a result mother-to-infant transmission is common. Paediatric AIDS cases are therefore numerous and of considerable concern. Intravenous drug use and homosexual transmission are either non-existent or occur at a very low level. In a number of countries, it is estimated that the prevalence of HIV infection on the overall population is more than 1%, and that in some urban areas up to 25% of certain segments of the young and middle-aged adult population (15-49 years of age) are infected. Transmission through contaminated blood remains a significant problem in countries that have not yet implemented nationwide blood donor screening. In addition, the use of inadequately sterilized needles and syringes, or any other skin-piercing instruments, is considered an important public health problem.

This second pattern is currently observed in sub-Saharan Africa and parts of the Caribbean.

Africa was the object of speculation in regard to the origin of HIV in the early 1980s. Though WHO stated that his is a "naturally occurring retro-virus of undetermined geographic origin", the continued attention for AIDS in Africa is based on high rates of HIV seroprevalence. Extensive epidemiological studies carried out in Africa revealed HIV seroprevalence rates of 50% and above among female prostitutes in central and eastern Africa, and up to 25% among sexually active population categories in urban centres. In some African countries the overall population seroprevalence reaches or exceeds 1%.

The response to AIDS in Africa came late. Among the reasons was the publicity given to speculations about the origins of HIV and alarming reports about the spread of HIV in Africa. This provoked under-reporting of HIV/AIDS or total silence, or the rejection of the fact that AIDS constitutes a problem. The African AIDS strategy thus did not begin to be elaborated until 1987-1988. The Regional Committee of WHO for Africa and the Conference of African Ministers of Health of OAU initiated policy-orientated discussions on HIV/AIDS. These resulted in resolutions which elaborate the African AIDS strategy.[4]

4. Cf. Resolution on the prevention of AIDS in Africa, CM/RCS.1165 (XLVII), the Council of Ministers of the OAU, Addis Ababa, 19-23 May 1988; Resolution on AIDS of the Conference of African Ministers of Health of the OAU, CAMH/Res.6 (III), Third Ordinary Session, Kamhala, 3-5 May 1989.
Resolutions of the WHO's Regional Committee for Africa: AFR/RC3/R5 (Bamaho, 9-16 September 1987), AFR/RC38/R9 (Brassaville, 7-14 September 1988).

Pattern I/II and III countries

In Pattern I/II, extensive spread of HIV commenced around the late 1970s or early 1980s. Initially, the burden of HIV infection was more or less confined to homosexual men with multiple sexual partners, self-injecting drug users sharing injection equipment, as well as recipients of HIV contaminated blood or blood products. In the middle to late 1980s, increasing transmission among heterosexuals with multiple sex partners has been noted to the extent that the latter mode of HIV transmission has increasingly become, in Pattern I/II areas, the predominant mode of HIV transmission. As a result, the male/female ratio of recent HIV infections have been found in some Pattern I/II areas to be close to equal. As more heterosexual transmission occurs, an increasing number of paediatric AIDS cases resulting from transmission from an infected mother to her foetus or infant can be expected in these areas.

Those areas where HIV has only been introduced in the early to mid 1980s form Pattern III. Only a small number of AIDS cases have so far been reported from these areas (Eastern Europe, the Far East, the Near and Middle East, North Africa, Southeast Asia, and most of the Pacific). Cases have been recorded among homosexual and bisexual men and self-injecting drug users; heterosexual transmission and transmission through blood transfusion or blood products have also occurred. At first cases had mostly been in persons who have travelled to higher prevalence areas or those who could have acquired the infection from such persons.

THE GLOBAL AIDS STRATEGY

The Global Strategy for the prevention and control of AIDS,[5] developed by WHO and endorsed by the entire United Nations system,[6] provides the framework for the elaboration of regional and national AIDS programmes.

The Global AIDS Strategy has three objectives: to prevent HIV infection, to reduce the personal and social impact of HIV infection, and to unify national and international efforts against AIDS.

Because drugs to cure HIV infection are not available and the infection is likely to be lifelong, it is essential to prevent new HIV infections.

5. Cf. Global Strategy for the prevention and control of AIDS, Resolutions WHA 40.26, WHA 41.24 and WHA 42.33.

6. Cf. Prevention and control of acquired immunodeficiency syndrome (AIDS), General Assembly Resolutions 42/8 and 43/15.

The second objective involves support and care for those who are already HIV-infected, regardless of whether they are presently healthy or have developed illnesses associated with HIV infection. The support and care for HIV-infected persons is not only humane, it is vital for the success of AIDS prevention and control programmes. The third objective arises from the global nature of HIV/AIDS; AIDS cannot be controlled in *any* country unless it is controlled in *every* country.

The international attention for AIDS and the mobilization of resources in support of national AIDS programmes in developing countries has been unprecedented. The Global Programme on AIDS (GPA) of the WHO is collaborating with 168 countries, and providing technical and financial support of over US $ 60 million to developing countries. As of 4 September 1989, medium-term AIDS programmes have been established in 39 African countries, 26 countries in the region of the Americas, 6 countries in Southeast Asia, 6 in Eastern Mediterranean, and 6 in Western Pacific. WHO provided technical support, financial assistance and also helped in the mobilization of resources to secure funding for these programmes.

It is a truism that every crisis presents an opportunity hence AIDS-related problems could be used to revive international cooperation in the field of health. The World Health Assembly recently urged states "to plan and implement national AIDS prevention and control programmes in collaboration with WHO as an integral part of their national health-for-all strategies".[7]

The United Nations Economic and Social Council also addressed the need to respond to HIV/AIDS in the context of the existing health priorities. It stated "that the struggle against AIDS should be consistent with and divert neither attention nor resources from other national public health priorities and development goals and should not divert international efforts and resources needed for overall health priorities."[8]

The scarcity of resource available in the field of health in developing countries has been exacerbated by the pressures of foreign debt and the structural adjustment policies. The necessity to make choices as to the use of the resources available has consequently increased. The determination of priorities in regard to health intervention is a difficult task: it is common knowledge that the identified needs are far from being met.

7. Global Strategy for the prevention and control of AIDS, Resolution WHA 42.33 of 19 May 1989.

8. Prevention and control of acquired immunodeficiency syndrome (AIDS), draft ECOSOC Resolution of 21 July 1989, UN Doc. E/1989/C.3/L.10/Rev.1.

The concept of *preventable deaths* has developed as a tool which can be used to guide decision-making in the field of health. This concept singles out those causes of death which are preventable, that is, where effective control is feasible, as priorities for health intervention. These include diarrhoeal disease, measles, malaria and whooping cough.[9] The spread of HIV infection *is* preventable.

Some of the fear and the consequent irrational responses to HIV/AIDS has been caused by speculation about possible modes of HIV transmission, especially regarding possibilities of acquiring HIV through casual contact with HIV-positive persons. HIV is transmitted by only three modes:

1. Sexual intercourse (heterosexual or homosexual);
2. Contact with blood, blood products, or donated organs and semen. The vast majority of contact with blood involve transfusion of unscreened blood or the use of unsterilized syringes and needles by IV drug abusers or in other settings;
3. Mother-to-child - mostly before and perhaps during or shortly after birth (pre-natal transmission).[10]

HUMAN RIGHTS IN THE AIDS STRATEGY

The World Summit of Ministers of Health, held in London on 26-28 January 1988, adopted the London Declaration on AIDS Prevention, which recognized that "in the absence of a vaccine or cure for AIDS, the single most important component of national AIDS programmes is information and education because HIV transmission can be prevented through informed and responsible behaviour".

The World Health Assembly adopted on 13 May 1988 Resolution WHA 41.26, entitled Avoidance of discrimination in relation to HIV-infected people and people with AIDS. This resolution affirmed three key human rights principles: responsibility of states to safeguard the health of their population, the need to avoid discrimination against people affected by HIV/AIDS, and the necessity to protect human rights in the Global AIDS Strategy. The relevant parts of this resolution are as follows:

9. D'Souza, S., The assessment of preventable infant and child deaths in developing countries: Some applications of a new index, Preventable mortality, World Health Statistics Quarterly, Vol. 42, No. 2, 1989, at 16-25.

10. Statement from Third Meeting of the WHO Collaborating Centres on AIDS held in Washington D..C., 6 June 1987 (Doc. SPA/INF/87.5).

1. [The World Health Assembly] Recognizes "the responsibility of Member States to safeguard the health of everyone and to control the spread of HIV infection through their national policies and programmes, taking into account their epidemiological situation, and in conformity with the global strategy;"
2. [The World Health Assembly] Urges Member States, particularly in devising and carrying out national programmes for the prevention and control of HIV infection and AIDS:
   i. to foster a spirit of understanding and compassion for HIV-infected people and people with AIDS through information, education and social support programmes;
   ii. to protect the human rights and dignity of HIV-infected people and people with AIDS, and of members of population groups, and to avoid discriminatory action against and stigmatization of them in the provision of services, employment and travel;
3. [The World Health Assembly] Strongly convinced that respect for the human rights and dignity of HIV-infected people and people with AIDS, and of members of population groups, is vital to the success of national AIDS prevention and control programmes and of the global strategy.

   Calls on all governmental, non-governmental and international organizations and voluntary bodies engaged in AIDS control programmes to ensure that their programmes take fully into account the health needs of all people as well as the health needs and dignity of HIV-infected people and people with AIDS;

   Requests the Director general to take all measures necessary to advocate the need to protect the human rights and dignity of HIV-infected people and people with AIDS, and of members of population groups.

The inclusion of human rights principles in the international response to HIV/AIDS had thus been initiated by WHO rather than United Nations human rights bodies. They started addressing AIDS-related human rights problems in 1988, and the first results of their work have become available in 1989.

The Commission on Human Rights adopted on 2 March 1989 resolution 1989/11, entitled Non-discrimination in the field of health. This resolution reaffirmed the right to the enjoyment of the highest attainable standard of health and the importance of the principle of non-discrimination concerning access to health care.

AIDS-related discrimination has been addressed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Sub-Commission asked in 1988 Mr. Luis Varela Quiros to prepare

a concise note setting forth methods for the study of discrimination against persons who are HIV-positive or those with AIDS.[11]

Mr. Varela Quiros thus proposed two basic questions to orientate the study:

> "(a) What measures have states adopted to protect AIDS victims against discrimination?
> (b) Does international legislation offer sufficient remedies to prevent AIDS victims from being exposed to measures jeopardizing their freedom or their lives?"[12]

The Sub-Commission appointed Mr. Varela Quiros Special Rapporteur, and entrusted him "with a study of problems of discrimination against HIV-infected people or people with AIDS".[13] Thereby the focal point for HIV/AIDS-related human rights issues has been created within the United Nations.

This text has been confined to mentioning some of the pertinent issues. Most of them merit thorough discussion because of the need to relate epidemiological, public health and medical information with the potentially applicable human rights law. This task will constitute a challenge for the human rights community. Suffice it here to give one example only: the non-discrimination principle has not yet been adequately defined; in regard to persons who are HIV-positive discrimination is based on their status of infectiousness, in regard to those with AIDS discrimination is based on their health status, as well as infectiousness. The nature and scope of the principle of non-discrimination needs to be clarified with respect to acceptable distinctions which may be made on the grounds of impaired health status. Moreover, international human rights bodies will need to determine whether discrimination against HIV-positive persons is already covered by the existing prohibition of discrimination on the grounds of 'any other status'.

11. Sub-Commission Decision 1988/11. Human rights and scientific and technological developments: discrimination against persons with the HIV virus or suffering from AIDS of 1 September 1988.

12. Concise note by Mr. Luis Varela Quiros pursuant to Sub-Commission Decision 1988/11, UN Doc. E/CN.4/Sub.2/1989/5, para. 19.

13. Discrimination against HIV-infected people or people with AIDS, Sub-Commission Resolution 1989/18 of 31 August 1989, para. 2.

AIDS AND HUMAN RIGHTS IN WESTERN EUROPE

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To start an in depth discussion among jurists on the human rights aspects of a medical topic deserves some courage. Jurists have never spearheaded revolutionary movements in human society and are famous for lying behind when it concerns the designing of a set of rules to cope with issues such as modern technology, computer sciences, environmental problems and genetic engineering.

We are now living eight years after the first person with AIDS was identified, six years after the first European countries started to issue their first AIDS specific regulations, four years after the European health authorities started with AIDS information and prevention campaigns, and two years after dr. Jonathan Mann, director of WHO's Global Programme on AIDS, first spoke about the third epidemic as the epidemic of social, economic, political and cultural reactions and responses to AIDS and HIV infection. We are now facing a situation of at least 25,328 persons with AIDS living with us in Europe (data WHO/GPA, 31 August 1989). Although the legal and ethical impacts of both the disease and the reactions it causes are widely acknowledged by now, it is an illusion to believe that we can make proposals for AIDS prevention and control policies to be designed. The foundations for such policies have, as we all know, already been laid. There are, however, many areas in which jurists can make a valuable contribution to improve the present situation. At present the cases of AIDS-related discrimination increase, instead of decrease.

For this reason I would like to congratulate the International Commission of Jurists (ICJ) for making AIDS and human rights a main topic of its annual meeting for the European sections. There is an urgent need for the views and opinions of jurists, particularly of jurists with a proficiency in human rights law. Despite the inspiring and coordinative role of WHO, and on Western European level the efforts by the Council of Europe and the institutions of the EC, to develop a common front against AIDS - and not against people with AIDS/HIV - there is a range of problems we are confronted with that cannot be solved as our legal framework is either insufficient or we do not know how to apply the provisions. This would be reason enough to convene this meeting, as health authorities, AIDS service organizations and, not in

the least, people with AIDS/HIV and those identified with HIV infection need our legal advice.

The ICJ is a respectable international NGO with certain authority in the international human rights community. Both governments and international organizations take good notice of its reports and recommendations. Together with the *Red Cross* (an international humanitarian organization) and the *Panos Institute* (an international information and policy studies institute) the ICJ was the first international human rights NGO that has consistently brought the human rights issues related to the AIDS epidemic to the attention of the UN organs, and public opinion in general. Despite these efforts, however, more action is needed to guarantee the rights and dignities of large groups of people.

As we, the participants of this meeting, all try to promote and protect universal human rights, without damaging the prestige of the ICJ, we should carefully analyze all the human rights issues related to AIDS and HIV infection before drawing conclusions and coming out with our statements.

I will not spend the limited time I have for this introduction to provide you with extensive factual information on AIDS and HIV prevalence in Europe, nor is it my intention to give you an enumeration of cases of AIDS-related discrimination in the various countries. I would rather concentrate on the major legal problems that have risen in the various Western European nations as a consequence of AIDS/HIV infection and, in relation herewith, the breaches of human rights as a result of the *social and legal* responses to AIDS/HIV infection. As it is my personal conviction that the outburst of cases of AIDS-related discrimination is rather a symptom of a society that discriminates against certain social and population groups than against this unique disease, I will try to point out the societal and legal structures that have enabled the massive impairments on the rights and freedoms of people with AIDS, HIV-positive individuals and people associated with the disease. I will further elaborate on the right to health care and the right to privacy, as it seems that - on a European level - there is no consensus on their substances and the rights and duties these basic human rights imply both for governments and for individual citizens. I will both come forward with examples of infringements on human rights caused by governmental (or lack of governmental) action and the attitude of fellow citizens.

As we cannot discuss these issues without having access to the measures enacted by the different Western European states and the epidemiological figures for each country, I wrote you a small outline with the most recent facts and data concerning AIDS, HIV seroprevalence and national actions to control AIDS and prevent HIV infection. I hope that all national sections have received by now at least one copy.

here is some general information that should be mentioned in an introductory survey on AIDS and human rights in Western Europe.

1. Different from the Third World countries, as reviewed by Katarina Tomasevski yesterday, the Western European countries belong to the so-called epidemiological *pattern one* area. WHO has made a global division of three patterns to describe the disease AIDS, which has demonstrated itself in various and disproportional ways. The characteristics of the pattern one countries are that HIV probably began to spread extensively in the late 1970s. Most cases occur among men with homosexual contacts and urban intravenous drug users. Transmission due to infected blood and blood products occurred between the late 1970s and mid-1980s. The male to female ratio is 10:1 to 15:1.

2. As concerning human rights it is important to note that the major UN human rights covenants and conventions have been ratified by almost all Western European nations. The European Convention of Human Rights (1953) and, to a lesser extent, the European Social Charter (1961) are binding and enforceable documents. Thanks to the activities of the Strasbourg Commission and Court a uniform interpretation and application - and thus enjoyment - of the basic human rights is pursued.

All Western European states have acknowledged the right of all human being to be treated equally under equal circumstances. There are legal prohibitions to discriminate on the basis of sex, race, political thoughts, religion, language and ethnic origin. The Western European governments have adopted policies to assist minority groups to emancipate, with the guarantee that they could uphold their own traditions and culture. The pluriform character of Western European society is taken as a matter of fact and it seems generally accepted that all individuals should have the right to develop their inborn talents and to take responsibility for their own lives, as long as the rights and freedoms of other citizens become not interfered with.

3. The Western European nations have a modern and developed health care system, particularly in comparison with the Third World region. As there are adequate systems for screening blood and blood products on infection with HIV, transmission through blood transfusions or the infliction of unscreened blood products can be reduced to an absolute minimum.

There are also extensive educational facilities, and modern means of communications (including satellite connections, telefax and multiple use of the telephone) have facilitated the possibilities for the authorities to inform its citizens on different issues in a relatively short space of time.

These characteristics are most relevant when discussing the AIDS epidemic and reviewing the AIDS policies that have been carried out by the various countries in an effort to control AIDS and to prevent new cases of HIV infection.

Now I come to my first thesis, which may be the basis for all furthergoing discussion today. I would like to advice you not to isolate the legal problems we encounter as a result of the AIDS epidemic, but to see them within a larger perspective. Throughout history our human societies have faced epidemics, and there have been more diseases that have caused millions of deads. In times of such epidemics it was quite common that certain groups became scapegoated, ostracized, segregated or quarantined. In this respect AIDS is not a particular disease.

Right from its discovery, that is to say in 1981, the disease was surrounded by mysteries, followed by accusations. It might have been easier to handle the disease if AIDS were affecting all nations and social and ethnic groups equally, but this is not the case. In Europe the disease immediately became identified with people of colour, male homosexuals, prostitutes, intravenous drug users, and to a lesser extent haemophiliacs, women, foreign students, refugees and immigrants. Different from previous diseases, where usually one social group became scapegoated, AIDS particularly was found among the members of groups that had traditionally been the subject of discrimination, stigmatization and legal restrictions or even legal sanctions.

In stead of giving objective information and encouraging people to take prophylactic actions, our press attributed the negative stigma's "promiscuity" and "drug abuse" to the disease and the persons who developed AIDS. People who had contracted the HIVirus "apparently" were "homosexual maniacs", "perversive individuals" or "people who made love with green monkeys". Entire social and ethnic groups became labelled and stigmatized. In Western Europe this holds particularly true for homosexual men, intravenous drug users, prostitutes, people of coulour, haemophiliacs and women in general.

According to the penal codes of most Western European societies persons who engage in prostitution or drug use commit a criminal offence. With still a few exceptions, homosexuality is formally legal in all Western European nations, although there are discriminatory legal provisions as concerning the age of consent, co-habitation, laws of succession, etc. People of coulour and women in general have always been in a disadvantaged and subordinate position, despite the number of specific anti-discrimination measures and treaties that have been enacted during the last 25 years. Both people of colour and women have always been considered as second rank citizens, the one's that could only get the lower paid jobs and lacked equal access to education, housing, property, insurance, etc.

In Western Europe the legal position of haemophiliacs can be compared to the position of people with AIDS and HIV-positive individuals in general. Despite the formal non-discrimination clauses and the good intentions of governments, people with a life inconvenience, a disease or a susceptibility to develop a disease are particularly vulnerable in our societies. As soon as an employer or insurance company finds out that a candidate-applicant has a certain (conceived) disadvantage, the employer or insurance company may give priority to other applicants that are considered to be healthy. Due to persistent misunderstanding and a lack of adequate information people with AIDS/HIV become evicted from their houses, expelled from schools and receive different treatment by health professionals, as everyone tries to protect him/herself from contracting the virus.

I dare state here that the legal problems we meet as a result of the AIDS epidemic are mainly, if not solely the tragic consequence of our legal system that has always neglected the rights and freedoms of some social groups and individuals with certain traits. As long as this gap in our national legislations, and in the international human rights system in general, is not filled it is hardly possible to solve the complex legal problems we meet today.

The rights, freedoms and dignity of people with AIDS/HIV and those identified with the disease become abridged both by public institutions, private companies and by fellow citizens. I will illustrate this by shortly analyzing two basic human rights, that seem to offer individual citizens different degrees of protection against arbitrary interferences in the various Western European nations.

1. *The right to health care* is a fundamental human right and as such laid down in the Universal Declaration of Human Rights (Article 25(1)), the International Covenant on Economic, Social and Cultural Rights (Article 12(1)) and on a European level in the European Social Charter (Article 11). The right to health care can be defined as the right of everyone to equitable access to the highest possible level of health care and health care facilities (see Preamble WHO Constitution).

In the present situation of the AIDS epidemic the right to health care would imply a duty for the governments, and especially the health authorities, to design a policy to counter the threat AIDS poses to public health with due regard to the other general human rights provisions. While access to the health facilities for people with AIDS/HIV should be guaranteed, according to international human rights law, restrictions upon basic human rights are only permitted if

a. there is a specific law,
b. the derogation is strictly necessary,
c. the derogation is strictly proportional and

d. the derogation must be for the protection of a legitimate aims.[1]

Public health policy should always in the first place aim at fighting the disease, and not at fighting the *persons* with the disease. As at present there is no cure for AIDS, nor is there a vaccine against HIV, health information and education are the most effective tools we have to curb the disease. This consequently implies an active state attitude, as efforts should be made to inform the overall population on riskful and *non*-riskful behaviour, and the measures that should be taken to prevent that the virus can pass to more persons.

In Western Europe we note, however, that HIV infection was identified among a selective number of persons belonging to certain social and ethnic groups, as mentioned before. It took several years before the health authorities took any noticeable steps to prevent these groups. The first AIDS-related regulations were exclusively aimed at screening the blood supplies, and other measures to prevent that HIV could pass within the health care settings.[2] It was not before 1985 that the first AIDS campaigns were launched by the authorities. The majority of countries did not start with any information or education campaign before 1987.

In the meantime organizations representing the groups hit hardest by AIDS had started targeting their own members with AIDS brochures, folders, telephone services, etc. This is particularly true for gay associations, haemophilia societies and, to a lesser extent, interest groups of prostitutes and drug users. Nongovernmental AIDS service organizations were set up in most Western European countries to provide additional information to citizens, or they served as umbrella organization for the NGO's already dealing with AIDS.

We can notice clear differences in the attitude of the public health authorities in the various Western European countries. In some countries, like Denmark and Norway, and to a lesser extent the Netherlands, Switzerland and Spain, the policy of health authorities corresponds to the activities already developed by the nongovernmental organizations. The AIDS information and prevention campaigns aim at passing health information both to the general public and to the groups considered to be "at risk".

1. Cf. Paul Sieghart, AIDS and human rights - a UK perspective, British Medical Association Foundation for AIDS, London 1989, p. 12.

2. Cf. Recommendation R (83) 8 of 23 June of the Committee of Ministers of the Council of Europe to Member States on preventing the possible transmission of AIDS from affected donors to patients or blood products, and Recommendation R (85) 12 of 13 September 1985 of the Committee of Ministers of the Council of Europe to Member States on the screening of blood donors for the presence of AIDS markers.

On the other hand there are countries, notably the United Kingdom, but also Belgium, France, Italy and Portugal, where the health authorities have hardly sought any collaboration with the already existing NGO networks and the population groups hit hardest by the disease. Instead of differentiated information campaigns, the AIDS campaigns often exclusively were (and are) directed to the so-called "general population" in these countries. While this information is of little use to men with homosexual contacts and intravenous drug users, the eventual target group had often difficulties in understanding the academic language used in the messages.

The right to health care also implies equal access to health care providers. Discrimination in the health care settings is reported frequently. People with AIDS and HIV-positive individuals have been denied treatment in most Western European countries. In some cases health care providers charged a higher price for the "apparent" risk to contract HIV during treatment. In the United Kingdom black HIV-positive and pregnant women are often urged to undergo an abortion, while white HIV-positive extensive psychological counselling.[3]

I hope that this Conference can give a clear and workable definition of the right to health care. I would suggest that such a definition should at least include a duty for the health authorities to provide accurate and up-to-date information for all individuals on the characteristics of the disease and how best people may protect themselves and others. The educational materials must be easily accessible and adapted to all different lifestyles and cultures that prevail within society. Special attention need to be drawn to the most affected groups. Health authorities must also counter misleading information, particularly if this encourages stigmatization or marginalization of certain population groups.

2. The second example I would like to discuss with you concerns the substances and the range of *the right to privacy*, particularly in the relationship citizen to citizen (the so-called horizontal relations).

The right to privacy is incorporated in both the Universal Declaration of Human Rights (Article 12), the International Covenant on Civil and Political Rights (Article 17) and the European Convention of Human Rights (Article 8). According to the text of Article 8(2) of the European Convention of Human Rights in case of a conflict of interests the right to privacy can only lawfully be interfered with under a limited number of circumstances. These are more or less the same provisions as mentioned before.

3. Study by dr Diane Richardson, University of Sheffield, Faculty of Sociology.

The right to privacy is the expressive recognition of the individual existence and as such individual autonomy. The European Court of Human Rights has said that the right to privacy consists *essentially* of the right to live one's own life protected from arbitrary interferences by public authorities (see *Belgian Linguistic Case*, 23 July 1968, A.6 1968). However, both the Court and the Commission have held that the right to respect for private life does not end there. The right comprises as well a duty for states to guarantee the enjoyment of this right, *also* in horizontal relations.[4] This would imply a title for individual citizens to positive state action in case this becomes violated by others.[5]

People with AIDS, HIV-positive individuals and persons assumed to be HIV-positive, report systematic violations of their identity, integrity, breaches of secrecy and arbitrary abridged by policies and measures both of state and of non-state actors.

A number of AIDS strategies proposed or adopted would appear to conflict with this basic human right. These strategies include mandatory testing for HIV, compulsory registration of suspects, the mandatory collection and storage of privacy related information, making AIDS or HIV infection notifiable diseases, the disclosure of testresults to third parties and the criminalization of behaviour considered likely to spread HIV. In each case, it is necessary to consider the issues of (a) lawfulness, (b) necessity, (c) proportionality and (d) the legitimacy of the aim.

Routine screening of certain population groups or the general population seems to be of little use in controlling or slowing down the AIDS epidemic. HIV transmission can only be slowed down through informed and responsible behaviour. It is important to note that substantial behaviour changes have occurred within the male homosexual community[6] in most Western European states as a result of the information campaigns and without any mandatory testing.

While the protection of public health seems to be the primary responsibility of the health authorities, individual citizens and private companies think that they should also take measures to avoid any contact with HIV and the people who carry the virus. There would not be any objection against this as long as the policies were aimed at controlling

4. Note however that Article 8(2) refers to "interference by a public authority".

5. Under the European Convention individual citizens have no possibilities to sue a fellow citizen before the Strasbourg organ, which implies that sufficient protection should be provided within the national legal order.

6. The Commission for Human Rights has refused to apply the protection of the right to respect for family life to homosexual couples, which is a denial of equal treatment for homosexuals as compared to heterosexuals who have the right to marry - D 9369/81 (UK), 3.5.83, 32/220.

AIDS and not at excluding people with AIDS and HIV-positive individuals. There appears to be evidence that the rights and dignity of these people and all those identified with the disease become infringed, and in particular their right to privacy. It is doubtful if such policies make any positive contribution in fighting AIDS.

I will mention some practices reported from most Western European states, where there is a clear conflict with the right to privacy and where the authorities - except France, and to a lesser degree Sweden - have not adopted any measures to counter these infringements:

a. AIDS and work. For financial reasons and out of fear for "infection" or "social unrest" among the employees, employers seem to be unwilling to hire people with AIDS or HIV infection. Although health professionals in most countries have decided not to engage in systematic pre-employment HIV-testing, there is strong evidence that this rule is not always observed. Some companies explicitly require their employees to undergo a HIV-test - like some airline companies -, while others consider candidate-employees that refuse to undergo a HIV-test to belong to a "high risk" group. HIV seropositivity or refusal to undergo a test can both result in self-exclusion for a job or dismissal. An infringement upon the right to privacy, notably the decision to undergo a test, the willingness to be confronted with health related information and the willingness to pass this information to others, has clear implications on the right to work.

b. Insurance companies, particular life insurance and labour disability insurance companies, perform similar policies. In most countries insurance companies are even allowed to require applicants to present a HIV free certificate for policies above a certain sum of money. Under this sum, the companies make fierce efforts to obtain any additional information concerning the applicant's lifestyle, civil status and sexual orientation. Questions concerning previous venereal diseases are used as a check to what extent an applicant might belong to a "high risk" group. In some countries, notably the United Kingdom, Ireland and the federal Republic of Germany, applicants who voluntarily took a HIV-test are automatically charged higher premiums or, in case of a positive testresult, are denied insurance. People who voluntarily let themselves tested apparently consider themselves to be a person at risk. Single men in the age group 30 to 45 years are also charged higher premiums. In Amsterdam homosexual men that participated in a long-term behavioural study became excluded from insurance.

As long as insurance companies are free to pose all kind of privacy related questions, the right to social security of a large group of people is at stake. We have to be aware that we can not test for HIV seroposi-

tivity but within a couple of years it will be possible to detect all kind of genetic defects and susceptibilities.

3. The enjoyment of privacy and private life becomes threatened as well by the unrestricted disclosure of privacy related information. Some health professionals consider it their responsibility and task to pass all kind of information on their patient's or the testee's health status to the parents, the partner, employers and insurance companies. Neighbours inform landlords and boards of school on the fact that their tenants or students are carriers of the HIVirus. Sometimes even our press considers it important to inform its reader that mr./ms. X was found HIV-positive.

You can imagine the effects: dismissal, denial of social services - sometimes including health care -, eviction from houses, expulsure from school - or even countries -, segregation, discrimination, etc. As long as the right to privacy becomes not more strictly defined or, more in particular, as long as the safeguards to enjoy the right to privacy are insufficient, it is very difficult to guarantee people with AIDS, HIV-positive individuals and all others identified with the disease the full enjoyment of human rights.

CONCLUSIONS

I hope that this small survey on AIDS and human rights will be helpful for our later on discussions and finally the decisions this Conference will take upon designing a specific ICJ policy on AIDS. As I stated before I would recommend you to see AIDS within a wider perspective. On the one hand we should be aware that most of the groups that encounter AIDS-related discrimination are the same groups that traditionally met (and meet) discrimination and marginalization. The general legal status of these groups should be taken into consideration. We should draw special attention to the rights of patients (or, the consumers of our health care system) and those with demonstrable or assumed susceptibilities. There is no legal protection against discrimination on the basis of health status, although there are many situations in which such discriminations can be said to impair the foundations of our legal system.

Their right to privacy needs to be strengthened, as under the present conditions individual citizens are often obliged to undergo a medical examination for all kind of services and to pass all kind of privacy related information to unknown persons and institutions. Their names and information concerning their health status become stored in both

public and private data files.[7] There is strong evidence that individuals cannot avoid that large groups of persons have access to these files.

I hope that my introduction has given you some thoughts for discussion. I will be happy to answer any questions you have concerning the issues I raised, or herewith related.

7. Cf. Resolution R (73) 22 of 26 September 1973 on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector, European Yearbook XXI (1973), p. 361.

AIDS IN PRISONS

Cecilia Thompson
Assistant to the Secretary-General, ICJ, Switzerland

With the increase of persons infected with the virus or suffering from AIDS, human rights violations in general and discrimination in particular will reach serious proportions. Public health programmes, education and counselling aimed at the control of the disease will be undermined if the fundamental tenets of human rights are not respected. Why discuss AIDS in prisons and why is it so important to focus on the respect of prisoners' rights with regard to AIDS?

The prison population in Europe reflects the distribution of at-risk groups for HIV in the general population. The results of a number of studies have shown that 20 to 30% of inmates in European prisons have a history of intravenous drug use — the second most important mode of transmission of the AIDS virus; the prison population is predominantly comprised of young men and sexual promiscuity before entry is a common phenomenon.

Reactions of fear and uncertainty in the community at large are reflected within prisons but amplified due to their closed and authoritarian environment.

The prison population has a rate of seropositives estimated at 50 to 200 times higher than in the overall community.

The drug user is especially at risk of the non-respect of human rights and is already marginalized and stigmatized by society and therefore also much more vulnerable to fear, ignorance, defeatism and discrimination. Prisons are a place where the defence of human rights assumes special importance and can therefore be regarded as a test case in the respect of human rights of all prisoners whether infected or not, and in ways of managing the AIDS crisis in such a closed environment.

In 1985, panic reactions leading to disorders were reported among prisoners and prison staff in many prison establishments in Belgium, France and Germany. Elsewhere there was mounting concern about the risks of AIDS transmission in prisons.

The Irish prison administration solicited the Secretary-General of the Council of Europe to request information from Member States on the problems caused by AIDS in prisons and the reactions of prison staff to the crisis. A study was undertaken in 1987 and updated in 1988 and its results presented by Dr. Harding of the Institute of Legal Medicine in Geneva. The objectives of the study were to assess the general situation in European prisons and to investigate the types of responses to the management of AIDS.

CURRENT SITUATION

Data collected from 17 countries in the Council of Europe provide evidence of a strong correlation between drug use and AIDS in prison, and it has been estimated that over 10% of the inmates in prisons in Council of Europe Member States are seropositive.The management of seropositive prisoners and AIDS cases vary from country to country. In 12 countries, testing is available to all prisoners belonging to at-risk groups on a voluntary basis. In three countries testing is carried out on request only, in two (Italy and Luxembourg) all new in-coming prisoners are tested, and in Portugal all detainees are tested.

Confidentiality of test results is specifically mentioned in Austria and Switzerland. In most of the other countries, information on test results is needed for adequate measures to be taken by the prison authorities.

As to the treatment of those infected, in six countries (Austria, Denmark, Spain, Portugal, Italy and Switzerland) seropositives are not treated any differently than other prisoners, in Norway violent seropositives are isolated from other inmates, and in Belgium and Germany infected persons are isolated in single cells. In some countries decisions as to the management of seropositive prisoners rests not only on medical considerations. In Germany, prisoners who are infected have no access to kitchens and certain workshops in order to avoid anxiety among fellow prisoners and in the UK isolation may be decided upon for administrative reasons in order to prevent outbreaks of panic among prisoners and staff.

WHY IS AIDS IN PRISONS SUCH AN IMPORTANT ISSUE?

The linking of AIDS with prisons has tended to create the false impression that prison is a major risk factor in the AIDS epidemic and that therefore exceptionally harsh measures are justified. Prisons are portrayed as a closed world, in isolation from the rest of society and yet there is a constant flow between prisoners and the general population. Homosexuality in prisons constitutes a 'bridge' between a known high risk group, drug users, and individuals who may later become a source of infection through sexual contacts. For this reason, control strategies of AIDS in prisons could well provide a key to the fight against the disease and it is therefore imperative to limit this 'bridging' phenomenon.

STRATEGY

Although it would seem easier to impose very strict controls in a closed environment such as the prison, improving conditions of life, increasing the number of staff and avoiding overcrowding will prove a

much more viable strategy and provide greater respect of human rights. As emphasized in the clear and useful recommendations of the WHO consultation on the control of AIDS in prisons held in 1987, for both practical and ethical reasons, measures adopted in prisons should follow closely the strategy for the community in general.

A coherent strategy is needed to deal with the AIDS epidemic in prisons. This should respond to:

- *Public health* aspects by limiting the spread of the epidemic within the prison and following release; and
- *Human aspects* preventing irrational fear and panic among staff leading to segregation, ostracism and discrimination.

The approach should therefore stress the individual responsibility of each prisoner who should act responsibly with regard to his own health and the consequences of his behaviour. Concrete measures are thus necessary to control HIV infection in prisons and prevent unnecessary alarm and inappropriate responses by staff and prisoners.

MEASURES

- Personnel to be informed about AIDS and other communicable diseases;
- Information to be provided to the detainees on the risk of AIDS thereby giving them an opportunity to take prophylactic measures;
- Condoms to be made available on demand, before their leave and ultimate release;
- Provision of a household detergent (bleach) to be considered. This can be used as a disinfectant for needles and syringes employed for intravenous drug injection;
- Tests should be available upon request and counselling beforehand to be stressed since the normal support system is unavailable in the prison setting. The results of the test are only to be communicated to the person and not to prison staff;
- Isolation is not justified under any circumstance and prisoners are to be allowed to work in all settings;
- Detainees must be provided with good food, and adequate medical care in order to prevent the rapid occurrence of complications of AIDS; and
- Prisoners with AIDS should be considered for compassionate early release to die in dignity and freedom.

It is clear that ethical and scientific standards in the control of HIV and care of prisoners with AIDS do not correspond to those accepted for the community in general. Conditions in prisons need to be improved along with the structure of health care delivery. It is important that prisons are visited regularly on an ad-hoc basis to assess the prevailing conditions, that consultations with prisoners can be held in

private so as to air grievances about human rights violations and international standards concerned with the treatment of prisoners and the duties of medical personnel be enforced.

THE CARE OF HIV-POSITIVE PRISONERS IN THE AUSTRIAN PENAL SYSTEM

Dr. Neider
Secretary-General of the Austrian Jurists' Association

Medical measures concerning prisoners on remand and prisoners serving sentences who are HIV-infected or suspected of being infected

Corresponding to the recommendations of WHO, the Council of Europe and the Austrian physicians, testing of prisoners is carried out only upon their consent.

Up till now, tests have been carried out in Austrian prisons and other penal institutions among particular risk groups and results are generally the same as in other European countries. There is an especially high number of seropositives in Austrian institutions for drug addicts. Intense therapeutic care in these institutions alleviates the psychic burden of a person informed that he/she is seropositive.

Since April 1988, the figures for Austria are as follows:

Distribution among the sexes:
148 males, 20 females;

Distribution among risk-groups:

Homosexuals/Bisexuals	85
IV drug users	40
Hemophiles	13
Homosexuals/Bisexuals and IV drug users	2
Transfusions	6
Risk unknown	17
Heterosexual contacts	5

Testing should be done periodically since the incubation period is so extended, however, this is difficult since the prison population is fluctuating (especially among prisoners on remand).

All preventive measures must be based on the assumption that any prisoner constitutes a danger to others by reason of his behaviour. Hence, the Ministry of Justice issued information leaflets and posters which have already been published by the Ministry of Health in 1985. These are available to all prisoners.

The Federal Ministry of Justice is dependent upon the advice of the medical specialists and has contacted the AIDS ward at the dermatological clinic of Vienna, the psychiatric clinic of Vienna and repre-

sentatives of the AIDS assistance programme. Moreover, the medical specialist of the Institute 'Favoriten' dealing in particular with drug addicted criminals has, for years, been involved with the problem of AIDS on both a scientific and practical basis.

According to existing legislation including the penal code, the hospital act, the physicians' act and the AIDS act, the transmission of information concerning an HIV-infected prisoner is prohibited in principle. However, according to the penal code, the director of a prison is bound to notify authorities when an HIV-infected prisoner poses a concrete threat to others by reason of his behaviour. According to current scientific knowledge, the disease is not transmissible as long as the limits of casual social contacts are not transgressed.

The city of Vienna has recently established a ward in the pulmonary centre for AIDS patients and there is a closed ward for HIV-infected prisoners to facilitate medical care.

Intravenous HIV positive drug users pose a particular medical problem. The Austrian health authorities decided to provide a methadon programme for this group of patients in order to avoid continued exchange of needles. Prisoners also have access to this programme. Moreover, the Austrian drug act provides that the carrying out of a sentence can be stayed if the HIV-infected prisoner attends a drug assistance programme on a regular basis. A further problem arises from the fact that according to the Austrian penal code, a prisoner with AIDS can only be released if he already had symptoms before entering prison. According to the law, the HIV infection alone cannot be a reason for early release, because according to the WHO definition, infection itself does not imply symptoms. In this regard, the Ministry of Justice is considering legislation.

Information for the staff of prison institutions

With regard to the threat posed by HIV to the prison staff, an extensive information campaign was launched involving medical specialists and experts form the Austrian AIDS assistance.

In particular each staff member of the penal institution received general directions which have been published by the health authorities for physicians and nurses. Continuing education courses were organized with all of the Austrian prison directors and prison doctors comprising a psychiatrist and a medical specialist who is appointed by the Ministry of Justice.

For over two years, court officials have been provided with disposable gloves which are break resistant. After initial fear, the situation has been stabilized by the above-mentioned measures.

In general, the increase in the number of HIV-infected persons has not been as dramatic as initially feared. The subject of AIDS has therefore disappeared from the daily media, one of the factors which had led to this fear.

THE PROVISION OF LEGAL SERVICES FOR PEOPLE WITH AIDS

Peter Ashman
Legal Officer, Justice, London, UK

Specialised legal services for People with AIDS (PWAs) in the United Kingdom is provided by the voluntary sector, particularly two groups: the Legal Centre of the Terrence Higgins Trust (THT) (the leading AIDS NGO) and Immunity, a legal advice service set up because of the needs of patients at St. Mary's Hospital, a leading AIDS hospital. Both organisations started out with voluntary input from lawyers and both now have a full-time lawyer working with them. In addition, the Legal Centre runs a legal telephone line open between 7 p.m. and 10 p.m. staffed by volunteer lawyers who provide advice.

The case load of these bodies has risen with the increase in the number of PWAs and persons infected by the HIV virus. The Legal Centre dealt with 42 cases in 1985, 244 cases in 1986 and 643 cases in 1987 and it now averages 700 cases per year. These range from simple telephone advice to legal proceedings at all stages up to trial. In the United Kingdom, some 2,000 people have been diagnosed with AIDS up to 1989 but some 60,000 to 100,000 people are estimated to be infected with HIV. All of these could potentially develop AIDS.

The areas in which advice and assistance are given include:

a) Insurance, mortgages and pensions;
b) Medical matters - testing for HIV infection, complaints about treatment and AIDS and HIV-related legislation, e.g. the power to compulsorily detain in a hospital;
c) Wills and Powers-of-Attorney and the winding-up of Estates;
d) Social welfare provisions (contributory, non-contributory and means tested benefits);
e) Housing - advice for tenants and landlords on homelessness, problems with rent and owner-occupation, transfer of tenancies and repairs;
f) Employment including advice for employees and employers, employment policies, health and safety at work, unfair and wrongful dismissal, pension and sick leave rights;
g) Immigration - rules and practice of the UK and other countries in relation to AIDS and HIV;
h) Debt problems; and
i) Family law - custody, adoption and care of children with HIV.

Most of these services are provided free of charge but where the clients are eligible for legal aid or can afford to pay, then a contribution is made. The THT Legal Centre tries to identify sympathetic lawyers to whom reference can be made, particularly for persons living outside London. Lawyers in the UK cannot refuse to accept clients on the grounds of race or sex, but they can on the basis of sexual orientation and health. There have been instances of lawyers who have refused to have as clients PWAs, or drug addicts or homosexuals.

The official legal bodies, the Law Society and the Bar Council, have themselves undertaken no work in relation to these specific problems of PWAs and have given no practical assistance to NGOs specialising in legal services. The THT Legal Centre is recognised as an official legal advice centre for professional purposes but this is the extent of the recognition. There appear to be no official attempts either at sensitising the profession to the particular needs of PWAs or of ensuring that the profession sees it as part of its function to ensure that adequate specialised legal services are provided to PWAs, either directly or by funding groups such as the THT Legal Centre.

The high level of case work, which is inevitably time intensive, prevents the specialised NGOs from playing a full part in the development of policy strategies relating to PWAs both on a national and international level. As a consequence, this is left to NGOs which campaign for the rights of homosexuals and drug users.

Legal Services Overseas

In the USA there are similar legal advice centres in San Francisco and New York, and State Bar associations in many states are beginning to assist in the establishment of such centres in recognition of the special legal problems of PWAs. It is not known whether there are any such advice centres working in Continental Europe. Nor is it known whether there are any such bodies working in other areas of high incidence of AIDS, such as Africa and South East Asia.

The growth in the rate of HIV infection and the consequent increase in the number of PWAs is likely to lead, in the next few years, to increasing numbers of people with particular legal problems related to the disease. The legal profession in the UK does not appear to be ready to deal with that both in terms of the adequacy of the services provided as well as the attitude of the profession to ensuring that such services are provided without discrimination.

RAPPORTEURS' REPORTS

AIDS AND HUMAN RIGHTS

THE PROBLEMS OF AIDS AND HUMAN RIGHTS GENERALLY AND IN THE THIRD WORLD IN PARTICULAR

presented by Katarina Tomasevski,
rapporteur: Leah Levin

On this topic, questions were raised about the difficulties in obtaining sufficient information on the number of persons with HIV/AIDS. WHO statistics probably underestimate the real number of persons affected by the HIV virus or AIDS.

Getting more reliable information is difficult because this can only be made available after (complete) screening (i.e. by testing only certain sectors of the population or by taking blood samples), whereas *compulsory* screening is objectionable on human rights grounds.

In her introduction, Dr. Tomasevski mentioned various human rights issues related to HIV infection and AIDS such as the right to privacy (publication of test results and compulsory screening), the right not to be discriminated against, the right to freedom of (international) movement (entry restrictions, testing only certain groups of people or persons from certain countries) and the right to medical health care, which may be jeopardized by the high costs of treatment.

Furthermore, the pressing need for reliable information on the dissemination of HIV, the number of persons affected by it, and the proper way to treat them while respecting their human rights was stressed.

AIDS AND HUMAN RIGHTS IN EUROPE

presented by Aart Hendriks,
rapporteur: Dr. Alpha Connelly

Although many European countries have ratified human rights instruments and despite the fact that facilities for the treatment of sero-

positives and AIDS patients are available in Europe there is nevertheless reason to pay attention to HIV-infected persons and AIDS patients. Especially where homosexuals, prisoners, foreigners and prostitutes are concerned, the danger of discrimination and stigmatization is real. HIV infection and AIDS should first of all *not* be considered as a special kind of disease, but measures to prevent HIV infection should be aimed at combatting the spread of HIV infection, not at the persons suffering from the effects of it. As far as the right to medical care is concerned governments are responsible to develop effective policies on HIV and AIDS. Furthermore, rational and objective information about the dissemination of HIV is needed. During the discussion it was pointed out that both national and international legislation may not be sufficient to prevent the adoption of measures such as HIV-testing of students as was considered in Bavaria (on grounds of the need to protect the rights and freedoms of others). Suggestions were made to add to the non-discrimination clauses (Article 14 of the ECHR and Article 2 of the ICCPR) the ground 'on health status' before 'other status' and to draw up a declaration on the prevention of discrimination on grounds of AIDS.

Furthermore, the issue of testing immigrants was raised: this may jeopardize the right to freedom of movement, is unjustified, in particular, because those tests are always *selective*, *tend to be discriminatory* and may lead to false medical certificates in cases where such documents are required. Another issue discussed was whether or not the partners of HIV-infected persons should be notified about test results. It was stated that this information should only be transmitted on a *voluntary* basis.

The problem of the relationship between HIV infection and life insurances and employment was discussed. In this respect the question was put forward concerning the extent insurance companies may distinguish groups of lower or higher risk (e.g. HIV-infected smokers) and their responsibility with respect to human rights.

AIDS IN PRISONS

presented by Cecilia Thompson and Dr. Neider,
rapporteur: Wolfgang Peukert

Special attention was given to prisoners in relation to HIV infection and AIDS, because of the relatively high percentage of HIV infection or AIDS patients. This is because drug users often continue to use drugs in prison.

The problem of the spread of HIV/AIDS is difficult to solve as it has been proven very difficult or even impossible to combat the use of

drugs in prison. Therefore, and alternatively, certain other measures seem to be more appropriate, such as:
- starting a methadon programme; and
- distributing clean needles or providing facilities to clean needles;

These measures can however give rise to other problems, as some states consider the possession and distribution of needles a punishable offence.

A second problem mentioned is that of *homosexuality* in prison, often in combination with violence/coercion. Suggested remedies in this area are: making condoms available for every prisoner, preferably by free distribution. Otherwise condoms will have to be sold upon request. This latter measure may increase the danger of infection by sexual contacts, since prisoners may prefer not to ask for them. Thirdly, in relation to this item, again the need for reliable information was stressed with respect to the spread of HIV infection.

Screening of prisoners should not be compulsory, and information about test results should not be transmitted to the staff or board of the prison or institute, because this might lead to discriminatory measures such as segregation or even isolation.

PROVISION OF LEGAL SERVICES FOR PEOPLE WITH AIDS

presented by Peter Ashman,
rapporteur: Aleidus Woltjer

Legal assistance to HIV-infected persons or AIDS patients e.g. in cases concerning discrimination in the field of housing, labour and medical care, is very important.

In order to provide adequate legal assistance, it is important that legislation is monitored and that *rational* objective information about HIV infection/AIDS is available to the public in general and to judges and lawyers in particular.

A particular problem in this field is whether or not a *lawyer* has the professional obligation to accept clients who are HIV-infected or have AIDS (e.g. in the UK there is no professional obligation).

This was followed by short reports by all the sections on the situation in their respective countries. It appeared that in many of them legal assistance to HIV-infected persons and AIDS patients does not differ from legal assistance given to others. In Finland it is a legal obligation to report HIV cases, although measures are taken to ensure confidentiality of test results.

In Sweden, compulsory treatment exists in cases where HIV-infected persons or AIDS patients have been identified. In general, the need

for more detailed information on legislative and judicial measures in the field was expressed.

DISCUSSION ON NATIONAL POLICIES AND ICJ GUIDELINES ON AIDS

A committee drew up a set of draft recommendations which were adopted by the participants after a number of amendments were made.

RECOMMENDATIONS FOR FURTHER ACTION TO COMBAT AIDS-RELATED VIOLATIONS OF HUMAN RIGHTS

Preamble:
The participants in the conference of the European Sections of the ICJ, meeting from 20 to 22 September 1989 in the Hague,

considering that various measures of governments aimed at preventing the spread of the HIV virus pose serious risks to the human rights and the human dignity of an increasing number of people in many parts of the world;
realizing that many of these measures discriminate against specific groups, such as homosexuals, intravenous drug users, haemophiliacs and people from the Third World, who are already often discriminated against;
welcoming the role of the ICJ in bringing the problems of AIDS-related discrimination to the attention of inter-governmental organizations and the public at large;
agreeing that the ICJ and its national sections should continue to give their activities in this area high priority;

RECOMMEND

1. That the Secretary-General of the ICJ request the Secretary-General of the Council of Europe to exercise her power under Article 57 of the European Convention on Human Rights to make a request to State Parties to the Convention to furnish information on how their domestic laws and practices with regard to persons with AIDS and seropositives comply with the Articles of the Convention, in particular those rights concerning freedom from inhuman or degrading treatment, liberty and security of the person, freedom of movement and the prohibition of discrimination.

2. That the Secretary-General of the ICJ arranges for fact-finding missions to countries, particularly in western Europe, to investigate AIDS-related discrimination and to report the results to the international community.

3. That the Secretary-General of the ICJ requests the European Committee for the Prevention of Torture to study the treatment of prisoners and other persons deprived of their liberty in respect of AIDS and HIV problems.

4. That the European sections of the ICJ arrange seminars for judges and lawyers on the legal and factual issues concerning AIDS-related discrimination, or request their governments to do so, and invite the participation of the World Health Organization in such seminars.

5. That the European sections report to the ICJ practices and legislative provisions of their countries related to AIDS which are incompatible with human rights.

6. That the European sections of the ICJ approach the governments in their countries with a view to ensuring that persons with AIDS and seropositives receive adequate legal services on a basis of non-discrimination.

7. That the European sections of the ICJ, in their work concerning AIDS-related discrimination, should examine the concept of "discrimination" to determine what is, and what is not, justifiable in order to preserve a balance between the rights of persons with AIDS and seropositives on the one hand and uninfected persons on the other hand and should pay particular attention to:

(i) entry restrictions
(ii) compulsory screening
(iii) confidentiality of test results
(iv) insurance issues
(v) equal access to employment
(vi) prisons
(vii) prostitution
(viii) drug use
(ix) access to and use of health services

TOPIC TWO

EUROPEAN SOCIAL CHARTER

EFFECTIVENESS OF THE EUROPEAN SOCIAL CHARTER

Rudolf Machacek
Secretary-General of the Austrian Section

Human rights in Europe are based on the following instruments: the Universal Declaration of Human Rights of 1948, the European Convention of 1950 and the European Social Charter of 1961.

It is obvious that the possibilities and the mechanisms of these European human rights instruments vary considerably.

A precondition for the effectiveness of human rights and their application is above all the existence of institutions capable of guaranteeing their observance.

The effectiveness of human rights is guaranteed by the wording of the instruments' provisions and the regulations which govern the supervisory organs.

It is necessary to inform the citizens of States Parties of their rights, and - even if they are not able to take legal action themselves - of their implementation procedures. Unfortunately the control system of the Charter is widely unknown.

No international instrument can serve as an absolute guarantee of human rights. Improvement of existing instruments of implementation are desirable, and should be enforced although social and economic rights are not legally enforceable by a national court. The only institution that can deal with complaints is the European Court set up under the European Convention.

It is domestic law that has to ensure, in a sufficiently precise and detailed manner, that economic rights are enforceable in a court of law.

It has been argued that the economic rights enshrined in the Social Charter are fundamentally different from civil and political rights as protected by the European Convention. Civil rights, it is said, are negative rights and their implementation is cost free, whereas social rights are positive and costly. They require action by the state. Though economic, social and cultural rights are broadly recognized, corresponding obligations are not.

There are three levels on which state responsibility for social rights has to be examined:

- the obligation to respect;
- the obligation to protect; and
- the obligation to fulfill.

The realization of social rights may vary from country to country. Different governments may find different approaches. However, in order to ensure the pragmatic realization of social and economic rights, it is necessary to at least strive for a minimum threshold approach, some measure of control and basic development.

Part IV of the Social Charter provides for an effective system of supervision of the contracting parties so as to determine whether their social systems adequately fulfill the obligations they are bound by. The Charter states that the contracting parties shall send reports to the Secretary-General of the Council of Europe at two-yearly intervals. A committee of experts of the highest integrity and of recognized competence shall give its opinion on these reports. The conclusions of the experts shall be submitted to a sub-committee of the governmental social committee. The results are then communicated to the consultative assembly whose views shall enable the committee of ministers to make the necessary recommendations.

The Guist report of 1985 stated that the instruments of the Social Charter are hardly known to the public - a poor achievement considering that it has existed since 1961. The system of reports and conclusions boils down to an academic exercise confined to a mere exchange of information. I quote the Guist report: the supervisory procedure slowly became an obscure and complicated exercise devoid of any external impact. The governmental committee interpreted its rôle as that of a critique of the independent experts. This dialogue resulted in obscuring the serious problems with which we are confronted and this in spite of the intention of the Social Charter to develop a European social dimension.

This critique was made five years ago. I am sorry to say that hardly anything has changed for the better.

This meeting cannot alter the facts. But what we can do is to point out the difficulties. We could make some recommendations to the States Parties of the Social Charter, to national, governmental and non-governmental organizations and specialized agencies. The Member States of the European Community should agree on a parcel of social rights. The supervisory mechanism of the Social Charter should be strengthened. In this way wider publicity would be given to the conclusions of the independent experts and public debate stimulated. This may also lead States Parties to report on progress achieved in the implementation of social rights.

This may not be realistic but I personally wish to make one additional recommendation: the specialized agencies should be entitled to bring States Parties before a national or international court claiming a breach of obligations under the Charter.

Almost five years ago, the Guist report was published. Is it too much to hope for that words will be translated into action and the Social Charter become more credible with increased effectiveness?

THE PROMOTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, WITH SPECIFIC REFERENCE TO THE EUROPEAN SOCIAL CHARTER

Prof. Dr. Oswin Martinek, Vienna

He who deals with an international guarantee of economic, social and cultural fundamental rights must take into account activities to date and future aims set by the Council of Europe. Even the Preamble and Article 1 of the Council's Statutes specifically stress as one of the most important endeavours of its future policy the keeping up to date of the provisions on human rights. In addition to aims at European unity and the promotion of social progress, the protection and realization of human rights is envisioned as a highly important concern of Member States. The latter is to be wholeheartedly promoted by all its offices.

The Parliamentary Assembly, in utilizing its far-reaching competence in connection with an effective protection of human rights by the Council of Europe, undertook two important endeavours. First, on November 4, 1950, it created the Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention), to be followed by seven Supplemental Protocols. Ten years later, it presented the European Social Charter (SC), which became open for signature at Torino, Italy, on October 19, 1961.

Despite the considerable time that elapsed between these two important international documents, their common intentions should not be overlooked.

The SC is seen as the opposite of the Human Rights Convention. The former was drafted with the specific intention of supplementing the latter. While the Human Rights Convention contains the traditional, liberal fundamental rights, the SC covers the economic and social areas of European human rights protection. Their overall protection rests on these two pillars, the effectivity of which shows vast differences due to existing enforcement mechanisms (see Oehlinger, "Die Sozialcharta" - in the following referred to as 'SC1' - published 1988 in "Österreich im Europarat 1956-1986", pp. 231 ff; "25 Jahre SC" - in the following referred to as 'SC2' - published 1986 in "Festschrift für Dallinger".

In recent years, topics on social affairs questions dealt with by the Council of Europe have increased in substance and extent. In this connection, their interdependence with human rights and, especially, fundamental social rights, needs to be stressed. Accordingly, the Parlia-

mentary Assembly recommended the inclusion of economic and social fundamental rights into the Human Rights Convention by way of a Supplemental Protocol, as well as the addition of further fundamental rights to the SC. The foregoing was contained in Recommendation No. 838 (1978) on the extension of the material applicability, and in Recommendation No. 839 (1978) on a revision of the SC (see Wiebringhaus, "Internationaler Schutz wirtschaftlicher und sozialer Grundrechte", published 1980 in "Festschrift für Weissenberg", pp. 299 ff).

An inclusion of economic and social rights into the Human Rights Convention was never accomplished. However, the SC was expanded by a Supplemental Protocol, which was adopted by the Committee of Ministers of the Council of Europe on November 26, 1987. It became open for signature on May 5, 1988. Such an expansion was obvious. The SC is the most important instrumental basis for all social affairs activities, having been ratified by 14 of its 23 Member States. This was rightfully stressed by Wiebringhaus (see BArbB 1 d BRD 11/1982, p. 5). Oehlinger is of the same opinion (see SC1, p. 282).

Drafted, as mentioned earlier, as the Human Rights Convention's complement, the SC serves to guarantee fundamental rights in the economic and social areas through its own mechanisms. These rights include the right to work and to just working conditions; to collective bargaining; to organization; to fair remuneration; to social protection and care; to vocational training; the right of the family to social, legal and economic protection; etc. The SC was signed at Torino, Italy, 25 years ago. Through dynamic developments in many Member States, the Charter now requires improvements and amendments. This fact was taken note of. The Steering Committee, on order of the Committee of Ministers, for a considerable amount of time worked towards a Supplemental Protocol to the Charter, examining the possibility of an expansion of individual rights in the social field, as well as the improvement and enforceability of rights and standards laid down in the SC.

It was necessary to determine whether the envisaged additions should be made to the Human Rights Convention or to the SC. The 7th Supplemental Protocol to the Human Rights Convention, signed by Austria in March of 1985 and approved by the National Council (Nationalrat) on April 3 of that year, originally led to the wrong conclusion that the international instrument was gaining preponderance.

In the meantime, work on the expansion of the SC by means of a Supplemental Protocol has been completed. During the deliberations it emerged that there would be marked limitations vis-à-vis original ideas and expectations as to what should be laid down in the Protocol being drafted.

The new measures envisaged by the new Supplemental Protocol to promote the protection of social and economic rights laid down in the original Charter, include the following:

- The right of all workers to equal opportunities and equal treatment with regard to employment and occupation, without discrimination based on sex;
- The right of workers to information and hearing within the plant;
- The right to workers' participation regarding determination and improvement of working and environmental conditions in the plant;
- The right of older persons to social protection.

This new Supplemental Protocol marks the completion of the task put to the Steering Committee on Social Affairs, i.e., to examine the rights laid down in the SC in an effort to bring them up to date and to supplement them. The question whether certain rights should be transferred to the Human Rights Convention was no longer dealt with. The new Supplemental Protocol, which is now open for signature by Member States, contains standardizing proposals for rights to be included in the SC.

The Supplemental Protocol constitutes a document which, "in certain ways is a continuation of the SC, but, from a legal viewpoint, stands on its own". It is patterned after the structure of the SC. The general listing of new rights and principles is followed by a detailed and standardizing description of these rights, including exact obligations to be assumed by Member States. The introductory sentences of these parts of the Protocol, for reasons of harmony, are identical with those of the Charter. They are followed by special parts on the duties of the contracting parties regarding performance and monitoring. Again, they are patterned after comparable portions of the SC.

The inclusion of these new legal items of fundamental rights' value constitutes an important and material rise in value of the Charter itself. Since they are rights that, in a traditional sense, are suitable bases for court actions, they will benefit future discussions regarding legal protection. The Protocol will not, however, result in changes in the monitoring mechanism, deemed by many as being in need of improvement. Mention must be made of the Guist Report, the report of the Parliamentary Assembly, the approach by the Committee of Ministers, proposals by the Independent Experts, the subject working group, and proposals put forward by Oehlinger (see SC1, pp. 239 ff; SC2, pp. 359, 364 ff). The latter finds fault with the fact that criticism put forward by offices of the SC regarding negligence by Member States in meeting their obligations, is not legally binding. The situation is different regarding the Human Rights Convention and decisions rendered by the European Court for Human Rights.

Oehlinger demands more effictivity for the supervisory machinery of the SC. In his opinion, any right is valuable only to the extent of its being attainable.

According to Machacek, the weakness of the SC is in the area of legal protection. In reciprocal action thereto is the diverse treatment of inclusion and application of provisions of the SVC in Member States, as is with fundamental social rights in general (see Machacek, "Die Justitiabilität sozialer Grundrechte", published 1988 in "Festschrift für Schnorr", pp. 521 ff and 549).

Machacek and Oehlinger draw appropriate conclusions regarding possible court decisions on fundamental social rights. According to Oehlinger, the SC shares the fate of social fundamental rights and their unsolved problems in principle. They lack constitutional rank and enforceability (see SC1, p. 234). In Machacek's view fundamental rights can only be those that are accessible to judicial action in some manner, with due account being given to a division of power (see "Die Justitiabilität", p. 548). When accepting and adding fundamental social rights, the material as well as the formal legal basis must be fine-tuned in order to make litigation possible. In this connection, one must keep in mind that the internal absence of social fundamental rights in Austria is contrasted with a tremendous number of such rights laid down in international instruments that are binding on Member States under international law. These are, to some extent, faced with reservations put forward, that factually deny individual rights, the entitlement to which accrued under these international instruments (see "Die Justitiabilität", pp. 548 and 549).

Machacek holds that in Austria this situation should be dealt with by applying Article 145 of the Austrian Constitutional Law (B-VG). Under this provision, it is for the Constitutional Court to rule on infringements on international law through the application of an individual federal act. We still lack the latter. In Machacek's opinion there are no convincing arguments why Austria cannot augment Article 145 of the Constitutional Law by an individual federal act, giving the Court competence on the questions of whether or not Austria fulfills its obligations assumed under international law. This measure would create a monitoring mechanism enabling an examination in court whether Austria is, in fact, in compliance with its international law obligations, without having to deal with the political question of an inclusion of fundamental social rights into Austrian constitutional legislation. It appears that this should be possible for a court with similar competence in any Member State of the SC. To this end, the court needs to be given competence, in which connection appeal, the determination of State negligence, complaints against reservations put forward, etc., must not be overlooked (see Machacek, "Die Justitiabilität", p. 551 ff).

At the present time, the future role of the SC is being examined within the Council of Europe. There are strong endeavours at clearly pinning down the importance of the SC in the framework of European integration. Ideas are being weighed regarding the extent of assistance and cooperation with the European Community in the area of social integration. These ideas include a possible acceptance of an improved SC by the EC, or the drafting of a separate social charter for all EC Member Countries. The future of the SC regarding the protection of fundamental social rights in the framework of the EC is on the agenda of the first quadripartite meeting on means of improved cooperation between the Council of Europe and the EC.

HUMAN RIGHTS IN COMMUNITY LAW

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Those who look for any explicit reference to fundamental rights in the EC Treaties, look in vain.

At the time of the drafting of the EEC Treaty, the German proposal to include a provision that fundamental rights would be protected in Community law was rejected.

It is true that the EEC Treaty includes some seemingly fundamental rights such as the prohibition of discrimination on the basis of nationality (Article 7), the freedom of movement of workers (Article 48) and the right to equal pay for equal work (Article 119). These rights were included, however, because they are fundamental to the proper functioning of the common market and not because they were considered to be fundamental rights of the citizens of the Member States. In other words, they are provisions to serve an economic goal.

One of the reasons why, at the time of the drafting of the EEC Treaty, the incorporation of fundamental rights was rejected was the argument that the Community institutions could not examine every measure for its compatibility with the constitutions of the Member States.

At the time, this attitude was understandable. The European Communities were to concern themselves with the economic rebuilding of post-war Europe. The protection of fundamental rights in Europe was seen as the concern of the Council of Europe, the other organization created immediately after the second world war.

It did not take many years, before it became clear that it had been a mistake to think that a basically economic organization could function without regard for the implications in other areas, such as social policy and fundamental rights. There were several developments within and without Community law that forced the builders of, in particular, the EEC, to reconsider the issue of fundamental rights. I mention two.

Firstly, towards the end of the 1960s the area of Community legislation (or interference) expanded enormously. This was the result of the realization that the fixation on economic policy, while the automatic effects this was expected to have in other policy areas did not occur. The process of integration stagnated and autonomous action in other policy areas was necessary. This broadening of Community policy made the lack of legitimacy, or, the lack of constitutionality, more apparent.

In the second instance, the national constitutional courts, in particular in Germany and Italy, refused to sacrifice the constitutional rights of the citizens of these countries on the altar of Community law, which did not protect these rights. It was the rebellion of these courts which threatened to jeopardize the uniform interpretation of Community law, and thereby shook its fundamental pillars that provoked immediate reactions from the institutions, which became aware that the problem of the lack of fundamental rights in Community law had to be solved.

This awareness was expressed formally for the first time in 1973, when the Heads of State and Governments issued a statement at the Copenhagen Summit declaring the determination "to defend principles of representative democracy, the rule of law, social justice and respect for human rights as basic principles of the European identity".

Not very impressed by this statement, the German Bundesverfassungsgericht in its famous Solange decision in 1974 judged that a rule of Community law could not be applied by the authorities or courts of the Federal Republic of Germany, in so far as it conflicted with a rule of the German constitution relating to fundamental rights.

A few months after this decision, (and apparently very much impressed by it), the Heads of State and Governments at the 1974 Paris Summit decided to set up a working group to study "the conditions and timing under which the citizens of the Member States could be given special rights as members of the Community".

The Commission's first reaction to the Solange decision was a blunt condemnation. It did not initiate a formal procedure for a violation of the Treaty, although it held that the decision did constitute such a violation.

In 1976, the Commission issued a report on "The Protection of Fundamental Rights in the European Community" (5/76), in which it considered the possibility of adopting a Community catalogue of fundamental rights. It was rejected. The Commission argued that the protection given by the Court guaranteed a maximum level of protection and it pointed out the danger that negotiations between the nine Member States on the definition of rights could lead to compromises.

In the meantime, the European Parliament became active in this area as well. It invited the Commission time after time to explain its attitude towards the protection of fundamental rights. It adopted several Resolutions on the matter. In its 1977 Resolution, the Parliament requested the Commission to draw up proposals relating to special rights as a first step towards European Union. It pressed for an agreement between the Member States to integrate into Community law the European Convention of Human Rights, the International Covenant on Civil and Political Rights as well as the civil and political rights in the constitutions and laws of the Member States.

In 1977, Council, Commission and Parliament adopted a common declaration in which they stressed the prime importance they attached to the protection of fundamental rights, which were to be respected in the exercise of their powers.

In 1978, the Parliament again pressed the Commission to come forward with proposals to grant special rights to the citizens of the Member States.

Finally, in 1979, the Commission presented its long awaited Memorandum (2/79) in which it proposed that the Community should accede to the European Convention of Human Rights. It opted for this solution, because it was convinced that this step could be achieved on a relatively short term. Creation of a special Community Bill of Rights was seen as a much longer term solution.

We are now in 1989, ten years after the 1979 Memorandum and nothing has happened so far to bring the Community one step closer in reaching the objectives set out in the proposals of that Memorandum. Questions have been asked in the European Parliament as to why nothing was happening. The answer of the Commission was simple (although not exactly put this way): three Member States are against accession to the European Convention. These are of course Great Britain, Ireland and Denmark, countries in which the European Convention has no domestic effect; their fear is that pressure to modify domestic legislation may be brought to bear through the backdoor of community law, once the Community has acceded to the Convention.

Before discussing the most recent developments closely connected to the fears and hopes as regards Europe after the magic year of 1992, let me assess the present situation. In spite of the numerous declarations, memoranda, and resolutions, fundamental rights have so far not been formally incorporated into Community law. That does not mean that they find no protection at all. In effect, the protection of fundamental rights is more or less guaranteed through a system that is alien to the legal system of most Member States, that is by the case law of the EC Court of Justice (praetorial protection), which finds no explicit basis for this protection in the Treaty itself, nor in any other primary source of Community law.

In the early years of the Community, this was exactly the argument used by the Court to deny protection of fundamental rights. In the Stork case (1/58), the Ruhrkohlengesellschaft case (joined cases 36-38 and 40/59) and the Sparlata case (40/64), the Court declared that it was its task to ensure that in the interpretation and application of the Treaties, the law was observed. As this law did not include provisions to protect fundamental rights it could not express itself on that matter. Allegations that principles of national constitutional law were infringed by the application of Community law could not be examined, as the Court was (and is) not empowered to interpret national law.

It was obvious that the Court could not maintain this attitude. I would not be surprised if they gave the above mentioned judgments through clenched teeth. After all, they were all judges used to constitutional systems of which fundamental rights formed an integral part.

The turning point came in 1969 in the Stauder case (29/69), when the Court found a way out of its predicament by declaring that fun-

damental rights are enshrined in the general principles of Community law.

Since the Stauder judgment it has answered to allegations of violations of fundamental rights by Community action, even though its basis for doing so has always remained, per force, somewhat insecure. It has used general principles of Community law, general principles of law, the constitutional principles, traditions, ideas, practices or precepts common to the Member States, and international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories. Analysis of the common constitutional practices etc. shows that they do not have to be very common, nor do they have to be constitutional. References to provisions of international treaties does not necessarily mean that all Member States have also ratified the treaties or accepted the provisions. The best example of the latter is probably the Blaizot case of 1986 (24/86), in which the Belgian university fees system was considered to be violating Community law. In this case, the Court referred to Article 10 of the European Social Charter, a treaty which has so far not been ratified by Belgium, even though it has signed the Charter in 1961.

However, one should not criticize the Court for this. As long as the other Community institutions fail to remedy the, "Legitimations-Defizit" (defined as such by the German scholar Sasse) the Court's work on the protection of fundamental rights, on whatever basis, should be welcomed.

At this point in time, therefore, we have to come to the conclusion that the protection of fundamental rights in Community law is achieved by way of praetorial protection, which does not offer the best of legal certainty, as nobody knows which rights are exactly protected in Community law and on what basis, but which is something to be glad of in view of the failure to formally incorporate fundamental rights in the Treaties.

The question is: how far has the Single Act amended this situation in any significant way. It is true that in the preamble there is now an explicit reference to the European Convention of Human rights as well as the European Social Charter as one of the bases for the Community to promote democracy.

I doubt very much, however, whether this will help in any way to overcome the political difficulties to formally incorporate civil and political rights into Community law. It may give the Court a firmer basis for its judgments on fundamental rights. In the one case it did refer to the European Social Charter after the adoption of the Single Act, however, the Court did not refer to the preamble.

The rather ironic situation at the moment is, that the attention has shifted from civil and political rights to fundamental social rights. The latter were omitted from the Commission's proposals so far, which made these proposals rather incomplete. The argument for omitting them, was, as always, that it proved so difficult to agree to common definitions as far as the wording of social rights was concerned.

Yet, what the Commission initially refused to do with regard to civil and political rights, that is, to draw up a Community catalogue with these rights, it has now done so with regard to the allegedly far vaguer social rights! Even more surprising is, that it achieved this within a period of less than a year, while it held, in 1979, that drawing up a Community Bill of Rights would be a long-term solution, whereas accession to the European Convention was seen as the short-term solution. The Commission probably uses very special calendars unknown to the rest of us.

Let this not lead anyone to think, however, that the matter is settled as far as social rights are concerned. The impression that social rights have gained a place in Community law, where civil and political rights failed is misleading.

Admittedly, there is a proposal for a Community Charter of Social Rights. But what are its contents and what will be its effect?

First, as to the contents. Surprisingly enough, it is not as bad as one might have expected. True, it contains old news and disappointing provisions, but many of its aspects are interesting. One of these is the fact that the document refers to the "citizens of the European Community," and not "workers". It contains provisions which go further than the protection of workers only. In my view, but I may be unduly optimistic again, this is rather significant.

More precisely, the proposed Charter contains the following provisions:

- the right to freedom of movement (of citizens), a combination of the fundamental right to freedom of movement protected in other treaties and the EEC Treaty's article 48 on the freedom of movement of workers;

- the right to free choice of work, to access to placement services free of charge, and to fair remuneration;

- improvement of living and working conditions: an instruction norm from which no legal right can be derived;

- the right to social protection: every citizen of the European Community shall have a right to adequate social protection, and every worker shall enjoy social security, proportional either to length of service or to their financial contribution to the system;

- the right to freedom of association and collective bargaining, including the right to strike, *and* the right not to join a trade union "without any personal or occupational damage being suffered by the individual concerned". Another blow to the British closed shop system.

However, I personally fail to see how the right to the freedom of association cannot include the freedom not to associate. Without this aspect it would be a most remarkable "freedom";

- the right to vocational training: everyone has the right to the opportunity to continue his vocational training during his working life (N.B. no working life for females). Continuing and permanent training systems must be set up. Every European citizen has the right to enroll for occupational training courses, including university courses, on the same terms as nationals of the Member State where the course takes place;

- the right to equal treatment; equal treatment for men and women shall be guaranteed and equal opportunities shall be developed;

- the right to information, consultation and participation of workers: this must be developed along the lines of national laws, agreements and practices;

- the right to health protection and safety at the workplace: covered also by Article 118 A of the EEC Treaty, and we may expect directives on this issue in the "short term";

- protection of children and adolescents: the minimum employment age shall be 16 years;

- the rights of the elderly; every European Community citizen in retirement or early retirement shall be able to receive an income affording him or her (suddenly the female appears!) a decent standard of living. Any European Community citizen having reached retirement age but who is not entitled to a pension, and who does not have other adequate means of subsistence, shall be entitled to a minimum income; and

- the rights of the disabled which are not defined as rights; measures shall be taken to ensure the fullest possible integration of the disabled into working life.

At first sight I would say that this document opens possibilities, which, if used to the full, could lead to some interesting developments in Community law. By far the most important question here is, of course, the status of this Charter, or, in other words, the effect it is going to have.

The intention is, that the Charter will be adopted by way of a declaration constituting the Community Charter of Fundamental Social Rights, by the European Council to be held early in December 1989 in Strasbourg. For the sake of the argument, suppose it is going to be adopted as such, what will then be its legal effect? Can we go to the courts and claim the implementation of those provisions which are worded as provisions to be implemented immediately? For instance, can a person of let us say sixty years of age, who has never worked in his or her life and who in many countries has no sufficient income, go

to court and claim such an income on the basis of this Charter? Can any European citizen who does not enjoy adequate social protection, and if I am not mistaken, there are many such citizens in today's Europe, claim that protection on the basis of this Charter?

In other words, is this a Charter that will be a basic instrument of Community law? Or is it yet another solemn declaration by the Heads of State and Governments, from which no rights can be derived?

The Charter itself reveals nothing explicit about its "legal nature". In title II which contains provisions on the implementation of the Charter, it says that Member States commit themselves to take such steps as are appropriate in order to guarantee the fundamental social rights contained in it and full implementation of the social measures indispensable to the efficient operation of the internal market, either through legislative measures or by encouraging the conclusion of collective agreements. The Commission is to present activities in the social domain and an action programme with a set of related instruments by the end of June 1990. It is also to present a report at regular intervals on the implementation of the principles of the Charter, in parallel with the implementation of the EEC Treaty as amended by the Single Act.

This seems to indicate that the Charter is a basis for future governmental and community action and not a catalogue of legal rights to be guaranteed in Community courts.

The main question, therefore, seems to be what the EC Court of Justice will do, when individuals claim violations of the rights laid down in the Charter. In view of the Court's practice until now, to review Community action in the light of fundamental rights which are not formally incorporated in Community law other than by its own case law the possibility that it will use this Charter as a basis for its judgment, can, it seems, not be excluded. On the one hand, this would improve the present situation in some respect; on the other hand it may also be a reason for some Member States to object strongly to the adoption of this document by the European Council in December 1989.

RAPPORTEUR'S REPORT

EUROPEAN SOCIAL CHARTER/HUMAN RIGHTS IN THE EEC

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The second topic of the conference which was discussed at the morning session of Friday, 22 September, under the chairmanship of Sven Beling, covered two sub-items: the European Social Charter and Human Rights in the EC.

The discussions on the European Social Charter (ESC) were based on a written paper by Oswin Martinek and an oral introduction by Rudolf Machacek, both members of the Austrian Section of the ICJ. Prof. Martinek described the history of the ESC including its recently adopted supplementary Protocol and pointed to the well known shortcomings of its international supervisory mechanisms. With respect to the implementation of the ESC in Austria he advocated the application of Article 145 of the Austrian Federal Constitution by a special Federal Act which would entrust the Constitutional Court with the authority to rule on infringements of the ESC in Austrian practice.

Similarly, Dr. Machacek criticized the weak and "top secret" international implementation procedure of the ESC. In particular, he focussed on the controversial role of the governmental committee which tends to criticize the conclusions of the committee of independent experts. He recommended the support of the developments within the EC aimed at adopting a Community Social Charter, which would strengthen the control system of the ESC by national or international courts.

Due to lack of time only a few issues were taken up during the discussion. There was general agreement that the international implementation of the ESC should be strengthened and given more publicity. One participant recommended the publication of the conclusions of the committee of experts in languages other than English and French. Another advocated the introduction of a tripartite system similar to that successfully adopted by the ILO.

A good part of the discussion centred on the differences between civil and political rights on the one hand and economic, social and cultural rights on the other. This would still justify principal differences in their methods of implementation at national and international level. No agreement could, however, be reached on this controversial issue.

The discussion on the second sub-item, Human Rights in the EC, was based on an oral introduction by Lammy Betten from the University of Utrecht. She outlined the various attempts made over many years to include a bill of human rights into community law or to

accede to the European Human Rights Convention. In spite of many declarations, memoranda and resolutions by different EC organs, above all the European Parliament, no fundamental rights have been incorporated into Community law. Some protection of human rights is, however, provided by the case law of the EC Court of Justice in Luxembourg, and Lammy Betten outlined the major judgments of the Court. Then she turned to the Single Act, and how far it has amended this situation in any significant way. Although the European Parliament adopted on 12 April 1989 a comprehensive Declaration of fundamental rights and freedoms which centres on the classical civil and political rights, Dr. Lammy Betten emphasized the rather ironic situation that the drafting of a Community Charter of Social Rights has recently shifted the emphasis from civil and political rights to fundamental social rights. This Charter seems to have good chances to be finally adopted by the European Council in December 1989. She outlined the provisions of this draft Charter which are phrased in terms of enforceable rights of citizens.

Due to lack of time, the discussion was again restricted to a short exchange of views on some of the issues raised. The absence of explicit provisions for adequate rights of women in Community law was noted, and some fears were expressed with respect to the protection of immigrant workers from outside the EC after 1992. One participant strongly reiterated that economic and social rights should not be treated in the same way as the classical fundamental rights, a view which was again rejected by others.

The discussion on the enforceability of economic and social rights was enriched by the experience presented by our Hungarian colleague, Dr. Bandi, who attended the conference as a guest of the Austrian delegation and who thanked the ICJ for having invited him. Fears were expressed that the proposed Community Social Charter will further reduce the significance of the European Social Charter of the Council of Europe. Finally, the importance of including the protection of the environment into European human rights law was stressed.

In view of the limited time and the preliminary nature of the exchange of views on both sub-items, the participants agreed to refrain from adopting specific recommendations. It was stressed that the questions of economic and social rights, including the right to a satisfactory environment, and their implementation within the framework of the European Communities should have high priority on the agenda of the next European ICJ Sections Conference to be held in Strasbourg.

THE ICJ AND EUROPE

FUTURE COOPERATION OF THE EUROPEAN SECTIONS OF THE INTERNATIONAL COMMISSION OF JURISTS

Christoph Klaas
Secretary-General of the German Section

It has already been agreed at the Strasbourg meeting in April 1987, that the cooperation of the European Sections had to be improved. So far, any cooperation depended on the initiative of individual section leaders.

It has to be regretted that some sections have never been founded (e.g. Switzerland). Others can be considered to be inactive (Belgium, Denmark, Norway, Ireland, Portugal, Italy). It cannot be accepted that such important countries do not dispose of a well functioning section.

The ICJ in Geneva is extremely occupied with the situation in the Third World and will also in the future have to devote its financial means and working capacity worldwide.

The European Sections would have greater weight vis-à-vis the European Institutions in Strasbourg, Brussels or Luxembourg if they employed one single European language.

It is recommended to institutionalize the cooperation between the European Sections. Of course it cannot be expected that one section assumes the task of a "European General Secretariat" in addition to its usual work. Therefore it should be conveyed to each national section in turn for a period of 2-3 years.

The current cost should be covered by contributions from all sections.

For the creation or activation of sections in countries such as Italy, Belgium, etc. special commissions should be formed which take the necessary measures in accordance with Geneva for recruiting members from the judiciary, human rights groups etc.

DEVELOPMENT OF EUROPEAN POLICIES BY THE ICJ

by

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I. INTRODUCTION

This paper will first set out the developments which have taken place following the conference of the European sections of the ICJ in Strasbourg in April 1987. This will be followed by some general remarks on the experience so far and more specific comments with regard to certain human rights issues.

After this some suggestions for future action to be undertaken by the ICJ will be discussed.

The paper will end with the proposition that implementation of European policies by the ICJ requires the addition of a European officer to the staff of the ICJ.

1. Developments since the 1987 ICJ Conference

At the 1987 meeting of the European sections of the ICJ one of the topics discussed was the role of NGO's (non-governmental organizations) in the Council of Europe. This topic was introduced by Andrew Drzemczewski, a legal officer of the Council of Europe, who had also prepared a paper for the Conference. (This paper has meanwhile been published in Human Rights law Journal, march 1988 issue.)

Andrew Drzemczewski reminded the meeting of the status the ICJ holds with the Council of Europe. Firstly, the ICJ is one of the NGO's holding consultative status with the Council of Europe. As such the ICJ is entitled to submit memoranda to the Secretary General who may transmit these to the Parliamentary Assembly or a committee of governmental experts. The ICJ is also entitled to attend the sectoral meetings for NGO's interested in human rights which are held in Strasbourg three times a year, during the sessions of the Parliamentary Assembly of the Council of Europe.

These meetings are intended to inform NGO's on recent developments in the field of human rights as well as to provide a platform for NGO's to report on their work. The meeting can also adopt motions or reports presented by NGO's to the meeting.

While there are a large number of NGO's holding consultative status with the Council of Europe, the ICJ is one of just two NGO's to

have been granted observer status with the Steering Committee for Human Rights (CDDH).

The Steering Committee is an important body of governmental experts.

At the meeting of officers of the national sections with the Secretary General of the ICJ following the Strasbourg Conference it appeared that due to its huge workload, the ICJ had not been able to attend the sectoral meetings of NGO's on a regular basis. It was unlikely that this situation would change in the near future. It was, however, recognized that it would be very much worthwhile for the ICJ to monitor more closely, and participate more actively in, the human rights matters of the Council of Europe.

In view of this situation the ICJ agreed to accept the NJCM offer to send representatives to attend the sectoral meetings of NGO's in Strasbourg on behalf of the ICJ.

As a result Jeroen Schokkenbroek and Frank Steketee attended the sectoral meetings held in October 1987, January, May and October of 1988 and January and May 1989.

II. THE EXPERIENCE SO FAR - GENERAL REMARKS

As the reports we submitted to the ICJ on the attendance of the meetings have been published in the ICJ-Newsletter (see vols. 37 & 39), their contents shall not be repeated here. Some of the important current human rights issues will be discussed later on (III).

First some general remarks will be made about the purpose and effectiveness of attending the sectoral meetings.

The sectoral meetings as mentioned above take place on one afternoon during the sessions of the Parliamentary Assembly and are attended by a wide variety of NGO's such as the European Association on Railwaymen, the World Confederation of Don Bosco Past Pupils Association, Amnesty International, the World Union of Catholic Women's Organizations and the International Association of Judges. On average there are approximately 50 organizations and 70 representatives present.

Fixed items on the agenda are "recent developments in the field of human rights" and "reports by NGO's".

The first point provides the opportunity for mr. Leuprecht, director of Human Rights, to brief the meeting on new proposals, the status of work going on, as well as to inform the meeting of cases pending before or recently decided by the European Commission and European Court of Human Rights. The second agenda item consists of NGO's reporting on their work and presenting motions or reports to the meeting.

These reports and motions are usually discussed during a number of meetings.

During their stay in Strasbourg for the sectoral meetings the ICJ-representatives have established contacts with members of the Parliamentary Assembly (especially the Legal Affairs Committee), and with members of the staff of the Council of Europe. Existing contacts with members of the secretariat of the European Commission of Human Rights have been strengthened.

These contacts have proved valuable for the discussion of recent developments as well as the exchange of information, as will be set out below (III).

On balance, the sectoral meetings do not by themselves justify the cost and effort of attendance, because apart from the excellent information provided by mr. Leuprecht, they have little result. Of course, the meeting may be a valuable forum for the introduction of new proposals as and when they may arise, but this does not require the attendance of each and every meeting.

The meetings do, however, provide the occasion for maintaining contacts and exchanging information which may be at least as valuable.

III. HUMAN RIGHTS IN THE COUNCIL OF EUROPE

1. Asylum seekers

The Council of Europe NGO meeting has, during the past few years, regularly discussed proposals for a protocol to the European Convention on Human Rights concerning the right of asylum and the admission of refugees. In view of the highly sensitive nature of the subject, a set of principles to be elaborated in such a protocol was finally adopted and referred to the Legal Affairs Committee of the Parliamentary Assembly, to which was added a draft protocol drawn up by the International Association of Judges.

The work in the Legal Affairs Committee resulted in Assembly Recommendation 1088 (1988) which, *inter alia*, recommends that the Committee of Ministers in the longer term prepare a protocol to the European Convention dealing with asylum seekers and the admission of political refugees. In the accompanying report, the NGO-principles were included and suggested as a basis for standard setting.

These documents are now on the agenda of the Steering Committee for Human Rights.

2. European Torture Convention

On February 1st 1989, the European Convention on Torture and Inhuman or Degrading Treatment entered into force. We recall that the ICJ, together with the Comité Suisse contre la Torture, played a vital role in the establishment of this Convention. At present, the supervisory organ of the Convention, the Committee, is being set up. So far, the election of the full Committee by the Parliamentary Assembly has not been completed. The delay is attributable to the objections that have been raised by the ICJ and other NGO's against certain candidates. We are informed that the Bureau of the Assembly is putting pressure on the national delegations to propose the best qualified candidates in terms of expertise and independence.

3. Merger and other improvements of European Human Rights mechanisms

As the reader will remember, the topic mentioned above was the subject of extensive debate at the first Conference of European Sections in 1987, resulting in the adoption of a resolution both recommending certain short-term measures proposed by the UK-section and the long-term goal of a merger of Commission and Court of Human Rights, as set out in the draft protocol submitted by the Dutch section. The revised draft protocol has meanwhile been sent to all European sections. Within the Council of Europe discussion of the functioning of the organs of the European Convention continues. On the one hand, on the basis of a report by mr. Linster, the Assembly adopted during it's October 1988-session a recommendation which "recommends that the Committee of Ministers consider the merging of the European Court and Commission of Human Rights, while weighing carefully the arguments for and against, and consult the European Commission and Court of Human Rights and the Assembly on the reform envisaged". The very modest nature of this text is at least partly due to the fear expressed by certain governmental experts that some states will, under cover of a necessarily very substantial revision of the Convention, demand a reduction in the standard of protection offered by the Convention. To our knowledge, so far no response has been given to the recommendation by the Committee of Minister's representatives. We do know that both the Court and the Commission are divided on the merger issue.

Nevertheless, we consider that it is of great importance to continue NGO-pressure on this issue. First, to keep this issue on the agenda within the Council of Europe, and second because we are of the opinion that the merger discussion can serve as an incentive for the necessary short- and medium-term measures (such as the functioning of the Commission on a semi-permanent basis).

The ICJ and its national sections can for this purpose pay attention to the documents mentioned above.

IV. FUTURE DEVELOPMENTS

The subjects of human rights in Europe discussed above can be added to with new initiatives to be developed by the ICJ, possibly as a result of this Conference.

It is quite evident that the ICJ as an NGO has an important part to play in the matter of human rights in the Council of Europe. Although it is not considered necessary to attend all sectoral meetings we do suggest that at least one (and preferably two) meetings be attended each year for the reasons set out above (II).

Starting from this October it has been agreed with the Secretary General of the ICJ that Jeroen Schokkenbroek and Frank Steketee will attend (certain parts of) the meetings of the Steering Committee for Human Rights which take place twice a year in Strasbourg. The observer status by itself does not guarantee access to the Steering Committee meetings as a request has to be made and approved for each item on the agenda. Attending the meetings of the Steering Committee, and some of the sectoral meetings will enable the ICJ to monitor closely the developments in the field of human rights in the Council of Europe. It will further provide a basis for maintaining valuable contacts as well as providing appropriate access to the Council of Europe for any initiatives the ICJ should wish to take.

Up till now the ICJ has not been able to pay much attention to developments in the field of human rights in the European Communities. There are, however, issues of great importance at stake.

The Member Countries of the European Communities have by their membership transferred their sovereignty in part to organs of the Communities. This in itself raises the question of democratic control of the governing process going on in Brussels.

Issues in the (not too distant) future will be the introduction of a social charter for the European Communities and possibly the introduction of a constitution for the European Communities. In this field too there is most definitely a role to be played by the ICJ for which the ICJ needs to establish and maintain close(r) contacts with the EC.

Finally, the ICJ should try to encourage more the cooperation between the European sections especially on issues at a European level. In European countries without a national section and others with a more or less dormant section, the ICJ should actively encourage the setting up or revival of sections.

To conclude, we propose that there is much important work to be done by the ICJ at the European level, much of which the ICJ at present is not able to undertake.

The monitoring and participation in the work of the Council of Europe should be increased, whilst the ICJ should acquaint itself more closely with the developments in the EC.

Finally, the encouragement of setting up and reviving of national sections so as to created a closer network of cooperating sections will greatly enhance the efforts of the ICJ at the European level.

V. EUROPEAN OFFICER

As set out above, the NJCM is at present maintaining contacts with the Council of Europe on a voluntary basis. However, there is of course a limit to the time and resources available.

Taking into consideration the amount of work that needs to be done not only at the Council of Europe but also at the EC and between the national sections of the ICJ, it is quite obvious that this cannot be done on the present basis. The work to be done justifies, it is submitted, the addition of a full-time European officer to the staff of the ICJ.

The NJCM is of course well aware that the resources of the ICJ at present do not allow for the addition of such a new staff-member.

Also we fully understand the notion that Europe cannot be first on the list of priorities of a global Human Rights NGO. This, however, should not deter the ICJ-sections from subscribing to the need to add a European officer to the staff.

If all European sections subscribe to this necessity a fund-raising appeal could be made for this specific purpose or could be included in general fund raising.

SUMMARY

Following the meeting in Strasbourg of April 1987, first steps have been taken by the ICJ towards monitoring and participating more closely in the work of the Council of Europe through the use of its consultative status. Making use of the observer status with the Steering Committee will further enhance these efforts.

RECOMMENDATIONS ON THE ORGANIZATION OF THE ICJ IN EUROPE

The European national sections of the International Commission of Jurists (ICJ) represented at their conference in The Hague from 20 to 22 September 1989;

Considering that the ICJ has an important role to play in the field of human rights at the European level;

Considering that the activities undertaken at present by the ICJ at the level of the Council of Europe should be maintained and enhanced;

Considering that the NJCM does not have the means and resources to increase its work on behalf of the ICJ;

Considering that the ICJ should monitor and participate more closely in the matters of the European Communities in field of human rights;

Considering that the work of the ICJ at the European level will be enhanced by the presence of a network of active national sections;

Considering that the ICJ should actively encourage the setting up of national sections in European countries where there are none and should try to revive sections which are dormant;

Considering that the work to be done at the European level ideally requires the addition of a full-time European officer to the staff of the ICJ, in the same way as the officers for Africa and Asia;

Considering that the ICJ at present does not have sufficient means to appoint a European officer;

I. RECOMMEND to the Executive Committee of the ICJ:

1. To support the addition of a European officer to the staff of the ICJ and to try to raise funds in Europe for this post, with the cooperation of the European national sections.

2. In the event that this post cannot be created to continue the arrangement that one or more national sections represent the ICJ at the European level, the costs of which should be met from the fund raising effort made by the ICJ and the European sections.

II. RECOMMEND to the European national sections of the ICJ:

1. That a steering committee be elected by officers from the European sections in order (i) to facilitate cooperation between sections, (ii) to monitor the human rights issues that arise at the European level and (iii) to assist in the planning of the biennial European sections conference.