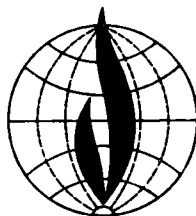


THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

Cameroon

Scrupulous observance of the law is far from being the established rule in Cameroon since the penal population is comprised not only of political prisoners, in the broadest sense of the term, but also of detainees whose trials have been long overdelayed and continually postponed, and still others who are still behind bars even after having finished serving their sentences. Since this state of affairs has in no way prevented President Biya from presenting his country repeatedly as a "nation under law", it is necessary to draw attention to the other side of the coin.

The attempted coup d'état on 4 April 1984 remains a topic which is absolutely taboo in Cameroon. To this day, there is no official who would venture to specify exactly how many people were executed or imprisoned in the wake of this uprising. The list of those who received the death penalty was never made public and estimates of the number of "4 April" political prisoners vary between 60 and 70.

The ICJ is very concerned about the fate of one of these prisoners in particular. According to available information, Mr. Abdoulaye Mazou, a judge, was allegedly arrested at his home during the repression of the abortive coup d'état against the regime of President Biya. Although Mr. Mazou had not taken part in the armed revolt personally, he was accused of trying to help his brother escape capture. He was tried and sen-

tenced to five years in prison for "harbouring a person unlawfully". It is said that his trial was heard *in camera*, his rights to a proper defence were flouted, and that he was denied the right to appeal. Albert Mukong was imprisoned allegedly for offences which were unrelated to the attempted putsch. He is reported to have been arrested on 16 June 1988 after having criticized the government during interviews which were broadcast by the BBC in December 1987 and May 1988. During these interviews he discussed his imprisonment in the 1970's, the torture which goes on at the headquarters of the para-military police (the Brigade Mixte Mobile or BMM) under the former administration, and the way the recent parliamentary elections had been organized. The ICJ speculates that this is why Mr. Mukong is being held, namely, for having expressed his political opinions in a non-violent manner. Furthermore, Mr. Mukong, who was indicted for violations of a regulation aimed at the "suppression of subversive activities", and who risks up to five years in prison, is still awaiting trial. A writ of *habeas corpus* was submitted on his behalf in a civilian court at the end of 1988, but it was rejected on the grounds that the court did not have jurisdiction in the matter. He was finally brought before a military tribunal on 9 February 1989, but his case was adjourned apparently because this court had not been constituted in due and proper form. When he is

eventually tried, he will probably have a right to appeal to a higher civilian court if he so desires. However, it is clear that up to now, his right to a fair and prompt trial has not been respected.

As seen, the cases of Mr. Mazou and Mr. Mukong are quite dissimilar, but they also differ in other ways. While Mr. Mukong is allowed to receive visits from his family and his lawyer in Bamenda, Mr. Mazou is detained in appalling conditions. He is held at the central prison of Yaoundé (Nkondengui). This penal institution is known not only for its overcrowding (because the prisoners are not brought to trial, or can not afford defence counsel, or the court-appointed lawyers disclaim competence). It is also known for the insufficient food (an average of four to five people per day are said to have died of starvation there up to 1988 out of a total of about 5,000 inmates), the diseases contracted there (scabies and others), and the shameful way the dead are buried (in a mass grave without notifying the family). The conditions endured by those confined there after the attempted putsch of 1984 are reported to have been even worse. Those concerned are said to have been sealed off from the other prisoners in a special ward under the military command of Colonel Asso, and they are denied reading matter, mail, visits and packages. Since it is a common practice in Africa for the families of convicts to take care of their food, a restriction on receiving packages amounts inevitably to their undernourishment. In such circumstances, Mr. Mazou's state of health is obviously precarious. Moreover, although prisoners at Nkondengui are not usually subjected to

harsh treatment, it nevertheless seems that the judge has been subject to many humiliations and deprived of medical treatment. Specifically, although his artificial leg has not been confiscated he has not been given the necessary care and treatment to prevent it from giving him sores.

About ten of the other political internees are reported to be in administrative detention without having been brought before any judicial officer nor even been formally charged. Others are said to have been tried and acquitted but are still imprisoned including: Ahmadou Alfaki, Arabo Bakary, Yanga Ibrahim, Suzanne Lacaille, and Alain Touffic-Othman. Finally, prisoners who have finished serving their sentences have still not been released. That is said to be the case for, among others, Nana Housmanou (whose sentence ended on 4 December 1986), Sani Haman (whose sentence ended on 8 August 1985), Moudio Hildinia, Ali Yousouffa and Captain Tamboutou Abdoulaye (whose sentences ended on 8 August 1986). Mrs Bello is another who should have been freed about two years ago, and who, according to witnesses, was thought to be nearing insanity towards the end of 1988. Several political prisoners were reported at that time to have rallied to her side by going on hunger strike.

According to people in President Biya's entourage and to some foreign dignitaries, it seems that the President of Cameroon is in no position to enforce the fundamental freedoms of prisoners because he is indebted to the military for keeping his regime in place.

N.B. On going to press information has been received that Albert Mukong was brought to court on 5 May 1989. The charges against him were dropped and he was discharged.

Glasnost in China

In the light of subsequent events a report from Peking dated 29 March 1989, and published in the *Neue Zürcher Zeitung*, is of more than passing interest. It quotes the Prosecutor General of China in disclosing figures of police brutality resulting in death and permanent injury, and other violations of the rights of prisoners and detainees, as well as illegalities on the part of the courts. The text is as follows:

"According to official sources, torture and forced confessions by police are widespread. 227 persons were tortured to death or crippled said the Chinese Prosecutor General, Lui Fushi, on Wednesday before the plenary of the National Peoples Congress

in Peking. There had been illegal arrests and false accusations. About 4,700 policemen violated the rights of prisoners and detainees in the past year.

Previously, Peking had always rejected such accusations when made by Amnesty International, saying that they were an 'attempt to discredit China'. Mr. Lui also said that the Chinese prosecutors had in 1988 dealt with 40,450 cases of human rights violations by policemen. Furthermore, another 4,982 cases of violation of the law by police forces and 1,918 infringements of the law by the courts had been rectified by the public prosecutor".

Israel

A controversial amendment to the Prevention of Terrorism Ordinance, 1948

The International Commission of Jurists has received a copy of a paper summarising a draft Amendment (No. 3) to Israel's Prevention of Terrorism Ordinance 1948. The Arab population in Israel, and sympathetic funding agencies, are understandably concerned about this draft Amendment, which had its first reading in the Knesset on 23 May 1989. They fear that, if passed into law, it will be used to make it increasingly difficult for social organisations of Arabs in Israel

to receive funding or other assistance from abroad.

The Amendment deals with three subjects:

(1) Knowingly receiving property from a terrorist organisation

A new sub-section has been added to section 4 of the law which states that a person commits a criminal offence who

receives or brings into the country any property knowing that it originated from a terrorist organisation, whether the property was intended to be used by him personally or for use by someone else.

The Amendment defines 'property' as land, moveable property, currency, rights over property of any other kind, such as rights under a contract or for the exchange of property, and any property that has been invested or was acquired as consideration from an interest in such property.

(2) Forfeiture of property

Forefeiture of property is dealt with in section 5. Forfeiture is not dependent upon proof of an offence under section 4, or any other criminal offence.

Section 5 provides that, on an application by the District Prosecutor, a District Court Judge can order the foreclosure of property believed to have been received directly or indirectly from a terrorist organisation, or believed to serve or be intended to serve the purposes of a terrorist organisation, terrorist activities or the promotion of terrorism.

The burden of proof to establish that the property came from a terrorist organisation is that required in civil law (i.e. on the balance of probabilities) and not that under criminal law (beyond reasonable doubt).

A foreclosure order will enable a police officer or anyone empowered by a court to seize the relevant property.

If a high ranking police officer has reasonable suspicion that property has originated from a terrorist organisation he can order in writing its seizure for the purpose of its foreclosure. If an application for foreclosure is issued to the District Court within 15 days, the seizure

order remains valid until the decision of the Court. A police officer carrying out a seizure order or a foreclosure order is authorised to enter premises, including houses and work places without a warrant. The police are authorised to seize and the Court to foreclose property even when it is mixed with other property.

Section 6 gives a right of appeal within 30 days to the Supreme Court where a single judge will hear the case.

(3) Illegal Corporations

The third subject is 'illegal corporations'. An illegal corporation is defined as a terrorist organisation or one which aims to serve, or serves as, a shield for the activities of an illegal terrorist organisation, or a corporation which acts or whose aims are even in part to act, in the name of or in the service of such an organisation, or a corporation which aims to deny or denies the existence of the State of Israel.

Section 6 C provides that the Registrar of Corporations may refuse to register a corporation if he has reasonable cause to believe that the corporation is an illegal corporation. There is a right to appeal such a decision to the District Court in Jerusalem.

Under Section 6 D the District Court in Jerusalem is authorised, on an application by the Attorney-General, to order the liquidation of a corporation proved to be an illegal corporation.

Representation and Rules of Evidence

Under Section 6 E, in any proceedings under this Ordinance, if the Defence Minister certifies in writing that state

security necessitates it, a person may be prevented from being represented by a lawyer who is not approved by the Military Jurisdiction Law of 1955. Only one Arab lawyer is so approved.

Section 6 F gives a blanket power to the Court to deviate from the rules of evidence in any proceedings concerning forfeiture or illegal corporations 'if it is persuaded, for reasons which must be given in writing, that it is necessary and useful for the revelation of the truth and the implementation of justice'.

It also entitles the Court in such proceedings to hear evidence in the absence of the interested parties or their lawyers, or without disclosing the evidence to such persons.

This section deprives interested parties of the elementary rights to a fair hearing under the rule of law, namely the right to counsel of their choice, the right to be present to hear evidence against them and the opportunity to refute such evidence. Moreover the Court can receive evidence which is normally excluded, such as hearsay evidence, which by its nature cannot be cross-ex-

amined.

The crucial issue in many of these cases is likely to be whether the property has been received from an organisation serving or intended to serve the purposes of a terrorist organisation. When such issues have arisen on other matters in Israeli Courts, the Court has accepted evidence by the security authorities that they know that the individual or organisation in question is working for or is in contact with a banned organisation, but for security reasons is unable to disclose the source of its information. If the Courts follow that practice in these cases, the other parties to the proceedings will be powerless to disprove the allegation.

Criticisms of Amendment 3 have appeared in the Israeli press, on the grounds that it is too broad and vague. It is to be hoped that amendments will be made at the Committee stage limiting the provisions relating to forfeiture and illegal corporations to cases where an offence of knowingly receiving property from a terrorist organisation has been proved, and deleting sections 6 E and F.

Philippines

It is three years since the dramatic events of February 1986 known as the 'people's revolution' led to the downfall of President Marcos and the assumption of power by Mrs. Corazon Aquino. The movement against Marcos culminated in February 1986 with a call for civil disobedience by Mrs Aquino to oppose the verdict of the rigged presidential 'snap elec-

tion'. Simultaneously there was a coup by some army officers belonging to the "Reform the Armed Forces Movement (RAM)", and the consequent defection of Defence Minister Juan Ponce Enrile and Acting Chief of Staff General Ramos. Camp Aguinaldo, the Defence Ministry headquarters in Manila was occupied by the rebels and Marcos sent forces loyal

to him to crush the rebellion. This led to hundreds of thousands of people coming out on the streets to prevent the army tanks from getting through to Camp Aguinaldo. Unable to crush the rebellion and faced with a total breakdown, Marcos fled the country and Mrs. Aquino assumed power. This came to be known as the February Revolution or People's Revolution. President Aquino established her legitimacy by decreeing a 'revolutionary government' to last until a new legislature was elected under a new constitution. The new President retained decree-making powers similar to those of Marcos but promised to use them sparingly.

The legacy of Marcos' twenty year rule needs to be recalled before analysing the performance of President Aquino's government. The 1984 ICJ report on the Philippines¹ summed up Marcos' rule as one of corruption in the government, cronism and repression plunging the country into a severe socio-economic crisis and leading to neglect of the social needs of the population and an increased role for the armed forces. According to Eduardo C. Tadem, a Filipino social scientist, Marcos restructured the Armed Forces of the Philippines (AFP) as a private army of his, mismanaged and plundered the economy, and abused human rights by harassing, imprisoning, torturing and killing thousands of dissenters². Furthermore the new government had to face the unresolved insurgency by the communist New People's Army (NPA) and the Muslim Moro Liberation Front (MNLF).

Immediately after assuming power, President Aquino restored *habeas cor-*

pus and repealed Marcos' decrees (PD 1836, and PD 1877/1877-A) which had allowed for indefinite detention without charge or trial. PD 1834, which had raised the maximum penalty for subversion from life imprisonment to death, was also repealed. She also released political prisoners including alleged members of the Communist Party of the Philippines and of its armed wing, the New People's Army (NPA). Within the first few months, about 500 political prisoners were released. However, there were problems in identifying the exact number of remaining political prisoners, particularly in the case of those charged with non-political crimes but allegedly arrested for political reasons. The government established a Presidential Committee on Political Prisoners/Detainees to review the case of those charged or convicted for criminal offences but who claimed they were political prisoners. By the end of 1986, the Committee had reviewed the cases of 90 prisoners and recommended 15 for release. However, many of the convicted prisoners refused to seek pardon stating that it would imply admission of guilt. This Committee was dissolved following the coming into force of the new Constitution in February 1987.

The restrictions imposed by Marcos on the press and the trade unions were removed and the government ratified the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights. It also ratified the Convention Against Torture and the Additional protocol to the Geneva Conventions on the protection of civilians in armed conflicts.

1) The Philippines: Human Rights After Martial Law, Report of a Mission, 1984.

2) The Popular Uprising in the Philippines by Eduardo C. Tadem; New Asian Visions, Vol.3, No.1, 1986.

In keeping with her promise to establish a constitutional government, the President appointed a fifty member Constitutional Commission in May 1986 to draft a new Constitution. The Commission completed its work in October 1986 and on 2 February 1987, the draft Constitution was endorsed by the people in a plebiscite with an 85 percent poll and a 75 percent vote in favour of the new Constitution (see ICJ Review of June 1987 (No. 38) for a commentary on the new Constitution).

Following the adoption of the Constitution on 11 May 1987, elections were held for the 200 member lower house and the 24 member Senate. On 27 July 1987 the two chamber Congress opened and ended the revolutionary government of President Aquino. However, as stipulated in the Constitution's transitory provisions, she continues to hold office as Executive President until June 1992.

Human rights violations under President Aquino

In her campaign against Marcos, President Aquino had promised to restore democratic institutions and protect human rights. Her sweep to power itself was made possible by the popular discontent over Marcos' abuse of power and human rights violations. Human rights have thus become an important indicator for evaluating her performance. According to Filipino human rights groups there is not much improvement in the human rights situation. According to the Task Force Detainees of the Philippines (TFD), which did commendable work during Marcos' rule, 2,310 persons were arrested for political reasons in the first thousand days of the present government, of these only 75 were served with

warrants of arrests, and 636 were tortured. Also, between February 1986 and December 1988 there have been 220 reported cases of disappearances. Similarly, in the first six months of 1988, 117 cases of extra judicial executions were alleged to have been committed with the direct or indirect involvement of the military or para-military forces. Those killed included five lawyers, who were all human rights defenders.

At the 45th session of the U.N. Commission on Human Rights (February-March 1989) the World Council of Churches stated that 'the perpetrators of alleged violations were invariably members of the military units or para-military groups'. In replying to this statement, the Filipino representative conceded that up to December 1988 a total of 1,026 cases of alleged human rights violations had been filed against military and police personnel. Of these, 407 occurred during Marcos' regime and 617 since his overthrow, 196 of these were during 1986, 107 in 1987 and 316 in 1988.

On completing a thousand days in office, President Aquino defended her human rights record by stating that she had restored and maintained full democracy in spite of attacks from groups belonging to the extreme left and right.

Role of the army

The attacks from the right include elements in the army which resulted in two major attempted coups and three minor ones. The most serious attempt took place on 28 August 1987. This was led by Colonel Gregorio Honasan and included attacks in Manila on the presidential palace as well as on the headquarters of the Armed Forces of the Philippines (AFP). What differentiated this at-

tempted coup from others was the fact that several commanders in the provinces declared themselves in one form or another against the leadership thereby calling into question the AFP's loose command structure and its loyalty to the government. Those who were involved in this attempted coup were critical of the present government's leniency to the communists and its plans to grant autonomy to the Muslims in the Mindanao region. They also raised the issue of corruption under the new government.

According to some commentators, the disloyalty in the army is due to its politicisation and corruption during Marcos' rule. Indeed, during the last years of Marcos there was a small group of officers (including Colonel Honasan, leader of the August 1987 coup) who advocated reform in the AFP under the banner of 'Reform the Armed Forces Movement' (RAM). This group as stated earlier was instrumental in tilting the balance in favour of Mrs. Aquino during the crucial days of February 1986. The fact that Marcos' defence Minister Enrile, Deputy Chief of Staff Ramos and members of RAM had played a role in the February revolution made the army an important factor in the new government. Unlike in Marcos' time, the army began to intervene directly in Filipino politics and attempted to influence the government's policy concerning the communist insurgency. The government's commitment to human rights is seen by the armed forces as being soft on communists and hostile to the army. As a result it is said that President Aquino is under pressure from the military. The Filipino human rights groups cite the following examples to show that pressure from the military is weakening her commitment to human rights:

One was the retention of Marcos' De-

creed 1850 under which all military and para-military personnel are to be tried only by military courts regardless of the offence for which they are accused. This decree protects the military by providing that no action against them can be brought in the ordinary courts for offences committed against civilians. However, a presidential waiver can transfer a case to a civil court and in a few cases this has been done. But the waiver has to be obtained for each case and no set criteria have been evolved to determine on what grounds a waiver should be made. The human rights groups are demanding the abolition of Decree 1850 so that the civil courts have jurisdiction over the armed forces for crimes committed against civilians.

Another is the lack of political will to investigate and punish those guilty of committing human rights violations. Human rights groups cite the example of the 'Mendiola incident' in which, as a result of shooting by the army, 12 died and hundreds were injured. This occurred in January 1987 when soldiers shot indiscriminately at demonstrators belonging to the militant peasant organisation Kilusang Magbubukid ng Pilipinas (KMP) who were marching to the presidential palace to submit a petition in support of land reform. In this case no-one has been prosecuted even though there were video-tapes identifying the soldiers who were involved in the shooting. Similarly, in spite of evidence of the involvement of identified military personnel, no prosecution has taken place concerning the killings of well known figures such as Rolando Olalia, leader of the 500,000 strong labour movement (Kilusang Mayo Unokmu) or in the killing of Leandro Alejandro, the Secretary-General of the left wing party Bayan (New Nationalist Alliance).

'Vigilantes' and human rights violations

The human rights groups also criticize the President for initially condoning the use of 'vigilante' groups to deal with the communist insurgency.

The use of vigilante groups in the fight against insurgency became prominent in the beginning of 1987, and at the end of 1988 there were allegedly to be at least 200 such groups. They are more pronounced in Mindanao which is considered the stronghold of the communists. The best known vigilante groups are Alsa Masa (Masses Arise), Nakasaka (acronym for United People for Peace), Caca (Citizens Army Against Communism) and Tadtads (chop chop). Some of the vigilante groups are said to be Marcos' private armies under a new name. Their operations varied from region to region. In some places they worked very closely with the army to track down and kill alleged leftists. In other places they acted on behalf of local vested interests to harass or even kill those who were working with the poorer communities. All the Filipino human rights groups commonly share the view that the emergence of vigilantes dramatically increased the killings and disappearances.

Initially, the vigilante groups received varying degrees of support from the authorities including funding from some local governments. For example, according to the Far Eastern Economic Review (23 April 1987) Alsa Masa received U.S\$ 8,800 from the Davao City government. President Aquino herself described Nakasaka as an expression of 'peoples power' referring to the spontaneous action of the people that won her the presidency in 1986. In April 1987, as a result of criticism by national and international

human rights organisations on the violations committed by vigilante groups, the then Armed Forces Chief Of Staff, General Fidel Ramos, issued Guidelines for what he called Civilian Volunteer Self-Defence Organisations. The Guidelines stated that leaders and members should be identified and listed to pinpoint responsibility, membership should be voluntary, members should be screened to eliminate criminal elements, members should not act with violence against any group except in self-defence, the members should be under the supervision of the military and the military should provide training in matters such as due process and human rights. However, according to human rights groups these guidelines were not observed and the membership was not always voluntary, nor were all the criminal elements weeded out. In most cases, the vigilantes are said to have gone beyond purely defensive activity and to have engaged in extra judicial killings.

There was a growing demand for disbanding armed vigilantes, including by the Catholic Bishops Conference of the Philippines. In July 1988, the government finally acknowledged that the vigilante groups violated the Constitution and issued instruction for them to be dissolved. According to Maria Socorro Diokno, Administrator of the Free Legal Assistance Group (FLAG), some elements within the army continue to support and encourage the formation of vigilante groups despite the orders to dismantle them.

Soon after the announcement that the vigilante groups would be dissolved, the President announced the formation of a new para-military organisation called the 'Civilian Armed Forces Geographical Units' (CAFGU). According to official sources, the members of CAFGU are 're-

servists' who have basic military training and are subject to military rules and regulations. The purpose of CAFGU is to be in charge of areas taken over by the army from the communist rebels and there are plans to recruit 80,000 members by the end of 1989. There are fears that CAFGU may turn out to be another Civilian Home Defense Force (CHDF) which was notorious during Marcos' regime for committing human rights violations. The present government abolished the CHDF and there are allegations that CHDF members as well as some vigilantes are being integrated into CAFGU.

The Two Insurgencies

The debate about the use of vigilantes is linked to the government's attempt to fight the insurgency of the Communist New People's Army (NPA) and that of the Muslim Moro National Liberation Front (MNLF).

The MNLF was established in 1969 and advocates autonomy for the Muslim provinces of Mindanao. The MNLF was engaged in full scale war in the early 70's. In 1976, in an attempt to end the insurgency, an agreement was signed in Tripoli by the Marcos government and the MNLF leader Nur Misuari. However, the MNLF leader continued to live in exile and the insurgency persisted. Recognizing the demand for autonomy by the MNLF, the present Constitution provides for the creation of an autonomous region in Muslim Mindanao. There were reports that President Aquino, made an offer on 21 July 1987 to the MNLF to create by decree a 10 member regional executive council in order to end the Muslim rebellion. The proposal is said to have included providing the

council with access to finances by allowing the proposed autonomous region to receive at least 50 percent of the taxes generated within the region. In addition the proposed council would have been allowed to receive grants through regional agencies such as the 'Southern Philippines Development Authority'. The MNLF is said to have rejected this offer because the Tripoli agreement, referred to earlier, envisaged autonomy for 13 regions and the present plan included only ten. Also, the MNLF was against holding a plebiscite as stipulated in the Constitution. According to the Constitution, the creation of an autonomous region would be effective when approved by a majority in a plebiscite, and only those geographical areas whose electorates voted in favour would be included in the autonomous region.

Unlike the MNLF insurgency, the insurgency by the Communist New People's Army (NPA) has grown over the years and the NPA is said to be active in most of the country's 73 provinces.

As an indication of her willingness to negotiate, the President offered an amnesty and a cease-fire to the NPA, and a 60 day cease-fire agreement was reached between the government and the National Democratic Front (NDF) negotiating on behalf of the NPA. Under the agreement, the cease-fire began on 10 December 1986, outlawed 'hostile acts' by either side, provided for the establishment of a cease-fire committee and the holding of further talks on substantive issues to produce a permanent peace settlement. However, very little progress was made during the talks and on 30 January 1987 the NDF withdrew after the 'Mendiola incident' referred to earlier. After the completion of the 60 day cease-fire period, the fighting gradually resumed and the President acknowl-

edged the failure of the truce on 11 February 1987.

In retaliation for the government's stepped-up insurgency drive, the NPA resorted to the killing of military and police personnel in cities by its assassination squads known as the 'sparrow units'. In 1987 in Manila alone, 88 persons including soldiers were said to have been killed. The killings by the NPA particularly in Manila led to criticisms from the army and other rightist elements that the government was soft on the communists and alleged that communists had infiltrated the government. The government responded by retaining the ban on the communist party and revived the Republic Act (RA) 1700 which outlawed membership of the communist party. However, the executive order reviving the Act repealed the Act's earlier amendments providing for the arrest and indefinite detention of suspected subversives. The President also issued another decree which raised the penalties for association with the NPA from a maximum of 12 years to life imprisonment. Moreover, on 16 September 1987 the President declared that her policy was to pursue war against the NPA and that she expected the Army to go on the offensive.

This policy of waging war against the communists regrettably led to attacks against groups who work with the poor and other disadvantaged. These groups are known in the Philippines as lawful 'cause oriented groups' and they work within the legal system by providing a variety of services to the poor and disadvantaged. Recent cases of arrest, torture and disappearances were mostly of members belonging to such lawful cause oriented groups. Indeed, in October 1988, the Defence Secretary Fidel V. Ramos went to the extent of saying that

these cause oriented groups form the 'underground structure' of the Communist Party of the Philippines. According to him this 'underground structure' is composed of 'civic organisations operating within the bounds of the law and which could generate funds, get recruits, get propaganda and which continue to produce NPA followers to replace those killed or neutralised by the military'. He also stated that the thrust of the military is to dismantle the structures which compose the front network of the Communist Party of the Philippines (CPP-NPA). Similarly, in December 1988, the Defense Under-Secretary Fortunato Abat stated that there are plans to 'outlaw cause oriented groups suspected of being communist fronts'. The Task Force Detainees (TFD) issued a statement that 'the intolerance of the government, particularly its military establishment, as regards political pluralism and openness, has resulted in a chilling crackdown against perceived enemies of the state'.

Ironically these 'cause oriented' groups had worked under great risk during Marcos' time and were part of the process that culminated in the 'peoples revolution'. The new government initially acknowledged the role of such groups and the 1987 Constitution contains a specific reference to the 'Role and Rights of Peoples' Organisations'. This section states that: "The state shall respect the role of independent peoples' organisations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.... The right of the people and their organisations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged". In view of this categorical

commitment to facilitate 'peoples' organisations, the government should continue to recognize their role in dealing with the socio-economic problems of the country and ensure their safety. The government should also promptly investigate and punish those involved in the torture and disappearances of members belonging to the lawful cause oriented groups.

Socio-economic problems

With the overthrow of Marcos' corrupt government, the economy did get revitalised and for the first time the population growth rate reached 5.5 percent. However, the structural problems remain and a World Bank Report entitled 'The Philippine Poor: What is to be done' is revealing. According to this confidential report which was made public by the Far Eastern Economic Review (August 1988) in both relative and absolute terms 'there are more poor people in the Philippines today than at any time in recent history and the situation has worsened during the past three decades'. Furthermore, the poverty is worst in the countryside. Out of the population of 56 million about 30 million are living in absolute poverty. As for the reasons for the poverty, the report says it is due to 'unequal asset ownership, rapid population growth and lack of new jobs'. The unequal asset ownership, according to this report, is more pronounced in land ownership with more than half of the Philippines' farms occupying 16 percent of lands and less than 4 percent occupying a quarter of the land. As for the solutions, the report suggests, among other things, that the redistribution of land could materially reduce poverty in rural areas.

The Land reform

Land reform has been the major demand of most groups working with the rural poor. In 1972 Marcos launched 'Operation Land Transfer' which covered rice and corn land and not lands on which crops for export and fruit are grown. The ICJ 1984 report referred to earlier concluded that Marcos's land reform was not fully implemented.

In view of President Aquino's election platform in favour of land reform, the demand by groups for a comprehensive land reform increased. The 1987 Constitution under Article XIII entitled 'Social Justice and Human Rights' states that, 'The state shall, by law, undertake an agrarian reform programme ... encourage and undertake the just distribution of all agricultural lands ... subject to reasonable retention limits and ... to the payment of just compensation'.

In 1987, the President issued a Decree for a Comprehensive Agrarian Reform Programme, giving the Congress a 90 day deadline to finish drafting the land reform law. The final Act was signed by the President on 10 June 1988. The new law called the Comprehensive Agrarian Reform Programme (CARP) promises 'redistribution of all agricultural lands to landless farmers and farm workers irrespective of tenurial arrangement'.

The essential elements of the new law cover all lands classified as in agricultural use, and include retention limits for existing land owners of 5 ha, plus 3 ha for each child of the land owner who is at least 15 years old and is actually tilling the land or directly managing the farm.

The land reform is to be carried out in three major stages. The first stage is to be carried out in four years and includes all land growing rice and maize, lands

sequestered, foreclosed or which belonged to Marcos' cronies, land seized or held by the government, idle and abandoned land, and any land offered voluntarily. The second stage is also to be carried out in the first four years and covers all private land in excess of 50 ha and any public agricultural land to be opened for settlement. The third stage, to be carried out in the fourth to seventh year, includes the re-distribution of land holdings from 24-50 ha.

This new law, which the President called a 'tolerable compromise', is criticised by peasant organisations for providing a 5 ha retention limit which would automatically exclude 51 percent of all agricultural land. In addition, the 3 ha retention given to each child would further reduce the land that could be distributed to the landless peasants. Moreover, the law also stipulates that corporate land owners could distribute shares or stocks to the beneficiaries instead of land. Another criticism is that the land reform law is ambiguous about multinational plantations by allowing them to continue and even extend their existing leases until 1992 and beyond. The critics also say that the land owners could obstruct the implementation of the programme by challenging in courts the government valuation of their lands (for paying compensation). In any event, it is too early to make an assessment of the impact of the law, but it clearly will need a strong political will on the part of the government to implement it successfully.

Another area where the political will of the government is tested is in the investigation and punishment of those responsible for violations of human rights. In March 1986, President Aquino established a 'Presidential Committee on Human Rights' (PCHR) with the mandate to investigate human rights violations and

recommend safeguards to prevent such violations in future. The late Senator Diokno was the Chairman of the Committee which included representatives from the army and leading non-governmental organisations such as the Task Force Detainees Of the Philippines (TFDP). The PCHR had no powers to prosecute and could only make recommendations on the basis of its findings. By the end of 1986, the PCHR had received 708 complaints of which 505 related to the Marcos period, the rest to the new government. According to the PCHR's 1986 annual report, only 23 cases had been closed, including bringing action in the courts. On the recommendation of the PCHR, the government passed a law under which all personnel involved in investigating and arresting suspects were required to undergo training in human rights. Following the 'Mendiola incident' referred to earlier, all the members except one resigned as an expression of their protest against the use of force against the demonstrators. Shortly afterwards Senator Diokno succumbed to his illness which left a void in the human rights movement in the Philippines.

With the adoption of the new Constitution, the PCHR was replaced by the Constitutional Commission on Human Rights (CHR). The CHR is mandated to 'investigate on its own or on complaint by any party, all forms of human rights violations involving civil and political rights'. The CHR could only investigate, prosecution having to be done through the courts. The President has appointed Mrs. Mary Concepcion Bautista (subject to confirmation by the Senate Committee on appointments) as Chairman of the CHR. She is also the Filipino member of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities.

At the 45th session of the U.N. Human Rights Commission, in reply to allegations that the CHR has not been effective, the representative of the Philippines stated that until December 1988 a total of 2,377 complaints of human rights violations have been received by the CHR including those committed during Marcos' period. He also stated that in 1988 there were 914 complaints of which 176 cases were resolved in comparison to 1986-87 when only 36 cases were resolved. According to him, the resolution of the complaints is slow as a result of 'requirements of due process', and the performance of the CHR would improve if the witnesses to human rights violations cooperated more fully. In January 1989, the Senate Commission on Appointments did not confirm Mrs. Bautista's appointment as Chairman and instead appointed her deputy, Mr. Mallillin who undertook to improve the image and performance of the CHR.

The present government had also said that it would end corruption and cronism which had been endemic during Marcos's rule. However, there are mixed opinions about how far the government has managed to accomplish this. The President is credited with personal integrity but there are allegations that a new style of cronism is emerging near the top of the Philippine government. A

pastoral letter in October 1986 from Manila's Archbishop Cardinal Sin stated that graft and corruption persists in many offices of government. Similarly, two weeks after Cardinal Sin's letter, Chief of Staff General Fidel Ramos and his four service Chiefs issued a 'statement of concern' in which they said that some high ranking officials as well as at the lower levels in the present administration are reported to be involved in graft and corrupt practices of significant magnitude.

Having inherited from Marcos a shattered economy, a corrupt administration and a polarised society, the government is faced with a complex situation. The re-establishment of democratic institutions was a positive beginning, however, this needs to be followed up by ensuring human rights and social justice. In this respect, the unwillingness of some elements in the armed forces to respect the rule of law, and the resistance from the economically powerful to social justice programmes could lead to further polarisation, destroying what has been achieved so far. This would be a disillusionment for the ordinary people who, through their courage and involvement in the heady days of the 'February Revolution', ousted Marcos and established a democratic government.

Turkey

Turkey with a population of over 50.3 million, occupies a strategic geo-political position. It is poised at the crossroads between Europe and the Middle East and shares boundaries with Greece, Bul-

garia, Iran, Iraq and Syria as well as a sea and land border with the Soviet Union. It is of great strategic importance to the Western alliance since it defends a third of the NATO frontier.

Following the defeat of the occupying forces of France, Italy and Greece in the 1914-1918 war by the Turkish armed forces led by Atatürk, Turkey turned away from its Islamic past, and became a republic in 1923. The Turkish armed forces seized power in 1960 and again in 1971. In 1973, Turkey returned to civilian rule. This was followed by intense political violence in the late 1970's between left-wing and right-wing political organisations resulting in over 5,000 deaths. In response, the Turkish government proclaimed martial law in 13 provinces in 1978. On 12 September 1980, Turkey's military forces again seized power and martial law was extended throughout the country's 67 provinces. Between 1980 and 1983, a National Security Council composed of five generals ruled the country. The generals dissolved parliament, suspended the Constitution and banned all political parties, trade unions and most other organisations. In September 1982, the National Security Council drafted a new Constitution which was put to a popular vote in November 1982. This referendum also resulted in the election of General Kenan Evren, leader of the National Security Council as President of Turkey for the following seven years.

The 1982 Constitution was approved of by 90%; no campaigning against the Constitution was allowed and the National Security Council threatened to continue military rule if the draft was rejected. The Constitution has three main features: it provides for increased powers for the President; further restricts fundamental rights and freedoms; and allows for increased mechanisms of State control by newly created institutions. After final approval by the National Security Council, these laws, enacted by the military rulers of Turkey, entered into

force and according to provisional art. 15 of the 1982 Constitution "no allegation of unconstitutionality shall be made in respect of decisions or measures taken under law or decrees having force of law enacted during the period from September 1980 to December 1983".

The 1980 coup was followed by a period of increased repression. Over 30,000 persons were jailed in the first four months after the coup, torture was rampant and large numbers of trade unionists were imprisoned, including 52 leading members of the Confederation of Progressive Trade Unions (DISK). In November 1983, general elections were held and the Conservative Motherland Party (ANAP) led by Turgut Özal won a majority of seats in the Parliament. From December 1983 onwards, military rule was gradually withdrawn and martial law was lifted throughout Turkey in July 1987. However, a special government with extra powers was appointed to eight of the eastern provinces and eight other provinces remain under a state of emergency where fundamental freedoms may be suspended or curtailed and the repressive laws enacted during martial law remain in effect.

Turkey's 1982 Constitution reflected the views of the generals who had usurped governmental power during a troubled period in Turkey's political life. Several of the more restrictive provisions in the Constitution therefore seem to have been drafted in response to the turmoil in Turkey at the time. For example, art. 68 prohibits teaching staff of higher education, employees of public institutions and agencies from joining political parties. Art. 14 states that "none of the rights and freedoms in the Constitution shall be exercised with a view to ... ensuring the rule of one social class over the others...". Art. 87 provides that no

amnesty or pardon shall be given "in respect of persons convicted of offences under art. 14". The Turkish parliament is thereby prohibited from enacting legislation to improve human rights conditions. The military prejudice against popular movements is evident in art. 33 which limits the right to form associations which "pursue political aims, or engage in any political activity". The provisions for the respect of the right to life are almost negligible as reflected in art. 17 which states that "occurrence of death as a result of use of weapons is permitted by law as a necessary measure in cases of apprehension, or the execution of warrants of arrest, the prevention of escape of lawfully arrested or convicted persons, the quelling of a riot or insurrection...". Orhan Tüzeman, retiring President of the Supreme Administrative Court claimed that the Constitution is unacceptable as it embodies 'the logic of the military takeover'¹.

Turkey's penal code which is inspired by the Italian penal code enacted under Mussolini contains controversial articles such as Nos. 140, 141, 142 and 163 which refer to 'Crimes of thought', 'organised propaganda', 'crimes against the state', and the introduction of the concept of 'crimes against religions under the guarantee of the Constitution' (since 1980, 70,000 persons have been accused of violating arts. 141 and 142). It provides for heavy punishments including the death sentence. In February 1989, the Ministry of Justice proposed some changes to the penal code. These amendments recommend the introduction of a new article (prohibiting the spread of rumours, ver-

bally or in print, harmful to a person's well being or property), changes to 15 others and the annulment of 12. However, the most controversial articles, such as Nos. 141 and 142 are to remain unchanged. The Turkish Penal Code Commission which is reviewing the code considered halving the prescribed sentences. Although this was proposed in a draft submitted to the Justice Ministry in mid-1988, it has yet to be taken up². A prominent Turkish lawyer observed "that the usual constitution defends the rights of citizens against a state; ours describes the power of the state against the individuals"^{3,4}.

Within the international arena, Turkey has taken active measures to improve its image with regard to the respect of human rights. In January 1987, the Turkish government recognised the right of individual petition to the European Commission on Human Rights. The government however qualified its recognition in a number of ways: the 'notion' of a democratic society is to be understood in conformity with the principles laid down in the Turkish Constitution and in particular in its preamble which states that "...no protection shall be afforded to thoughts or opinions contrary to Turkish national interests" and in art. 13 of the Constitution which claims that "fundamental rights and freedoms may be restricted by law in conformity with the letter and spirit of the Constitution with the aim of safeguarding the indivisible integrity of the state and its territory and Nation". In February 1988, Turkey became the first signatory of the European Convention against Torture which

1) Turkey Briefing, Vol.3 No.1. Jan. 1989

2) Turkey Briefing, Vol.3, No. 2, March 1989.

3) H. Balian, Turkey-continuing violations of human rights, p. 15.

4) For an account of the legal situation of Turkey, see ICJ Review of June 1981 (No. 26).

provides for a system of unannounced visits to places of detention and in August 1988, Turkey ratified the UN Convention against Torture.

Although Turkey has returned to civilian rule since 1983, and has taken steps to improve its image abroad, the government has consistently failed to protect the human rights of its citizens.

In the eight years following the 1980 military coup, there have been an alleged 250,000 political prisoners almost all of whom have been tortured, 60,000 political prisoners convicted after unfair trials, over 700 death sentences passed and over 200 deaths in custody most of which are alleged to have been as a direct consequence of torture⁵.

Many human rights organisations such as the Helsinki Watch Committee, the Helsinki Federation and Amnesty International which have on a number of occasions sent missions to investigate the human rights situation in Turkey report that "torture continues to be systematic and widespread in Turkey" and "people have been tortured in police stations and prisons of every type and there are buildings especially equipped for torture". Methods of torture include severe beatings, assaults with truncheons, electric shocks, burning with cigarettes, beating of the soles of the feet until the skin is broken (Falaka), and hanging from the ceiling by hands and feet. Torture sessions are often supervised by doctors who for example treat the victims with stimulants so that they do not faint or treat their wounds so that the torture marks are rendered invisible. According to Amnesty International, most

allegations of torture have not led to any investigations. Evidence as to the identity of the torturers is difficult since there are no witnesses and victims are blindfolded, and the few charges against torturers are discouraged by the large number of "suicides" in police stations.

Prisoners in Turkey have little or no access to medical treatment. Many prisoners are exposed to prison conditions that have been described as unfit for human beings. The majority of political prisoners have been incarcerated for over five years since in most cases their trials are still continuing (in the case of the Devrimci Yol trial, 50 of the 700 defendants are still in pre-trial detention, most of them for some eight years)⁶, or they have been sentenced to death or to long-term or life imprisonment. While Turkish legislation provides for medical care to prisoners, frequency of examinations, procedures in cases of emergency and general care often fall short of the legal requirements. Medical staff is insufficient, in serious cases medical examinations are carried out very superficially, often merely visually through the window of the ward. The Turkish Human Rights Association⁷ concluded that patients were frequently not taken to a doctor; that those presented to a doctor did not receive a proper examination or treatment; that prisoners with fatal illnesses were not taken to the hospital on time; not treated on time; and that supervision and treatment of those suffering from torture or malnutrition was delayed⁸.

The hunger strikes staged by prisoners in protest to their conditions is a

5) Amnesty International. Brutal and systematic abuse of human rights, Jan. '89.

6) Amnesty International. Turkey: further information on Devrimci Yol trial in Ankara.

7) The Human Rights Association was founded in 1986 and officially recognised in early 1987.

8) Turkish Human Rights Association Report. Treatment in Prisons, April '87.

clear indication of the appalling conditions in Turkish prisons. According to the Turkish Human Rights Association, not one prison meets the Standard Minimum Rules for the Treatment of Prisoners and related recommendations. In October and November 1988, widespread hunger strikes were staged by political prisoners to protest their ill-treatment. The strikes began in Diyarbakir (where most of the prisoners are Kurds accused of being Kurdish activists and sympathisers) and Eskisehir prisons and rapidly spread to involve 2,000 political prisoners in 18 prisons. They protested against prison regulations introduced in August 1988 which stipulate the wearing of a uniform by remand and convicted prisoners, and set new limits on visiting and exercise periods. The strikes ended 44 days later after the Ministry of Justice made some concessions. In March 1989, unrest in Turkish prisons has continued with renewed hunger strikes in Eskisehir and Ankara. The Eskisehir hunger strike re-started because inmates claim that the authorities revoked concessions made to end the previous such strike. On the 21st day of the new strike, prisoners said they would continue to their deaths if 38 demands were not met⁹.

Military tribunals first came into being in the late 1800's with a special law inspired by the French 'Military Pe-

nal Code of 1857'. Military courts usually try only members of the armed forces but they also try civilians in security cases under martial law. However, these courts are continuing to try cases against civilians where the proceedings were commenced before the lifting of martial law (i.e. before 1984 when it was lifted in some regions and 1987 for the rest of the country). 61,220 people have been sentenced by military courts between December 1978 and April 1988 at which date the Ministry of Justice quoted that 5,309 civilians were still being tried by such courts with 1,392 of them in pre-trial detention. This includes most of the defendants of the mass trials such as the TIP trial, the TKP trial, the DISK trial and the Dev-Yol trial¹⁰. The military courts in Turkey do not meet internationally recognised standards. In particular: they are not independent from the executive; the right to defence has been restricted in many ways; the defendants have been subjected to excessively long periods of pre-trial detention; and these courts have repeatedly failed to investigate allegations of torture.

Detainees may be kept for up to thirty days (under the state of emergency law) before they are brought before a court. Between November 1980 and September 1981, defendants in the Dev-Yol trial could be held in incommunicado detention by the police for up to 90 days¹¹.

9) Turkey Briefing. Jan. '89. Vol.3, No.1.

10) TIP- Turkish Workers Party trial. After Sept. 1980, hundreds of members charged under art. 141, trial began in April 1982.

TKP- Turkish Communist Party trial- hundreds of members arrested in early 1981, trial started in Feb. 1982.

DISK-Confederation of Progressive Trade Unions, trial began in Dec. 1981 and involved 1,477 trade unionists charged under art. 141 of the Penal Code.

DEV-YOL- Revolutionary Path Movement whose aim was to put into practice a defence policy centred around 'Committees of resistance' which were to counter attacks against the population by some right-wing militants, trial began in Oct. '82.

11) Amnesty International - Turkey- AI Index: EUR 44/09/89

During this period, they have no access to relatives or defence lawyers and lawyers criticized the length of this period of custody as encouraging torture. The final verdict is almost always based on what the defendant said during these 30 days - information most often extracted under torture. Following the military coup of 1980, Military Appeal Court No. 4 ruled on 3 March 1981 that "it is in accordance with the free evaluation of evidence that even confessions based on force be taken into account"¹². On 8 July 1988 Halit Celenk, a lawyer, stated that additional evidence required by judges consisted in the majority of cases of testimonies by other defendants, also extracted under torture, or protocols written by the police but signed by defendants undergoing torture. He quoted from a verdict by Erzincan Military Court of 24 January 1984: "...if it were agreed that torture was applied, torture is inflicted in order to obtain a correct answer. If incorrect answers are given, answers that are invented, torture will be intensified because its aim is to obtain a correct answer...". Even in prisons, the defendants are very often not allowed to see a law-

yer and the few lawyer's visits that are allowed are not private.

Turkey has since 1982 returned to civilian rule and established a legal framework for the development of democracy¹³. However, the contradictions inherent in the system have become increasingly pronounced: on the one hand, the Turkish government seeks to assuage international public opinion of its human rights record by suppressing the facts and denying the accusations; on the other hand, human rights restrictions continue on a large scale, justification of which is reflected in Turkey's EEC membership application in 1987, in which it states that human rights restrictions "are justified as measures to prevent a breakdown of law and order, the kind of which paralysed the country ten years ago". Although Turkey occupies a strategic position in the Western alliance and many countries are therefore reticent to point an accusing finger, the time has come for the international community to use its influence to persuade the Turkish government to take more effective steps to curb human rights abuses.

12) Amnesty International report. Brutal and systematic abuse of human rights, Jan. '89, p. 57

13) For a review of the political and legal conditions of return to democracy, see ICJ Review of December 1983 (No. 31).

COMMENTARIES

UN Commission on Human Rights (1989)

The 45th Session of the United Nations Commission on Human Rights met in Geneva from 30 January to 10 March 1989. At its first meeting, the Commission elected Mr. Marc Bossuyt (Belgium) as Chairman, Ms. Christy Ezim Mbonu (Nigeria) as Rapporteur and Mr. Claude Heller (Mexico), Mr. Quian Jiadong (China) and Ms. Zagorka Ilic (Yugoslavia) as Vice-Chairmen. The election of Mr. Quian broke a long-standing unwritten rule that representatives of the Permanent Members of the Security Council would not sit on the bureau of the functional committees of the Economic and Social Council and it fueled speculation that China would seek to become Chair at next year's Commission.

The Commission was marked by major achievements: among them were the establishment of a Special Rapporteur to examine the human rights situation in Romania, approval of a draft Convention on the Rights of the Child, the transmittal to the General Assembly of a draft Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of capital punishment and the recognition of the right of conscientious objection to military service. It was marred, however, by the failure to take any action on the situation in Iraq and even to discuss human rights in Africa (other than South Africa). The Commission also seemingly put an end to the United States' three year campaign against Cuba by refusing to con-

tinue its inquiry into the situation in that country.

The Commission heard speeches from an unusually large number of leading government ministers including Mr. Michel Rocard, Prime Minister of France; Mr. Dante Caputo, Foreign Minister of Argentina and President of the UN General Assembly; Mr. F. Fernandez Ordonoz, Foreign Minister of Spain, who spoke as Chairman of the EC Council of Ministers; the Vice-President of Afghanistan and the Foreign Ministers of the Holy See and Sweden. Mr. Rocard was eloquent in his praise for NGOs: "When states keep silent, the NGOs speak. When governments are powerless, the NGOs act, unfettered by reasons of state. That is when the oppressors hesitate, when the oppressed resist and the excluded regain hope."

The ICJ made interventions on South Africa, the Israeli-Occupied Territories, the right to development, the independence of judges and lawyers, the report on Cuba, advisory services in Guatemala and Haiti and human rights violations (Burma, Iraq and Romania). It prepared interventions made jointly by several NGOs on the work of the Sub-Commission, advisory services and the rights of mental patients, and joined in two others on the Convention on the Rights of the Child and women in development. It promoted draft resolutions on the independence of judges and lawyers, the Special Rapporteur on Mercenaries, and a draft

optional protocol to the Convention against Torture which were adopted and on the situation in Iraq, which was not. In addition, it lobbied in favour of the resolution on Romania and helped to strengthen those on Haiti and on disappearances.

Theme Mechanisms

The status of the Special Rapporteurs and the Working Group on Disappearances appeared to be further solidified. Last year, their mandates were renewed for two years instead of the usual one year. This year, a Soviet-initiated resolution expressed appreciation of the special rapporteurs and other fact-finding and monitoring mechanisms established by the Commission for their contribution in implementing universally recognized standards of human rights. It requested the Secretary-General to consider convening a meeting of Commission special rapporteurs, the Chairman of the Commission, and the Chairman and five Rapporteurs representing the Sub-Commission.

In a salient 1988 intervention, Amnesty International had suggested that the theme mechanisms provide an objective vehicle by which the Commission could identify situations of serious human rights violations and find ways of according them particular attention. It often seems, however, as if the Commission lacks the political will to respond appropriately to the information provided by the rapporteurs. Thus, despite clear signs from the Special Rapporteur on Summary or Arbitrary Executions and the Working Group on Enforced or Involuntary Disappearances concerning the gravity of the situation in Iraq, the Commission failed to act. Similarly, although

the Working Group on Disappearances reported after visiting Colombia that in most cases "circumstantial evidence strongly suggests or precise information clearly demonstrates involvement of the armed forces or security services in enforced or involuntary disappearances," no resolution on that country was even tabled. Indeed, the resolution on the Working Group traditionally introduced by the French delegation did not even refer to the Group's visit to Colombia.

Disappearances

In one of its best reports yet, the Working Group on Enforced or Involuntary Disappearances reported to governments 392 cases alleged to have taken place in 1988 in 15 countries. The largest number of outstanding cases are found in Argentina (3,387, all from before 1983), Guatemala (2,851), Iraq (2,728) and El Salvador (2,141). The Group expressed its "concern over the total lack of cooperation from....governments which have never provided substantive replies to the allegations transmitted to them, such as Afghanistan, Angola, Chile, Guinea, the Islamic Republic of Iran, Nepal and Seychelles."

The group again noted the inadequacy of the institutional and legal framework in most affected countries, in particular the limitation on *habeas corpus*. It also announced that at its first 1989 session it would examine the various initiatives aimed at the preparation of international declarations or conventions on the subject.

The Group emphasized the importance of the judgment of the Inter-American Court of Human Rights finding Honduras liable for disappearance (see Review No. 41) as "a precedent for the in-

vestigation and judgment of an enforced disappearance by a supra-national judicial organ". It highlighted two aspects of the Court's holding which supported the Working Group's practice: state responsibility for violations of human rights continues irrespective of changes in government, and states are obliged to investigate disappearances as long as uncertainty remains, with no time limit. The Dutch delegation (which has a member on the Working Group, Mr. Toine van Dongen) would later emphasize these points to "put to rest" the argument of "some governments" (e.g. Argentina) that they cannot be held responsible for disappearances occurring under earlier administrations. Portugal also stressed these points.

The group also drew the attention of the governments of El Salvador, Iran, Iraq, the Philippines, and Sri Lanka to the recommendation of the General Assembly and the Commission that governments concerned with disappearances consider inviting the Working Group to visit their country.

Torture

In his fourth annual report, the Special Rapporteur on Torture, Mr. Peter Kooijmans (Netherlands) concluded that "torture is still rampant in various parts of the world", most often accompanying civil strife and civil war. In Peru, the Special Rapporteur noted that virtually all the allegations of torture came from areas under emergency rule by political-military commands which reportedly disregard the law in the fight against the Shining Path rebels. In Korea he observed that the authorities do not respect the legal safeguards against incommunicado detention. In Turkey he referred to

continuing reports of torture in police stations despite government ratification of the U.N. and European conventions against torture.

During the year, the Special Rapporteur accepted invitations for consultative visits to South Korea, Peru and Turkey and in each case made evaluations and recommendations which are included in his report. During the year he transmitted allegations to 37 countries for clarification and sent 42 urgent appeals for immediate government attention. Some 20 states did not reply in any form.

Among his recommendations, the Special Rapporteur suggested that legal provisions prescribing that a person be given access to a lawyer not later than 24 hours after his arrest usually constitutes an effective protection against torture, so long as governments complied with such provisions. He also recommended that the right of *habeas corpus* should be strictly respected and never suspended.

Summary or Arbitrary Executions

In his seventh report to the Commission, the Special Rapporteur on Summary or Arbitrary Executions, Mr. S. Amos Wako (Kenya, Member of the ICJ), reported addressing urgent cables to 23 governments (of whom only 8 responded) and letters concerning alleged executions to 36 governments (of whom only 15 responded).

The Special Rapporteur gave relatively detailed summaries of the situations in different countries giving rise to his concerns. He referred, for example to "persistent reports received that several thousand persons had been executed without trial or with a trial of a summary

nature" in Iran and reports that several thousand civilians were killed in a series of chemical weapons attacks in Iraq. In this respect, he concluded that "in some areas where peace negotiations have ended international armed conflicts, reports are emerging which indicate that the governmental instruments of power have turned from the enemy across the border to civilians within the country, with the result that there has been a very noticeable increase in summary or arbitrary execution by the governments concerned of their own civilians".

The Rapporteur also noted with concern the increasing reports of use of chemical weapons and the increasing allegations of killings by law enforcement officials during demonstrations.

The Rapporteur suggested that the effective implementation of his mandate would be enhanced through more on-site visits and through the creation of a team of forensic medical experts to accompany and assist him on the visits.

Mercenaries

In the second year of his mandate, the Special Rapporteur on Mercenaries, Mr. Enrique Bernales Ballesteros of Peru, responded to invitations from Angola and Nicaragua to examine reports of mercenary aggression against those countries. The report of his mission to Angola was presented to the General Assembly while a report covering his visit to Nicaragua was prepared for the Commission.

The report analyzes the U.S.-sponsored "Contra" war against Nicaragua in the light of the judgment of the International Court of Justice holding that the aggression violates customary international law. After finding (as had the World Court), that numerous non-Nicaraguans, including U.S. citizens, Cubans and others, were involved in mercenary acts against Nicaragua, the Special Rapporteur turned carefully to the Nicaraguan government's categorization of all the Contras, including Nicaraguan citizens, as mercenaries. He noted that, in accordance with Additional Protocol I of the 1949 Geneva Convention, the general approach is that one of the prerequisites for mercenary status is that the person concerned should be a foreigner. Nevertheless, he stated that it would be "in the interests of the international community that it should consider from a legal standpoint the situation by which nationals of a country are recruited, armed, financed, equipped and used by a third country for aggression against their own country, on an individual basis or as part of a group serving the interests of the country that recruits and employs them directly or indirectly."

Country Situations

Action by the Commission on country situations has become increasingly difficult with the strengthening of regional blocs determined to prevent or control measures sought to be taken against one of the region's governments. This problem has long inhibited Commission initiatives in Africa and now threatens to do so in Latin America where the "Group of 8" now effectively determines the limits of the resolutions on Chile, El Salvador and Guatemala. According to several Latin diplomats, this trend towards regionalisation was accelerated by the United States' campaign against Cuba which, in the words of one, "made us realize that this is a political forum, not a human rights forum, and that we had to develop a political response". Similarly,

the Asian group was able to substantially limit a French initiative on Burma.

On the other hand, the resolution on Romania (which was left unprotected by its regional group) marked the first time provision had been made for a new Special Rapporteur since 1984 (when Afghanistan and Iran were added to the list), and the first time a European country had been the subject of a resolution since 1982 (Poland). A new Asian country, Burma, was also added to the list of countries subject to a resolution.

Another new factor in the examination of country situations was the decision of Bulgaria, the G.D.R., the Ukrainian S.S.R. and the U.S.S.R. not to participate in voting on the resolutions concerning Albania, Iraq, Iran and Romania, thus giving these resolutions a greater chance of adoption.

Afghanistan

The Commission, without a vote, welcomed the co-operation of the Afghan authorities with the Special Rapporteur whose report this year was very brief and summary; and urged all parties concerned to work for a comprehensive political solution, based on the right to self-determination. It urged all parties to the conflict to release all prisoners of war in accordance with humanitarian law and to do everything possible to facilitate the return of refugees and displaced persons in safety. It called again upon the Afghan authorities to investigate the fate of disappeared persons.

Albania

Last year the Commission decided to transfer its consideration of Albania from

the confidential 1503 procedure to an open consideration under agenda item 12. A recommendation forwarded to ECOSOC that all communications concerning Albania under the confidential procedure be made public was, however, rejected by the Council. Hence, despite last year's decision, there was no reference to Albania in the agenda of the present session. On a Portuguese initiative, the Commission (by a vote of 33 in favour, 3 against and 13 abstentions) regretted that the exhaustive efforts to solicit the co-operation of Albania under the 1503 procedure had been in vain, and that for the second consecutive year the Government had failed to respond to the allegations transmitted to it by the Special Rapporteur on Religious Intolerance. It called upon the Government to provide information on the concrete manner in which constitutional and legal measures complied with the provisions of the Universal Declaration of Human Rights and to respond to the allegations transmitted to it by the Special Rapporteur.

Burma

A French draft resolution on Burma which sought appointment of a Special Rapporteur met with strong resistance by the Asian group. A compromise decision submitted by the Chairman expressed concern "at the reports and allegations of violations of human rights in Burma in 1988" and encouraged the Burmese authorities to honour their promises to hold elections.

Chile

The Commission expressed once again its concern at the persistence of

serious violations of human rights and fundamental freedoms in Chile, as described in the report of the Special Rapporteur, which referred to cases of murder, abduction, disappearances, torture, arbitrary arrest, prolonged periods of incommunicado detention, political prisoners, death threats and the intimidation of opponents of the régime. Despite the abstention of Japan, the U.S. and 8 developing countries, the Government was again urged to put an end to these situations, to continue adopting measures to permit the restoration of the rule of law in Chile and the full enjoyment of human rights and fundamental freedoms.

Cuba

The most politically-charged debate was over the attempt by the U.S. to condemn the human rights situation in Cuba. At last year's session, Cuba invited the Commission to send its Chairman Alioune Sene (Senegal), and five other experts to observe the human rights situation and "prepare a report to be submitted for consideration by the Commission, which would decide on the manner in which the report was to be examined."

During ten days, the six experts met with government officials, NGOs and private individuals, and visited prisons (and met prisoners in private), schools, hospitals and other facilities. The Cuban government publicized the mission and published the telephone numbers by which the group could be contacted, with the result that the group received over 1,600 complaints alleging human rights violations.

When the Commission began its session, the carefully-negotiated report had not yet been completed and no agenda

item was assigned to it. The U.S. made clear, as it had last year, that it wanted discussion to take place under item 12 (violations of human rights and fundamental freedoms). The Cubans, and their Latin allies, were equally insistent that Cuba could not be compared to other countries on the Commission's item 12 agenda (Afghanistan, El Salvador and Iran) and proposed discussing the report under item 11 (further promotion and encouragement of human rights and fundamental freedoms). The compromise solution was to deal with the report under a separate, special item, 11 *bis*.

The report, released at the end of the Commission's third week, provided an extremely interesting picture of the situation in Cuba. The group took as its yardstick the Universal Declaration of Human Rights and the international instruments to which Cuba is party. In 400 pages (55 pages of actual text and 350 pages of annex), the report compiled facts and figures, government assertions and the allegations of dissidents and alleged victims of human rights abuses. In one annex, the report listed by category all 1,600 complaints it received. (1,183 concerned the right to leave the country or to return). In another, it reproduced the questions on the Cuban constitutional and legal system prepared by Ambassador Michael Lillis (Ireland) on behalf of the group. Virtually half of the annexes were given over to articles and allegations by dissidents. The report also included tables showing the remarkable gains in the enjoyment of economic, social and cultural rights since the Cuban revolution of 1959. After laying out all this information, however, the report came to no conclusions and made no recommendations.

The Cuban Ambassador, Raul Roa Kouri, spent almost 90 minutes providing

his government's answers to allegations contained in the report. Debate on the report then generally followed geo-political lines. The western Europeans and others asserted that the report showed evidence of grave violations even if, in the words of the Portuguese delegate, these "can not be compared in terms of seriousness — both in quality and quantity — with (worse) human rights situations in many other countries". To the U.K., the report showed that "an all-powerful, oppressive, ever-intrusive party machine dominates all aspects of life and prevents or extinguishes all dissent." The Latins and most developing countries saw the exercise as a political battle. The Indian representative stated that: "my country does not believe that any consideration of the situation of human rights...in any society should be invoked for the purposes of forcing changes in the socio-economic system freely adopted by a society." Several countries on both sides of the debate stressed that the human rights situation in Cuba could not be considered in isolation from the attempts to destabilize it, and its consequent necessity to defend itself, while most participants recognised Cuba's outstanding record on economic social and cultural rights.

A week of tense negotiations between the European Community (EC) on behalf of the western group, including the U.S., and the Latin "Group of 8" then followed, with an agreement on both sides not to take any action until all hope of a consensus was exhausted. In a move which the French daily *le Monde* described as "particularly maladroit," however, the U.S. unilaterally presented a tough resolution which stood no chance of passage. The draft expressed the Commission's "concern" over violations alleged in the report and called on the

group to maintain contacts with the government "and the people" of Cuba and to report to the 1990 session under item 12. Colombia, Mexico, Panama, and Peru responded by tabling the text which had been the basis of the negotiations and which bore "in mind the willingness of the government of Cuba to analyse the observations made by the mission and...the objective assessments formulated in the course of the debate."

Further bargaining followed, during which the Latins agreed to add a paragraph to their text welcoming "the willingness of the Government of Cuba to co-operate with the Secretary-General in maintaining their direct contacts on the issues and questions contained in the report. These contacts and their results will be taken up by the Secretary-General in an appropriate manner". They refused, however, to again provide a role for "people of Cuba" (i.e. a new fact-gathering exercise). It was over this point that negotiations finally broke down and the stage was set for votes on the competing resolutions.

With little chance of seeing their own resolution adopted, the U.S. and U.K. proposed to vote first on the Latin text, a move to which no one objected. The U.K. then proposed to add the paragraph (on the "people of Cuba") which the Latins had refused in the negotiations. With both sides expecting victory in this key showdown, a vote was called on the U.K. amendment. The roll-call showed a tie: 17 in favour, 17 against with 8 abstentions and one not-participating. The amendment was thus defeated, to the cheers of the Cubans and their partisans. The Latin text without the amendment was then passed by 32-1-10. When the U.K. then, to the astonishment of many of its allies, called for a vote on the original U.S. draft resolution, a Cuban motion

to take no action was adopted by 16-7-19.

El Salvador

The Special Representative on El Salvador, Pastor Ridruejo of Spain, reported that the situation of human rights in that country had seriously deteriorated. In particular, he noted that "An alarming number of politically motivated summary executions, including mass executions, have been carried out by members of the State apparatus, particularly members of the armed forces" and that their number had increased. Nevertheless, the resolution on El Salvador, written by Colombia, Mexico and Peru but negotiated with the government of El Salvador, was considerably weaker than in previous years, failing to mention, for instance, the "death squads" who, according to the Special Representative, had "increased their criminal activities" in the past year.

Guatemala

Hector Gros Espiell (Uruguay), the Expert appointed in 1987 under the advisory services programme, pointed in his report to serious human rights violations in Guatemala. Once again, however, he seemed to treat the government as a victim of circumstance ("these [violations] are the outcome not of government orders or policy but of factors, of acts committed by power circles and a persistent climate of violence that are still beyond effective government control"). He thus failed to identify the major cause of the continuing violations — the government's "dirty war" counter-insurgency policy which is in the hands of the military authorities. In a joint intervention

with the Andean Commission of Jurists, the ICJ stated that "the Guatemalan military has traditionally violated human rights because such violations, far from being seen as illegal, have been regarded as a principal tool in the current internal armed conflict". Guatemalan opposition NGOs pointed out that the Expert's evaluation of the situation was markedly more positive than that of the Inter-American Commission on Human Rights, non-governmental human rights monitors and the Commission's own procedures on disappearances and executions.

Several participants, including Sweden, still believe that the 1987 decision to remove Guatemala from item 12 was "premature". Nevertheless, the weak resolution "recognized" the government's commitment to human rights while expressing its concern "at the harmful conditions that still exist."

Haiti

The excellent report by the Expert appointed under the Advisory Services programme, Philippe Texier of France, concluded that under the new government of General Prosper Avril, "the political will to take specific measures aimed at ensuring everyday observance of (human) rights has not so far been convincingly demonstrated." Consequently, he wondered "whether minimum standards of respect for international norms should not be required in order for a country to benefit from United Nations Advisory Services," and asked the Commission (as did the ICJ), to consider the possibility of appointing a Special Rapporteur. If Advisory Services were to be continued, he recommended that the programme's focus should be on

organizing elections and promoting an independent judiciary, and that local human right groups be associated with the programme. The French-promoted resolution, which seemed to weaken with each revision, continued the mandate of the Expert, adopted his suggestions and requested him "to provide information ... on the development of the human right situation in Haiti."

Iran

In addition to the report of the Special Rapporteur on Executions (see above), the Commission had before it the report of Special Rapporteur Galindo Pohl (El Salvador) and a written submission by Amnesty International recording over 1,000 names of political prisoners reportedly killed in a "massive wave of political executions". Since July 1988, Mr. Pohl, who is still denied access to the country, recorded reliable reports of arbitrary arrests, ill-treatment of political prisoners, torture, and unfair trials. A western-sponsored resolution (20-6-12) urged Iran to grant access to the Special Rapporteur and expressed deep concern over the wave of executions as well as the numerous and detailed allegations of other human rights violations.

Iraq

The Commission's most regrettable failure was its refusal to take action on Iraq which, according to Amnesty International, "clearly and incontrovertibly presents a situation of the most flagrant and massive violations of human rights." With the Special Rapporteur on executions recording thousands of alleged deaths by chemical weapons attacks and

mass executions, the Working Group on Disappearances listing over 2,600 unresolved cases and detailed reports of routine torture even against the children of political opponents, both the ICJ and Amnesty said in their oral interventions that the "credibility of the Commission" depended on its taking action against Iraq. After consideration of Iraq was discontinued under the confidential 1503 procedure, the 12 EC countries (minus France), Australia, Canada and Sweden tabled a resolution to appoint a Special Rapporteur. Only Japan, Peru and Togo, however, joined the western countries in opposing successfully a motion by Iraq (17-13-9) to take no action on the draft. The majority included the six Islamic countries, Botswana, Brazil (the principal source of arms to Iraq), China (which also sells missiles to Iraq), Cuba, Cyprus, Ethiopia, India, the Philippines, Sao Tome, Sri Lanka and Yugoslavia.

Israeli-Occupied Territories

The Commission adopted three resolutions on the Israeli-Occupied Territories. Over the opposition of most western countries, the Commission (32-8-2) reaffirmed the inalienable right of the Palestinian people to self-determination and the establishment of its independent sovereign State on their national soil in accordance with the U.N. Charter and General Assembly resolutions since 1947; welcomed the declaration of the State of Palestine and considered the decisions of the Palestine National Council of 15 November 1988 a prerequisite for the establishment of a just and lasting peace in the Middle East. It also condemned the beating, mistreatment and killing of Palestinians as well as the imposition of collective punishments, mass

administrative detention and deportation. A resolution on human rights in occupied Syrian Arab territory was passed 31-1(U.S.)-10. In its intervention, the ICJ pointed to the disproportionate response of Israeli security forces to the *intifada*, including the use of fire-arms against stone-throwers and the illegal destruction of houses.

Southern Lebanon

The Commission, by 30-1(U.S.)-12, strongly condemned Israel for its continued violations of human rights in southern Lebanon and called upon Israel to put an immediate end to such practices, to liberate Lebanese prisoners, to return all those expelled to their homes, to stop expelling Palestinians arbitrarily to southern Lebanon and to implement the resolutions of the Security Council which require the immediate, and unconditional withdrawal of Israel from all Lebanese territory.

Romania

The ICJ has been pressing for a year for the UN to take action on the deteriorating situation in Romania. At this session, the proposed rural "systematisation" (see Review No. 41), the treatment of the Hungarian and German minorities, and the declining enjoyment of economic social and cultural rights were the subject of numerous governmental and NGO interventions. A Swedish resolution to appoint a Special Rapporteur to study the human rights situation in Romania received a boost when the State Secretary for Foreign Affairs of Hungary came to the Commission to announce his country's co-sponsorship for the measure.

This gesture prevented the issue from becoming an East-West matter and made passage of the resolution likely. Two days before the vote, and reportedly at the insistence of the Soviet Union, Romania informally offered to invite the Commission's Bureau to visit Romania. However, when the co-sponsors of the resolution insisted that the offer be made in writing and contain at least the guarantees provided to the mission which visited Cuba, the Romanians withdrew their offer. With the countries of Eastern Europe not participating in the vote, the Swedish resolution passed easily 21-7-10. The Romanian delegate responded that his country considered the vote "null and void" and made it understood that the Special Rapporteur was not likely to be permitted into his country.

South Africa

The Commission heard the report of the "Group of Three" created in the framework of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and the report of the ad hoc Working Group of Experts on South Africa. The Commission again adopted resolutions demanding that South Africa abolish the system of apartheid in all its forms, reaffirming the inalienable right of the people of South Africa and Namibia to self-determination and independence, and condemning the continuing collaboration of certain western states which obstruct efforts to eliminate apartheid. It called once again upon all governments to take measures at a national level with a view to putting a stop to their commercial activities on the territory of South Africa as well as of Namibia.

In its intervention, the ICJ placed on

record that "in spite of some minor relaxations in the apartheid policies of South Africa, we consider that on balance the situation has further deteriorated in the past year" and gave examples focusing on the grounds for and conditions of detention.

Confidential "1503" Procedure

Under the confidential "1503" procedure, the Commission continued the consideration of the cases of Brunei, Haiti, Paraguay and Somalia while discontinuing those of Honduras, Iraq, Syria and Zaire (though Zaire will apparently be discussed in a special closed session next year). The viability of this procedure is increasingly being questioned, first because it is unclear what positive effect "confidential" sanctions have (particularly when compared with the public resolutions which were not an alternative when 1503 was instituted) and, second, because in confidential voting, countries appear even less likely to criticize their counterparts than when those votes are publicly recorded. Thus, while the confidential voting on Iraq was reported to be 24-12-7 in that government's favour, the no-action motion on the public resolution was passed by only 17-13-9.

Economic, Social and Cultural Rights

Once again, this debate was marked by a strong difference of points of view between the developing and socialist countries on the one hand, and the western states on the other. The Commission heard the report of the Working Group of Governmental Experts on the Right to

Development which, *inter alia*, recommended that the coordination of activities of UN organs concerning development should be reinforced; that a global consultation on the realization of the right to development should be organized; and that means of evaluation should be established to measure the progress achieved in the reinforcement and implementation of the Declaration on the Right to Development.

Resolutions were adopted without a vote on the right to development, human rights and extreme poverty, and non-discrimination in the field of health; other resolutions, such as one on the realization of economic, social and cultural rights, were adopted over the opposition of the western countries (except for the abstention of Portugal).

The ICJ's regional affiliate, the Andean Commission of Jurists demonstrated in a written intervention how the crushing debt burden created by the unjust economic order created political tensions in the Andean countries, undermining the stability of democratic systems and encouraging large scale violations of human rights. The World Council of Churches noted that readjustment policies often served to strengthen the power grip of local elites. Over stiff western opposition, the Commission approved (30-6-6) a Latin proposal to include as a specific point on its agenda next year economic adjustment policies and their effects on the full enjoyment of human rights and, in particular, on the implementation of the Declaration on the Right to Development". According to the Peruvian diplomat Manuel Rodriguez, "until now, the Commission has only studied violations of civil and political rights on the part of underdeveloped countries. Now we will be able to study the role of the industrialized countries in

economic adjustment policies which prevent the fulfillment of these rights."

Administration of Justice

In its first year of consideration of the issue, the Commission adopted without a vote a resolution transmitting to the General Assembly through ECOSOC the text of a draft second optional protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty. Such swift passage was seen in part as a tribute to the Chairman, Mr. Marc Bossuyt who, as the Sub-Commission's Rapporteur on the question, had prepared the draft optional protocol. The Commission also asked the Secretary-General to send the text to governments, inviting them to comment on it by the beginning of September.

On the independence of judges and lawyers, the ICJ proposed that the standard-setting task be concentrated in the U.N. Crime Branch, where the Basic Principles on the Independence of the Judiciary had already been approved and where Basic Principles on the Role of Lawyers are now being prepared (see *CIJL Bulletin* No. 22), and that the Commission request its Sub-Commission to use its agenda item on the independence of judges and lawyers to monitor the implementation of the Basic Principles and the protection of practising lawyers. A Belgian resolution to this effect was passed without a vote.

A British attempt to obtain a Special Rapporteur to examine the question of persons deprived of their liberty for seeking peacefully to exercise their rights to freedom of expression, association and assembly was blocked by India and other third-world nations. A resolution, similar to last year's, was finally adopted calling

on governments to release such persons.

At the request of the ICJ and the Committee for the Prevention of Torture in the Americas (CEPTA), consideration of a draft optional protocol to the Convention against Torture setting up a visit-based system was postponed for two years to allow the Commission to take note of the experience of the new European Convention and to explore the possibility of establishing other regional systems.

Convention on the Rights of the Child

Since 1981, an open-ended group has met prior to the Commission's session to draft a Convention on the Rights of the Child. At this session the Working Group submitted to the Commission the text of the draft Convention.

The question of the recruitment into the armed forces of youths had been a difficult one for the Working Group. The problem was to avoid falling below existing standards of humanitarian law, while adopting a text by consensus. During the Commission debate, some delegations expressed concern that the present draft does not ban recruitment under 18, but only recommends that "States Parties (...) take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities", thus failing to extend to children the level of protection equal to that recognized in Protocol II of the 1977 Geneva Convention. In a joint statement on behalf of 32 NGOs, including the ICJ, Defence for Children International lamented this "amazingly low level of protection." The statement also noted among numerous other deficiencies, that the right of the child to choose his or her

own religion was removed from the draft text and that no provision was made for protection from medical experimentation. Nevertheless, the NGOs supported the text as an "impetus and back-cloth for much-strengthened efforts on behalf of children." Some Maghrebin delegations warned, however, that the Convention may have negative effects by not sufficiently taking into consideration the role of the family.

The expression of these concerns did not prevent the Commission from deciding without a vote, to adopt the draft Convention and to transmit it, as well as the report of the Working Group, to the General Assembly – through the ECOSOC – for consideration, with a view to the adoption of the Convention by the Assembly at its forty-fourth session. NGOs concerned with children's rights hope that, in the meantime, efforts will be made to ensure a more satisfying text.

The Sub-Commission

The debate on the report of the Sub-Commission reflected the incontrovertible success of its last session in producing new initiatives on the death penalty, mental patients, computerised personal files, the independence of judges and lawyers and the rights of indigenous peoples as well as in avoiding political confrontation. The Soviet delegation pointed out that 35 of its 40 resolutions were adopted by consensus. Few interventions, however, failed to evoke the question of the Romanian expert Dumitru Mazilu, apparently being prevented by his government from coming to Geneva. (The Commission, by 26-5-12, requested ECOSOC to seek an advisory opinion from the International Court of Justice on the applicability of the U.N.

Convention on Privileges and Immunities in the case.) Many also believe that the Sub-Commission devotes too much time to issues already being considered by the Commission and other UN organs. A joint NGO intervention promoted by the ICJ welcomed the success of the Sub-Commission and suggested that even more could be achieved through the increased use of working groups. The intervention also warned that the question of independence goes deeper than the Mazilu case, pointing out that 9 Sub-Commission experts were government foreign service officers subject to intense pressure, particularly when voting on country situations. This sentiment was strongly echoed by the delegates from Ireland and the Netherlands.

In other actions, the Commission:

- recommended that the General Assembly consider the adoption and publication of the "guidelines on the use of computerized personal files" prepared by the Sub-Commission expert Louis Joinet (France);
- recommended to ECOSOC that it authorize an open-ended Working Group to meet for two weeks before the Commission's next session to "examine, revise and simplify as necessary" the Sub-Commission's draft body of principles and guarantees for the protection of persons detained on grounds of mental ill-health or suffering from mental disorder;
- recognized, more clearly than ever before, "the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought conscience and religion." The resolution was adopted without a vote – and with the co-sponsorship of Hungary – though China, Ethiopia, Mexico, the

U.S.S.R. and Yugoslavia announced that had there been a vote they would have abstained, while Iraq would have voted against;

- confirmed the appointment of Miguel Alfonso Martinez (Cuba) as Special Rapporteur of the Sub-Commission to

carry out a study on treaties between indigenous populations, and governments welcomed the decision by the General Assembly to launch a World Public Information Campaign for Human Rights.

UN Committee on Economic, Social and Cultural Rights

In May 1986, the United Nations created a new expert Committee on Economic, Social and Cultural Rights. Its task is to assist the Economic and Social Council in monitoring states parties' compliance with their obligations under the Covenant on Economic, Social and Cultural Rights, hereafter called 'the Covenant'. From 1979 to 1986, principal responsibility for supervising implementation had been vested in a Working Group¹ composed initially of government representatives and subsequently of governmental experts. That Working Group had examined 138 initial reports and 44 second periodic reports regarding articles 6 to 9 (economic rights), 10 to 12

(social rights) and 13 to 15 (cultural rights)*.

The Covenant provides under its articles that each State Party undertakes to take steps, individually and through international assistance and co-operation, to ensure human rights, including the right to work (art.6), the enjoyment of just and favourable conditions of work (art.7), the right to form trade unions (art.8), the right to social security (art.9), the widest possible protection of the family (art.10), the right to an adequate standard of living (art.11), the right to the enjoyment of the highest attainable standard of physical and mental health (art.12), the right to education (art.13),

1) See UN Working Group on Economic, Social and Cultural Rights, The ICJ Review No.27 December 1981 pp.26-39

*) The experience of these working groups lead to the conclusion that it would be better to have a Committee of independent experts serving in their individual capacity, comparable to the Human Rights Committee under the Covenant on Civil and Political Rights. The main difference, however, is that the Human Rights Committee is a treaty body, whereas this is a Committee of the ECOSOC with less independence.

compulsory primary education free of charge (art.14) and participation in cultural life (art.15).

During its third session held from 6 to 24 February 1989 in Geneva, the new Committee examined reports by Poland, Cameroon, Canada, Tunisia, Rwanda, France, Netherlands, United Kingdom and Trinidad and Tobago. They consisted of initial reports concerning articles 6 to 9 of the Covenant (Netherlands and Trinidad and Tobago), second periodic reports concerning articles 6 to 9 (Canada, Rwanda), initial reports concerning articles 10 to 12 (Cameroon, Tunisia, France and Trinidad and Tobago), second periodic reports concerning articles 10 to 12 (Poland, United Kingdom, Netherlands) and initial reports concerning articles 13 to 15 (Rwanda, Netherlands, Trinidad and Tobago). The Committee considered these reports on a country by country basis and in the order the reports had been received by the Secretariat. The Committee also established a Pre-sessional Working Group to consider reports in advance and a Sessional Working Group to examine the Committee's working methods, and to study other means to expedite the consideration of the reports.

Before the Committee considered states parties' reports, the experts (of the 18-member Committee) discussed the problems of reporting it had encountered so far. They found it essential to enter into a cordial, frank and fruitful dialogue. To enable the Committee to carry out its work more effectively, some members also suggested that it was necessary to understand how States perceived the Covenant. Guidelines should therefore consist of the necessary steps States were expected to take to prepare the report. Some Third World countries which lacked the human resources to answer

questionnaires or other enquiries should also profit from the extended programme of advisory services of the Centre for Human Rights.

The Committee had before it parts of a draft manual about improving the writing of reports which would contain the following:

- (1) Land and people. This section would contain information about the main geographic, ethnic and demographic characteristics of the country and its population. It would also include information on the languages spoken, life expectancy and infant mortality;
- (2) General political structure. This section would briefly describe the political framework, type of government and organization of the executive, legislative and judicial organs;
- (3) General legal framework within which human rights are protected. This section would explain:
 - (a) Which judicial, administrative or other competent authorities have jurisdiction affecting human rights and fundamental freedoms;
 - (b) What remedies are available to an individual who claims that any of his rights have been violated;
 - (c) Whether any of the rights referred to in the various conventions are protected either in the Constitution or by a separate bill of rights and, if so, what provisions are made for derogations;
 - (d) Whether the provisions of the various human rights conventions can be invoked before and directly enforced by the courts or other tribunals or whether

they must be transformed into internal laws or administrative regulations in order to be enforced by the authorities concerned;

- (4) Economic, social and cultural characteristics. This section would include information on such indicators as per capita income, gross national product, rate of inflation, external debt, rate of unemployment and literacy rate in order to give the Committee (and other monitoring bodies) an idea of the socio-economic and cultural framework in which a State implements the human rights conventions.

At its second session in 1988, the Committee had decided, pursuant to an invitation by ECOSOC resolution 40/102, to begin, as from its third session, the preparation of general comments on the various articles and provisions of the Covenant in order to assist the State Parties in their reporting obligations. The experience gained by the Committee, and its predecessor the working group, illustrates many of the problems which may arise in implementing the Covenant, although they do not yet provide a complete picture. These general comments did not constitute part of the Committee's report, but it was decided to include them in the summary records.

During the third session, the Committee considered it incorrect to assume that reporting by States is only a procedural matter. On the contrary, in accordance with the letter and spirit of the Covenant, the preparation and submission of reports by States can, and indeed should, serve a variety of objectives. A first objective is to ensure that a comprehensive review is undertaken with respect to national legislation, administra-

tive rules, procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. It should be undertaken in co-operation with the ministries responsible for the different fields covered by the Covenant.

As a second objective special attention should be given to any worse-off regions or areas and to any specific groups which appear to be particularly vulnerable or disadvantaged. This would ensure that the State party monitors the actual situation.

Thirdly, non-fulfillment of the rights contained in the Covenant is clearly implied by the obligations in article 2(1) "to take steps ... by all appropriate means..." Therefore a government should demonstrate that principled policy-making has in fact been undertaken.

Fourthly, non-governmental organizations which are active in the various economic, social and cultural sectors should be involved in the preparation of a report. States should also ensure a wide-spread dissemination of the report.

As a fifth objective, it may be useful to identify specific benchmarks or goals against which States' performance in a given area can be assessed. The Committee thus attaches particular importance to the concept of "progressive realization" of the relevant rights.

The sixth objective is that State Parties report in detail on the "factors and difficulties" inhibiting realization of economic, social and cultural rights and their inclusion in overall policies.

A final objective is to enable the Committee and the States Parties to develop a better understanding of the common problems faced. This part of the reporting process will be dealt with again in a separate general comment focussing on articles 22 and 23 of the Covenant.

The following are some highlights of

the reports considered by the Committee at its third session and its views and comments thereon.

Poland

Since the breakdown of the economy in the early 1980's, there was a lack of market stability and high inflation. New measures of social policy and the Government's social policy in general had been, to a considerable extent, determined by economic circumstances and the demographic situation, causing dramatic declines in national income and high inflation. The Polish representative underlined that his Government's policy in the implementation of the rights contained in article 10 to 12 of the Covenant was intended not only to establish the formal rights of the individual, but also to provide opportunities for the practical exercise of these rights. Benefits for low income groups were further built upon as part of the 1988 "price income operation". There had been criticism of that policy since wages were also supposed to benefit those who worked hardest.

The Polish representative gave detailed information on opportunities for mothers for half time or home work, maternity leave, child care leave, holiday camps, social activities, social and housing funds, loans in case of impeccable work, protection of living conditions of the youth etc. In response to questions compiled by the pre-session group and submitted ahead of time in writing, more information was given on the family climate, high rates of divorce, high rates of abortion, the situation of single mothers and feeding facilities for school children and university students.

During the final phase of consideration of reports, (i.e. after a 45 minute

presentation of the report and the answering of questions in writing the making of observations and additional questions from expert members), the Polish representative elaborated on the new concept of "social democracy" which was currently being discussed, "adequate health" by the year 2000, health in rural areas, AIDS, drug abuse, environmental safety, housing programmes, mortality, the chronically ill and care for orphans. Finally, the experts observed that the constructive dialogue that had been established between the Committee and the reporting State during the second periodic report of Poland on articles 10 to 12 of the Covenant would set an example for other States Parties.

Cameroon

The representative of Cameroon highlighted the recent austerity programme, the effect of the tribal and religious composition of his country on the enjoyment of the rights in the Covenant, different types of marriage and the provision of food by some private associations. The Committee stressed that future reports of Cameroon should take into account the questions raised and should also provide statistical data so as to enable the Committee to determine the trend and progress made in the enjoyment of economic rights. Cameroon's report was also criticized for emphasizing the legal aspects of implementation rather than factual aspects.

Canada

The representative said that although it was for the central Government to ratify international treaties, direct responsi-

bility for their implementation lay with the provincial government and the two territories. He emphasized the importance of the Canadian Charter of Rights and Freedoms which entered into force in 1985 and led to the amendment by the courts of provisions at variance with it. Furthermore, the courts frequently referred to the provisions of the Covenant in interpreting the relevant provisions of the Charter.

The Committee requested *inter alia* further information concerning the Native Economic Development Programme and the Government's view on its dispute with the Mikmaq Indians regarding the administration of their territory, including information on this point presented by the Four Directions Council.

Members of the Committee stated that it was important that details of difficulties encountered and of the extent of non-realization of the relevant human rights be included in the report. It was also said that parts of relevant legislative provisions had consisted largely of a recitation of relevant legislative provisions and that this did not enable the Committee to draw any detailed conclusions as to the State Party's compliance with the Covenant.

Tunisia

In his report, the delegate of Tunisia highlighted some of the changes which had taken place since the change in leadership on 7 November 1987. The Constitution had also been revised so as to permit the functioning of democratic institutions and the coming election procedure. A more healthy social climate had been created in order to enable trade unions to exercise their rights freely.

The Committee nonetheless regretted

that detailed information, especially statistics, had not been furnished, either on the most vulnerable sector in Tunisian society or on the difficulties still experienced in realizing economic rights.

France

The emphasis in the report submitted by France was placed on the following issues: struggle against social marginalization; poverty and insecurity; protection of children and the family; housing policy; protection of the handicapped; and, within the context of article 12, the struggle against AIDS.

Having noted that France has a strong social policy, the Committee accepted the delegation's willingness to provide further written information on various questions raised by the experts.

Rwanda

In his report, the representative pointed out that major difficulties in implementing economic rights had been hampered by the adverse effects of underdevelopment. He referred, in particular, to human rights teaching at all levels, including the police and military; employment of women in public and private sectors; maternity leave (1 hour per day for breast feeding); polygamy and pension rights and social services as applied to the legal widow only.

Again the Committee expressed its view that the report did not give sufficient information and statistics with respect to monitoring human rights. It was observed that on the requirement to provide, within two years, compulsory education free of charge, the report did not mention such a plan. Lack of material re-

sources did not explain why there was only one trade union in Rwanda. The Committee stated also that consultation and co-operation were no substitute for the right to strike.

Netherlands

When introducing the reports on articles 6 to 9 and 10 to 12 respectively, the State Party explained that the Kingdom of the Netherlands had a unique constitutional framework within which three autonomous parts freely co-operated, namely the Netherlands, the Netherlands Antilles and, since 1986, Aruba.

The Kingdom's 1983 Constitution reflected most of the provisions of the Covenant and the Supreme Court had recently taken the provisions of the Covenant into account. The delegate made reference to a number of issues, namely: an Act to help the long-term unemployed; youth traineeships; health statistics; infant mortality; "du coeur" restaurants to receive the poor; single parents; paternity leave; housing; and an information campaign called "Women in men's jobs". The representative of a non-governmental organization was allowed to make a statement on housing in the Netherlands in his personal capacity.

Despite the frankness of the Netherlands' delegation's replies, the Committee felt nevertheless that some further details should be given and that gaps still had to be filled.

Trinidad and Tobago

The representative of Trinidad and Tobago emphasized the effects of the fall in the price of oil, the country's main export, on the implementation of economic

rights. The growth target set in the 1989 budget could only be met through an alleviation of its indebtedness and improvement of the market in commodities. The representative referred to a number of issues, such as: the extended family which was still in existence; the level of health services; juvenile delinquency; training for development; seasonal labour (in Canada); applications for citizenship; scholarships in the arts; flooding; rise in tourism and existence of export processing zones (EPZ's).

Experts noted that there was a general balance in all three reports and that specialists directly concerned with the rights of the Covenant should have been at the session in order to be able to give satisfactory replies. The representative offered to furnish additional information at a later date.

United Kingdom

Presenting his report, the representative of the United Kingdom of Great Britain and Northern Ireland highlighted relevant recent developments in his country. These included the establishment of separate departments of health and social security with both ministers being in the Cabinet, the reform of social security as contained in the Social Security Act of 1986 and a comprehensive strategy to fight AIDS. Other topics discussed were: underdeveloped areas; the income support system; children's rights; child labour; delinquent minors; sexual abuse of children; rate of divorce; unfair dismissal on grounds of pregnancy; the homeless and the average calories consumed.

The Committee would have liked to have a presentation of developments over time and on issues still to be re-

solved and requested further information on the experts' questions.

Before adopting its report, the Committee discussed arrangements for the transition to a new reporting periodicity. In place of the three stage six-year cycle for initial reports and the three-stage nine-year cycle for periodic reports the Committee agreed to request a global initial report within two years of the entry into force of the Covenant for the

State party concerned and thereafter periodic reports at five-year intervals.

Among the objectives sought to be achieved by this change were: to reduce the burden imposed on State Parties with respect to reporting; to facilitate the task both for the reporting State and the Committee by working on a global unified report; and to make the reporting process more readily understood by all concerned.

Call for Action to Halt Destruction of Rainforests

It is widely recognised that the destruction of the world's rainforests presents one of the most serious challenges to the world's ecology.

The World Rainforest Movement (WRM), a non-governmental organisation based in Penang, Malaysia¹ recently called an urgent meeting in Penang because of rising concern over the rapid disappearance of the tropical rainforests and the deteriorating state of the world's forests in general. They point out that the lives of the forest peoples whose survival depend on the forest resources, are critically affected by this process. In Amazonia, Sarawak, Thailand, Philip-

pinas, the Himalayas and elsewhere, people are engaged in struggles to protect the forests and their societies.

In view of the urgency of the issues, the participants at the meeting felt that it is time to mount an international campaign to call upon the world, specifically the United Nations and national governments to take urgent steps to arrest and reverse forest destruction. A Declaration was drafted and endorsed at the concluding day of the meeting by all participants which included representatives from some of the world's active forest groups. The text of this Declaration is given below.

1) The address of the WRM is 87 Cantonment Road, 10250 Penang, Malaysia. FAX 04-368104; Telex CAPPG MA 40989; Cable CAPEN PENANG; Tel: 04-373511. Signatures of support can be sent by any of these means.

The organisation seeks to collect 3 million signatures endorsing the Declaration and calling upon the United Nations General Assembly and national governments to take immediate steps to halt the current process of forest destruction worldwide.

Declaration of the World Rainforest Movement

(An emergency call for action for the forests, their peoples, and life on earth)

1. Forests, both temperate and tropical, are an integral part of the life-support systems of the planet, performing numerous ecological and social functions that are essential for the continuation of life as we know it on earth.

Those functions include:

- regulating climate at both the regional and global level;
- providing a habitat for the majority of species on earth;
- providing a homeland and spiritual basis for millions of forest peoples;
- maintaining and conserving soils;
- regulating hydrological cycles and ensuring water supplies.

2. The continuing loss of the world's forests now constitutes a global emergency:

- In temperate areas, the bulk of primary forest have been destroyed. What remains is being lost to logging and acid rain and other pollutants;
- In tropical areas, forests are disappearing at the rate of 100 acres a minute or more. Moreover, the rates of destruction are increasing and, on current trends, little will be left within a few decades.

3. The immediate and long-term consequences of global deforestation threaten the very survival of life as we know it on earth. Indeed, the scale of deforestation and its impact now represents one of the gravest emergencies ever to face the human race.

Such consequences include:

- The disruption of climatic equilibrium and the acceleration of global warming;
- A loss of biological diversity on an unprecedented scale;
- The destruction of forest-based societies;
- Increasing droughts, floods, soil erosion and desertification;
- The dispossession and displacement of peasants and forest peoples through floods and the other ecological impacts of deforestation.

4. The current social and economic policies and practices that lead to deforestation throughout the world in the name of "development" are directly responsible for the annihilation of the earth's forests, bringing poverty and misery to millions and threatening global ecosystems with collapse.

Such policies and practices include:

- Plantations, both for industrial forestry and for export crops;
- Ranching schemes;
- Dam projects;
- Commercial logging;
- Colonisation schemes;
- Mining and Industry;
- The dispossession of peasants and indigenous peoples;
- Roads;
- Pollution;
- Tourism.

5. Official solutions to the problem of deforestation have ignored or played

down the fundamental causes of deforestation and have instead adopted policies that blame the victims of deforestation for their plight, while simultaneously pursuing "solutions" that can only result in the further degradation of forests and croplands through the promotion of industrialised forestry.

Specifically such policies include:

- The Tropical Forest Action Plan, as promoted by the World Bank, the UN Food and Agriculture Organisation, the UN Development Programme and others;
- "Sustained yield" commercial logging, as promoted by the International Timber Trade Agreement;
- Policies to Zone the forests;
- The commercialisation and privatisation of biological diversity, as promoted through the International Biodiversity Programme;
- Pollution control programmes that are directed towards "managing" specific pollutants rather than reducing the source of pollution.

6. Throughout the world, the victims of these policies are taking action to arrest deforestation and reverse the process of destruction. In Sarawak, Amazonia, the Himalayas, Thailand, the Philippines and elsewhere, people are standing up to protect the forests and their societies. Such peoples have proved that they are able to use the forests in the only way that is compatible with their preservation. It is not corporations, aid agencies and banks, who should be entrusted with designing and implementing the protection and regeneration of the forest wealth of the planet.

7. The victims of the development process, along with those concerned with their fate and the fate of the earth, there-

fore call upon the United Nations and national governments to take urgent steps:

- To restore ecological justice and integrity to humanity by returning to the millions of people both who live in the forest and who depend upon it, their right to sustainable livelihood.
- To restore ecological justice and integrity to life on earth through ceasing further forest destruction and regenerating damaged forest lands through the guidance of indigenous peoples, peasants, and local communities, planting only their choice of trees and plants, with the aim of restoring ecological diversity and the survival of indigenous societies.
- To restrain the over-consumption and wastage of resources by the world's privileged groups through making the necessary changes in lifestyle and consumption patterns consistent with the development of sustainable livelihoods throughout the globe, in order to satisfy the ecological, spiritual, social and aesthetic needs of people everywhere.

8. Specifically we call upon the United Nations and national governments:

- i) To empower forest peoples and those who depend upon the forests for their livelihood with the responsibility for safeguarding the forests and ensuring their regeneration by:
 - a) achieving land security for rural peoples, both through revising land reform, as recommended in the Brundtland report;
 - b) empowering local people with the right to a decisive voice in formulating policies for their areas;
 - c) rejecting social and economic policies based on the assumed

cultural superiority of non-forest peoples.

- ii) To halt all those practices and projects which would contribute either directly or indirectly to further forest loss. Such projects would include: plantation schemes, dams, ranching schemes, mining and industrial projects, commercial logging, the Tropical Forest Action Plan, the UN Biodiversity Programme, etc.
- iii) To revise radically the policies of those agencies that currently finance the projects and practices causing deforestation. Funding for such projects should be ceased and instead directed towards projects that promote the protection and regeneration of forests. The agencies involved include: the multilateral aid agencies and banks, such as the World Bank; the Inter-America Development Bank and the Asian Development Bank; the UN Food and Agriculture Organisation and the United Nations Development Programme; the overseas aid agencies of the developed countries; and major international corporations.
- iv) To implement, through the agency of forest peoples and under their direction, a programme for regenerating degraded forest lands and reinvigorating local cultures.
- v) To take immediate steps to curb the wastage, misuse and over-consumption of timber products.
- vi) To ban all imports of tropical timber from natural forests and tropical wood products.
- vii) To take immediate steps to cut

down the consumption of imported beef from tropical forest areas.

- viii) To restructure the present unequal world economic system which is dominated by institutions and practices that favour the developed countries at the expense of the poor of the Third World. This global system at present enables the developed countries to control and use an overwhelming and disproportionately high share of the world's natural resources. A fairer and more equitable economic system is therefore fundamental to any strategy for saving and regenerating the world's forests.
- ix) To initiate a global shift towards developing sustainable livelihoods. The basic goals of such a shift would be developing systems of production that are ecologically and socially sustainable. This will require:
 - Reducing the scale at which production is carried out and adopting practices which minimise the impact of production on the environment;
 - Maximising local self-sufficiency;
 - And assuring that economic activities are subordinated to social and ecological ends.

The authors of this Declaration included representatives of the following organisations:

- The Indonesian NGOs Network for Forest Conservation (SKEPHI) (INDONESIA)
- Sahabat Alam Malaysia (MALAYSIA)
- Haribon Foundation (The PHILIPPINES)
- Project for Ecological Recovery (THAI-

- LAND)
- Research Foundation for Science and Ecology (INDIA)
- Japan Tropical Forest Action Network (JAPAN)
- Rainforest Information Center (AUSTRALIA)
- Probe International (CANADA)
- The Ecologist (UNITED KINGDOM)
- Survival International (UNITED KINGDOM)
- Forest Peoples' Support Group (UNITED KINGDOM)
- Bank Information Center (USA)
- Rainforest Action Network (USA)

Response to Review 41 article on ILO Convention 107

I. Extract from a letter by Klaus Samson¹ to the ICJ:

"Mr. Berman asserts that Convention No. 107 has been a dead letter for many years, and that it is not clear why the ILO determined to resuscitate it, in view of the Organisation's limited mandate. He refers to 'bureaucratic territoriality' as a prime motivating factor, and in particular to the initiative taken by the International Labour Office in bringing the matter forward.

I would agree that, had there been no earlier comprehensive standard-setting by the ILO on the subject, it would have been preferable now to leave such action to the UN. Various reasons had, however, led to the ILO being chosen by the UN system as a whole as the forum for adoption of Convention No. 107, and its supplementary Recommendation, in

1957. The ILO had been designated as the lead agency in the Andean Indian Programme, in which other agencies – such as the UN, FAO, WHO and UNESCO – also participated. The ILO had an established framework for the adoption of standards, whereas UN human rights standard-setting at the time was making little headway. The other interested agencies of the UN system participated fully in the adoption process, both by contributing to the preparatory reports and by taking part in the discussions as the ILO Conference. They supported the adoption of instruments of comprehensive scope, in the face of suggestions by some delegates that the standards should be confined to matters of direct ILO concern.

The 1957 standards had two main policy aims: protection and integration of indigenous populations. Over the years it

1) Former Coordinator for Human Rights questions in the ILO

became apparent that many indigenous people objected to the idea of integration, and instead placed primary emphasis on respect for their identity and wishes. The ILO secretariat brought this development to the attention of the competent supervisory bodies – especially the Committee of Experts on the Application of Conventions and Recommendations – so that they might be taken into consideration in supervising the implementation of Convention No. 107, by giving greater attention to the protective provisions (e.g. as regards land rights, labour conditions, or respect for cultural traditions). We came to realise, however, that this was an inadequate response. An unrevised Convention might inspire or justify integration policies and programmes – not only in the 27 ratifying States but also elsewhere – contrary to the desires of the intended beneficiaries of the Convention. Moreover, a look at the reports of ILO supervisory bodies shows that the protective provisions of the Convention are far from a dead letter. For example, the Committee of Experts on the Application of Conventions and Recommendations in its report of 1988 made comments on important issues concerning the rights of indigenous peoples in Bangladesh, Bolivia, Brazil, India, Panama and Peru, and several of these cases gave rise to lengthy discussions at the Conference in June 1988. These discussions have also drawn on information provided by NGOs, including organisations of indigenous people.

In all the circumstances, it appeared desirable to have the Convention revised, with a view to removing all provisions directed at integration of indigenous peoples, emphasising the need to respect their identity and wishes, and

strengthening certain protective provisions (e.g. as regards land rights)".

II. Reply to Howard Berman by Lee Swepton²

While Mr. Berman's article is factually correct in most respects, it does not, reflect the view of most NGOs, and certainly not of most delegates, who participated in the first discussion in 1988.

Mr. Berman believes that the ILO should leave the United Nations to work alone on this important subject. This ignores the different kinds of standards which are being discussed, and the different working methods and goals of the two organisations. The United Nations' role is always to express the highest aspirations of mankind, and to act as a forum in which these aspirations can be explored. The UN's Working Group on Indigenous Populations therefore began in 1988 the examination of a preliminary draft of a Declaration of Indigenous Rights (with the close co-operation of the ILO and the other specialised agencies). When adopted – a process which may take many years – this Declaration will have moral but not binding legal force. If the United Nations then goes on to adopt a Convention on the subject, likely to take many more years, it will have to adopt a mechanism by which its implementation can be supervised. Finally, the UN has no mechanism for linking directly practical assistance to governments or to indigenous peoples and the objectives of UN human rights instruments.

By contrast, the revised ILO Convention will be before the Conference for adoption in 1989, less than three years after it was first decided to do so. When

2) Senior official in the ILO Department of International Labour Standards and Human Rights

ratified, the Convention's application will be subject to close scrutiny by the ILO's highly-developed supervisory bodies. The ILO's programme of technical assistance will undertake projects (as it is already doing) to promote in practical terms the improvement of the situation of these peoples, and to assist governments and these peoples themselves to meet their own goals within the framework of the Convention.

In fact, the United Nations itself asked the ILO to adopt Convention No. 107 in 1957, and it asked the ILO to undertake the present revision process. The other specialised agencies have either participated in or encouraged the ILO in this work, which all concerned have agreed is well within the ILO's mandate. Moreover, virtually every national, regional or international gathering of indigenous and tribal peoples for the last decade has urged the revision of Convention No. 107, and a number of indigenous peoples' organisations are participating actively in this work. Admittedly, not all the non-indigenous observers share this view.

Thus Mr. Berman is in a small minority in feeling the ILO should stop trying to improve its 1957 Convention, and that the UN should work alone in this field. Both organisations recognise the need for complementary approaches, and neither can do everything the other one can.

He goes on to state that the revised Convention which is emerging is not meeting the expectations he held for it, and that it does not correspond to the aspirations of indigenous peoples. The central criticism would appear to be that the draft Convention does not demand that full control over all aspects of their lives immediately be handed over to these peoples. What Mr. Berman meant as a criticism is in fact an accurate reflec-

tion of what the ILO has been attempting to do with this revision: to establish a basis for a working relationship between indigenous and tribal peoples and the countries within which they live. The ILO so far has taken great care, in the discussions which have taken place, to establish conditions under which indigenous and tribal peoples in a ratifying country would be able to enjoy the degree of autonomy in managing their own affairs which they are in fact able to handle. The draft revised Convention would open the door to the assumption of responsibility for internal self-government, by stages and depending on the readiness of the community concerned.

There is room in international organisations both for statements of the highest aspirations of these peoples, and for the establishment of minimum standards of conduct for governments. Mr. Berman grudgingly admits that the old integrationist flavour has disappeared from the draft, but laments that it is not replaced by a call for self-determination. The approach taken by the ILO, with the active participation of indigenous representatives, has been to agree that political self-determination is not within the ILO's mandate, but that management of their own cultures, economies and education is.

There are some who advocate the inclusion in the ILO Convention of the term "self-determination". It has no defined meaning in international law, but its use arouses visions of the fragmentation of states. Its inclusion in a Convention would guarantee that the Convention would not be ratified. Nothing in the draft is inconsistent with the notion of self-determination, but the fullest expression of this principle should, as Mr. Berman wishes, be left to the United Nations.

In fact, the "ratifiability" of the revised Convention is a great deal more important than Mr. Berman believes, although he has made no examination of the practical effects of the ILO's supervisory work for Convention No. 107.

Finally, the question of indigenous participation in the discussions must be examined. The participation by NGOs in the ILO's revision process is greater than at any time in the history of the United Nations system for the adoption of any human rights instrument. Nevertheless, only international NGOs are allowed to speak in formal session, and there has been a certain amount of conflict among the different NGOs over who is truly rep-

resentative. One of the ways in which they dealt with the problem in 1988 was to refuse to allow non-indigenous observers to speak in their names and to continue to explain to them what they should want and how they should get it. It bears saying to the NGO community that any NGO which has tried to take a positive role in the ILO discussions has found the door wide open.

If, on the advice of academics like Mr. Berman, the potential benefits of the revised Convention are rejected, indigenous and tribal peoples will have no international leg on which to stand for many more years.

AIDS Strategies and Human Rights Obligations

by

Justice M.D. Kirby CMG*

Basic Proposition

The strategies for the containment and ultimate elimination of the spread of HIV virus and AIDS must be designed within the framework of internationally recognised human rights norms. There is no human right to spread a dangerous virus. But the nature of HIV/AIDS, and of national and international reactions to its spread, are such that those who determine policy to meet the challenge must be alert to the particular risks of pressure which will arise from the derogation of basic human rights.

The reasons for ensuring that World Health Organisation (WHO) strategies comply with basic human rights may be obvious. But they include the following:

- (a) The international legal norms on human rights merely state fundamental rights of human beings which derive from the very fact of humanness and the entitlement to the respect of each human being which that fact necessitates;
- (b) The norms are contained in international treaties, many of which have been developed and promulgated under the authority of the United Nations Organisation (of which WHO is part). The instruments include the U.N. Charter with its opening recital which is a reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". Also relevant are the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. These and regional statements of human rights have acquired increasing recognition as part of the law of nations. They are binding rules of international law, even if their enforcement and application are sometimes uneven;
- (c) The 41st World Health Assembly of WHO (May 1988) urged member states "to protect the human rights and dignity of HIV-infected people

* Commission Member of the International Commission of Jurists. President, Court of Appeal of New South Wales, Australia. (Personal views only). This commentary is based on an extended monograph by Paul Sieghart entitled "AIDS and Human Rights", obtainable from the British Medical Association Foundation for AIDS, BMA House, Tavistock Square, London WC1H 9JP, UK.

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, travel...";

- (d) If ethical and legal reasons for protecting human rights are insufficient, a strong case exists, based upon pragmatic grounds, that only by strategies which respect human rights can the behaviour modification be achieved which is essential to turning the tide of the AIDS epidemic at this stage.

Status of Human Rights Law

In many countries, basic legal norms of human rights are included in national and subnational constitutions. In some regions of the world, basic human rights are secured in regional treaties such as the European Convention on Human rights (1953), the American Convention on Human Rights (1978) and the African Charter of Human and Peoples' Rights (1985). For all countries, whether they have ratified these international instruments or not, the International Covenants, which entered into force in 1976, provide statements of rules which are legally binding because they are now part of international law. Such rules may not be immediately enforceable. There is no international court or police force with powers to pronounce and sanction breaches. But these practical impediments to enforcement do not affect the legally binding nature of the norms. Moreover, a majority of member states of the United Nations submit to investigatory/supervisory organizations established to monitor compliance with human rights norms, e.g. the U.N. Human

Rights Committee. Some have also submitted to an additional obligation which permits complaint by individuals concerning alleged violations of the basic standards.

In some countries international obligations are incorporated as part of domestic law. In most they are not. They require domestic legislation to give them local status as legally enforceable rules. But even in such countries, there is now a growing tendency for judges, in stating and developing local common law or interpreting ambiguous local statutes, to perform their functions with reference to international standards, including those relating to human rights.

The WHO, as an organ of the United Nations Organization is required to comply with international human rights norms. This obligation is recognised by the World Health Assembly (WHA 41.24). It is supported by the World Summit of Ministers on Health (London, 1988). It has been inherent in the strategy of WHO to date, in tackling HIV/AIDS. The lessons from the derogations from human rights in public health measures and other responses to earlier epidemics in all parts of the world emphasises the importance, in tackling this epidemic, to ensure that national and international policies conform to international law, particularly on human rights. Although this law will occasionally inhibit WHO and member states from adopting strategies which may at first seem attractive and useful, rejecting the inhibition is important:

- (a) It is the ethical and legal duty of WHO and of member states;
- (b) It ensures that abiding basic principles are respected in emergencies, when they are most likely to be ignored, yet when they are most im-

portant; and

- (c) Experience to date suggests that far from diminishing the effectiveness of policies to combat AIDS, because the virus tends to be spread primarily by sexual intercourse and intravenous injection of drugs, oppressive policies which do not respect basic human rights will drive what is typically already private behaviour still further underground. They will make behaviour modification (the principal target in default of a vaccine or a cure) difficult and in many cases impossible. All past experience shows that sexual and drug related activities are not readily susceptible to oppressive, punitive and prohibitory legal responses.

The General Justification of Derogations

International human rights law only permits restrictions upon basic human rights where –

- (a) They are provided by law;
- (b) They are necessary in a democratic society;
- (c) They are needed because of a pressing social need for them;
- (d) The restrictions adopted are proportional to the needs and are weighed against the adverse effects on the persons whose rights are restricted and upon the public which has its own interest in the free exercise of the rights concerned; and
- (e) The derogation must be for the protection of a legitimate aim of society. One such aim is "the protection of the rights and freedoms of others" and "the protection of public health".

These "legitimate aims" do not provide a blanket entitlement to derogate from basic human rights. It must be shown that the derogation is necessary in each case to meet a pressing social need and that the response proposed is proportional to the risks inherent in derogating from basic human rights. These rules require close attention to the nature of the virus in question, its established modes of transmission and the risks and incidence of transmission. Good laws and policies arise out of good understanding of the relevant scientific data. They do not arise out of hunches, guesswork, indiosyncratic decisions, still less from prejudice, fear and loathing.

Thus, a total quarantine of all persons infected with HIV would be grossly disproportionate to the risks of further transmission of the virus (except possibly in the case of a person proved to be guilty of repeated deliberate transmission). Similarly, universal testing or even widespread testing of particular groups will be disproportional to the benefits secured thereby. The risks of discriminatory use of the data secured, uncounselled signification of infection, false results with consequent diminution of precautions and diversion of scarce health funds all render such strategies unnecessary in a democratic society, inappropriate to the pressing social need of containing HIV/AIDS and disproportional to the limited benefits attained.

The Right to Privacy

In the International Covenant on Civil and Political Rights (ICCPR), art. 17 provides:

"17.1 No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence

nor to unlawful attacks on his honour and reputation.

17.2 Everyone has the right to the protection of the law against such interference or attacks".

A number of strategies proposed or adopted in respect of AIDS would appear to conflict with this basic right. They include mandatory testing for HIV; compulsory registration of suspects; mandatory collection of data on suspects; making HIV or AIDS notifiable diseases; the provision of test results to third parties; and the criminalization of behaviour considered likely to spread HIV/AIDS. In each case, it is therefore necessary to consider the issues of necessity, proportionality and legitimacy of the strategy used or proposed. For example, as far as the criminalization (or re-criminalization) of male homosexual conduct or particular acts (e.g. anal intercourse) are concerned, differing decisions have emanated from different courts considering the application of *basic human rights*. The Supreme Court of the United States has refused to strike down under that country's Bill of Rights a state statute imposing criminal penalties on anal intercourse and an Army Regulation requiring discharge for proved homosexual orientation. On the other hand, the European Court of Human Rights has held that criminal sanctions on homosexuals (whether or not energetically enforced) conflict with respect for private life in a way which cannot be justified consistent with the basic human rights norms. (see *Dudgeon v United Kingdom* and *Norris v Ireland*).

Norris v. Ireland

Right to Liberty and Security

The ICCPR contains a guarantee of the "right to liberty and security", (see

art. 9(1)). The same is true of virtually all international human rights instruments. Deprivations of liberty can be total (e.g. strict quarantine) or partial (e.g. to administer compulsory blood tests). Such liberty may only be taken away by law (i.e. not arbitrarily) and in the circumstances previously mentioned. Only one country (Cuba) has so far adopted a strategy of strict quarantine for HIV infected persons. Other countries have adopted policies of expulsion of persons who are found to be infected. Many have laws providing for compulsory detention of particular AIDS suspects, e.g. those deliberately and repeatedly spreading the virus indiscriminately. The derogation from the human rights of persons compulsorily detained because of HIV infection is completely disproportionate to the benefits secured thereby. The infection may last indefinitely. On average it may last ten years or more before causing disabilities. The impact on family and economic life of such a strategy is obviously devastating. The risk of the spread of the virus lies in activity not in the existence of the carrier. If the activity can be controlled in a more precisely targeted law directed at the activity, the gross, heavy-handed response directed at the liberty of the individual can be avoided.

Freedom of Movement

The ICCPR (art. 12(4)) provides for everyone lawfully within the territory of a state to liberty of movement and freedom to choose his residence. It also provides for freedom to leave any country, including his own. Such freedoms are subject to restrictions "necessary" *inter alia* "for public health". No one is to be arbitrarily deprived of the right to enter his own country. The rights listed are

limited to nationals and persons lawfully within countries. Aliens and stateless persons generally enjoy no such rights under this heading.

Some countries have introduced restrictions on the entry and movement of persons with HIV/AIDS. No such restrictions may be placed upon nationals. Those placed upon other persons lawfully within a country must run the gauntlet of necessity, legitimacy and proportionality. They must also be provided by law and not imposed arbitrarily e.g. by border officials with an unreviewable unstructured discretion. A general blanket restriction on the international movement of HIV infected persons would not appear to be proportional to the risk of their spreading the infection. The right of international travel is now an important attribute to freedom. It is an important contribution to peace. Whilst there is no such right to spread an infection internationally (particularly in countries where there is a low incidence of it) the widespread requirement of border checks, health certificates of post-entry examinations of aliens would seem, in the present state of the epidemic at least, to be disproportional to the benefits secured thereby. AIDS exists in all countries. The imposition of a general requirement of AIDS-free certificates would add enormously to the costs of travel, impede greatly the travel of poorer persons and provide no sure protection because of false positives, the "window period" before antibodies appear and the need for constant retesting at disproportionate cost to the benefit gained.

The Right to Marry and Found a Family

Article 10 of the International Cove-

nant on Economic, Social and Cultural Rights (ICESCR) recognises that the family is the "natural and fundamental group unit of society". It contemplates the recognition of marriage so long as it is "entered into with the free consent of the intending spouses". Other international instruments specifically recognise the right to marry and to found a family (see e.g. European Convention on Human Rights, art 12). Mandatory pre-marital HIV testing does not derogate from this right. However, a prohibition on marriage for persons found positive clearly would. Similarly, laws or practices which forbade women infected with HIV bearing children would infringe such human rights norms. The question would then arise concerning the necessity, legitimacy and proportionality of such laws and practices.

Right to Work

The right to gain a living by work freely chosen and accepted by the individual is a common provision of international instruments (see e.g. ICESCR art 6(1)). Pre-employment HIV/AIDS screening derogates from such a right. The ILO has condemned it. Having regard to the modes and risks of transmission, a blanket requirement of such screening as a pre-condition to employment would be disproportional to the benefits obtained save possibly in a small number of occupations where there may be a very high risk of spreading infection. It is the dangerous activity which should be targeted not the occupation.

Other Rights

There are other human rights which are relevant to policies on AIDS. These

include the right to education, the right to social security and assistance and freedom from inhuman or degrading treatment or punishment. There has also developed a jurisprudence around the circumstances which permit a derogation from human rights e.g. "public emergencies" and "public health". It is important that those who design legislation, strategies and policies on AIDS/HIV should familiarise themselves with the basic rights so secured and the limited circumstances in which derogations from them will be authorised by international law.

Conclusions

The purpose of this paper has been to draw attention to the international legal environment in which national and subnational governments, WHO and the Global Commission on AIDS operate in developing responses to the AIDS epidemic. National and international agencies are not free to adopt policies without any regard at all to international law. International law includes international human rights law. This has now become part of the law of nations. It is a central tenet of the U.N. system itself. Various provisions of the Charter, the Universal Declaration and International Covenants are relevant to the respect for human

rights which must be accorded at the same time as combating HIV/AIDS.

Derogations from basic human rights are normally permitted on the ground of "measures necessary for public health". But this does not give a blanket exemption from respect for human rights. The derogations must be specifically provided by law, they must not be arbitrary, they must be legitimate, necessary and proportional to the benefits to public health secured thereby. Good laws and policies will therefore be designed with a high degree of precision. They will be targeted at particular risky activities rather than at people as such. They will also be grounded in a thorough understanding of the nature of the virus, its modes of transmission and the measures necessary to secure, at critical moments, the behaviour modification that will prevent the spread of the virus. The global Commission on AIDS should familiarize itself with and accept the framework of international human rights norms. It should do so not simply because it is part of international law and thus binding on WHO. It should do so from an ethical respect of humanness, because of the sad lessons of derogations from human rights in past epidemics and because any strategy which ignores basic human rights norms is almost certain, in HIV/AIDS, to be less successful than a strategy which respects human rights.

Freedom of Speech and Blasphemy

The laws in India and UK

by
Fali Nariman*

If *Satanic Verses* had contained passages vilifying Christ (and not the Prophet) and its author had been prosecuted for blasphemy in the country of his adoption, neither Rushdie nor his book would have stood a chance – he would have been convicted and imprisoned; all copies of his book would have been forfeited. Given the same fact-sequence and had Rushdie been prosecuted in the country of his birth, his right to freedom of expression (though painful and hurtful to the religious feelings of others) would have been upheld in the absence of proof of his deliberate or malicious intent!

This article is not about the book - it is about the conflict between the freedom of speech and expression and the freedom of religion – which it has universally aroused. Each of these freedoms has been guaranteed in International Declarations and Regional Conventions, as also in the written constitutions of most countries of the world.

Rushdie affair

Rushdie, a perfectly respectable name, has been scorned, as a profane word; by others the name is revered as a heroic exponent of Free Speech. We have on the one hand, the International Committee for the Defence of Salman

Rushdie and His Publishers, who emphasise Article 19 (2) of the Universal Declaration of Human Rights (UDHR 1948): "Everyone shall have the right to freedom of expression" and "the freedom to impart information and ideas of all kinds". On the other hand, there is the denunciation by Muslims around the world, as also by those who profess other faiths, on grounds of religious scurrility and vilification: they stress Article 19(3) of the same Universal Declaration – that restrictions on the right of free expression may be imposed by law to ensure respect for the rights of others, which include their religious rights and feelings. And to cap it all, the whole affair has been propelled on to the stage of world opinion by a time bomb: the stark, totally indefensible, edict of the Ayatollah.

Basically – summary execution apart – who is right? Those who seek to propagate the right to free speech and expression, or those who claim to be offended by the exercise of that right and claim a corresponding right to be protected by the "blasphemy" involved in its exercise?

Let me tell you what our Constitution and our laws have provided for when these two great Rights come into conflict.

First, a little background. It was

* Member of the Executive Committee of the International Commission of Jurists; Indian advocate. This article was published in the Indian Express of March 13, 1989.

nearly 200 years ago that Lord Macaulay had protested in the British parliament against the way blasphemy laws were then administered in England. Blasphemy is an indictable offence in English common law: it consists in the publication of violent or scurrilous words attacking the Christian religion – words which pass the limits of decent controversy; in England it is not blasphemy to attack any religion except Christianity. When Macaulay protested that blasphemy laws were not properly administered, he had said (and this was two centuries ago): “If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque!

When Macaulay became a legislator in India and a Member of the Viceroy's Council as Law Member, he gave expression to his feelings. In the Penal Code of 1860, which is almost entirely his handiwork, he inserted provisions which made it a penal offence to excite enmity or hatred among different religious communities. He virtually extended by legislation the English common law of blasphemy to other religions, to the religious societies and communities of India.

That was how the law was understood and applied in India for almost fifty years after the enactment of the Penal Code. Then, in 1927 a judge of the High Court of Lahore (part of British India) held that the statutory provisions prohibiting excitement of hatred and enmity between subjects and communities of His Majesty were not meant to stop polemics against a deceased religious leader, however scurrilous and in bad taste. The Legislature promptly intervened. The Criminal Law (Amendment) Act of 1927 introduced Section 295A into Macaulay's Penal Code. It has been on the statute book ever since. It provides that “whoever with deliberate and mali-

cious intent of outraging the religious feelings of any class of citizens of India by words, either spoken or written, or by signing or by representations, insults or attempts to insult the religion or religious beliefs of that class shall be punished with imprisonment...”. The freedom from vilification of religious beliefs and sentiments was thus preserved.

Constitutional guarantee

Then came the Constitution of India 1950. It guarantees both the right to freedom of speech and expression (Article 19(1)(a) and the right to freedom of religion and religious worship, (Article 25). Each of these separate fundamental rights are expressly made subject to “public order” – (Article 19(2) and Article 25(1) i.e., they are subject to laws imposing reasonable restrictions on the exercise of each of these rights to prevent violence or disorder.

It was on this basis that the validity of Section 295A of the Penal Code – when challenged after the coming into force of the Constitution – was upheld by the Supreme Court of India

Chief Justice S.R. Das who spoke for the Court (1957) made it clear that insults to religion offered unwittingly and without deliberate or malicious intent, which outraged the religious feelings of a class of citizens, did not come within Section 295A of the Penal Code. Section 295A only punished the aggravated form of insult to religion when it was perpetrated with the deliberate or malicious intention of outraging the religious feelings of a class. It was the calculated tendency of this aggravated form of insult to disrupt public order that went beyond the permissible limits of free speech: protected from challenge by Article

19(2). A masterly judgment – preserving the balance between the two sets of rights without losing the essence of either.

Lord Macaulay never perhaps intended it that way, but S.R. Das was not only a great judge, he was also a judicial statesman. He believed that a free people may be a "pain in the neck" to governments – but once you have enough of them speaking out, without malice or ill-will, it is not difficult to get used to them, to tolerate them; the mere likelihood of public disorder was not to be an impediment to the freedom of speech and expression in India – it is only so when accompanied by an intent, deliberate or malicious, to wound or hurt the religious feelings and sentiments of a particular community. The two sets of rights are better harmonised and preserved in India than in the United Kingdom.

British libel case

This was demonstrated in an interesting case decided by the House of Lords in 1979. England's highest court said that it was not an essential ingredient of the common law offence of blasphemy that the publication must tend to lead to a breach of peace (as in the case under the laws of India). It was also said that a subjective intent to attack the religion was not an element of the offence as in India; it was enough that the publication (of the blasphemous material) was deliberate.

The case arose out of a publication in a newspaper edited and published by one Mr Denis Lemon – the newspaper was *Gay News* (a newspaper for 'Gays'). In its issue of June '76 there appeared a poem by one Prof. James Kirkup which

described in explicit detail acts of sodomy with the body of Christ immediately after his death and ascribed to Jesus Christ during his lifetime promiscuous homosexual practices with the Apostles and others. A prosecution was launched; Mr. Lemon and the publication company, *Gay News Limited*, were convicted: nine months imprisonment for the editor and publisher, and a fine of £1,000 on the company.

For more reasons than one, the case went up to the House of Lords – first because for more than fifty years before the prosecution of *Gay News*, the offence of blasphemous libel appeared to have become obsolete; the last previous trial having taken place in 1922. Second, because it involved a very important question of law as to whether it was necessary to establish intent on the part of the publisher to hurt or injure the feelings of devout Christians, or whether it was sufficient merely to intend to publish what in the Court's or Jury's view was a blasphemous libel. The House of Lords was divided, but by a majority of 3:2 they upheld the correctness of the conviction. Lord Scarman – a great liberal and a humanist judge – upheld the severity of the law of blasphemous libel, and the correctness of the conviction, for reasons he set out at the commencement of his judgment.

The verdict

My Lords, I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences de-

signed to safeguard the internal tranquility of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.

Mr. Lemon took the case to the European Commission on Human Rights - without success. The Commission held (1982) that a conviction for blasphemous libel did not amount to a violation of the European Convention on Human Rights: Articles 9 and 10 (freedom of thought and religion and freedom of expression). They too felt with Lord Scarman that the protection of the religious feelings of citizens was a necessary way forward in a plural society. Apparently for this reason, freedom of speech and expression, so prized in England and the European

(EEC) countries, has been subordinated to the laws of blasphemous libel - even where there was no intent to act maliciously, even where there was no apprehension of a breach of peace!

One final word: that most readable and popular historian of the twentieth century, Will Durant, has written that "education is the technique of transmitting civilisation". To be civilised is to be tolerant. We must not, we cannot strangle the free word. And 'mob culture' cannot be excused or condoned. The recent film *The Last Temptation of Christ* was blasphemous to many Christians - but violence and killing of innocents was not their response. And, it is as well to remember that the Pope and the Archbishop of Canterbury (though greatly offended) did not order the summary execution of the film director Martin Scorsese.

Human Rights and Inquisitorial Procedures in Latin America

by
*Guillermo Bettocchi**

The various international instruments now in effect dealing with human rights, both Declarations and Covenants, greatly emphasize the procedural guarantees that a legal system must provide for individuals who, for whatever reason, find themselves obliged to resort to the judiciary. These guarantees operate in resolving of private or public disputes, but are especially important when an individual is accused of having committed a crime.

These guarantees are so crucial for the observance of all the other fundamental rights that international texts have adopted and enshrined them as fundamental rights themselves. They serve a dual purpose, first as fundamental rights and second, as guarantors of all the other basic rights.

Specifically, the guarantees in the field of criminal law place a set of restrictions on the State's power to act against an individual who is being investigated for allegedly committing a crime, and who is facing possible conviction and punishment, often imprisonment and on occasions even death. These guarantees are designed to ensure that the individual will receive a fair trial in which the evidence against him will be weighed thoroughly to decide upon his guilt and that any penalty imposed will ensue from convincing proof and fit the crime. In such conditions, it can be agreed that the

principle stating that criminal law protects the interests of society while criminal procedure safeguards the rights of the defendant is true.

This notion is hardly a new development owed to the international instruments of the 20th century, although these texts have definitely endowed them with an international dimension. Even as far back as the year 1215, we can find references to the ideas of "lawful judgment" (as a necessary pre-requisite for the imprisonment or conviction of any individual) in such documents as the Magna Carta from King John of England, which nonetheless took into account the peculiarities of the customs and context of that far-off time.

Again, in the late 18th century, the first ten amendments to the U.S. Constitution (the "Bill of Rights") made mention of the same guarantees which appear in the current international instruments, although those amendments applied only to the domestic affairs of that nation. These can be summed up in the concept of due process of law, a concept which has been widely developed by American legal scholarship.

In the 20th century and particularly in the aftermath of World War II, it became an urgent matter to set up international means for the protection of human rights. Consequently, various instruments were drafted, both in the interna-

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tional and regional spheres, which enshrined the fundamental rights of the individual. As these rights found expression, they bore increasingly strong resemblance to each other. The likeness also extended to those procedural guarantees which were applied to individuals accused of a crime and brought to trial.

Therefore, we now have the Universal Declaration of Human Rights of 1948 and the subsequent Covenant on Civil and Political Rights of 1966 in the international realm, the American Convention on Human Rights of 1970, the European Convention for the Protection of Human Rights of 1950 and the African Charter on Human and Peoples' Rights. All these texts protect, to varying extents, the right of an accused person to a prompt, public hearing, to be tried by an independent and impartial tribunal, to avail himself of all the means for his own defence, to be presumed innocent, not to be deprived of his freedom except in cases determined by law (and never arbitrarily); not to be judged twice for the same crime, and not to be punished for an act or given a penalty *ex post facto*, among other rights.

The same guarantees appear in essence in the great majority of Constitutions, or equivalent codes, the world over. Furthermore, binding international covenants are directly and automatically applied in the internal affairs of the State Parties. This should suffice, at least in theory, to secure the widespread observance of and compliance to these rights.

Unfortunately, however, this does not hold true in many countries, which, through accidents of fate and history, have embraced a procedural system

which, in its very essence, does not follow the lead taken by the international documents. Quite the contrary, in many cases, they openly thwart these very principles. Those countries are ones, which, following the "Roman-civil" tradition (also termed "continental European") have set up a procedural process rooted in inquisitorial practices as opposed to an adversarial approach, the hallmark of the common law tradition.

It would be too time consuming and surpass the scope of this article to embark on a detailed description of each of the major procedural systems outlined above and of their numerous variations¹. By way of illustration, it should be pointed out that in inquisitorial systems, which, in Latin American countries (the focus of this article) derive from the Napoleonic Code, there is a secretive investigative stage where all the evidence for and against the defendant is gathered together, with scant or no participation whatsoever from the defence counsel. It is followed by a plenary stage (either written or oral depending on the country) where the evidence is weighed, the act classified and the corresponding penalty imposed. The inquisitorial body or officer may come under the Executive Branch (the police or State attorney) or under the judiciary (the "juez instructor"). In turn it may delegate some of the investigation to the police or another body from the Executive. Some countries use a so-called "mixed" procedure which is supposed to compensate for the inadequacies of a basically inquisitorial system, by implementing an allegedly adversarial oral trial at the plenary stage, where evidence is presented and weighed, the de-

1) On the characteristics of each system, consult LOSANO, Mario G., "Los Grandes Sistemas Jurídicos" Ed. Debate; Madrid, 1982 and DAVID, René, "Los Grandes Sistemas Jurídicos Contemporáneos". Biblioteca Jurídica Agilar; Madrid, 1973.

fendant is "publicly tried" and the suitable sentence passed.

Usually, in an "adversarial" system, "the body which directs the accusation assembles all the evidence relevant to proving its case, under the close supervision of the defence, and it calls for a trial if there are sufficient grounds, but the evidence is integrally produced or reproduced at the trial, and the judge exercises broad discretionary powers"^{2,3}. Ultimately, the judge acts as a "referee" for the two parties (prosecution vs. defence) and takes no part in the investigation of the facts, limiting himself quite literally to acting as the "judge", meaning he applies the relevant law to the facts established at the trial.

In England for example, before a person can be 'committed for trial' before a jury, the prosecutor must establish by evidence in 'preliminary proceedings' before a magistrate (the lowest level of the judiciary) that there is 'a case to answer'. The defence is entitled to call evidence at that stage, but rarely does so as there is nothing to be gained by it. The court's sole duty is to decide whether, if the prosecution evidence is believed, the defendant's guilt will be proved. He does not himself adjudicate between the prosecution and the defence. Conse-

quently, the defendant does better to withhold his defence until the trial.

It goes without saying that the procedural guarantees embodied in the various international instruments have been designed along the lines of the adversarial approach and that the most important developments have been evolved in common law countries, whereas countries heir to the Napoleonic system have been unable to adapt to them fully.⁴

Latin America provides a prime (although not exclusive) example of this phenomenon. The legal systems in several Central American countries are equipped with inquisitorial procedures and use written plenaries, or as is common in South America, they use "mixed" procedures and have oral plenaries. In the latter, the administration of justice has a long way to go towards the effective implementation of procedural guarantees provided for in international instruments, and the attempts at judicial reform have apparently only served to worsen the status quo⁵.

(a) *Right to a public hearing*: This right, which is recognised by all the international instruments on human rights, has several justifications, the greatest being to allow public scrutiny of

- 2) The Inter-American Institute of Human Rights (I.I.D.H.) "Sistemas Penales y Derechos Humanos en América Latina" (final report). Ediciones Depalma; Buenos Aires, 1986, pp. 168-169.
- 3) Consult the description of the common law procedure today in DAVID, René, op. cit., p. 277.
- 4) "Traditionally, the European legal profession has focussed all its attention on substantive law and neglected everything related to adjective law," DAVID, René., op.cit., p. 276.
- 5) Consider, for example, the situation in Peru where the new Constitution of 1979 established an office of Public Prosecutor as an independent body apart from the Judiciary and gave it the power to lead the investigation and the responsibility of conducting the public hearing in a scheme which approximated to an adversarial approach. However, the procedural method was not substantially altered and consequently, in reality, there are two consecutive investigations in operation: one, which is conducted by the Prosecutor who is obliged to "personalize it to the alleged perpetrator of the crime and present the proof of guilt", and the other performed by the "juez instructor" which basically repeats the evidence already furnished. Furthermore, it is often the same judge who must give the verdict in the plenary stage which applies to 70% of all crimes. This results in a totally inquisitive process that is even more delayed because of the supplementary formalities involved.

the conduct of the judiciary. In so doing, there is a greatly reduced risk that the judiciary will engage in improper or unlawful conduct. Publicity also signifies a better defence for the accused since the parties are directly involved and the evidence can be put to the test of argument. Moreover, the proximity between the judge and defendant is a long-standing tradition in procedural law. This all goes to prove that a fair trial requires publicity except, naturally, when exceptional, easily identifiable circumstances involving questions of morality or security are at stake.

The inquisitorial process, on the other hand, is, by definition, a written method which is kept secret (or at least confidential) and, thus, precludes, from the very outset, this essential guarantee from being observed.

In the countries of Central America having the continental European legal system (with the exceptions of Costa Rica, El Salvador and Panama with "mixed" procedures), the general rule is the exclusive use of inquisitorial methods, with a written plenary that categorically bars an open trial.

Nevertheless, most South American countries have put into effect the so-called "mixed procedure", which, as mentioned above, provides for a later "oral" stage following the investigatory and highly inquisitorial phase, and which purports to rectify the inherent deficiencies of the system. Yet, soon after the enactment of the Napoleonic Code, "the oft-cited assertion that the inquisitorial investigation (which is secretive and generally prescribes preventive detention) is adequately counterbalanced by the addition of a later authentic adversarial trial was proven false as soon

as it became obvious that part of the evidence could not be reproduced at the plenary or in the trial; in practice, the evidence presented in the investigation could not be reproduced in the trial"⁶. What this ultimately means is that although evidence from the investigative phase is often decisive at the time of judgment, there is no opportunity to examine or debate it in the spirit of the guarantees offered by a public hearing.

(b) The right to be presumed innocent and not to be detained arbitrarily. These two guarantees, approved in each and every international text, will be discussed jointly because there is a negative correlation between them: specifically, in the inquisitorial criminal procedure, the general rule is preventive detention. This signifies that, depending on the gravity of the act under investigation and on the defendant's previous record, the investigating body, as a matter of course, orders him into custody for the entire span of the procedure (both the investigative and plenary phases). This practice, as shall be seen, leads to flagrant violations of recognized human rights. For reasons which many authors explain as being intimately tied to the reasoning behind the inquisitorial approach, preventive detention has usually been imposed as a legal measure whenever the law lays down a mandatory sentence for the crime (e.g. over two years in prison) or when the defendant has a prior criminal record or is a "repeater". Generally-speaking, it is the judge who is authorized to order preventive detention. He makes that decision at the start of the process based on the elements in his possession.

While the law normally grants him a

6) I.L.D.H., op. cit., pp. 169-170.

certain leeway in this matter, the judges on the continent regularly adopt an approach which can readily be considered "repressive", for they usually order preventive detention whenever permitted by law, considering it safer to take all necessary precautions against the defendant's evading trial. This, in fact, is very likely to happen if the accused remains at large because, as shall be seen later, procedures are exceedingly long and drawn-out.

This practice blatantly defies the express mandate of Article 9.3 in the International Covenant on Civil and Political Rights of 1966 (to which most countries in the area are State Parties) in the sense that, "It shall not be the general rule that persons awaiting trial shall be detained in custody". Failure to apply this, is also an indirect violation of other substantive and procedural rights.

This issue has been analyzed in detail in a "comparative statistical and legal study of 30 countries", conducted by the UN Latin American Institute for the Prevention of Crime and Treatment of Prisoners (ILANUD), published under the title, "Unconvicted Prisoners in Latin America and the Caribbean"⁷.

This report concludes that the weighted average of unconvicted preventive prisoners in Latin American countries having continental European procedural methods comes to 67.28% while the average in Latin American and Caribbean countries under common law systems (former British colonies and Puerto Rico)⁸ amounts to 22.57%.

At either end of the scale, the figures from the ILANUD report can not withstand comparison: Paraguay (a country with the continental European system) has the highest average of preventive prisoners—94.25% against Cayman's low figure of 2.1% for a common law country.

This data, telling in itself, is even more so when we realize that the country with the continental European system with the *lowest* percentage of preventive prisoners (Costa Rica with 47.40%) has 9.96% more than the country with a common law system having the *highest* percentage (Guyana with 37.44%). This proves beyond a shadow of a doubt that, aside from any possible social or economic factors, the inquisitorial criminal procedure in countries with a continental European legal tradition is the decisive factor in this state of affairs.

Without belabouring the point, let us note some of the infringements of human rights which are an outgrowth of this aspect of the inquisitorial method:

- 1) It violates the principle of presumed innocence because the defendant is detained without ever having been legally proved guilty.
- 2) In effect, it becomes an "advance serving" of the sentence if the defendant is ultimately convicted because he has usually already served a sentence as long or even longer than that provided for by law.
- 3) If the defendant should be acquitted (which is often the case after all), there is no justification whatsoever

7) *The United Nations Latin American Institute for the Prevention of Crime and Treatment of Prisoners (ILANUD). "El Preso Sin Condena en América Latina y El Caribe-Estudio Comparativo Estadístico y Legal y Propuestas para Reducir el Fenómeno"; 1982.*

8) The following countries have a criminal procedure similar to the common law tradition: Cayman, Santa Lucia, Belize, Montserrat, Barbados, Jamaica, San Vicente and Las Granadinas, Puerto Rico, St. Christopher & Newis, Dominica and Guyana (source: ILANUD, op. cit).

(not even *ex post facto*) for his prior detention, thus making it truly arbitrary detention.

As ILANUD states, this implies, "... a violation of the principle that a person can not be convicted without having been proven guilty. It is a contradiction of the basic tenets of criminal procedure, which is mindful of human dignity. Upon the flimsiest indication (and sometimes based on suspicion alone) this preventive detention custom (purely vindictive or for the sheer infliction of pain) is imposed while awaiting the verdict to come later"⁹.

- 4) It causes a significant increase in the prison population and leads to overcrowding, thus hindering compliance with the United Nations Standard Minimum Rules for the Treatment of Prisoners. This occurs in countries, which, as a general rule, are floundering in the midst of a serious economic crisis, and which, following logical priorities, allocate a meagre budget to prisons where prisoners languish, herded together in sub-human conditions.
- 5) Finally, "...there is no doubt . . . that it is totally incompatible with proper respect for human rights to countenance an extended deprivation of freedom that alters individuals' personality when this is not imposed as a sanction nor extended through the fault of the individual"¹⁰.

c) *The right to be tried by an impartial judge*: This guarantee, in the same way as those above, appears in all the

international instruments on human rights and in the Constitutions of most nations, and it would seem to be an unnecessary demand in a nation under law. Yet in the purely inquisitorial procedure, this principle is flouted when the same judge who investigates the facts is the one who passes judgment. Since the judge, from the moment he launches the investigation and decides whether to order the defendant's detention, takes a personal stand (whether consciously or subconsciously) on the investigation, and as the process unfolds, he gets increasingly involved in his task. This governs his attitude (for or against the defendant), a bias that compromises his objectivity, which is so necessary for handing down a verdict based solely and exclusively on the evidence presented. In addition, he is the very person who decides exactly which evidence to bring to bear.

This explains why the procedural codes having a "mixed" system (with a public plenary session) provide that an investigating judge cannot serve as a judge in the plenary session of the same case, thus eliminating this feature of the inquisitorial procedure.

This is not the only situation that undermines the guarantee of an impartial judge in Latin America. Other factors that come into play include: meddling by political powers, the proliferation of special or emergency tribunals, and the procedures designed for the appointment of magistrates etc...¹¹. However, since these elements can occur independently of the inquisitorial process and its inherent nature, they exceed the scope of this

9) ILANUD: op. cit. p. 52

10) op cit. p. 54

11) See Rosenn, "The Protection of Judicial Independence in Latin America", CIJL Bulletin No. 22.

article. Obviously, however, they must be taken into account when the time comes to assess the true extent of effectiveness offered by this guarantee.

d) *The right not to be punished twice for the same crime*: Summed up in the old saying, *non bis in idem* this guarantee appears to belong to the field of substantive rather than procedural law. However, in the inquisitorial procedures outlined above, the general rule requires preventive detention which is often imposed on the basis of the defendant's previous record, even when a minor offence is involved. Furthermore, granting bail to a person under arrest who is awaiting trial is generally prohibited if he has a previous criminal record. So, even barring any conviction for the second offence, the defendant is immediately treated as a recidivist and his previous record worsens his current legal predicament. If we follow this reasoning, it means that the first crime casts its shadow on subsequent events and dictates prejudicial treatment. Thus, the defendant is indirectly being punished twice for the same crime.

In addition, the practice of provisional adjournment or 'staying' is common in several codes of criminal procedure on the continent,¹² meaning that the judge or the court suspends or halts the proceedings when it becomes impossible to provide conclusive evidence. Yet, the judge fails to make a final ruling on the case. This situation may be drawn out indefinitely, resulting in a sort of "permanent and continuous sentence" for a person who has not been convicted, but who, nonetheless, is stigmatized all the same. This procedural practice, typical of

inquisitorial systems, is also an infringement of the principle of *non bis in idem*.

(e) *The right to be tried promptly*: The most prevalent characteristic of the administration of justice in Latin America is its slowness. The very manner in which it is organized produces an overload of work for the investigating judge, who is put in charge of hundreds of cases at the same time and who must often assume the task of sentencing in many of these cases as well. Unbelievable situations may well result for lawyers accustomed to working in other systems. Criminal cases dragging on ten years or more are not unusual, and, as previously mentioned, an individual quite often serves provisional detention for as many years as the law sets down for that crime without ever having been convicted of the offence.

While the delay in solving a criminal case is detrimental in itself, owing to the stigma attached and the breach of rights, this is far worse if, as often happens, the defendant is imprisoned for the entire length of the trial.

Therefore, ILANUD has recommended that ideally, preventive detention should not exceed four months' time, since this rule would satisfy the standards set up in international instruments. However, since ILANUD is aware that the administration of justice in Latin America today still leaves much to be desired, it recommends that preventive detention on that continent should be restricted to a maximum of two years to avert irreversible harm to those who become hopelessly involved in a criminal case. This gives an idea of the disheartening slowness of criminal procedures in Latin America,

12) This schema exists in the procedural codes of Cuba, Chile, Ecuador, Guatemala, Peru, etc.

which periodically last "for periods equivalent to one tenth of a man's life expectancy in that area"¹³.

(f) *The right to have sufficient time and means to prepare one's defence*: As already mentioned above, one of the characteristics of an inquisitorial criminal procedure is the secrecy surrounding the investigation. This secrecy also often strikes the defendant's counsel who is made privy to the evidence only at the plenary stage when everything is virtually decided and who has had no chance to challenge the evidence during the investigation, nor to submit evidence in rebuttal.

Needless to say, this facet of inquisitorial procedures also blatantly flouts the right to defence counsel granted in all the international instruments on human rights and thus, transforms the obligation of appointing a lawyer into a mere formality.

When the law has provided for a writ-ten plenary, the situation is even worse because at no time is the defence counsel able to question witnesses publicly or to cross-examine them or to discuss material or written evidence freely as this guarantee requires.

Thus, the lawyer plays an extremely passive role in the process, limiting his work to the verification of formal matters which have little or no bearing on the final outcome.

Moreover, writs such as *habeas corpus*, so crucial to the protection of the right to freedom (and quite often in Latin America, of the right to life) become meaningless insofar as the investigating judge can order detention on the basis of suspicion alone.

The above-mentioned guarantees,

recognized as fundamental rights for every person by the various international instruments on human rights, are not the only ones overtly violated by the inquisitorial criminal procedure methods prevailing in most Latin American countries. A comprehensive study on this issue would require a balanced analysis of the situation in each country and its respective procedure law. A valuable attempt along those lines was made by a research team of the Inter-American Institute for Human Rights between 1982 and 1986 whose final report was published under the title "Penal Procedures and Human Rights in Latin America". This report described the situation of the administration of justice on this continent from various angles and drew alarming conclusions, particularly with reference to procedural matters.

In this article, we have simply sought to focus attention on a phenomenon, which, despite its significance, has usually been neglected when discussing human rights, disregarding the serious consequences which are daily and routinely inflicted on a large number of people who are unfortunate enough to be subjected to a procedure that could have inspired one of Franz Kafka's best known novels.

Granted, we agree with the report of the Inter-American Institute for Human Rights that "the Bonapartist deformation of Latin American criminal procedure lies... in the investigating stage, in the fact that it is inquisitorial, and that the evidence gathered is aimed at conviction, in the fact that it need not be reproduced in the trial, that it is secret, that the accused person is not entitled to defend himself in this phase, that he can be held "incommunicado", and, further-

13) *ILANUD*, op. cit., p. 53.

more, that the investigating body comes under the Executive Branch or is surrounded by the Executive"¹⁴. However, we also concede that there are solutions: "... What is needed is a new model ... to revert to a procedural method where the evidence is produced and weighed at the trial by the court itself... The idea is to discard the Bonapartist system whether in its original or modified version, and to adopt the checks and balances of the common law system (this does not mean blindly adopting common law institutions, but rather the distinct feature of the system)"¹⁵.

This is not, however, an easy task. First, there is the problem of the inquisitorial "mentality" which is deeply engrained in Latin American judges and lawyers, who resist changes with the idea that, in so doing, they "would be copying models foreign to our legal tradition". They have not grasped that there is no need to turn our backs on our Roman heritage, which thoroughly permeates our substantive law, but simply to adopt procedural devices that are flexible and respectful of human rights and perfectly compatible with our own legal tradition. Consider, for example, the case of French-speaking Canada or of Louisiana, where the Roman substantive system and the common law procedural system co-exist in perfect harmony.

On the contrary, the same international instruments have guaranteed the principle that a person can not be convicted for a crime not defined as such, nor be given a penalty not established by law (*Nullum crime, nulla poena sine lege*). As a consequence, there is an increasing tendency towards the codification of substantive criminal law, very

similar to that existing in the Roman legal tradition, in the common law countries. This does not imply that the common law system should adopt the inquisitorial procedures of the Roman tradition.

Another difficulty is the existence of structural problems. The adoption of an adversarial procedural system would require establishing and equipping a strong and independent Public Prosecutor, well-prepared for the important task entrusted to it. It would also mean ensuring a responsible and independent defence of the accused. It would also be necessary to adapt the existing premises to enable public hearings. In many Latin American countries the cost of this would be prohibitive and would not be viewed as a priority given the widespread hunger and misery and the crushing external debt.

Nevertheless, it has become urgent to adopt a solution. Not only for the sake of human dignity and the effectiveness of fundamental rights, but also to prevent the problem from mushrooming to a point where the administration of justice will simply collapse through its failure to cope with the situation. At that point, the very foundations of the democratic system will crack wide open.

There have already been some isolated attempts at this. In Colombia, for example, a Criminal Procedure Code was adopted in 1982 which implemented an adversarial system; however, for reasons that will not be discussed here, it never came into effect. A new Code, restoring the inquisitorial system was enacted in early 1987. In Peru, a draft of an adversarial Criminal Procedure Code is awaiting public debate. In Argentina, distin-

14) I.L.D.H., op. cit. p. 171.

15) op. cit. pp. 171-172

guished jurists are coming forward to underscore the problem and proposing various solutions¹⁶. However, on the whole, it seems that the field is not yet ready owing to the "inquisitorial mentality" of Latin America's legal profession. More research and consciousness-raising on the issue are required in addition to broader-based support from institutions

and bodies seriously interested in human rights in order to reveal possible solutions to the problem and to implement measures which would ensure the genuine effectiveness of procedural guarantees, which, let us remember, are hallowed as fundamental human rights in all the international instruments in this field.

16) This is pointed out by Professor Dr. Eugenio Raul Zaffaroni, the distinguished Argentinian legal scholar who was the coordinator of the I.I.D.H. project and participated in the ILANUD study.

The Changing Face of Mental Health Legislation in Japan¹

by
*Etsuro Totsuka**

Introduction

Today, I would like to report on the recent history of Japan's efforts to reform the law which has governed mental hospitals for 37 years until this year when the new law was introduced. I also wish to highlight the important role of international mechanisms such as the United Nations which have given great impact to the Japanese Government's philosophy on the protection of mental patients' rights. But I have to be very careful in doing so. This is not because I am afraid of the government's retaliation. But because to make recommendation on how to run a mental hospital or the United Nations is quite a dangerous proposition.

It was said 'the person who may give advice on matters about which he or she has no special knowledge, such as how to run a mental hospital or the United Nations is showing the very first and typical symptom of a manic episode. I suffered from these symptoms in 1981. I was neither an expert in mental health law nor in international law. This meant that I knew nothing about mental hospitals or even the existence of the International Covenants on Civil and Political Rights, one of the most important UN instruments. Nevertheless, I became out-

spoken about both of these, to many of my lawyer colleagues, to journalists and even to psychiatrists! And since then, I have earned almost no income at all!

Now I feel very happy that I have not been detained in any of Japan's notorious mental hospitals but also that the new law has given mental patients some rights to protect them before my possible admission to a mental hospital in the future. I believe this achievement could not have been brought about without invaluable international support, for which I would like to express my utmost appreciation and gratitude.

Traditional attitudes towards mental illness in Japan

In ancient Japan, written characters and religions were largely based on the Chinese culture. For nearly a thousand years, the Japanese have read the story of 'Genji-Monogatari' written by Shikibu Murasaki in Japanese characters. In it, one can find several passages which seem to describe mental illness. The ancient Japanese thought that this state of mind was caused by 'Mononoke' (a monster) or 'Kitsune' (a fox). These were able to enter into and take over the body of

1) Paper prepared for the 9th annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law and a joint Congress of the Institute of Psychiatry, University of London and the American Academy of Psychiatry and the Law, Melbourne, Australia (Oct. 1988).

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human beings. 'Mononoke' could be someone else's soul bringing a curse of fury, jealousy or hatred upon the mentally ill person. In order to cure this, the ancient Japanese asked priests to say special prayers. When 'Mononoke' or 'Kitsune' escaped from the body of the mentally ill person, the patient could then recover completely. So prognosis and recovery were probably better in those days than today.

Another important piece of literature that illustrates the Japanese attitude is a contemporary novel 'Narayamabushi-ko' written by Shichiro Fukazawa, which is based on an ancient legend. The legend tells of a folk tradition whereby old people were abandoned in the mountains and left to die.

For many centuries Japanese families have been allowed to detain their own mentally ill relatives in private cells at home.

In 1868, the Meiji Restoration took place. The new Meiji Emperor's Regime tried radically to reform Japan, introducing Western culture, technology, and legal and medical practices. Western style court procedures were introduced for criminal cases. However, in 1900, a law called 'Seishin-byosha Kango Ho' (The Confinement and Protection of the Mentally Ill Act) was passed and confinement in a domestic cell was upheld. In the meantime, German psychiatry was also introduced in Japan by the Tokyo Imperial University.

In 1919, 'Seishin-byoin Ho' (The Mental Hospital Act) was passed and the detention in mental hospitals was added to domestic confinement as another way of treating mental patients.

During those years, the Japanese attitude towards the mentally ill was as follows. Mental illness was regarded as genetic, incurable, impossible to under-

stand and dangerous, namely one of the worst diseases. As a result, the mentally ill were thought to be a disgrace to the family. The Japanese did not want to talk about them, did not want to see them, to hear about them, to get married to them, and did not want to employ them. Japanese families hid these mentally ill relatives in a cell at home or in a mental hospital. Even conscientious doctors and families thought mental patients would be happier in remote asylums rather than in the community. Thus, concern about public safety took precedence over patients' rights.

This historical attitude towards the mentally ill has had its effect on current approaches to psychiatry in Japan.

Current problems

In 1981, I visited Prof. John Gunn, Professor of Forensic Psychiatry at the Institute of Psychiatry, University of London, in order to seek information about the legal system and the treatment of mentally ill offenders in the UK.

The reasons for visiting him were as follows. At that time in Japan, those who committed a crime because of insanity were not found guilty by the courts. The courts had no powers to order the detention of these patients. They were detained by a Governor of Prefecture indefinitely in a mental hospital under the Mental Hygiene Act (the old Mental Health Act legislated in 1950) article 29, provided that more than two psychiatrists agreed. But every time newspapers published sensational articles about incidents caused by mentally ill offenders, the Ministry of Justice tried to amend the Criminal Code in order to allow the courts to order a security measure detention for these patients in a maximum se-

curity institution under the control of the ministry. The Japan Federation of Bar Associations had always been opposed to this demand, because we thought that detention under the Mental Hygiene Act was sufficient and that lawyers should not be involved in what we considered to be the business of psychiatrists. This was the only major issue surrounding the law and mental health in Japan at that time. The Ministry of Justice cited examples in Europe of the successful involvement of the criminal courts in the detention of mental patients. We were not convinced and that is why a group of us visited Europe to study the law surrounding security institutions.

Prof. Gunn told me that about 7,000 patients, namely 5% of a total of about 130,000 inpatients were being detained in mental hospitals in the UK. When asked about the number of detainees in Japan, I had to confess I was ignorant of these figures. In order to answer his question, I tried to get the statistics.

Firstly, I was astonished that nobody including the Ministry of Health and Welfare had these important statistics about the number of mental hospital detainees. Secondly, I found that more than 240,000 patients, namely 80% of a total of 300,000 inpatients were being detained in Japan's mental hospitals! This figure was five times greater than the prison population. The patients were being detained indefinitely under Articles 29 and 33 of the Mental Hygiene Act.

My second major concern was about the legal rights of mentally ill persons.

In the UK, I also met Mr. Larry Gostin, then Legal Director of MIND. He told me about the Mental Health Review Tribunal procedure, which guaranteed quasi-judicial hearings for detained patients in the UK; and the X vs. UK case pending before the European Court. This eventu-

ally set a precedent concerning the right to independent reviews by the Tribunal for restricted patients. I was unaware of this important information. I then realized that no thorough comparative research had taken place in Japan either by scholars or lawyers into the law surrounding the detention of mental patients in Japan and in Europe.

I also began to realize that the Japanese Mental Hygiene Act provided none of the human rights guaranteed to detainees by the Japanese Constitution and the International Covenant on Civil and Political Rights. For those subject to detention proceedings, and those already detained, the Mental Hygiene Act provided no court procedure, no independent tribunal, no communication, no visiting, no lawyer, no advocate, no hearing, no access to any report or document, no free and independent expert witness and no notification of the reasons for detention.

Thirdly, I now wish to refer to the subject of the abuse of mentally ill persons.

On my return to Japan, I discovered information in newspaper articles, books and medical journals about numerous incidents and examples of the violation of human rights of mental hospital patients. These included arbitrary detention over long periods of time without proper treatment; suspicious deaths; the alleged abuse of psychosurgery techniques and other therapies such as ECT and drug therapy; torture and inhuman or degrading treatment; human experiments; forced labour; and appalling conditions and overcrowding in wards. 'Rupo Seishin-byoto' (Japanese Mental Hospitals) is a title of a book written by a journalist, Mr. Kazuo Okuma in 1973. This and many reports in a medical journal called 'Seishin-iryō' (Psychiatry) pub-

lished by a group of psychiatric professionals were among the most persuasive. The situation was particularly bad in many private mental hospitals, where owners tended to care more about their profits than their patients. It is important to note that over 80% of 1500 mental hospitals were privately owned. But none of this information succeeded in persuading either the general public or the Government to take any step to reform the law in order to protect mental patients.

My fourth point concerns discrimination against the mentally ill.

Why was it in Japan that mental patients did not deserve human rights?

One possible explanation was that the people in Japan had not been regarding mentally ill persons as proper human beings or equal fellow citizens. Even lawyers including myself were not much different in our attitude – considering mentally ill people as dangerous and incapable of making decisions about their daily life and especially about their need for hospitalization and treatment.

Moreover, hundreds of laws and regulations discriminated against the mentally ill. They were not allowed access to swimming pools, public baths, ferries, art museums, historical monuments, local assemblies and so on. They were barred from becoming, *inter alia*, a barber, beautician, cook, interpreter, and guide. They were not entitled to the same social welfare benefits as the physically disabled.

So what should be done?

Professional associations

It was clear to me that radical legal reform was necessary to protect the hu-

man rights of mental patients in accordance with international standards. What should be done in order to achieve this? It was necessary to persuade both the Government and Parliament. But before this, I had to get the consensus of professional associations. That was a difficult task.

The Japan Federation of Bar Associations had adopted a resolution on medical malpractice including psychiatric abuses in 1971. In it, the Federation had called for improvements in the areas of medical ethics and administration, but it had not demanded actual amendments to the laws.

At that time, the lawyers involved in these recommendations were not aware of the facts on mass detention in Japan or of the position on standards for mental patients' human rights outside Japan. The Daini Tokyo Bar Association, to which some 10% of the Japanese lawyers belonged, realized the seriousness of the situation and, in May 1982, set up the 'Sub-Committee on Mental Health and Human Rights' inside its existing Human Rights Committee. I was fortunate enough to be elected chair of this Sub-Committee for several years. Six months later, following intensive research and seminars conducted by the Sub-Committee, the Human Rights Committee of the Daini Tokyo Bar Association submitted its provisional report to the Human Rights Convention of the Japan Federation of Bar Associations. Although the Daini Tokyo Bar called for legal reform of the Mental Hygiene Act in its proposal, the Federation turned it down, because of strong objections by some influential members who were against any legal reform.

The Japanese Society of Neurology and Psychiatry were already aware of the existing problems and had been

strongly critical of the serious psychiatric abuses. Its board had adopted a resolution requesting its members to respect the ethical obligations of psychiatrists in 1969. Its general assembly called for freedom of communication and visits in 1974 and abolished the practice of psychosurgery in 1975. The problem was that most of these resolutions were not adhered to by many of the society's members.

Surprisingly, most Japanese psychiatrists already knew about the situation on mass detention which I thought I had discovered! Our relationship was very similar to that between the South American Indians and Christopher Columbus. Columbus claimed to have discovered America but the Indians justifiably claimed that they had known it for a long time!

Some conscientious psychiatrists cooperated with the Daini Tokyo Bar Association, but they did not all agree amongst themselves. Most of them supported our criticisms of the government but they asked us not to propose any legal reform based on these criticisms. They thought legal reform would further harm patient rights, because, in their view, the ruling conservative government and parliament had always succeeded in worsening these delicate situations.

Non-governmental organizations

Japan had no non-governmental organization which could work on behalf of mental patients rights because none had enough finance to support full-time staff. The UK had MIND, the National Association for Mental Health, which had about 100 staff and the USA had strong human rights organizations like the American Civil Liberties Union, with full-time legal

staff who could deal with test cases for mental patients.

The National Federation of Families of the Mentally Ill in Japan (Zenkaren) was a good organization with several highly competent staff. It had been campaigning for legal reform which would give mentally ill people substantial social welfare benefits. They could not easily fight for human rights, openly criticizing the abuse of patients in mental hospitals, because they felt their own family members were being detained as 'hostages'. Another problem was that family members were obliged to give consent to detention of mentally ill relatives under Article 33 of the Mental Hygiene Act and this had led to conflicting interests between patients and families exacerbated by the existing laws.

Although the Japan Civil Liberties Union, of which I was a member, was one of the best human rights organizations, it had no full-time staff except one clerical secretary. Also the issue was so new for all of its members that it took almost a year for the Union to accept that the involuntary hospitalization of mentally ill persons constituted 'detention' in legal terms. The Union was very helpful in supporting the Daini Tokyo Bar Association's view and, in March 1984, it submitted a report on mental patients' rights to the then Prime Minister, Mr. Nakasone who ignored it. The report was also sent to the International League for Human Rights and the International Commission of Jurists. The Japan Civil Liberties Union also set up a sub-committee for mental patients' rights. But even the best lawyers could not tackle these complex issues as part-time volunteers.

Mass-media

Japan had good newspapers rela-

tively free of editorial constraints. One of them, the *Asahi Shimbun* newspaper which produced about eight million copies a day, published a series of articles in 1970 on scandalous abuses in private mental hospitals. This was the result of the work of a tenacious investigative journalist, Mr. Okuma (author of the book mentioned earlier). But the biggest problem was that newspapers were only interested in mental illness when a patient committed a serious crime. I researched one newspaper, and found that about 80% of leading front-page articles which reported deaths linked them with mental illness, in spite of the fact that even the police claimed that only 10% of murder cases were linked with mental illness. Mass detention or appalling conditions in mental hospitals could not become big news, because it was accepted and there was nothing new in it. At the same time, it was hard for the public to believe that a mentally ill person's testimony could ever override a psychiatrist's testimony in libel court proceedings.

Political parties

The Japan Socialist Party was the only political party which had been actively working in this field and had the 'Special Committee on Mental and Geriatric Hospitals'. The Socialist Party was the biggest of the five opposition parties. But it was difficult for it to propose radical legal reform, as one of the senior committee members was the owner of mental hospitals and the party did not have a majority in Parliament.

The Liberal Democratic Party, the long running ruling party had formed the 'Forum on Social Rehabilitation for Mentally Ill Persons' which had been cooperating with the families of mental patients. But private mental hospitals,

which were wealthy had good contacts with the party. As a result, it was extremely difficult for us to persuade the party to accept demands for radical legal reforms on the human rights of mental patients.

When I began my work as a full-time volunteer independent advocate for a legal reform, I realized that I and our few supporters could never achieve the changes that were needed inside Japan. The situation looked hopeless. I knew that three books on the subject were about to be published by us, but there would be no hope of a change in the law in the near future. The image of thousands of people locked up in wards indefinitely waiting for help with no legal rights began to torment me.

I began to think of Japan's history. Japan had always been very sensitive when stimulated by international forces ever since the USA sent battle ships to Japan in the 1850's to open the ports for trade and influence. But when it came to mental patients' rights, information about the Japanese situation had not been reported outside Japan, and information about international human rights standards were not known within Japan. If a proper exchange of information were to take place, Japan could learn very quickly just as we did in the area of industry. I decided to go to the United Nations to raise the issue in order to stimulate Japan and raise awareness in the international community. There seemed to be no other alternative.

Seeking international help

The World Health Organization

Japan's mental health services had already been heavily criticized in 1968 by

the very important report written by Dr. D. H. Clark, a World Health Organization (WHO) consultant. The Japanese Government completely ignored this report. The WHO is an intergovernmental organization. At this time it was not possible for it to become further involved in these issues without a specific request from the Japanese Government.

Academic conferences

We were anxious to the views expressed in our bar's provisional report at an international conference. In February 1983, we presented our paper to the International Congress of Psychiatry Law and Ethics in Haifa. In it, we reported mass detentions in Japan and claimed that all of Japan's detained mental patients were illegally detained, as they were not guaranteed the right for their case to be reviewed by a court, thus violating Article 9.4 of the International Covenant on Civil and Political Rights ratified by Japan in 1979. Delegates at the conference were very surprised at our report and its contents were reported by the mass-media. I found that foreign lawyers and psychiatrists reacted to these facts quite differently from those in Japan. Because we were supported by many international figures, our bar began to feel that its concerns were justified. After this I attended various other international conferences organized by the International Organization of Consumers Unions, the International Academy of Law and Psychiatry, and the World Federation for Mental Health. Fortunately, the reaction was always much the same as in Haifa. There was no attempt by anyone to stop me reporting on the sorry state of affairs in Japan, except when I was given an old wartime label and called 'a traitor to my country'. The

big practical problem was that I could not get financial support from mental health organizations. Our bar budget was limited and we lacked even printing expenses.

International non-governmental organizations

I learned that, in order to raise these issues in the international community such as at the United Nations, international non-governmental organizations in consultative status with the UN played a vital role. They had the legal status to speak and submit their statements in various UN procedures and they could join in discussions to formulate international standards of law and implement these standards. Furthermore, international NGOs which enjoyed a high reputation such as the International Commission of Jurists (ICJ), Amnesty International and so on, could create a big impact on member countries' governments by publishing articles, sending fact-finding missions to a particular country, publishing their reports and making interventions at various UN meetings. I was very fortunate in being able to establish contact with the several influential international NGOs which were seriously concerned about mental health and human rights.

The reform which later took place in Japan would not have been possible without the willingness of those NGOs to help Japanese mental patients. Since 1980, the UN had been discussing document 'Guidelines, Principles and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-health or Suffering from Mental Disorder' under the item 'Human Rights and Technological Development'. A letter of mine with the information about the Japanese

problem was conveyed to the UN by Mr. Niall MacDermot, Secretary-General of the International Commission of Jurists. It was cited in an interim report on the subject dated 31 August 1982 to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by Mrs. Erica-Irene Daes, Special Rapporteur of the Sub-Commission.

After our bar had been engaged in an intensive campaign for more than one and a half years, some disturbing and new confidential information on the serious abuse of mental patients in Japan started reaching us. Needless to say, allegations brought by ex-mental patients were difficult to prove, because mental hospitals were isolated and a completely closed world. One of the most disturbing cases was verified by a team of journalists from the Asahi Shimbun Newspaper with cooperation from the staff of the Japan Socialist Party and some lawyers including ourselves. It has been a 'cause célèbre' since 14 March 1984 when the Asahi Shimbun and two other major newspapers reported that two detained patients had been beaten to death by staff of Hotokukai Utsunomiya Hospital, which was then privately owned by the director Dr. Ishikawa and his family. The most striking revelation at Utsunomiya Hospital was the number of deaths, 222 within three years among some 1000 in-patients. Although the circumstances surrounding these deaths were extremely suspicious, only 9 cases among 222 had been examined by the authorities concerned before the scandal was revealed. There was no way for the authorities to conduct thorough investigations of these 222 cases, as the bodies had already been cremated and inquests had not been held because the Japanese law was defective in this area. It was found that many patients were being de-

tained illegally even under the inadequate Mental Hygiene Act. Violence was rife and there was not proper supervision by the authorities nor any way of protecting patients. Whilst this was going on, the family that owned the hospital was continuing to accumulate wealth.

This information was added to the previous information which had been handed to the ICJ. Subsequently Mr. MacDermot sent a letter to the then Prime Minister Mr. Nakasone in May 1984, 'suggesting to consider appointing an independent commission to enquire into the treatment of mental patients and the legislation relating to it'. The Prime Minister's Office did not reply and later said they had not been able to find the letter.

In June 1984, the ICJ published an article entitled 'Treatment of the Mentally Ill in Japan' in its periodic 'ICJ Review'. This succeeded in disseminating information about the Japanese problem to the world.

The United Nations

The Japanese Constitution (1946) promised that Japan will faithfully observe established international laws. And Japan had always held the UN in great respect.

In August 1984, having been requested by the Japan Civil Liberties Union, the International Liberties Union, the International League for Human Rights (ILHR) took the issue to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The ILHR submitted a written statement under the agenda item 'Human rights and scientific and technological development' and also made an oral intervention during the open session of the Sub-Commission where the panel was discussing

Mrs. Daes's report on human rights for the mentally ill. The ILHR reported the Utsunomiya scandal, mass detention and the lack of legal procedures to protect mental patients' rights criticizing these violations of international law. This allegation of grave human rights abuse of the mentally ill in Japan was widely reported by major national newspapers and international media such as the International Herald Tribune. Another NGO, Disabled Peoples' International (DPI), also joined in the debate and severely criticized the Japanese Government on the same issue.

The Japanese Government responded and substantially denied those allegations before the Sub-Commission, saying that serious abuses constituted no more than a few exceptional isolated cases; that the compulsory hospitalization figures were 12% - not the 80% we claimed. This discrepancy is explained by the fact that the Government did not include involuntary admission with family consent in their figures. The Government also claimed that legal procedures for detention were not violating international laws; and that administrative measures to supervise mental hospitals were satisfactory. The only point we found encouraging was that the Government promised it would carefully study and follow international trends.

After the Government denied the allegations, the ILHR sent a letter to the Prime Minister, which raised other examples of mental hospitals' scandals reported even after the Utsunomiya scandal. The letter also objected to the Government's exclusion from their figures on involuntary committal, the patients who had been committed to mental hospitals by hospital administrators and family

consent but without patient consent (under Article 33 of the Mental Hygiene Act). This triggered a debate in Parliament where the Government could not give a satisfactory explanation. But it still refused to admit any need for legal reform.

Fact-finding mission

International NGOs often send fact-finding missions to countries where gross violations of human rights are reported. The reports of such missions are submitted to the UN organs and create great impact on human rights standards in that particular country.

Japan had not in the past been subjected to this type of rigorous scrutiny. It was the ICJ/ICHP* mission which persuaded Japan to take a step forward in the reform of its mental health legislation. The ICJ decided to send a mission to Japan in response to our request in September 1984, as the Prime Minister had not responded to the letter from the ICJ. The mission was co-sponsored by the newly-formed International Commission of Health Professionals. The Japanese Committee of the Fund for Mental Health and Human Rights was formed in order to receive the mission. It comprised 18 prominent multi-disciplinary figures in the field of law and mental health.

The four members of the ICJ/ICHP mission visited Japan for two weeks in May 1985. Although, the officials from the Ministry of Health and Welfare were apprehensive when they first received the mission, after frank exchanges the atmosphere lightened. The Private Mental Hospitals Associations did not hide their hostility towards the mission. However, some kind of mutual understanding

* International Commission of Health Professionals (ICHP).

was established after more friendly discussion. It seemed to me that, through this encounter, these two main policy makers of Japan's mental health system realized, to a certain extent, that it might not be possible to hold on to the old mental health policies and attitudes towards mental patients' rights. The Conclusions and Recommendations of this independent experts' mission were made public in July 1985, but they were made available to the Government of Japan much earlier than this. The mission supported our bar's view in these findings. The Government reserved their right to comment against the forthcoming final full report. It seems that at last serious discussion on reform of the Mental Hygiene Act was underway.

Turning point

Another debate on the human rights situation of Japanese mental patients took place in August 1985 before the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The ICJ, the ILHR and the DPI criticized Japan.

The ICJ referred to its mission's findings and suggested:

- 1) Urgent legal reform of the Mental Hygiene Act in order to protect the human rights of mental patients.
- 2) Improvement and re-orientation of mental health services; namely, total revision of the mental health system encouraging voluntary hospitalization, rehabilitation and community care.
- 3) Improved education and training in the mental health field.

The ILHR criticized the Japanese Government based on its previous letter

to the Prime Minister, as it did not respond to the ILHR's communication.

The DPI supported our bar's view based on its independent mission to Japan in April 1985.

Responding to these NGOs' statements, the Director of Japan's Department of Mental Health at the Ministry of Health and Welfare, Dr. Hidesuke Kobayashi, representing the Government of Japan, for the first time in Japanese history, officially declared before the United Nations that Japan had decided to take the necessary step to amend the Mental Hygiene Act for further protection of the human rights of mental patients. This was a turning point in the history of mental health and human rights in Japan.

I believe that this important step forward will improve the standard of human rights for mental patients. But more importantly this change of heart will lead to valuable advances in the whole attitude towards the care of the mentally ill – in areas where the law cannot always enter.

Further international support

The Ministry of Health and Welfare's move towards legal reform was rapid. The Ministry sought written statements on the issue from 22 different organizations in December 1985. Two months later, the Japanese Committee of the Fund for Mental Health and Human Rights submitted a document entitled 'A Legislative Proposal for the Revision of Mental Health Laws' to the Ministry and made it available to the organization. I was pleased to be able to draft this document as the Secretary-General of the committee. It was welcomed by many organizations and even by the Ministry.

The Ministry set up internal working

groups of officials and mental health professionals and the 'Forum for Fundamental Problems on Mental Health' which included representatives from private mental hospitals and families of mental patients, a journalist and others but excluded representatives of patients' groups or their advocates.

In Japan, when formulating a new law, the different Government Ministries play a crucial part. Most of the dialogue surrounding the proposed law takes place before the Bill is presented to Parliament. Once the Bill is put before Parliament it is unusual for fundamental changes to be made. I shall describe some of the events that took place in the early stages of the proposals for mental health law reform.

In October 1986, the Ministry submitted information including facts about international trends to the Council for public health, an official advisory body of the Ministry and asked the Council to draw up proposals for the amendment of the Mental Hygiene Act. The Council's Sub-Committee on Mental Hygiene quickly convened many meetings. Important roles in the workings of the Sub-Committee were played by Prof. Ryuichi Hirano, former President and Professor Emeritus (Criminal Law) at Tokyo University, the representatives of the Japan Municipal Hospital Association and the Private Mental Hospital Association.

During the whole process the Ministry of Health and Welfare met strong resistance from Japan's mental health industry. This industry which comprised many private mental hospitals was very powerful. It received subsidies from the government and a sum of money per patient through the National Insurance system. The profit motive behind many of these private hospitals had led to a reduction in standards of care. The lobby-

ing power of the Private Hospitals Association was very strong and the government needed international support in order to make radical changes to such an entrenched system.

One influential piece of international support came in the final report of the ICJ/ICHP mission 'Human Rights and Mental Patients in Japan' which was published in September 1986, translated into Japanese and sent to the Council by the Japanese Committee for the Fund of Mental Health and Human Rights.

In January 1987, a seminar called International Lectures was held by the Daini Tokyo Bar Association which invited Mr. Niall MacDermot, Prof. Timothy Harding and Mr. Larry Gostin. The seminar was followed by the 'International Forum on Law and Mental Health Law Reform' which was convened by Dr. Kotaro Nakayama of Kyoto University and held under the auspices of the International Academy of Law and Mental Health, the Japanese Society of Neurology and Psychiatry and the Japanese Association of Law and Psychiatry. This forum unanimously adopted the Kyoto Five Principles which were immediately submitted to the Government.

At this time the World Federation for Mental Health (WFMH) sent its fact-finding mission to Japan.

In March 1987, 'Viewpoint '87: Forgotten million', a television documentary co-produced by Miss Joan Shenton and Mr. David Cohen reported on the Japanese mental health problem, comparing it with situations in four other countries. The programme was broadcast by Central TV in the UK and shown in many other countries.

Eventually, in March 1987, the Cabinet submitted the bill proposing the new Mental Health Act to Parliament after complicated procedures which involved

the approval of the ruling Liberal Democratic Party (LDP). The LDP admitted that the changes were necessary because of international criticism.

Resistance against legal reform

The Amendment Bill contained some important points which demonstrated a definite improvement in the law and these improvements provided an opportunity for a complete change in attitude towards psychiatry and the care of the mentally ill in Japan, although it contained serious weaknesses.

The Japan Federation of Bar Associations, the National Federation of Families of the Mentally Ill in Japan, the Association of Prefectural Hospitals-Department of Psychiatry, the All Japan Prefectural and Municipal Workers, the five major opposition parties including the Japan Socialist party and public opinion all basically shared these views.

Regrettably, the main obstacle to the reform of the mental health system was the Private Mental Hospitals Association. Resistance from the Association constituted a serious threat to the bill as it had powerful contacts both in the Government and in the Opposition. The Private Mental Hospital Association had been vigorously lobbying MP's with demands for three specific changes. Their demands were as follows:

- 1) The principle of voluntary hospitalization should not be introduced, in other words, doctors should not be asked to encourage voluntary hospitalization.
- 2) Patients should not be given written notice of their rights when they are admitted to a hospital.
- 3) All of the new clauses on penalties

which would be imposed on those who violate the new law should not be introduced.

These demands contravene international standards and common sense on the care of the mentally ill. Some very influential MP's in the Government and Opposition who were persuaded by the Private Mental Hospitals Association tried to block the new Mental Health Act and almost succeeded in the summer of 1987. This attempt to sink the bill was severely criticized by the ICHP, the WFMH and DPI in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in August 1987. With international support for the reform, the ruling Liberal Democratic Party maintained its position urging that the bill be made law as it stood. In the end, Parliament rejected the main demands of the Association and the bill became law on 18 September 1987 with only relatively minor changes. The Act came into force on 31 July 1988.

New Mental Health Act

Now let us look at what has actually been achieved by the recent legal reform.

Principle of Voluntary Hospitalization

A provision was included stating that superintendents of mental hospitals must make efforts to admit the mentally ill with their consent where hospitalization is necessary. This could be seen as the greatest achievement in the recent legal reform, as previously Japanese law had no concept of voluntary hospitalization. This clearly demonstrated Japan's

philosophy which has always considered that all mentally ill people are incompetent. Mindful of the fact that British law first introduced the concept of voluntary hospitalization in 1930, it has taken Japan a very long time to catch up.

Standards for the Treatment of Patients

The new law empowered the Minister of Health and Welfare to set forth regulations on standards for the treatment of mental hospital patients. Restrictions on actions designated by the minister such as the sending and receiving of correspondence by inpatients, meetings between government employees and the inpatients, and certain other actions, are now prohibited by the new law. These are indeed a big step forward, as under the previous law, doctors were able to play God and had discretionary powers to restrict all patients' freedoms, as a matter of course, and were able to exercise any kind of compulsory medical treatment. As a result, not even a government minister could intervene in the medical practice that prohibited patients from seeing a lawyer, because this and other restrictions were considered to fall within the area of the medical discretionary powers – or clinical judgment. It is abundantly clear now, however, that the new law compels Japan to abandon the old philosophy of unrestricted professional freedom of psychiatry.

Right to Complaints

Patients who are involuntarily admitted to a mental hospital are able to request the Prefectural Governor to order the necessary measures for improvement of treatment or discharge under the new

Psychiatric Review Boards (PRBs) which are set up by the new law in each prefecture to handle the above requests and advise the Governor who may order improvement of treatment, or discharge.

Hospital superintendents must inform patients of their right to these requests in writing. Patients had none of the above rights under the previous law. The introduction of the right to complaint demonstrates that Japan has admitted that mentally ill people are human beings who may enjoy the same human rights as ordinary citizens.

Social Rehabilitation Facilities

For the first time, the new law made it possible for prefectural governments, other local governments, social welfare corporations and others to be authorized to establish social rehabilitation facilities, and sheltered workshops for the mentally ill. And national and prefectural government may subsidize the building and running costs of these rehabilitation facilities. This also represents an important change in the philosophy in the Mental Health Act, as the previous law had no such provision for social rehabilitation.

Are these recent reforms likely to affect attitudes towards the mentally ill?

Although only a small number of our own proposals for reform were incorporated, these changes in the philosophy in the Mental Health Act could well trigger overall reform. This depends upon whether the changes in the law affect the philosophy of those who are working in the field of mental health and human rights, of the administration of national and local government, of Parliament, and above all of the general public.

Further legislation

The new law will be subject to an official review in five years to see whether further changes will be needed. This is incorporated in an article of the new law and will provide an opportunity for many issues to be raised which could not be agreed upon in time for the 1987 legislation. The International Commission of Jurists sent a second fact-finding mission to Japan in May 1988, and published its report on 1 July 1988. In it, the ICJ again made suggestions to the Japanese Government as to changes which could be introduced in the application of the new law.

We Japanese lawyers have made strong criticisms of the new law, as it has some serious defects. One example is that the Psychiatric Review Boards are not independent bodies, but are dominated by doctors (three doctors, one lawyer and one lay person) and do not have judicial hearing procedures. There are other omissions. For example:

Many laws which have discriminated against the mentally ill remain as they were, except one law the Public Bath Law and a few local regulations which were amended in 1987.

Many legal rights of mental patients, suggested by the ICJ/ICHP report are not legislated. There is no provision for rights such as the right to treatment, the right to consent to or refuse treatment, the right to rehabilitation, the right to independent patient advocate, the right to a lawyer and legal aid, the right to refuse forced labour and so on.

There is no clear and convincing definition of criteria such as for example, the definition of the term 'mental disorders' when involuntary hospitalization takes place.

Because involuntary hospitalization

with family consent, not patient consent remains as it was under the name of 'Treatment and Protection Admission', families still suffer under their legal obligation and power to detain their own relatives. This may make them legally responsible for any crime their mentally ill relative may commit outside a hospital.

The social rehabilitation of mentally ill persons is left to the discretion of government and to the mercy of charity, as the responsibility of local and national government to ensure social rehabilitation of these people is not written in the law.

There is no provision for a professional and accountable body such as an Inspectorate System recommended by the ICJ or a Board of Control system recommended by the WHO.

Thus the debate will have to continue.

Is further reform possible?

Enforcement of the new law is also a difficult task. Many changes occurred in 1988. The government issued many regulations. Members of Psychiatric Review Boards (PRBs) were appointed and Prefectures began formulating rules for the administration of PRBs.

In 1987, in order to cooperate with the enforcement of the new law and assist patients in exercising their legal rights, the Daini Tokyo Bar Association recommended to the Japan Federation of Bar Associations the setting up of a Special Committee for the Protection of the Detained Mentally Disordered. This was done. The Legal Aid Association started funding patients from the limited Special Fund. This originated from donations from the Japanese Committee of the

Fund for Mental Health and Human Rights (JCFMHHR). Two Centres of Mental Health and Human Rights were set up by part-time volunteers as requested by the JCFMHHR.

These examples are only the beginning of the new era involving a total overhaul of the system. Legal reform constitutes only one part of the ICJ/ICHP recommendations. The 'Improvement and Re-orientation of Mental Health Services' and 'Improved Education and Training in the Mental Health Field' were strongly recommended to Japan's Government. Law in itself is not omnipotent. There are a great many tasks which need to be tackled that are outside the confines of the law. We have many difficulties. These include lack of vision and leadership in these areas; lack of willingness to participate in international activities; lack of openness with information and research; lack of a constructive approach; lack of finance, of a training system for professionals and of an effective consumer organization.

Despite all of this, the change in attitude of the people in Japan towards mental patients triggered by the debates on mental patients' rights has been important. One example of this is the efforts of health professionals to try to create a training system for themselves which they did not have before. The Japanese Society of Neurology and Psychiatry set up a Committee for Training in 1988. Clinical Psychologists and Psychiatric Social Workers have also begun to create their own training programmes.

These are areas where the law cannot play a significant role. For example, the lawyers cannot train good psychiatrists or treat patients.

In fact in the past, psychiatry considered there was no place for the law in the field of mental health. However, lawyers argue that there is a fundamental role for the law to play. It was the law itself that gave psychiatry its unlimited powers in the first place; it is therefore totally justifiable for the law to step in to control these powers wherever they have been abused and create a better framework for health professionals to work in for the benefit of patients.

Needless to say, the role of the government is the most important. I really appreciate the recent enormous change in attitude of the Japanese Ministry of Health and Welfare. The Ministry was receptive to some of the recommendations made by international non-governmental organizations. I am sure that the Government can and will go on further in its efforts to improve the situation.

But it will be difficult for it to do so without constructive help and advice from voluntary organizations. I believe that in order to cope with the discrimination against and the neglect of the mentally ill, Japan needs to have a strong, well financed and well staffed consumer oriented organization like MIND in the UK, further support from existing voluntary organizations, and international support on these issues. Without this, true reform will never be achieved.

BASIC TEXT

Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment

*(Adopted by the General Assembly of the United Nations
on 9 December 1988 by Resolution 43/173)*

The General Assembly

Recalling its resolution 35/177 of 15 December 1980, in which it referred the task of elaborating the draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment to the Sixth Committee and decided to establish an open-ended working group for that purpose,

Taking note of the report of the Working Group,¹ which met during the forty-third session of the General Assembly and completed the elaboration of the draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,

Considering that the Working Group decided to submit the text of the draft Body of Principles to the Sixth Committee for its consideration and adoption,²

Convinced that the adoption of the draft Body of Principles would make an important contribution to the protection of human rights,

Considering the need of ensuring the wide dissemination of the text of the Body of Principles,

1. Approves the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment for its important contribution to the elaboration of the Body of Principles;

3. Requests the Secretary-General to inform the Members of the United Nations or members of specialised agencies of the adoption of the Body of Principles;

4. Urges that all efforts be made so that the Body of Principles becomes generally known and respected.

1) A/C.6/43/L.9.

2) *Ibid.*, para.4.

Annex

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Scope of the Body of Principles

These Principles apply for the protection of all persons under any form of detention or imprisonment.

Use of terms

For the purpose of the Body of Principles;

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These Principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief,

political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these Principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of the Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial power.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of the charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

- (a) The reasons for the arrest;
- (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
- (c) The identity of the law enforcement officials concerned;
- (d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in this principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in this principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in this principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical

or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information prescribed above.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these Principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these Principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these Principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under this principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in the present Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

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NIALL MACDERMOT

South Africa and the Rule of Law

A report of an ICJ Mission to South Africa in February 1987 by Geoffrey Bindman, Jean-Marie Cretaz, Henry Downing and Guenter Witzsch.

Published by Pinter Publishers, London, 1988.

Available in English in paperback. 160 pp. Swiss Francs 25, plus postage.

The report gives a detailed and comprehensive account of the elaborate legislation with which, over the years, the South African government has undermined all human rights of the black and coloured population.

Report of Seminars on Legal Services for the Rural Poor and Other Disadvantaged Groups

A report of two seminars in South-East Asia (Jakarta, January 1987) and South-Asia (Rajpipla, December 1987). Published by the ICJ, Geneva, 1988.

Available in English. Swiss Francs 12, plus postage.

The seminar papers provide a good insight into the problems faced by legal resource groups in organising and assisting the rural poor and other disadvantaged groups, the methods used in training para-legals and the type of legal aid programmes that are being implemented in the region.

The Independence of the Judiciary and the Legal Profession in English-Speaking Africa

A report of two CIJL seminars in Lusaka (December 1986) and Banjul (April 1987).

Published by the ICJ, Geneva, 1988.

Available in English. Swiss Francs 20, plus postage.

The seminars were organised as part of a series of regional seminars to examine how norms to protect the independence of the legal profession and the judiciary are being developed at the international level and how such norms should be applied and adhered to in different regions, and make recommendations for their implementation. The papers and recommendations encompass many aspects of the functioning of the judiciary and the legal profession in English-speaking Africa.

The Erosion of the Rule of Law in Asia

Report of an ICJ Seminar in Bangkok, Thailand, December 1987.

Published by the ICJ and the Christian Conference of Asia, Hong Kong 1989.

Available in English from the ICJ and the CCA-IA, 57 Peking Road,

4/F Kowloon, Hong Kong. Swiss Francs 12, plus postage.

This report reproduces the working papers pertaining to the six major topics discussed, namely: economic development and human rights violations; National Security laws; freedom of the press and other media; freedom of association; and the independence of the judiciary and the legal profession. The conclusions and recommendations are directed to ensuring the participation of the poor and the disadvantaged in the development process, and assisting them in asserting their rights and securing their basic needs.

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