

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

ARGENTINA	1	SOUTH AFRICA	13
LATIN AMERICA	3	SRI LANKA	16
NAMIBIA	8	BULGARIA	19

COMMENTARIES

MR. VORSTER'S POLITICAL PRISONERS	20
UNITED STATES POLICY AND HUMAN RIGHTS	25

ARTICLES

HUMAN RIGHTS, THE POOR AND THE LEGAL SYSTEM	
R. SACKVILLE	27
PSYCHIATRY, THE LAW AND DISSENT IN USSR	
CLAYTON YEO	34
CONFERENCE ON HUMANITARIAN LAW—PHASE II	
S. SUCKOW	42
TORTURE AND 5TH UN CONGRESS ON CRIME PREVENTION	
J.A. DOLAN AND M.L. VAN DEN ASSUM	55

No. 14

June 1975

Editor: Niall MacDermot

THE INTERNATIONAL COMMISSION OF JURISTS

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

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

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

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

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

ASSOCIATES

If you are in sympathy with the objectives and work of the Commission, you are invited to become an Associate by making an annual contribution to its funds. A contribution of not less than Sw. Fr. 100.00 per year will entitle you to receive free copies of the *REVIEW* and of any special reports we may issue.

SUBSCRIBERS

Alternatively, you are invited to become a subscriber to the *REVIEW*.

Annual Subscription Rates:

By Surface Mail	Sw. Fr. 12.50
By Air Mail	Sw. Fr. 17.50
Special Rate for Law Students	Sw. Fr. 9.00

Note: Payment may be made in Swiss Francs or in the equivalent amount in other currencies either by direct cheque valid for external payment or through a bank to Société de Banque Suisse, Geneva, account No. 142.548. Pro-forma invoices will be supplied on request to persons in countries with exchange control restrictions to assist in obtaining authorization.

Human Rights in the World

Plight of Defence Lawyers in Argentina

From time to time reports are received from different parts of the world of the victimization of defence lawyers as a result of their professional activities on behalf of their clients, especially in political cases. There is no country where these reports have been so numerous and so consistent as in Argentina in recent months. It is no exaggeration to say that the state has now been reached where defence lawyers are unable to carry on their practice in political cases.

In March 1975 Dr. Heleno Claudio Fragoso of Brazil went to Argentina at the request of the International Commission of Jurists to enquire into this situation. He received the full cooperation of the Argentine Ministry of Foreign Affairs and Ministry of Justice. Dr. Fragoso is Vice-President of the Brazilian Bar Association, a Member of the ICJ, and one of the leading penal lawyers in Brazil.

In his 20-page report (which is available from the ICJ), Dr. Fragoso makes clear that the difficulties confronting defence lawyers have arisen in a situation where violent left wing revolutionary groups have, since 1970, been committing frequent political murders, kidnappings and other forms of subversive action, and where right wing para-police groups, in particular the AAA (Argentine Anti-Communist Alliance) have been carrying out systematic illegal action against left wing militants. It appears to be the latter organisations which have been responsible for the violence directed against defence lawyers. Dr. Fragoso lists a number of incidents which, while not amounting to proof, point to a connection between these groups and the police or other government authorities.

On November 6, 1974, the Argentine government proclaimed a State of Siege which gave the Executive power to order indefinite detention without trial. Dr. Fragoso lists 32 lawyers held in preventive detention under the state of siege at the time of his enquiry in March. This list is incomplete but includes the majority of those who had been practising in political cases.

The report gives details of six defence lawyers who have been murdered since November 1973, and another 26 defence lawyers who have been threatened with murder by the right wing terrorist organisation AAA (Argentine Anti-Communist Alliance). Eight others have left the country as a result of such threats. Prior to 1973, there was only one case on record of the assassination of a defence lawyer, the well-known case of Nestor Martins in December 1970. Sixteen lawyers are named whose offices or homes have been broken into and in some cases bombed. Threats have also been made against judges who are considered to have acted leniently in cases of subversion, and in one case an attempt was made on the life of a judge who had sentenced 13 policemen for illegal killings.

The result of these events has been that advocates are refusing to defend political prisoners. At Bahia Blanca the Bar Association decided to designate defence counsel in political cases by drawing lots. Those whose names were drawn had their homes bombed, and were subsequently arrested. The headquarters of the Bahia Blanca Bar Association was also bombed.

Dr. Fragoso's report also gives information about restrictions on freedom of the press and about other arrests under the state of siege, conditions of detention and cases of torture of political prisoners. He reports that cases of proven torture of political prisoners are common. He names 9 prisoners whose torture has been judicially proved, and cites many others where the allegations have been established by medical experts, including torture by drugs, electric shocks and long privation of water and food. He quotes a statement by former President Arturo Frondizi which was published in the press while Dr. Fragoso was in Buenos Aires: "It will not have escaped anyone's notice that torture is almost becoming an institution in our country. If on the one hand the terrible degradation of torture is not fought against, no attempt can be made at extirpating that other terrible degradation consisting of the death of innocent people in guerrilla warfare." ¹

The International Commission of Jurists agreed to give the Argentine government an opportunity to comment upon the report before it was published. For this purpose the report was given to the Argentine Ambassador in Geneva on April 9. Two months later, no comments had been received. It is said by way of explanation that as Argentine is a federal state, reports have to be obtained from the provincial governments concerned.

At the end of Dr. Fragoso's mission he saw the Minister of Justice. Dr. Antonio Benitez stated that the lawyers who defended political prisoners were also militant activists in politics and it was because of their militancy that some had been killed and others arrested. As regards the latter group, he stated that the situation of each detainee was being examined and that on the basis of the conclusions reached they would either be released or sent for trial. The Minister stated also that the lawyers were getting fabulous sums from the guerrilla organisations. The police had found the books of the ERP (The People's Revolutionary Army) showing that a payment of 600 million (old) pesos had been paid to lawyers. As Dr. Fragoso comments, the latter allegation seems inconsistent with the alleged political militancy of the lawyers. Dr. Benitez also declared that judges were being intimidated by subversive organisations and often resorted to claiming lack of jurisdiction over the matter as a delaying tactic in order to avoid having to hand down a decision. ²

The Minister of Justice stated the government has no knowledge of activities of para-police groups ³, and that it is ignorant of the identity of those responsible for the attorneys' deaths. Dr. Fragoso comments that it is a fact that many lawyers are political activists, but it does not appear that any of them had engaged in illegal political activities, nor that they were connected with subversive organisations. The suggestion has been made (but not by the Minister of Justice to Dr. Fragoso) that some of the arrested lawyers had acted as a channel of communication between their clients

¹ *La Razón*, March 11, 1975.

² Some judges interviewed on this matter stated that the legislation on procedure, as respects jurisdiction, is in chaos.

³ This seems a remarkable statement. Dr. Fragoso says "That there are para-police groups operating is not open to doubt. The most important and remarkable is... the AAA (Argentine Anti-Communist Alliance)... [which] took responsibility for the majority of the kidnappings, attacks and crimes committed in recent months in reply to subversive terrorism." In an article in *Las Bases* in 1972, General Perón himself stated "that para-police organisations, recruited and trained by persons in the military and in the police, are operating in Argentina".

in custody and subversive organisations. No charges to this effect appear to have been preferred against any of the lawyers.

It is deplorable that political prisoners should be deprived of the services of experienced defence lawyers. As Dr. Fragoso concludes: "As a result of these events, the lawyers who were working on political trials and who were still at large, began to refuse systematically this sort of case, alleging that they were given no protection. Political prisoners began to be defended by public defenders who only provided a totally ineffective *pro forma* defence. Also several lawyers complained that when political prisoners instructed legal counsel of their own choosing, their conditions of detention became more rigorous."

Latin America — Expulsion, the Rights to Return, Passports

The practice is regrettably increasing in certain Latin-American countries of expelling both nationals and aliens from the territory for political reasons, preventing them from re-entering, and depriving them of the passports they need for travel or residence abroad. In some cases they are even deprived of their citizenship. This practice violates accepted norms under international law, as was shown in an article in ICJ REVIEW No. 12, June 1974, p. 22.

The most serious aspect of this matter is that these are administrative acts of the government, based on political motives. They are imposed as punishments or penalties enforced by all the executive powers of the state, even though such sanctions are not provided for or authorised under the respective national legislations. They also violate the basic and universally accepted classical principle of criminal justice forbidding the punishment of acts not defined as crimes, or imposing punishment greater than that provided for by the legislation in force.

Every person has the right to leave any country, including his own and the right to return to his country. There are international covenants and treaties proclaiming this right. Thus, for example, the American Convention on Human Rights of November 22, 1969, states:

" Article 22: Freedom of Movement and Residence

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with the law."

Similar provisions appear in Articles 9 and 13, para. 2 of the Universal Declaration of Human Rights, 1948; Articles 12, para. 4, 13 and 15 of the International Covenant on Civil and Political Rights, of December 16, 1966, and Article 19 of the American Declaration of the Rights and Duties of Man, 1948.

The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities carried out a study on this right in 1963 and defined in draft form the principles which in its opinion should be adopted in this field. In May, 1973, the U.N. Economic and Social Council commended these principles to all governments (see ICJ REVIEW No. 11, December 1973, p. 61). In these principles it is stated that any person, without distinction... has the right to enter his own country, and that this right may not be denied to him on the grounds that he does not possess a passport or other valid travel document. On the other hand, no-one may be arbitrarily denied the passport necessary to leave the country or to return to it. The formal requirements for the delivery of a passport (or other valid travel document), including the grounds on which it may be refused, revoked or cancelled, must be set out in regulations having the force of law. Lastly, it is laid down that sanctions or penalties may not be imposed for legitimately exercising this right.

Against the background of these principles, the practice in a number of Latin-American countries will be considered.

Bolivia

Expulsion from the Country

The Bolivian Government now uses the mechanism of expulsion as an habitual means of getting rid of political opponents. It suffices here to cite a few examples out of many:

- (a) In January, 1974, Victor Paz Estenssoro, a former President of Bolivia (in 1952-1956 and 1960-1964), principal leader and founder of the Nationalist Revolutionary Movement (MNR), and the prime mover of the 1952 revolution, was exiled from the country with five of his co-workers. He was accused of "ideological deviationism" (until that time he had supported and defended General Banzer's military government). He had already been subjected to similar treatment in 1973, but subsequently had been permitted to return to Bolivia.
- (b) At the time of a mining strike in January 1975 in the Catavi, Siglo XX and Llalagua tin and zinc mines, the government announced that it had uncovered a conspiracy. It stated that the former President of the Republic, Hernan Siles Suazo (President from 1957 to 1960) was responsible. He was in custody at the time and along with thirteen other persons was exiled from the country and sent to Paraguay.
- (c) Later in the same mining dispute (March 1975), two Belgian priests of the "Justice and Peace" Commission of the Bolivian Church were deported to their country of origin. In this case, unlike others, the question of foreign citizenship was involved.

In the light of the principles set out at the beginning of this article, it is clear that international standards have been violated. Further, it may be recalled that from the point of view of internal law, the Constitution of the Republic provides in Article 111 (4), concerning the effects of a state of siege, that "Expulsion from the country for political reasons is prohibited".

Chile

Expulsion from and Re-Entry into the Country

Legislative Decree No. 81 of October 11, 1973 (as amended by Legislative Decree No. 684 of 1974) set out penalties and sanctions for anyone who failed to present himself to the authorities when required to do so "for reasons of State security". If the accused was abroad, his passport was revoked. It was also provided that in cases of declaration of a state of siege and when "it was so required by the overriding interests of State security, the Government may determine the expulsion or deportation of certain persons, whether aliens or nationals, by a decree setting out the grounds and signed by the Ministers of the Interior and National Defence".

Further, anyone who had left the country for the purposes of seeking asylum, or otherwise illegally, or had been expelled or was serving a sentence of exile, could not re-enter the country without the consent of the Minister of the Interior, who might refuse to give such consent. If any of those who were expelled, or who fled from the country of their own accord, attempt to re-enter the country subsequently without the consent of the Minister of the Interior, they run the risk of being held guilty of a crime punishable by death. It is laid down in Decree 81 of October 11, 1973, that in such cases there is a presumption of law that the person has returned for subversive purposes and unless he can prove the contrary he is subject to the penalty of death or long-term imprisonment.

These provisions are in breach of international principles accepted by Chile in the field of basic human rights, as well as violating the presumption of innocence and the principle that guilty intent must be proved.

The "Liberation Programme": A Programme of Expulsion]

In a speech delivered on September 11, 1974, on the occasion of the first anniversary of the military take-over, General Pinochet, Chief of State, suggested that all political prisoners, with the sole exception of those sentenced for the most serious crimes, should be "released" on condition that they leave the national territory.

This surely cannot be styled a release. It is rather an expulsion, and expulsion is a penalty, a punishment, and not a privilege. It is one of the oldest penalties known to man. When such an offer is made to a prisoner, the choice is scarcely a free one. It is very heavily weighed. He can choose between exile and continued incarceration. For the great majority it is a choice between one unjust penalty (exile) and another (imprisonment without trial), since the majority of those concerned in this programme are in custody without being charged with any offence.

Another point needs to be made. This "programme" has none of the safeguards of a normal and regular legal procedure. It is not a matter of commuting a prison sentence to one of exile, nor of imposing a penalty of expulsion or deportation. The distinction is important enough to be stressed. In either of these cases what would be required is a formal judicial decision, given after a trial based on due process of law, assuring the rights of the defence, with stated grounds for the decision. Moreover, under Chilean law, in cases of commutation, since it involves the substitution of one penalty for another, the penalty of exile can only be imposed for a fixed time period as set out by law.

Paraguay

Expulsion from the Country

As in Bolivia, and with equal facility, the government of Paraguay makes use of the mechanism of expulsion as an habitual method of getting rid of political opponents. The recent cases cited below relate to aliens, but the system is commonly used for nationals as well:

- (a) In March 1975, two teachers of a church school in Tuna, both of Spanish nationality, were expelled from the country on charges (which were made public in official communiqués, but never substantiated) of having "worked in the interests of political organisations of the Marxist type".
- (b) On March 10, 1975, in the context of a campaign to suppress the agricultural communities organised by the Paraguayan Church in distant parts of the country, a cleric of the Franciscan Order, of U.S. nationality, was expelled from the country and taken to the Argentine border.

In both cases the Paraguayan Church made public its support for those expelled.

Peru

Expulsion from the Country

Various political personalities, and particularly individuals connected with news media which in one way or another were engaged in political opposition to the military authorities, have suffered expulsion from the country.

Mention may be made of a few recent examples of expulsion of Peruvian citizens:

- (a) On November 19, 1974, on the basis of a series of criticisms directed against the economic policies of the government and in particular against the acceptance of a tender of a group of Japanese companies for the construction of a pipeline in northern Peru (the largest single public works programme undertaken by Peru), the government ordered the expulsion from the country of journalists of the weekly "Opinion Libre", which was closed down at the same time; of the Editor-in-Chief of the review "Oiga", also closed down; and of a political leader of the Popular Action Party (which had been founded by the deposed President Fernando Belaunde Terry). They were all accused in official communiqués of "subversion". They had criticised the inclusion of an arbitration clause in the contracts which, according to them, were in breach of the Peruvian Constitution since they excluded from the competence of Peruvian courts any differences arising out of the execution of the contracts.
- (b) On March 21, 1975, the Editor-in-Chief of the magazine "Caretas" was expelled to Argentina and the publication was closed down. He had criticised the government over the treatment of fellow journalists.

It is significant to recall that Article 68 of the Political Constitution of Peru, which, according to express statements of the military government, continues in force, provides that "No one may be expelled from the territory of the Republic, nor removed from his place of residence, except by an executory decision of a court or by application of the Expulsion Act". In the cases mentioned there was neither judicial intervention nor a trial.

Uruguay

Expulsion from the Country

The Uruguayan Constitution provides in Article 168, paragraph 17, for "prompt security measures". These are exceptional powers enabling the Executive to extend its powers when confronted with exceptional situations, such as those described in the legislation as "serious and unforeseen cases of external attack or internal upheaval". As regards the treatment of individuals, these measures are strictly limited. Persons may be arrested or displaced from one part of the country to another by Executive Order only insofar as they do not choose to leave the country. If the latter option is exercised, the person cannot lawfully be kept in custody.

Political prisoners who have been arrested under the prompt security measures and have not been brought to justice, or who have been tried and their release ordered by the judge on grounds of insufficient evidence, but who nevertheless are kept in custody, have the right to take up this constitutionally guaranteed option. In fact, however, in spite of the explicit provisions to this effect, prisoners are not allowed to take advantage of this constitutional right.

Another case is that of a person charged with a political offence, who has been ordered to be conditionally released by a military judge on the grounds that he has already served a sufficiently long sentence even though he has not been brought to trial. Even these orders are not respected by the Executive, which invokes reasons of security. At this point there begins a long and painful process of unlimited duration which ultimately results in a decision by a secret military tribunal as to whether the judicial order is to be carried out. Defence counsel have no access to these proceedings. Nor, of course, do the accused. If the tribunal's decision is negative, the prisoner, technically "at liberty", remains in custody. For such persons the military authorities responsible have found a solution: expulsion from the country. Since such a measure cannot in any way be based on existing legal provisions, they force the prisoner, in an attempt to save appearances, to take advantage of the option to leave the country set out in paragraph 17 of Article 168 of the Constitution mentioned above. If he has the wherewithal to pay his passage abroad, he can then regain his freedom, but only outside the country.

This procedure has become a "regular" one and those who have been subject to it are already numerous.

Re-Entry into the Country

Whoever leaves the country by making use of this covert form of expulsion, runs a very real risk—indeed a certainty—of being arrested again should he resolve to re-enter the country.

This whole system is in complete violation of legal and constitutional norms*, as well as violating accepted international standards.

Another procedure to which the civil-military government has had recourse is to refuse political opponents who are abroad the renewal of their passports, thus leaving them without identity or travel documents.

In all these cases certain common features may be observed. Expulsions are decided by administrative means with neither intervention nor supervision by an organ of the Judiciary. The accused has no right to defence nor the chance of placing his defence or explanation before an impartial tribunal. In the majority of cases the procedure as it is implemented is not based on provisions in the national legislation and, when it is, it is in violation of constitutional norms.

U.N. Legislates on Namibia

Relatively little attention has till now been paid to a remarkable development in the field of international law. This is novel legislative action taken by the U.N. Council for Namibia to protect the natural resources of the people of Namibia. It remains to be seen whether national courts will be prepared to recognise its validity and to enforce it.

The Decree is set out in full below. By way of introduction and explanation some extracts are first given of a lecture by Mr. Sean MacBride, U.N. Commissioner for Namibia, on March 3, 1975, to the Association of the Bar of the City of New York, entitled "Our International Responsibility for Namibia":

"Time after time all the organs of the United Nations, the General Assembly and the Security Council, have called upon South Africa to vacate Namibia and to hand over Namibia to the United Nations on behalf of the people of Namibia. In its Advisory Opinion the International Court of Justice has declared South Africa's presence in Namibia as illegal and has affirmed the validity of the United Nations decisions in calling upon States to disavow all relationships which they may have with South Africa in regard to Namibia. The credibility in the principles enunciated in the Universal Declaration of Human Rights, and in the effectiveness of the United Nations and in the Rule of Law will be further damaged if the decisions of the International Court of Justice and of the Security Council and General Assembly continue to be flouted by South Africa, sometimes with the tacit support of some of the major powers. ...

"At the end of World War I . . . under Article 22 of the Covenant of the League of Nations, the former German Protectorate of South West Africa was placed under South African administration as, "*a sacred trust of civilization*". The mandate agreement granted the mandatory "full power of administration and legislation over the territory . . . as an integral part of the Union . . ." (Art. 2, para. 1) and directed it to "*promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . .*" (Art. 2, para. 2).

* No constitutional or legislative provisions permit the expulsion of nationals.

“ In the years between the two World Wars, the League Council, aided by the Permanent Mandates Commission, exercised limited supervision over South African administration of its mandate. It forced South Africa to modify a number of lightly veiled attempts to claim outright sovereignty over the Territory; but it could only censure the Union for sending its air force to bomb Bandelswarts women and children when the men of that small Nama community rose up with ancient hand weapons against the government.

“ After the Second World War the Union sought United Nations approval for the annexation of Namibia. The Organisation exercised its responsibility by refusing and urging South Africa to place the Territory under trusteeship. South Africa in turn refused. Claiming that the mandate had terminated with the demise of the League, the Union government quit reporting to the General Assembly on its administration of the Territory and began to impose its *apartheid* system there.

“ In response to requests of the General Assembly for guidance on issues raised by South Africa, the International Court of Justice advised the Assembly, *inter alia*, that the mandate still existed, that the Assembly should supervise its administration, and that South Africa could not alter the international status of the Territory without United Nations approval. (International Status of South-West Africa, 1950; see also Voting Procedure Case, 1955, and Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956).

“ The Assembly was, however, unable to translate the Court’s advice into effective action. So, in 1960 Ethiopia and Liberia brought a contentious proceeding, i.e., one in which the judgment binds the parties—against South Africa, charging the Union in substance with maladministration of the Territory. However, in somewhat dubious circumstances, six years later the Court held that the complainants had no standing to bring the proceedings and thus avoided ruling on the merits of the case. (South West Africa, Second Phase, 1966).

“ Unable to persuade South Africa, by either negotiations or judicial proceedings, to live up to its mandate obligations, the General Assembly thereupon took an historic action: it revoked the mandate and made itself responsible for administering the Territory until independence. (resolution 2145 (XXI) of 1966). Subsequently, it established the Council for Namibia, composed at present of 25 Member States, to act on its behalf. (G.A. resolution 2248 (S-V) of 1967). The name of South West Africa was changed to Namibia by General Assembly resolution 2372 (XXII) of 1968, and the name of the Council for South West Africa, as it was originally named, was correspondingly changed to Council for Namibia.

“ South Africa, however, refused to recognise the Assembly’s right to take these steps. Consequently, the International Court of Justice was asked to rule on States’ obligations in the situation.

“ The new opinion dealt with the issues in considerable depth and included the following findings (given hereunder in a condensed and re-arranged form for clarity):

1. The termination of the mandate by UN General Assembly was *legal* and did not require South African consent.
2. It follows that the continued presence of South Africa in Namibia is *illegal* and South Africa is therefore under an *immediate obligation to withdraw*.

3. States that are members of the UN have an obligation to recognise the illegality of South Africa's occupation and *are to refrain from any acts or dealings with the South African regime implying recognition of a legal South African presence in Namibia.*
 4. In terms of Article 25 of the Charter of the United Nations, *member states are obliged to comply with Security Council decisions even if they had voted against such decisions.*
 5. South Africa remains accountable for any violations of the rights of the people of Namibia.
- (Emphasis in italics supplied)

(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971). The Opinion of the International Court of Justice was accepted by the General Assembly and the Security Council and was supported by the United States.

" I want to spell out a few of the implications of the obligation of States as set out in the Court's 1971 Opinion.

" Basically, these obligations require States to treat South Africa as having *no rights whatsoever* in Namibia. It is *not a de facto* government, since it has no claim of right to govern the Territory. It is a naked usurper, an occupier on a par with the Nazi forces occupying Norway, Belgium, or other parts of Europe and it should be treated as such. The mere fact that the wrongful occupation has stretched on for nearly a decade is no ground for automatically upgrading it to a *de facto* government, as the United States demonstrates in its continued refusal to recognize the Russian occupation of the former Baltic republics. In the case of Namibia, which I anticipate will receive its independence within a year or two at most, the lapse of time can certainly not legitimate in any way, or to any extent, South African occupation.

" States are bound to make it clear at all times that South Africa has no legal authority to levy or collect taxes in Namibia. Consequently, governments whose nationals invest in Namibia should not grant them tax credits for " taxes " paid on such investments to the South African Government or its local surrogate. I regret that the United States Treasury has not seen fit to rule to this effect.

" Similarly, States should recognize that the Republic of South Africa has no valid authority to issue permits, concessions, licences, mining or prospecting rights etc. Your Government has gone further than any other major trading partner of South Africa to act on this obligation by publicly announcing that it would not support the claims of post-mandate American investors against action by any future lawful Namibian government. It has not yet, however, indicated any doubt as to the validity of title currently granted by the South Africans for the export of Namibian natural resources, particularly of minerals, which are being exploited for the benefit of South Africa and can never be replaced.

" For that reason the Council for Namibia has issued a Decree, approved by the General Assembly, making it unlawful to exploit or export any Namibian natural resource without a licence from the Council, or the Commissioner acting for it. Under General Assembly resolution 2248 (S-V) the United Nations Council for Namibia was given full authority

' to promulgate laws, decrees and administrative regulations as are necessary . . . '

" Resources exported without a licence are subject to seizure and forfeiture to the benefit of the Namibian people, wherever in the world they may be found.

" The legal basis for the Decree adopted by the United Nations Council for Namibia and approved by the General Assembly is quite simple.

1. The United Nations has given full powers to the United Nations Council for Namibia to protect the natural resources of Namibia on behalf of the people of Namibia.
2. The mining and export licences issued by the South Africans in respect of Namibian resources were granted by an illegal authority and are null and void.
3. The natural wealth of Namibia belongs to the people of Namibia and not to the illegal administration set up by the Government of South Africa, to South Africa or to any firm authorised to despoil Namibia of its natural assets by an illegal authority.
4. In these circumstances it is open to the United Nations Council for Namibia to have these assets seized and held in trust for the people of Namibia. These assets can be pursued as stolen property illegally taken from the people of Namibia. There are ample precedents and authorities to support this view."

*Council for Namibia Decree on the Natural Resources of Namibia
of 27 september 1974*

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

DECREE

The United Nations Council for Namibia,

Recognizing that, in the terms of General Assembly resolution 2145 (XXI) of 27 October 1966 the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

Accepting that this responsibility includes the obligation to support the right of the people of Namibia to achieve self-government and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming that the Government of the Republic of South Africa is in illegal possession of the Territory of Namibia,

Furthering the decision of the General Assembly in resolution 1803 (XVII) of 14 December 1962 which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources,

Noting that the Government of the Republic of South Africa has usurped and interfered with these rights,

Desirous of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,

Acting in terms of the powers conferred on it by General Assembly resolution 2248 (S-V) of 19 May 1967 and all other relevant resolutions and decisions regarding Namibia,

Decrees that

1. No body or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resources, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;

2. Any permission, concession or license for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the "Administration of South West Africa" or their predecessors, is null, void and of no force or effect;

3. No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;

4. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

5. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

6. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia;

7. For the purpose of the preceding paragraphs 1, 2, 3, 4, and 5 and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with resolution 2248 (S-V), to take the necessary steps after consultations with the President.

South Africa

The Black Consciousness Trial

When giving evidence at his trial in Pretoria in November 1973 for refusing to testify before the Schibusch Commission, Dr Beyers Naudé, Director of the Christian Institute, was asked to explain the concept of Black power, Black awareness or Black consciousness in South Africa. He replied by referring to a lecture he had previously given at the University of Natal on "Black Anger and White Power in an Unreal Society" in which

"I showed that the policy of Apartheid, in name later changed to the 'Policy of Separate Development', how well and honest its intention may be, for a number of reasons brings about frustration and embitterment and in the end hatred in the hearts and thoughts of the majority of the Black population in South Africa. Further, that it is inevitable that a situation will come about, also because of the over-emphasis on the future independence of the homelands, that a reaction will take place, that from the Black population will come firstly a stronger Black consciousness, in itself good and positive, that from this will follow a possible increasing demand by the Black population on the Whites, after the Black population had received a platform on which they feel they could stand as equals over against the White man, and that this too in my opinion is good and necessary because through this it is possible to know the just aspirations and demands (claims) of the Black population. But if we as the White population do not take note of and do not take seriously the legitimate claims and aspirations of the Black population, then it would necessarily lead to estrangement, to bitterness and a polarization between White and Black which can lead to conflict which can possibly result in violence in our country, and we as Whites should be sensible enough to see this development and to recognise the legitimate claims of our Black population, to intercept it, in time through negotiation to come to a sensible agreement about a political and social order in which the Black community could feel that they have been granted an equal place in our community".

The wise warning contained in that passage has unfortunately not been heeded by the white people or government of South Africa. On the contrary, an elaborate trial is (at the time of going to press) due to begin shortly in Pretoria against 13 leaders of this growing Black Consciousness movement. The defendants are among the African leaders arrested at the time of the banned FRELIMO rally in Durban on September 25, 1974 (see ICJ Review No. 13, Dec. 1974). They are members of the South African Students' Organization (S.A.S.O.), the Black People's Convention (B.P.C.), the People's Experimental Theatre (P.E.T.), the Theatre Council of Natal (T.E.C.O.N.) and the Students' Representative Council of the University of the North (Turffloop S.R.C.). The trial has become known as "the Black Consciousness trial" or "the SASO/BPC trial".

The charge sheet with its annexes is one of the most remarkable documents of its kind to be seen in any court of law.

The defendants are charged with various offences of participation in terrorist activities by conspiring to transform the state by unconstitutional, revolutionary or violent means; to condition the non-white population for

violent revolution; to create and foster feelings of racial hatred, hostility and antipathy towards Whites and the State; to denigrate Whites, to represent them as inhuman oppressors of Blacks, to induce, persuade and pressurize the Blacks to reject the White man and his way of life and to defy him; to eulogise and encourage emulation of persons convicted of terrorism, subversion and sabotage; etc. etc. On conviction, the minimum sentence is 5 years imprisonment, although it does not seem that any of the defendants are accused of participating in any acts of violence.

The annexures to the charges cover 91 pages. They contain articles, plays, poems, and resolutions expressing the determination of the Black people to overthrow the domination of the Whites and to develop their own society in freedom. They include an article in SASO newsletter of September 1971 on "Fear—an important determinant in South African politics"; another of September 1972 on "Ugandan Asians and the Lesson for Us" (the lesson being that South African Indians and Coloureds should join the Blacks in their struggle for emancipation); an article on "Unity and Dedication" in support of Black Power; resolutions of the General Students' Council in 1974; an "Information Brochure" of the B.P.C., published in 1973 on the anniversary of the Sharpeville massacre; a play "Shanti" (the play concerns a Black youth rejected by his Asian girl friend for cowardice, who is arrested, and falsely charged and convicted of housebreaking, and who later escapes and joins a band of freedom fighters; they think he is a spy and execute him); a newsletter of the P.E.T. entitled "The Spear Lives On"; an Off-Broadway play, "Requiem for Brother X", by William Wellington Mackey of Miami, Florida,—“a dramatic dialogue about Black people trapped in the ghetto”.

The following extracts give some idea of these writings and their moods:—

“There are those Whites who will completely disclaim responsibility for the country's inhumanity to the Black man. These are the people who are governed by logic for 4½ years but by fear at election time. The Nationalist party has perhaps many more English votes than one imagines. All Whites collectively recognise in it a strong bastion against the highly played-up "swaart gevaar". One must not underestimate the deeply imbedded fear of the Black man so prevalent in White society. Whites know only too well what exactly they have been doing to Blacks and logically find reason for the Black man to be angry. Their state of insecurity however does not outweigh their greed for power and wealth, hence they brace themselves to react against this rage rather than to dispel it with openmindedness and fair play. This interaction between fear and reaction then sets on a vicious cycle that multiplies both the fear and the reaction. This is what makes meaningful coalitions between the Black and White totally impossible. Also this is what makes Whites act as a group and hence become culpable as a group.”

To Brother Shezi

There are births
Conceived from the womb of revolution
Deaths that are immortal
Blood which can never be covered by concrete
And Moments that build history.

Brother Shezi
Your body is absent
But your spirit is in us
From your heroic act
We have learnt
Oppressors death
Is Black Survival.

“ Black is not the matter of the colour of one’s skin. Black is an attitude of mind. Black is borne out of the Blackman’s experience of life in this country. It is a response to a life of humiliation, a life of “ coolies, kaffirs and hotnots ”, a life of suffering under white racist regimes. Thus by describing yourself as Black, you are the former “ non-white, coolie etc. ” saying NO to the whiteman. It is the Blackman saying NO to white racism and paternalism. It is the Blackman saying NO to all whites whether they are Nats, U.P., Progressive or Liberals. Blackness is the Blackman refusing to believe that the white man’s way of life is best for Blacks. Blackness is the Blackman being the architect of his own destiny and liberation. In fact, by describing yourself as Black, you are already committing yourself to fight all forces which aim at using the colour of your skin as a stamp of inferiority. Blackness is a positive assertion in your fight for freedom and manhood.”

“ Black consciousness has been labelled as racialism in reverse. This is absolutely untrue. Racialism is the exclusion of one race for the sole purpose of oppressing and dominating that race. Secondly, racialism is the exclusion of one race on a criterion that the race is biologically inferior. Black consciousness accepts the fact that before Black people should join the open society, they should first close their ranks to form themselves into a solid group to oppose the definite racism that is meted out by white society, to work out and plan their direction clearly and bargain from a position of strength.”

Dream Variation

To fling my arms wide
In some place of the sun
To whirl and to dance
Till the white day is done.

Then rest at cool evening
Beneath a tall tree
While night comes on gently,
Dark like me— !
That is my dream !

To fling my arms wide
In the face of the sun,
Dance whirl whirl !
Till the quick day is done,
Rest at pale evening . . .
A tall, slim tree . . .
Night coming tenderly
Black like me.

What a Friend we have in Vorster !

What a friend we have in Vorster,
Freedom has no truer friend.
Does your telephone sound funny
Take it to the Special branch

If they take you to the shower
Do not take your soap with you
If they take you to the tenth floor
Ask them for a parachute

If you hear a knock at four
Dare not open up your door
Dare not open up your door

Arson, rape and Bloody Murder
Arson, rape and Bloody Murder
Arson, rape and Bloody Murder
When the Black revolution comes

Were it not so tragic it would be something of a sick joke that when Blacks are driven to express in this way in articles, plays and poems the bitterness and polarisation predicted by Dr Beyers Naudé, they should be charged under the Terrorism Act with creating and fostering feelings of hatred, hostility and antipathy between the races. One wonders who are the accusers, and who the accused.

Recent Measures in Sri Lanka

In ICJ REVIEW No. 10, June 1973, some of the emergency legislation in force in Sri Lanka was examined, and the hope expressed that the government would soon be able to dispense with some if not all of the remaining Emergency Regulations. Unfortunately, this hope has not been fulfilled and, as the following brief examination shows, the limitations on fundamental freedoms have been extended.

Press Freedom

In Sri Lanka there were formerly three main groups of papers publishing daily newspapers in all three languages. One of these was the Associated Newspapers of Ceylon Limited. On July 1, 1973, the government, by legislation, took control of the Associated Newspapers of Ceylon Ltd., which had the largest circulation. Each shareholder at the time of the take-over was only permitted to own up to a maximum of 2% of the shares and the balance was vested in the Public Trustee. Provision was made for the payment of compensation. The vested shares could be released only to persons nominated by the Prime Minister.

Soon after this, the premises of the Independent Newspapers, the second largest group were sealed and the printing and publication of its newspaper

was prohibited. It appears that the government acted in this fashion because the paper gave wide coverage to the opposition and was critical of the government. Following this, *The Times*, belonging to the third group, which had previously also been critical of the government, began to follow the government line. Consequently, there is no longer any newspaper or journal of wide circulation which publishes independent views.

In addition, under the Emergency Regulations, the "competent authority", who is nominated by the government, has the power to:

- (a) prevent or restrain the transmission of publications to places outside Sri Lanka,
- (b) prevent any person from distributing among the public in any specified area any posters, handbills or leaflets.

Broadcasting is the sole monopoly of the Sri Lanka Broadcasting Corporation. This is under indirect state control since, under the Emergency Regulations, the control of this Corporation was recently transferred to the Director-General of Broadcasting who is appointed by a Minister.

Elections

The National State Assembly was inaugurated in 1972. The members, who were elected under the old Constitution in 1970, were deemed to be the members of the first National State Assembly. Under the old Constitution their term of office expired in 1975. Under the new Constitution, members could hold office for six years. Therefore, the government has decided not to hold elections prior to 1977.

There are in Sri Lanka self-governing local bodies, namely Municipal Councils, Urban Councils, Town Councils and Village Councils. A Regulation has been promulgated in the following terms: "Notwithstanding anything in any other written law, any election due to be held for the purpose of the election of any member of any local authority under the Local Authorities Election Ordinance (Ch. 262) shall not take place so long as the Regulations are in force." As a consequence of this order, elections to local authorities stand abandoned and most local councils have been dissolved. The powers exercised by those Councils which were dissolved have been vested in a Special Commissioner who is appointed by the government. The life of some Councils has been extended by the Minister of Public Administration, who is empowered to do so under the Regulations.

The leader of the Federal Party, an opposition group from the northern part of Sri Lanka, which consists mainly of Jaffna Tamils, resigned his seat in the National State Assembly two years ago. The nomination of candidates for an election to fill this vacancy was until recently prohibited by regulations. The seat fell vacant in June 1972 and a by-election was not held until February 7, 1975.

Meetings and Processions

The Prime Minister can, by order, prohibit the holding of any public processions or public meetings. Under this power at one time she prohibited any meeting organised by the United National Party or its members or in which any member of the United National Party participated. For this purpose, a certificate from an officer-in-charge of the police station of the area in which the meeting or procession was to be held to the effect that any

person is a member of the United National Party is conclusive proof thereof.

The opposition group in the National State Assembly decided to call upon the people to observe Friday, October 19, 1973, as a day of peaceful mourning and fasting. They also invited the people to join them in performing Satyagraha¹ on that day at the Galle Face Green. The day before the Satyagraha the government prohibited the entry of anybody to the Galle Face Green and banned the Satyagraha. The opposition organised another Satyagraha at Attangala, the electorate of the Prime Minister. Violence was used to disrupt this move. A few days later, the opposition members gave notice in the National State Assembly calling for the removal of the Inspector-General on his failure to maintain law and order at Attangala. The Prime Minister herself condoned the action of those who broke up the Satyagraha.

The United National Party wanted to hold 100 protest meetings throughout the country on April 21, 1974. The opposition leader, Mr. Jayewardena, emphasised through the Independent Newspaper of Ceylon the peaceful nature of these meetings. On the night of April 19, these meetings were declared illegal, and a 24 hour curfew was ordered.

In order to protest against what they called "the anti-democratic acts of the government", the U.N.P. decided to observe May 22, 1974, the Republic Day, as a day of mourning. People were asked to fly white flags. The U.N.P. also announced its intention of performing Satyagraha at the Independence Hall in Colombo. The people were asked to assemble at the Town Hall premises and march to the Independence Hall. In the early hours of May 22, the police occupied the Town Hall premises and started dispersing the crowd which attempted to gather there. There were repeated baton charges and tear-gas canisters were fired.

On November 17, 1974, the L.S.S.P., one of the coalition parties in the government, organised a mass rally. It was expected that a resolution would be passed at the meeting criticising the government and calling upon it to nationalise all privately owned industries. At 12 noon it was announced that the government had imposed a curfew beginning at 1 p.m., and no one was allowed in any public place. This made it impossible for the meeting to be held.

Control of Movement

No one is allowed to leave Sri Lanka without first obtaining an exit permit. Some, other than those suspected or accused of offences, have been refused travel documents. The Minister can order the Controller of Immigration and Emigration not to issue exit permits.

The Prime Minister, by order, can direct that no person in any area shall, between specified hours, be in any public place. The Secretary to the Minister of Defence and Foreign Affairs can, by order, restrain any person from moving within the island, require him to notify his movements, prohibit him from leaving his residence or require him to surrender his travel documents or impose restrictions as regards his employment or business and in respect of his association or communication with other persons.

¹ Satyagraha means a peaceful demonstration, often by sitting on the ground and fasting until demands are met.

Judicial Proceedings

Judicial review of legislation is prohibited by the Constitution, except by the Constitutional Court, which can pronounce contemplated legislation *ultra vires*.

In many of the recent Acts the jurisdiction of the Courts are taken away by providing in the Act itself that the decision of the Executive in that particular instance is final and conclusive and cannot be questioned in any Court of Law.

Writs and Injunctions do not apply in respect of an order, direction or other act made or done or purported to have been done under any Emergency Regulation.

The Prime Minister has the power to declare any organisation to be a proscribed organisation and anybody taking part in any activities of the organisation thereafter is exposed to severe penalties.

Arrest and Detention

The powers of arrest and detention are very wide. Any person authorised under the Emergency Regulations has the power of search, seizure, arrest and detention of any person. Such a person may be detained at the will of the "authorised person". The detainee has no right to bail; nor need he be produced before a Court.

A person detained under Emergency Regulations has the right to submit written submissions to an advisory body. This body is nominated by the Prime Minister, and its only power is to submit an advisory report to the Prime Minister.

As all these provisions indicate, there continues to be a considerable erosion of the Rule of Law in Sri Lanka, chiefly due to the continuation of the Emergency Regulations.

Bulgaria

By a law published in the Official Journal of Bulgaria on November 8, 1974, those citizens who had left the country without a passport, or having left with a passport did not return within the time specified, are granted an exemption from prosecution or an amnesty from having to serve any sentences imposed by the courts, provided they return to Bulgaria before December 31, 1975.

The amnesty does not have the effect of restoring any of their property which has been confiscated or any fines paid for having illegally left the country or remained abroad. Persons whose citizenship has been revoked or who are no longer citizens of Bulgaria are excluded from the amnesty.

This measure is to be welcomed, as far as it goes, but it is still a long way from the right to leave one's country and return, as proclaimed in the Universal Declaration of Human Rights. It is not known how many Bulgarians have availed themselves of this offer, or are likely to do so before the end of the year.

Commentaries

Mr Vorster's Political Prisoners

The South African Prime Minister, Mr. B. J. Vorster, was asked in the House of Assembly in April this year to consider releasing political prisoners. Mr. Vorster, in dismissing the request (from the leader of the Progressive Party, Mr. Colon Eglin), made three points:

- he denied that Nelson Mandela and others held with him were political prisoners. They had, he said, been convicted by competent courts and were serving terms of imprisonment;
- they were, said Mr. Vorster, "self-confessed, card-carrying" communists, whose aim was to establish a communist state in South Africa, in the interests not of the South African people but that of the Kremlin;
- and their conviction, he said, did not involve matters of ideology but had arisen from acts of murder and arson. They were adults who had deliberately wanted to overthrow the State and who were therefore not entitled to release or remission of sentence.¹

These arguments—like much else in South African affairs—have been heard before. The only evident change is the way Mr. Vorster seems now to have begun re-writing history; and his third point about absence of ideology would appear immediately to contradict his second point and needs to be returned to.

But while his reply is not strikingly novel, it is remarkable for its timing. It comes when Mr. Vorster is involved in an energetic attempt to establish detente between South Africa and the rest of Africa—and this is a process which has already, for instance, involved him in successfully persuading Mr. Ian Smith to release leaders of the African nationalist cause in Zimbabwe (S. Rhodesia) from their long-standing detention. Mr. Vorster cannot be unaware of the parallels and it is therefore necessary to examine more closely not only his reluctance to show any clemency towards South African political prisoners (which recently had such macabre consequences in the case of Bram Fischer) but also his peculiar refusal to admit that these political prisoners exist at all.

This latter refusal is the more puzzling because it is so obviously tendentious, based at best on a verbal quibble. But it is a point he has consistently put, and an indication of what lies behind his thinking was given by the man who succeeded him as Minister of Justice, the late Mr. Peet Pelser, who declared in 1967:

With the possible exception of Robert Sobukwe, no one else is being detained on account of his political convictions.²

The distinction thus is between prisoners—those, in Pelser's terms who "have been sentenced in respect of serious crimes against the public safety and security of the State"—and detainees, those held without trial.

Robert Sobukwe was the leader of the Pan Africanist Congress who, with 18 others, was sentenced in May 1960 to three years' imprisonment for "incitement" following the anti-pass campaign which was met with the police shootings at Sharpeville. Shortly before his sentence expired, a special clause was introduced in the General Law Amendment Act of 1963 enabling Sobukwe to be held in detention on Robben Island after his prison term. This "Sobukwe clause" was re-enacted for six years until, in 1969, Sobukwe was "released" from the Island and confined to the Kimberley area in terms of restrictions placed on him under the Suppression of Communism Act.

It is consistent with the Gilbertian nature of South African official semantics that this later confinement—where the restrictee is in fact made his own gaoler—is not termed detention and so Sobukwe, along with the considerable number of other banned and house-arrested South African opponents of apartheid, is not apparently accorded any status by Mr. Vorster, whether as "political prisoner" or as "detainee". Observers might be forgiven for rejecting all these subtle distinctions as ludicrous and irrelevant were it not for the fact that Mr. Vorster, both as Minister of Justice and as Prime Minister, has been insistent on maintaining the distinction between prisoner and detainee—specifically for those held *in prison*. Such insistence must have deep-seated reasons, particularly when Mr. Vorster maintains it at a time when he is involved in areas as delicate as those of the S. Rhodesian situation.

The reasons certainly are deep-seated—and personal. They relate to Mr. Vorster's own experience as a young man when, in September 1942, following a wave of sabotage, he joined other pro-Nazi detainees at the Koffiefontein internment camp in the Orange Free State. Mr. Vorster was released in January 1944 and placed under house arrest in Robertson until the end of the war.

This is not an easily-forgotten experience and the subsequent author of the Sabotage Act clearly remembered it well. The fact that detention without trial and house arrest became essential features of the Nationalist Party armoury is hardly coincidental. Indeed, the South African statute book contains a fearsomely sophisticated array of legal provisions making possible detention without trial, the most important of them having been introduced under the direct supervision, if not actual ministry, of Mr. Vorster: the 90-day and 180-day laws of 1963 and 1965, and the all-embracing detention provisions of the Terrorism Act of 1967.

These provisions form only a small part of the whole structure of legislation which constitutes the apartheid state and there has, sadly, been ample time and opportunity to document fully the repressive nature of that whole structure.³ But what needs to be noted here—because it bears closely on Mr. Vorster's attitude to political prisoners and because it is often conveniently ignored in the frequent assertions of the "independence" of the South African judiciary—is the essential *political* nature of so many of the laws.

There is a very real sense in which—as has been recently put⁴—the whole South African society is "imprisoned"; where "for Africans . . . the ever-present imminence of imprisonment is a universal experience": and where one in every four black adults are imprisoned annually for offences unknown in other countries, which derive directly from apartheid laws.⁵ (The annual report of the Commissioner of Police for the period ended June 1971, for example, disclosed some 930,000 prosecutions under

laws which apply only to blacks and which go towards maintaining the apartheid state: curfew regulations, documentation offences, influx control offences, African tax, trespassing in white areas, contraventions of the Masters and Servants Act, etc.).

In a sense, therefore, all those sentenced under these apartheid laws could be deemed "political" prisoners. But these are victims of the system rather than political prisoners in the generally accepted sense and it is those sentenced under the so-called "security" laws who are the true political prisoners whom Mr. Vorster refuses to recognise. He maintains that they—unlike himself at Koffiefontein and, some time later, Joshua Nkomo at Gonakudzingwa—have been tried and convicted for specific crimes under specific laws.

But what, one must ask, are these "security" laws? Their scope was set before Mr. Vorster's time with the Suppression of Communism Act in 1950 which defined communism so widely as to include not only Marxian socialism but any other doctrine which aimed at changing the *status quo*. This—together with similar ubiquitous definitions of "sabotage" and "terrorism"—have made illegal any real opposition to apartheid; and acts such as the Unlawful Organisations Act of 1960 (which banned the two major black political movements) have made impossible any large-scale black political movements. (And observers tend to forget that the much-publicised Transkei "homeland" will this year be given "independence" with Proclamation 400 of 1960—instituting a permanent State of Emergency—still in force.)

In these terms, Nelson Mandela's words to the court in 1962 are especially pertinent:

I was made, by the law, a criminal—not because of what I had done but because of what I stood for, because of what I thought, because of my conscience . . .⁶

In these terms too, Mr. Vorster's distinction between detainee and prisoner becomes nugatory—and misleading. The deception, it would now seem, is deliberate, if one is to take at all seriously his reply in the House in April. What he said was not only contradictory but wrong in fact. For example, Mandela—as has never been disputed, even by Mr. Vorster's own Security Police—was neither a "card-carrying" nor a "self-confessed" communist—and it is obviously necessary to repeat his and the African National Congress's aim for South Africa, as carefully set out in Mandela's address at the Rivonia Trial in 1964:

The ANC's chief goal was, and is, for the African people to win unity and full political rights. The Communist Party's main aim, on the other hand, was to remove the capitalists and replace them with a working-class government. The Communist Party sought to emphasise class distinctions, whilst the ANC seeks to harmonise them. This is a vital distinction.⁷

Mandela admitted close co-operation between the ANC and the Communist Party. "But," he pointed out, "co-operation is merely proof of a common goal—in this case the removal of white supremacy—and is not proof of a complete community of interests."

Mr. Vorster—13 years after Mandela first went to prison—now glibly forgets these distinctions. And he chooses too to gloss over the fact that among those still serving "security" sentences are many whose only

“crime” was membership of the ANC (African National Congress) and the PAC (Pan Africanist Congress) and who were certainly not members of the Communist Party, nor had they anything to do with “murder and arson”.

An official footnote needs to be added to Mr. Vorster's refusal to acknowledge the existence of political prisoners, for their existence, in practice, is daily recognised by Mr. Vorster's own subordinates. Whether on Robben Island (where the majority of the black males are held), or in the New (Blanks/Whites) Section of Pretoria Local Prison (where the white politicals are held), or at the Barberton Women's Prison (where the two black women are)—wherever there are political prisoners, they are held separately from other prisoners. They are, furthermore, treated differently—in several important aspects, their treatment is worse than that of other prisoners. And—possibly most important in terms of official recognition—it is only these political prisoners, as a separate group, whom the International Red Cross are allowed to visit: not the detainees under the Terrorism Act, whether South African or Namibian; nor any common law prisoners; only the political prisoners Mr. Vorster refuses to recognise.

Yet he persists with his myth and has recently demonstrated the peculiar malice of which he is capable in his treatment of these prisoners. In this case—that of the former QC, Bram Fischer, sentenced in 1966 to life imprisonment—the malice appears to have gained extra venom from the fact that Fischer was a true son of Afrikanerdom who turned against the faith of the volk and, unrepentantly, became and remained a communist even after the 1950 ban. In December last year it was discovered that Fischer, in his ninth year in prison, had terminal cancer: the Minister of Justice, Mr. J. Kruger, expressed initial sympathy for the family's plea that their father be released but, with Fischer responding temporarily to treatment, the Minister's attitude changed and, even when the State doctors pronounced only a “very poor” prognosis for Fischer in February, the Minister prevaricated and eventually only in March allowed Fischer, still technically a prisoner, to his brother's home. When Fischer finally died in early May, the Minister gave a macabre display of official truculence by insisting that the man's ashes be returned to the Prisons Department after his cremation.

Fischer's case is an interesting touchstone on another count: as a white and an Afrikaner and a man universally respected for his integrity and professional ability, and as somebody who had never himself participated in any specific acts of sabotage, he was an obvious choice for clemency, if any clemency or political concession was ever to be made. And there was a particular irony about his case: he was originally charged in October 1964 under the Suppression of Communist Act, alongside 13 others, but went into hiding during the trial to “continue the fight against apartheid.” The maximum sentence given those that remained was five years; Fischer, when caught ten months later, was charged under the Sabotage Act as well and was sentenced to life imprisonment.

In 1973, at the time of Fischer's 65th birthday, a wide-spread campaign inside South Africa—involving several well-known and respected whites—called for Fischer's release. The then Minister of Justice, Mr. Pelsler, said that under no circumstance would he be released and Mr. Vorster was reported as saying that Fischer would never be released while he, Mr. Vorster, was alive. The *Transvaler*, official newspaper of the Transvaal Nationalist Party (of which Mr. Vorster is leader), took up one of the arguments put forward during the campaign for Fischer's release: that Fischer should

be shown the same mercy granted to Robey Leibbrandt after World War II. (Leibbrandt was a South African, trained in Germany and landed in South Africa by the Nazis to organise sabotage; he was convicted of espionage in 1942 and sentenced to death, but Smuts commuted this to life imprisonment. When the Nationalists came to power in 1948, one of their first acts was to release Leibbrandt and five others similarly convicted of pro-Nazi activities.)

The cases of Fischer and Leibbrandt could not, said the *Transvaler*, be compared : when Leibbrandt was released, the Nazi era was past and there was no possibility of his continuing the activities for which he had been sentenced. Fischer, on the other hand, was still an avowed communist and the communist threat was as alive then as it had been when Fischer was first apprehended.

The point is, indeed, well taken—and has been used with effect by Mr. Vorster and his subordinates often when approached in private and asked to show leniency to various political prisoners. But what Mr. Vorster does not seem to have realised is that the Leibbrandt argument is, in fact, a dangerous one for him to use at all because it confirms the very point which he is seeking to deny by refusing to accept Mandela and the others as political prisoners : i.e. that, unlike the cause of Leibbrandt in 1948, *their* cause is still very much alive. And it is, however Mr. Vorster may try to twist it, the cause of black liberation in South Africa—and Mandela and the others on Robben Island *are* the true leaders of that cause.

This is a fact which no amount of semantic juggling will dispel. Mr. Vorster, in fact, by pressing Mr. Smith to release Nkomo, Sithole and the other Zimbabwean detainees, has spelt out—with very clear logic—the direction that he himself must take if, as he claims, he is really interested in detente and dialogue and peace. His solution lies on his own doorstep—just a short ferry-ride across Table Bay, to the Island which had already, within South Africa, become such a strong symbol of the desire for freedom.

References

1. *The Star*, Johannesburg, 26 April 1975.
2. Quoted in Allen Cook *South Africa: the Imprisoned Society*, International Defence and Aid Fund, London, 1974, p. 5.
3. See, e.g., *Infringements of the Universal Declaration of Human Rights in South Africa*—study by the International Commission of Jurists in *Objective Justice*, vol. 5 no. 4, United Nations, October/November/December 1973.
4. Allen Cook, *op. cit.*, p. 6.
5. *Ibid.*, p. 5.
6. Quoted in Mary Benson *The Sun Will Rise—statements from the dock by Southern African political prisoners*, International Defence and Aid Fund, London, 1974, p. 9.
7. *Ibid.*, p. 16.
8. *Die Transvaler*, Johannesburg, 25 April 1973.

United States Policy and Human Rights

The United States, due to its power and position, has enormous potential for influencing the promotion of human rights in many parts of the world. For a country in this position there is often a conflict between the interest of national security and a declared policy of promoting respect for human rights. Sometimes this may be merely a conflict between long term and short term interests, since a government which consistently violates human rights may eventually prove to be an ally of doubtful value.

Recent action by the United States Congress, action within the State Department, and action by the American Bar Association give encouragement to those who would welcome greater attention being given to human rights issues in policy formulation.

The U.S. Congress, in enacting the Foreign Assistance Act of 1974, has added a new section, 502 B, to Chapter 1 of Part II of the Foreign Assistance Act of 1961. This section in sub-paragraph (a) states it to be "the sense of Congress that, except in extraordinary circumstances, the President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognised human rights, including torture or cruel, inhuman or degrading treatment or punishment; prolonged detention without charges; or other flagrant denials of the right to life, liberty, and the security of the person".

If the President proposes to furnish security assistance to a government falling within this category he must advise the Congress of the extraordinary circumstances which necessitate the assistance.

In determining whether a government falls within the definition in sub-paragraph (a), the United States Executive must take into consideration "the extent of cooperation by such government in permitting an unimpeded investigation of alleged violations of internationally recognised human rights by appropriate international organisations, including the International Committee of the Red Cross and any body acting under the authority of the United Nations or of the Organisation of American States. This provision can be of great value to impartial international bodies seeking to investigate and inform public opinion upon human rights situations.

The term "security assistance" covers military assistance (Chapter 2) and security supporting assistance (Chapter 4) of the Foreign Assistance Act and sales under the Foreign Military Sales Act. It also covers assistance for public safety (aid to police forces).

In an apparent response to congressional initiatives, a new post has been created in the Department of State entitled "Coordinator for Humanitarian Affairs". Mr. James M. Wilson has been appointed to the post. In a letter (published in the Congressional Record, August 7, 1974), to Congressman Donald M. Fraser, of Minnesota, Chairman of the Subcommittee on International Organisations and Movements of the House Foreign Affairs Committee, and a leading advocate of international human rights, Deputy Secretary of State Robert S. Ingersoll points out that this post has been expressly created "to bring a clear focus on human rights issues to activities throughout the Department, and to assure attention at the highest level, as these issues deserve".

Thus far no government has been cited by the Executive Branch as requiring security assistance despite gross violations of human rights.

Whether this indicates that no government presently receiving such assistance is considered by the Executive as falling within the definition is not clear, but the existence of the new law will give added scope to those endeavouring to influence United States policy in this field.

A recent resolution passed in February 1975 by the House of Delegates of the American Bar Association is another encouraging development for those who believe that the Rule of Law and human rights are inseparable, and that the legal professions should concern themselves about its implementation both in their own countries and abroad.

In this resolution the American Bar Association affirms its support for the Rule of Law in the international community and its recognition of the need for an independent judiciary and for the independence of lawyers. It notes with concern the reported arrest, detention and sentencing of lawyers in an increasing number of countries because of their representation of individual clients, and authorises its President, whenever he thinks it rights to do so, to urge the United States government to bring to the attention of foreign governments the concern of the American Bar Association.

In a report accompanying the proposal for the resolution, a Working Group of the A.B.A. International Law Section's Human Rights Committee pointed to cases of the violation of the right to defence which have been reported in such places as South Korea, Indonesia, Uganda, Greece under the previous military dictatorship, Brazil and Chile.

HUMAN RIGHTS, THE POOR AND THE LEGAL SYSTEM

by

Professor Ronald Sackville *

It is trite to observe that Australia, in common with most other Western countries, is encountering serious economic and social problems. Some of these problems are obvious and recognised throughout the community. Thus a great deal of attention is quite properly devoted by politicians, commentators, businessmen and ordinary people to the task of reducing the levels of unemployment and inflation. The dislocation and human misery caused by the "twin evils" are well understood and it is generally accepted that unless they are brought under control the broader social objectives of the welfare state will prove unattainable.

Yet the present preoccupation with economic issues presents dangers that may not be altogether obvious. One danger is that the declining economic situation will stimulate conflicts and tensions between groups within the community to such an extent that the claims of those who lack political and economic power will be neglected or ignored. The present climate is, after all, hardly conducive to altruism. The unique feature, in post-war terms, of the current economic difficulties is that virtually all sections of the community feel themselves to be under threat. The worker faces the prospect of retrenchment. The employer complains of labour unrest, government intervention, competition from imports and, ultimately, declining profits. The fixed income earner sees the fruits of his labour turn sour, as he runs the risk of joining the ranks of the genteel poor. The middle income earner struggles with high taxes and ever increasing commitments. Plainly it is not practicable to remain docile in the pursuit of one's economic interests. After all an annual inflation rate of about 25% ensures that the meek will inherit only a loss of relativity.

In the competition for a fair share of available resources and for a favourable exercise of legislative judgment, the worker has the protection of his unions, which have not displayed a notable reluctance to use the various weapons at their disposal. The business community, despite suffering some casualties, retains a considerable capacity for influencing political decisions, as revealed by government initiatives in the last few months of 1974 designed to stimulate the private sector of the economy.

* Professor of Law, University of New South Wales, and Commissioner for Law and Poverty, Australian Commission of Enquiry into Poverty. This paper was read to the 1974 Human Rights Day meeting of the Australian ICJ Section.

The most disturbing question, however, is who will speak for the poor in the political arena. In a book published in 1973, entitled *The Powerless Poor*, Peter Hollingworth substantiated the thesis that the poor in Australia lack an effective voice in the decisions and processes that affect them. Of course there have been some developments in recent times designed to improve the position, most notably the Australia Assistance Plan initiated by the Social Welfare. Nevertheless, it remains true that, for the most part, the poorest groups in the community are unorganised and without substantial political and economic leverage. Moreover, their position may well be threatened by a backlash against government assistance (or handouts, depending on the point of view) to "non-productive" members of the community. An unhealthy symptom of this backlash is the preoccupation with surfs and loafers who are allegedly cluttering up the unemployment rolls. Undoubtedly some abuses have occurred, but few of the critics have sought to burden their arguments with detailed investigations as to the incidence of abuse in relation to the total population of the unemployed.

It is helpful in any discussion of the poor to have some idea of the extent of poverty and the kind of people who are especially at risk of being poor. This is important because many Australians adhere to the myth that the poor, with the possible exception of children, overwhelmingly comprise the lazy and the irresponsible elements of the community. There are serious problems in defining and measuring poverty in predominantly affluent societies, but the most important attempt to do so in Australia is that of Professor Ronald Henderson, both in his book *People in Poverty* (1970) and in the much neglected Interim Report of the Australian Commission of Enquiry into Poverty, *Poverty in Australia* (March 1974). The Commission's Report adopted an austere poverty line, amounting to \$62.70 per week in August 1973 for a married couple (wife not working) with two children.¹ This figure is equivalent to a weekly income of about \$75.30 in December 1974 when adjustments are made for movements in average weekly earnings.² The Report estimated that 10.2% of the total Australian population could be described as "very poor" (with incomes below the poverty line) and a further 7.8% as "rather poor" (with incomes less than 20% above the poverty line). As the Table reproduced below shows, the groups most at risk of very poor or rather poor were single aged persons, fatherless families, the sick and invalid and aged couples^e.

The general pattern revealed by Table 1 below may vary somewhat when housing costs are taken into account, but it is clear that the disabilities suffered by the groups most at risk of being poor overwhelmingly flow from circumstances that cannot reasonably be regarded as within their control.

The concept of the "poverty line" in effect accepts that poverty is basically an economic problem and concentrates attention on the level of income required to follow what would be regarded in Australia as a decent, minimum standard of living. Although this approach is extremely valuable, it must not be used in a manner that overlooks the various forms of deprivation experienced by poor people extending beyond income

¹ The figure varied according to the number of persons in the household and whether the head of the household worked. See *Poverty in Australia*, App. A.

² The poverty line originally devised by Professor Henderson amounted to 54.55% of average weekly earnings. These stood at \$138 per week in the September quarter 1974 on an Australia-wide basis, or \$140.20 seasonally adjusted.

deficiencies. The point has been put this way by two American commentators :

“Poverty is not only a condition of economic insufficiency : it is also social and political exclusion. We suggest that a minimum approach by government in any society with significant inequalities must provide for rising minimum levels, not only of (1) incomes, (2) assets, and (3) basic services, but also of (4) self-respect and (5) opportunities for education and social mobility and (6) participation in many forms of decision-making.”³

TABLE 1
Adult income units by selected disabilities :
income in relation to the poverty line (percentages)

Disability	Very poor (below poverty line)	Rather poor (less than 20% above poverty line)	Total poor
	%	%	%
Aged males (single)	36.6	13.3	49.9
Aged females (single)	31.0	19.8	50.8
Aged couples	5.0	29.6	34.6
Fatherless families	36.5	12.9	49.4
Motherless families	13.1	4.5	17.6
Large families (4 or more dependent children)	9.4	13.5	22.9
Sick or invalid	21.4	13.8	35.2
Unemployed	16.6	8.2	24.8
All income units%	10.2	7.8	18.0

The question that must be faced by lawyers is what role the legal system can and should play to overcome the pattern of deprivation that characterises the lot of poor people in Australia.

Lawyers have always paid homage to the goal of equality before the law. Justice is to be administered impartially and without regard to a man's means. Every person is entitled to his day in court. The theory is laudable but the reality is quite different. In recent times it has become more apparent than ever that access to effective justice very often depends on the resources—using that term in its broadest sense—of the individual concerned. The most obvious victim of inequality is the person who simply cannot afford legal representation for the criminal or civil litigation in which he is involved. It is hardly surprising to find powerful evidence linking lack of legal representation in criminal cases, which are conducted within the framework of an adversary system, with higher rates of conviction and more severe penalties.⁴ However, the problem of equal access to the legal system goes far beyond the limited financial means of potential

³ S. M. Miller and P. Roby, *The Future of Inequality* (1970) 12.

⁴ T. Vinson and R. Homel, “Legal Representation and Outcome” (1973), 47 *Aust. L. J.* 132.

litigants. There are many important psychological and physical barriers impeding the ability of the poor to reach the sources of legal assistance that may be available to them. These include the failure of many people, particularly those who are poor, to realise that problems which they encounter have legal implications requiring legal advice or action. Even if a problem is correctly characterised as legal, the prospect of actually consulting a lawyer may prove daunting to people who are ignorant of the services provided by lawyers and who are often fearful of professionals. A recent study has documented the uneven distribution of lawyers throughout the community, revealing the difficulty of relying on private practitioners for the delivery of legal services to the poor.⁵ All of these difficulties are exacerbated in the case of migrants

“who are obliged to deal with an unfamiliar legal system with language barriers that reduce their capacity to cope with the problems confronting them and to reach sources of legal assistance.”⁶

The deficiencies of the existing patchwork system of legal aid in Australia in meeting the challenge of providing legal aid services to all who require them have been analysed in detail in the Discussion Paper on *Legal Aid in Australia*, Commission of Enquiry into Poverty.

It is regrettable that the ongoing debate on legal aid in Australia has failed to come to grips with many of the crucial issues which inevitably will confront the policy makers in the field. Rather the emphasis has been on deciding who should wield control over the agencies providing legal aid services. Professional bodies representing private practitioners have consistently maintained that they should have the responsibility for administering and controlling legal aid services, albeit with financial assistance from government sources. The entrance of the federal Australian Legal Aid Office into the field of legal aid has created considerable misgivings in the private profession, which remains generally fearful of the role of a large scale salaried service. Moreover, serious questions have been raised about the form that a federal salaried office should take, some contending that an independent statutory corporation is required and others being content to leave the Office within Departmental control. In the territorial battle the principal contestants have tended to overlook the crucial question of the extent to which members of the community served by legal aid offices should participate in and even direct the work of those offices. If poverty should be tackled by providing opportunities to the poor to participate in decision-making processes, it is vital that the consumers of legal aid services assist in shaping the form of those services. Anything less—including token non-legal representation on governing bodies—deeply affects the quality of legal aid and its impact on the poor.

Indeed the most important issue affecting legal aid in Australia has been almost completely neglected—largely because it appears not to have been properly understood. This issue is

“whether the services provided should be confined solely to meeting

⁵ N.S.W. Bureau of Crime Statistics and Research, *Territorial Justice in Australia* (1974).

⁶ Australian Commission of Enquiry into Poverty, *Legal Aid in Australia* (Discussion Paper issued by Professor R. Sackville, Commissioner for Law and Poverty, November 1974) 328. See also A. Jakubowicz and B. Buckley, *Migrants and the Legal System* (Discussion Paper prepared for the Australian Commission of Enquiry into Poverty 1974).

the needs of individual clients or should extend to the use of the legal process to attempt to change the political, economic and social status of the poor.”⁷

In Australia the more limited view has been accepted to date by default. However, legal aid services have a peculiar potential for assisting disadvantaged groups and individuals to influence changes in legislation, administrative practices or even the behaviour of the private business sector. This can be done by means of test cases designed to challenge or modify apparently settled principles of law and by the formulation of proposals for change and the presentation of those proposals to responsible decision-makers. Existing law reform agencies are almost invariably limited to areas of “lawyers’ law” that are undoubtedly important but of peripheral relevance to the poor. The process of community education, which is an important function of a legal aid agency prepared to adopt a broad view of its role, not only aims to equip people to recognise and deal with the legal problems they encounter, but to create a general awareness of the changes that are required to overcome laws and practices that bear harshly on the poor.

The powerlessness of the poor in relation to the legal system is further emphasized by an examination of some areas of substantive law that work to the disadvantage of the poor. Even the most casual observer of magistrates’ courts cannot fail to be saddened by the daily parade of people, mostly homeless, who are charged with vagrancy and drunkenness. This extraordinarily wasteful and futile system, which essentially punishes people for their poverty and chronic alcoholism, has persisted despite overwhelming evidence that the imposition of criminal sanctions on such people serves no socially worthwhile objective.⁸ It is true that suggestions for reform are made from time to time and that some changes in legislation or practice have been introduced in a few jurisdictions.⁹ But the laws are still enforced and there is evidence that the pattern of enforcement discriminates against Aborigines.¹⁰ The continued existence of these laws is attributable to the absence of sustained and systematic pressures for reform. If the victims of this process were persons who were not poor, there can be little doubt that the criminal law would have been replaced by a more humane method of assisting homeless people and alcoholics long ago. An effective legal aid service would not only represent individuals charged with vagrancy and drunkenness (and there are often substantial points of law that can be raised on behalf of defendants),¹¹

⁷ *Legal Aid in Australia*, 5.

⁸ See the following reports of the N.S.W. Bureau of Crime Statistics and Research: *City Drunks—Central Court of Petty Sessions* (Statistical Report 3, 1972); *Drunks who go to Gaol* (Statistical Report 5, 1972); *City Drunks—A Possible New Direction* (Statistical Report 7, 1973). See also Report of the Working Party, *Habitual Drunkenness Offenders* (London, H.M.S.O., 1971).

⁹ For example the offence of public drunkenness has been abolished in the Northern Territory and the Victorian Statute Law Revision Committee has recommended repeal of the vagrancy provision (s.5 of the Summary Offences Act 1970).

¹⁰ N.S.W. Bureau of Crime Statistics and Research, *Minor Offences* (Statistical Report 18, 1974).

¹¹ There is authority for the view that a person whose means are insufficient to support him adequately cannot be convicted of vagrancy provided the means he has are lawful: see *Zanetti v Hill* (1962) 108 C.L.R. 433, 441 *per* Kitto J.

but would urge the repeal of those laws as inconsistent with the values of a humane society.

There are other areas of substantive law which operate in practice heavily against the interests of the poor. Some of these, such as the legal principles governing landlord-tenant residential relationships or the legislative and common law rules regulating consumer transactions, have yet to shake off completely the nineteenth century laissez-faire philosophy that shaped legal doctrine so decisively. The law of landlord and tenant, for example, for the most part allows the parties to define their own rights by agreement, although in practice the agreement consists of a standard form designed primarily in the interests of landlords. The theory of freedom of contract is applied to a situation in which the tenant lacks the bargaining power and knowledge to alter terms in his own interests. A similar situation prevails in consumer credit transactions, a matter of considerable importance since there is substantial evidence that a great deal of distress is caused to ill-informed and vulnerable consumers by the availability of easy credit on onerous terms which the recent introduction of the Bankcard has done nothing to improve. While there is an urgent need for legislative reforms to redress the balance in favour of the poor tenant and consumer, there is much that could be done without legislative intervention. The ready availability of sources of advice, whether through legal aid services or specialist bodies such as credit counselling agencies, would create a more informed class of consumers better able to understand their legal rights and obligations. Moreover, an expanded system of legal aid would create greater opportunity for tenants and other consumers to take dubious legal points to the courts for resolution or indeed for the purpose of showing important policy issues to the attention of legislators. It is no accident that some areas of law of particular importance to the poor are underdeveloped—the common law does have a capacity for quite rapid growth provided that issues are presented to the courts for determination. There is, in short, a close link between the development of substantive legal principles and access to legal services. Without access to these services the constructive growth of the common law in the interests of the poor is not possible. Moreover, legal aid services, if they actively involve the community, are likely to generate a general awareness of areas in which reform is required and thus increase pressure for reform.

One virtually unexplored field in which the lawyer may have a major contribution to make in redressing the powerlessness of the poor is that of social welfare, where the goal of making pensions and benefits rights rather than privileges has not been entirely realised. I have made the point elsewhere that in Australia lawyers have largely ignored the legal problems created by income maintenance schemes, despite the fact that the consequences of rejection of an application for a pension or benefits may be far more drastic for an individual than other adverse decisions or disadvantageous transactions experienced by him.¹² This failure to penetrate the welfare process symbolises the failure of the Australian legal profession, even as supplemented by recently expanded legal aid schemes, to reach the heart of the problems experienced by the poor. This is not to say that there is universal acceptance of the proposition that lawyers have an important role to play in advancing the claims of welfare applicants and beneficiaries. There are some who contend that the intervention of lawyers,

¹² R. Sackville, "Lawyers and the Welfare State" (1974) 9 *J. of Social Issues* 11.

with their emphasis on adversary processes and confrontation, will not advance the well-being of clients who must maintain a continuing relationship with the Department that provides monetary and other benefits.¹³ These commentators do not dispute that welfare beneficiaries require a greater say in the decisions affecting them, but argue that lawyers are not the appropriate means of attaining that goal. On the other hand, others point to the experience in the United States where the explosion of test cases challenging departmental practices and eligibility requirements in the 1960's produced significant changes in the administration of social security. It may well be that the lawyer's role in welfare claims will prove less extensive in Australia than in the United States because of the absence of a Bill of Rights on which to base legal arguments and the existence of a more conservative judicial tradition, coupled with a generally more sympathetic administration of the social security system. However, the lawyer does have skills of advocacy, negotiation and organisation that are capable of assisting people dependent on income maintenance schemes in asserting claims, resisting official intrusion into their lives and in influencing changes in oppressive or misguided administrative and legislative policies. Undoubtedly these skills should be exercised in conjunction with the activities of other professionals in the interests of welfare beneficiaries, but there is a strong case for suggesting that lawyers have an important part to play in ensuring that benefits are available as of right to eligible applicants. It is of course ironical that the social security system may provide the means of replacing at least some of the business lost to the legal profession through changes in other areas such as accident compensation, divorce and conveyancing.

Conclusion

In a time of considerable economic turmoil there is a serious risk that the poorest people in the community will find their legitimate claims ignored. There is therefore an urgent need to develop institutions and procedures that not only serve the interests of the poor, but enable them to play an active role in influencing the decisions that affect them. One important method of advancing this process is by the establishment of legal aid services that provide genuine opportunities for community participation in their activities and in the formulation of policy. The services should aim both at assisting individual clients with their problems and also at changing the substantive law and administrative practices insofar as they work to the detriment of the poor. If actions by lawyers on behalf of the poor are confined to those which accept without question existing rules and institutions, the task of eliminating significant inequalities will not have been materially advanced.

¹³ R. M. Titmuss, "Welfare 'Rights', Law and Discretion" (1971) 42 *The Political Quarterly* 113.

PSYCHIATRY, THE LAW AND DISSENT IN THE SOVIET UNION

by

CLAYTON YEO *

In August 1973 Dr. A. V. Snezhnevsky, a member of the USSR Academy of Sciences and a leading psychiatrist at Moscow's Serbsky Institute of Forensic psychiatry, was called upon to put paid to claims that Soviet psychiatry has been abused for political purposes. Dr. Snezhnevsky said that "in 50 years of work in the Soviet public health service he knew of no case in which a healthy man was put in a psychiatric hospital".¹

If it were true, this statement would make Soviet psychiatric practice the envy of those throughout the world who are concerned for the preservation of individual's rights. Psychiatrists and jurists in many countries have recognized that in cases of confinement of persons to mental hospitals against their will there are real dangers that the intolerance or ignorance of persons in authority may take precedence over the need of the patient for treatment or the need of society for protection. It is widely recognized that these dangers must be countered by continuous improvement of psychiatric service and even more so by development in law of powerful procedural rights for all persons deprived of the right to judge for themselves the propriety of their own behaviour.

Few psychiatrists could claim like Dr. Snezhnevsky that they know of no case during half a century in their country where sane persons have been forcibly committed to psychiatric hospitals. Equally few would accept his claim at face value, especially in view of strong documentary evidence which has in recent years emerged from the Soviet Union indicating systematic abuse of psychiatry in that country. However what is most disconcerting about Dr. Snezhnevsky's statement is that speaking with official authority he implicitly and unequivocally rejected from consideration any effort to develop stronger barriers against injustices against those whose place in society is challenged on psychiatric grounds. Even the most cursory familiarity with Soviet law makes plain the weakness of institutional guarantees against abuse of psychiatry.

* Mr Clayton Yeo is a Canadian currently completing doctoral studies in Soviet politics at the London School of Economics and working in the Research Department of Amnesty International.

¹ *Izvestiya*, 31 August 1974.

In most cases known to us of individuals being forcibly confined to psychiatric hospitals on account of their political views the procedure used is that provided by Soviet criminal law.² Soviet criminal legislation stipulates that if officials investigating a criminal case question the mental health of the accused, they must request a psychiatric diagnosis of him by a psychiatric commission. If this commission declares that the accused is suffering from mental illness, or was mentally incapacitated at the time of his alleged commission of the crime, criminal proceedings must be suspended and the diagnosis presented to a court, which then decides whether the person must be confined for "compulsory measures of a medical character".

As Alexander Yesenin-Vol'pin has shown in a remarkable "expert opinion" written for the Moscow Human Rights Committee, the individual is deprived throughout this process of even the limited procedural rights established by Soviet law for accused persons.³ The accused need not be told that an order calling for his psychiatric examination has been made, nor need he be informed of the results of the examination. Once the accused's sanity has been called into question, the investigation officials are not required to inform him of new charges against him or to familiarize him with any documentation of the case. It is left to the court's discretion as to whether the accused or his relatives shall be allowed to attend the court hearing which decides upon his sanity and his need for confinement to a psychiatric hospital. There is no legal requirement that the accused be informed of the date of this hearing, despite its decisive influence on his fate. In many republics of the USSR the hearing need not be open to the public. Thus in the huge Russian republic, for example, there is no need for officials to provide a smokescreen for the closed nature of such hearings, as they must do in political cases where no formal issue is made of the sanity of the accused.

The authors of the present Soviet criminal laws no doubt justified the absence of stringent procedural guarantees by the expectation that justice and the rights of purportedly mentally-ill accused persons would be protected at two decisive instances: the psychiatrists' formulation of their diagnosis and the final judgment of the court. This is the kind of buck-passing which has opened the way for various kinds of abuses in many countries. However in the USSR the direct infusion of political criteria and pressures into the work of psychiatrists and courts dealing with politically sensitive cases makes for systematic and deliberate confinement of healthy citizens to psychiatric hospitals.

Soviet psychiatrists are bound by their professional ethic to be guided strictly by medical considerations in all of their work. Yet a number of Soviet psychiatrists have succumbed to direct or indirect political pressures to shut troublesome dissenters into psychiatric hospitals, and have clearly recorded this abuse of their position in psychiatric diagnoses which, through the efforts of men like Vladimir Bukovsky, have reached the West. A study of such diagnoses reveals a variety of attitudes on the part of the psychiatrists who have written them. On occasions psychiatrists have

² The most graphic account of abuses of the civil procedure for compulsory confinement for psychiatric purposes is that by Zhores and Roy Medvedev, *A Question of Madness* (Penguin: London, 1971).

³ "Mneniye Eksperta Komiteta Prav Cheloveka A. S. Vol'pina", in *Proceedings of the Moscow Human Rights Committee* (The International League for the Rights of Man: New York, 1972).

confided to political "patients" that they recognize clearly the lack of medical justification for their forced confinement to psychiatric hospitals. For example, when the wife of Vladimir Borisov protested that he was confined to a Leningrad psychiatric hospital because of his opinions, a psychiatrist replied: "... he is unlucky; he is down on our register. What may be a symptom of opinions in a normal person is a sign of illness in your husband".⁴ On the other hand, in many cases psychiatrists have shown clearly that their own narrow world-view makes them ready to characterize refusal to conform to official norms of behaviour as a symptom of mental illness. A certain Dr. Shafran told the Orthodox Christian "patient" Gennady Shimanov in 1969:

"You see, Gennady Mikhailovich... Everything that you just told us confirms us in the view that illness lies at the root of your 'conversion'. Of course you yourself cannot understand this; but you must have confidence in us: we are specialists. If you had grown up in a religious family or had lived somewhere in the West, well, then we could have looked at your religiousness in another way... But you were educated in a Soviet school, and were brought up in a family of non-believers... You are an educated person, I am ready even to admit that you know more about philosophy and religion than I do... And suddenly... wham! ... you're religious!... It's very odd indeed... and makes one wonder if some abnormal process were not already developing in you in your youth, which later on brought you to religion."⁵

In those psychiatric diagnoses of political dissidents which are available to us, a great deal of attention is invariably devoted to the political records of the subject of psychiatric investigation. As Roy Medvedev told the Moscow Human Rights Committee:

"In the conclusions of several psychiatric 'special expert diagnoses' it is possible to find such 'symptoms' of 'psychiatric illness': 'an obsessive mania for truth-seeking', 'wears a beard', 'meticulousness of thought and insufficiently critical attitude towards the existing situation', 'considers the entry of Soviet troops into Czechoslovakia to have been aggression'... 'thinks that he must devote his life to the ideal of communism'."⁶

Whatever the motivations of the psychiatrists involved, such diagnoses usually do not disguise acceptance of the security organs' viewpoint that political dissidence can reasonably be explained in terms of mental disturbance. Unapproved of efforts to seek reform of Soviet institutions are recorded as "reformist delusions", while an individual's refusal to recant goes into the diagnosis as "absence of a critical attitude to his situation".

Diagnoses submitted by psychiatrists to the courts are frequently outlandish in their efforts to prove the presence of mental illness in political dissidents. For example, in 1972 a number of persons were arrested in

⁴ "Vladimir Yevgenevich Borisov", in *Abuse of Psychiatry for Political Repression in the Soviet Union* (US Government Printing Office: Washington, 1972), page 148.

⁵ G. M. Shimanov, "Notes From the Red House", in *Abuse of Psychiatry for Political Repression in the Soviet Union*, page 213.

⁶ R. A. Medvedev, "O Prinuditel'nykh Psikhiatricheskikh Gospitalizatsiyakh Po Politicheskim Motivam", in *Proceedings of the Moscow Human Rights Committee*, page 131.

Siberia for organization of a Buddhist sect. The most prominent of the group, Bidya Dandaron, was sentenced to a long term in a prison camp where he has since died.⁷ His four co-defendants (Yu. K. Lavrov, A. Zheleznov, D. Butkus and V. M. Montlevich) were all submitted to psychiatric diagnosis, declared mentally ill and consigned by court order to a psychiatric hospital.⁸ This was not the result of some new Soviet contribution to human knowledge of group hysteria, but a practical device in the face of lack of evidence suitable for use in court. A similar example of collective hospitalization occurred in 1971, when a psychiatric commission recommended that four persons from a group of seven Leningrad Communists arrested for propagating dissident Marxism be confined to a special psychiatric hospital.⁹

The psychiatric diagnosis of General Pyotr Grigorenko and Ivan Yakhimovich, two prominent dissident Marxist-Leninists, reveal with particular clarity the difficulty often had by psychiatrists in disguising the political motivation for their conclusions. In 1969 after a Tashkent psychiatric commission had examined Grigorenko and declared him to be mentally healthy, the Serbsky Institute of Forensic Psychiatry in Moscow was asked for a second opinion. This second diagnosis found in Grigorenko's political activity clear signs of "pathological (paranoid) development of the personality". In recommending that Grigorenko be confined to a "special" (i.e. prison) psychiatric hospital, the Serbsky Institute's experts noted the deficiencies in the way the Tashkent commission had come to its opposite conclusion :

"The commission cannot agree with the outpatient forensic psychiatric diagnosis formulated in Tashkent since it has noted the presence in Grigorenko of pathological changes in his psyche recorded in the present report which could not be revealed in the conditions of an outpatient examination because of his outwardly well-adjusted behaviour, his formally coherent utterances and his retention of his past knowledge and manners—all of which is characteristic of a pathological development of the personality." ¹⁰

In June 1969 a psychiatric commission in Riga examined Ivan Yakhimovich, a Communist who had earned high official praise as a collective farm chairman until in 1968 "he began spreading slanderous and defamatory statements blaming the Soviet Government and social system". The psychiatrists could discover nothing abnormal in Yakhimovich's record of behaviour apart from his political activity. The commission's remarks included the following :

"Patient is completely oriented... The patient has an excellent knowledge of literature, of classics of Marxism and Leninism, and also has an excellent knowledge of works of many philosophers and political

⁷ cf. *Index*, number 1, 1975, pages 92-93.

⁸ *Khronika Tekushchyykh. Sobitii* (Khronika Press: New York), Number 28, pages 14-18.

⁹ *A Chronicle of Current Events* (Amnesty International Publications: London), Number 26, pages 229-230; cf. Anthony de Meeus, *Livre Blanc sur l'internement psychiatrique de dissidents sains d'esprit en URSS*, (Comité International Pour La Défense Des Droits De L'Homme en URSS: Brussels, 1974), page 16.

¹⁰ "Report Number 59/5: An In-Patient Forensic Diagnosis of P. G. Grigorenko", in *Abuse of Psychiatry for Political Repression in the Soviet Union*, page 70.

figures... During the interview with the psychiatrists, patient was polite, gentle, and showed no evidence of delusions and hallucinations, and displayed adequate memory."¹¹

The commission's conclusion and recommendations were something of a *non sequitur* :

" On the basis of the above findings, the Committee reaches the conclusion that Yakhimovich shows development of a paranoid system in a psychopathic personality... The patient is in need of compulsory treatment in the hospital of special regimen." ¹²

The psychiatric commission having made its diagnosis and recommendations, it is up to the court to decide what action is to be taken. Soviet courts are legally required to operate independently of any outside institutional interests, and Soviet judges are constitutionally " independent and subject only to the law ". The courts no doubt do act autonomously in deciding most cases under criminal law. However when the case before it has political aspects, the Soviet court reverts to the political role created for it in Stalinist times. That this is so is made plain by the fact that no case brought before a Soviet court under the articles proscribing " anti-Soviet agitation and propaganda " and " anti-Soviet slander " has ever brought a " not-guilty " verdict, and by the fact that no appeal court has reversed a " guilty " verdict against a political defendant.

Persons accused of " anti-Soviet " activities and found mentally ill by a psychiatric commission do not fare any better in court. In no known such case has a Soviet court decided in favour of the defendant on the grounds that his constitutional or procedural rights had been violated. Although the defendant (or, since the defendant is likely not to appear in court, his advocate) may legally demand a second psychiatric opinion, this request is almost never granted. In those republics where an open hearing of psychiatric cases is required by law, the courts frequently comply in KGB efforts to ensure that only a selected public is in attendance. In the case of Leonid Plyushch, the brilliant Ukrainian cyberneticist currently being " treated " in Dnepropetrovsk special psychiatric hospital, Judge Dyshel ruled that the court hearing on Plyushch's state of mind was a " state secret " and could therefore be held *in camera*.¹³ The most obvious manifestation of the courts' submission to political pressures lies in the fact that they accept as decisive evidence such reprehensible psychiatric documents as those we have cited.

If, as normally happens, the court accepts the psychiatric commission's diagnosis and recommendations, it then releases the defendant from criminal responsibility or punishment and orders that he be submitted for medical treatment. The court can send the " patient " either to an " ordinary " or a " special " psychiatric hospital for an indefinite period. According to a 1966 official textbook on Soviet criminal law, " ordinary " psychiatric hospitals are intended for persons who have committed " not especially serious " actions, while the " special " institutions are designed for persons who " represent a special danger to society ".¹⁴ The same source

¹¹ " Official Psychiatric Diagnosis " — I. A. Yakhimovich: Report Number 96 ", in *Abuse of Psychiatry for Political Repression in the Soviet Union*, pages 170-171.

¹² *Ibid*, page 172.

¹³ T. S. Khodorovich (ed), *Istoriya Boleznyi Leonida Plyushcha* (Herzen Foundation: Amsterdam, 1974), page 87.

¹⁴ *Ugolovnoye Pravo: Chast' Obshchaya* (Moscow, 1966), page 448.

used as its example of a person sent by court to an "ordinary" psychiatric hospital a certain "B", a Leningrad woman.

"who during an argument with her neighbour slashed her in the face with a large table knife and, after dislodging several teeth, inflicted less serious wounds to her body."¹⁵

Soviet courts normally have sent "mentally ill" dissidents to "special" psychiatric hospitals, which are under the control of the MVD (Ministry of Internal Affairs) and where security is militarized.

There is no legal code regulating the operation of psychiatric hospitals such as there is for regular prison institutions. This fact has special significance in evaluating the legal status of patients. Inmates of prisons and labour camps are legally guaranteed retention of citizens' rights (albeit with significant limitations).¹⁶ While in practice their rights are widely abused, they have a legal right to protest violation of prison regulations and to bring them to the attention of legal supervisory organs. In other words, they are at least formally recognized as subjects of the law.

Inmates of psychiatric hospitals lack even this formal protection since the operations of such institutions are regulated not by legal codes but by secret ministerial instructions. They may write letters only at the discretion of their doctors, and then usually only to relatives. They are not allowed to write letters of protest to the Procuracy, the toothless watchdog of socialist legality, although this right is formally guaranteed to all Soviet citizens. In their outward correspondence "patients" may make no reference to their treatment or conditions of confinement. This censorship occasionally has its disadvantages for the authorities. Partly because he could not refer to events and conditions in the Dnepropetrovsk special psychiatric hospital, Leonid Plyushch has focused his letters on his philosophical and scholarly interests and on his family relations. In so doing he provided documentation of his brilliant mind and warm, honest character. The letters of Leonid Plyushch provide even greater condemnation of his persecutors than any description of their actions could have done.¹⁷

Inmates of psychiatric hospitals and their relatives have no say in selection of the psychiatrist in charge of their case, nor can they question his decisions as to treatment or even see the psychiatric reports on which these decisions are based. This opens the way for the most arbitrary and dangerous practices. Whether impelled by official decision to suppress troublesome individuals by medical means or anxious to apply their own pet theories of diagnosis and treatment, doctors have without medical justification inflicted on many inmates courses of injections with such drugs as aminazin, sulfazin, triftazin, haloperidol and insulin, often with disastrous results for "patients" not genuinely suffering from the condition for treatment of which the drugs' use is intended. Leonid Plyushch, after being injected for months with, alternatively or in series, insulin, haloperidol and triftazin, has lost his capacity to read or write letters and developed massive oedemic swelling and a heart condition.

¹⁵ *Ibid.*

¹⁶ *Fundamentals of Corrective Labour Legislation of the USSR and the Union Republics*, (Moscow, 1970), article 8.

¹⁷ Many of Plyushch's letters together with comprehensive documentation of his case have been published in T. S. Khodorovich, *Istoriya Boleznyi Leonida Plyushcha*.

Because the courts, either criminal or civil, do not specify the length of confinement for compulsory treatment, inmates of Soviet psychiatric hospitals are at the disposal of the psychiatrists and administrators for an indefinite period. According to the ministerial instructions, every six months a commission of psychiatrists (with optional attendance of legal officials) re-examines each patient's case and recommends either continuation of treatment or release. When examining an inmate with a political record, the examining psychiatrists pay particular attention to developments in his political attitude. The inmate's refusal to recant "anti-Soviet opinions" and his efforts to resist harmful forms of treatment or to protest his confinement to the psychiatric hospital are recorded as symptoms of persistence of a mental illness. A doctor in the Arsenalnaya special psychiatric hospital in Leningrad told Victor Fainberg in 1971 :

"Your discharge depends on your conduct. By your conduct we mean your opinions precisely on political questions. Your disease is dissent. As soon as you renounce your opinions and adopt the correct point of view, we'll let you out."¹⁸

For Victor Fainberg this demand was as repugnant as it is to most human rights activists in the USSR, who knowingly risk imprisonment for convictions which have been formed in the face of the immense official agitation and propaganda campaign to which all Soviet citizens are continuously exposed. Fainberg refused to submit, and it was by a series of hunger strikes and even suicide threats, coupled with foreign publicity, that he was able to obtain his release in 1974. Others have been even less fortunate. According to Vassily Chernishev's 1971 statement on his own period of confinement to a psychiatric hospital, Nikolai Broslavsky had spent 25 years in such confinement because of refusal to compromise his religious convictions.¹⁹

Recently Vladimir Bukovsky and Semyon Gluzman, two men sentenced to long terms of imprisonment for their efforts to help victims of psychiatric persecution, have advised persons threatened with confinement to psychiatric hospital to play by the KGB's rules :

"It is fatal to emphasize the moral qualities of the dissidents, truthfulness, honour and sympathy, because that would mean to give truthful responses which harm oneself and provide the psychiatrist with the symptoms he needs."²⁰

Bukovsky and Gluzman recommend that the political dissident tell the psychiatrists that his political activities were due to ignorance of the possible consequences and by desire for fame. If he is nonetheless cast into a psychiatric hospital, he must use "every possible tactical trick" to convince the psychiatrists that he has changed his political views.²¹

In the past year there have been some tenuous indications that the practice of incarcerating political activists in psychiatric hospitals has been modified. Many of the better known victims have been released altogether, and others have been transferred from "special" to "ordinary" institutions.

¹⁸ *A Chronicle of Current Events*, No. 19, page 179.

¹⁹ "The Case of Vassily I. Chernishev", in *Abuse of Psychiatry for Political Repression in the Soviet Union*, page 227.

²⁰ Quoted in *Frankfurter Rundschau*, 19 December 1974.

²¹ Quoted in *Frankfurter Rundschau*, 19 December 1974.

While any change for the better must be acknowledged, there is little ground for optimism on this subject. Abuses of psychiatry have been perpetrated on a large scale for several decades, as a CPSU Central Committee special commission reported as early as 1956.²² We know the names of only a handful of the victims of this practice, whose total number has been estimated to be in the thousands.²³

The putative recent policy change has not saved all of even the best-known political figures. (Leonid Plyushch and Zinovyi Krasivsky, for example, still languish in the "special" psychiatric hospitals in Dniepropetrovsk and Sychyovka respectively). For unpublicized political victims, and for ordinary citizens incarcerated through psychiatric or judicial errors, there has been no change. Nor can real improvement be expected without changes not merely of policy but of the institutionalized relationships between psychiatry and the law.

It may be too much to hope that in the near future the political impulses which have brought about the most notorious abuses of Soviet psychiatry will be stopped. However a great step in the direction of greater guarantees for the rights of all Soviet citizens would be made by removal of those features of Soviet legislation which have made it possible to perpetrate such abuses without even formally violating the law.

²² S. P. Pisarev, letter to the Presidium of the USSR Academy of Science (20 April 1970). The full text of this letter is reproduced in *Survey*, number 77, Autumn 1970. According to Pisarev, a CPSU member on whose initiative the commission was created, the commission's findings were suppressed.

²³ Dr. Norman Hirt, a Canadian psychiatrist who has been researching this problem for several years, has arrived at the figure of "around seven or eight thousand 'political patients'". See *The Washington Post*, 2 March 1975. After reading the full text of Dr. Hirt's testimony, presented to a US Senate Subcommittee in 1972, the present author believes his estimate to be exaggerated and based on inadequate data. See *Abuse of Psychiatry for Political Repression in the Soviet Union*, Vol. 2 (US Government Printing Office: Washington, 1975).

CONFERENCE ON HUMANITARIAN LAW — PHASE II

by

Samuel Suckow

I. Introduction

The second session¹ of the Diplomatic Conference of the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts² held in Geneva between February 3rd and April 18th, may be called the session of consensus. It was also a working session in the true sense of the term. Of the 69 articles or parts of articles newly adopted by the various committees (a significant achievement when compared with the 3 articles or parts of articles adopted by committees at the first session, of which 2 needed confirmation at this session) 56 were adopted by consensus, and of the remaining articles adopted, many paragraphs obtained consensus. This is even more striking if we consider only the First Protocol (the Conference had before it two draft protocols, to the four Geneva Conventions of 1949, the first applicable to international conflicts and the second to certain non-international conflicts). 40 out of 47 articles or parts of articles of this Protocol adopted by the Committees were agreed to by consensus, and on four others there was consensus on parts of the articles.

There were several factors which contributed to the unanimity on many points at this session. The first was fortuitous, the absence of several states whose positions may have been in opposition to the consensus. This refers specifically to the decisions of China, Albania and South Africa not to send representatives to this session. China had preliminarily stated

¹ The first session was held in Geneva in the Spring of 1974 and the third and hopefully final session is scheduled to convene in Geneva on April 21, 1976. For a discussion of the major results of the first Session, see "Development of International Humanitarian Law", ICJ Review No. 12, June 1974, p. 50.

² International humanitarian law, to the extent that it has been codified, refers primarily to the Four Geneva Conventions of 1949; the first dealing with wounded or sick combatants or supporting personnel (known as "Protected Persons") being a revision and updating of the Geneva Conventions of 1929 for the Relief of the Wounded and Sick in Armies in the Field; the second covering "protected persons" at sea, being a revision of the Xth Hague Convention of 1907 (which Convention remains in force) for the adaptation to Maritime Warfare of the Principles of the Geneva Convention; the third regulating the treatment of prisoners of war, which updated the rules contained in the 1929 Convention on the Treatment of Prisoners of War; and the fourth introducing for the first time in a codified form rules for the protection of civilians in time of war.

a position at the first session which drew a distinction between "just wars" and "unjust wars" in the application of humanitarian law. Clearly, such a position would have created serious difficulties in arriving at consensus agreements.

South Africa's presence may have blocked consensus on provisions of particular interest to liberation movements. There was a factor exterior to the Conference which played an important role, the change of regime in Portugal that occurred between the two sessions and the subsequent progress in decolonization of its African territories. Much of the antagonism occasioned during the first session had its roots in the colonial wars then in progress in the Portuguese territories in Africa.

Finally, the issues before this session were more technical than political in contrast to the heavily political emphasis of the first session. This is not to say that there were no political decisions to be taken, and the first few days of the conference were devoted to a discussion of the seating of the Provisional Revolutionary Government of South Vietnam.

II. The Seating Debate on the Provisional Revolutionary Government

The proposal to seat the Provisional Government on an equal basis with that of the government of South Vietnam was opposed by the United States, which achieved a tactical success at the time but by the end of the session it appeared to have been only a pyrrhic victory.

From the point of view of the work of the Conference there were good arguments for permitting the Provisional Government to participate (although it would have required some adjustment to the general rule that each country has only one vote). As the war in Vietnam and the problems raised in terms of humanitarian law in the context of that conflict were a major reason for the convening of this Conference, the experience of that particular government would presumably have been useful.

Prior to the convening of the conference it appeared that the votes needed for inviting the Provisional Government would be found, considering that the subject had been defeated the previous session by only one vote and that at that session the delegation of the Vietnam Democratic Republic had walked out and had not participated in the vote, and Portugal, which had voted "no" in the first session, had since changed its government and its policy. That the result did not go in this sense can be ascribed to the degree of influence and effort the United States expended and to a series of circumstances which aided that effort.

At the outset, the absence of China and Albania changed the calculation. Then, the United States fought the proposition on the level of procedure (where it could obtain greater support) claiming that an invitation to the Provisional Government, having been rejected the previous session, required a two-thirds vote to be reconsidered. The President of the Conference refused to rule on what was in essence a point of order (because of its political connotations) and expressed the wish that the Conference decide the issue. On the suggestion of the United States, the two standpoints i.e. that as a proposal concerning invitations it required a simple majority (Rule 35(4)); that as a re-consideration of a previous decision it required a two-thirds majority (Rule 32), were both submitted to the delegates who were asked to pick one or the other rule as applicable. The vote, during which one of the sponsors of the resolution to invite the P.R.G. was

absent, resulted in a 41-41 tie with 24 abstentions and 30 other delegations absent.

At this stage the President suggested that the Conference then vote on whether a simple majority vote would be sufficient to decide the issue of the invitation to the P.R.G. Considering the confusion that had preceded this suggestion it was understandable. On analysis, however, what was before the Conference was a proposal to invite the P.R.G. to participate and a motion of order submitted by the United States which would have required that a decision on the invitation be taken by a two-thirds vote. (There was no motion before the Conference requesting a decision by a majority vote but rather opposition to the United States request for a two-thirds vote, which opposition had it prevailed would have effectively resulted in a majority vote solution). It would have been more appropriate to take a vote on the motion of order after which the substantive proposal could be considered.

The procedure adopted (and adopted without any opposition) in this case had as could have been anticipated very practical consequences. A tie vote on any proposal had according to the Conference rules the result of defeating that proposal. The vote suggested by the President ended in the same 41-41 tie as the previous vote, only this time it meant the defeat of the proposition and as the President then ruled, what was left was the two-thirds vote requirement.

At this point the missing delegate re-appeared to explain that he had been called away to get a message from his government but had he been present he would have voted in favour of the majority rule. Although the President's ruling was appealed, the die had been cast, and the President's ruling was upheld 48-43 with 19 abstentions and 28 others absent. Several delegations which had previously abstained such as the Holy See, Switzerland, Argentina, Ivory Coast, Denmark and Upper Volta, and Haiti which had been absent on the prior votes, supported the President's ruling. In addition Morocco and Nigeria which on the previous votes had supported the position of a majority vote now switched to abstention. On the other hand, Venezuela, which on the previous votes had abstained, and Niger and Dahomey who had been absent, voted to overrule the President's decision.

The sponsors of the invitation to the P.R.G. thereupon withdrew their proposal and instead proposed that both the P.R.G. and the Government of South Vietnam be invited as observers without a right to vote. The United States opposed this proposal as well, claiming that it was in effect a reconsideration of a decision taken the previous year and therefore requiring a two-thirds vote. This time the President made a ruling on the point of order, and it was in favour of the U.S. position. An appeal of the President's ruling resulted in it being upheld 44-40, with 24 abstentions and 30 delegations absent.³

³ The 37 states who had voted in favour of a majority vote solution on the question of inviting the P.R.G. in all four votes were:

Algeria, Australia, Byelorussia, Bulgaria, Czechoslovakia, Congo, Cuba, Egypt, Finland, Gabon, Germany (Dem. Rep.), Ghana, Guinea, Hungary, India, Iraq, Korea, (People's Republic), Lybia, Madagascar, Mali, Malta, Mauritius, Mauritania, Mongolia, Peru, Poland, Rumania, Sudan, Sri Lanka, Sweden, Syria, Uganda, Ukraine, U.S.S.R., Vietnam (Dem. Rep.), Yemen Yugoslavia.

There was a sense of unreality about the entire procedure as the conference rules provide that any rule of procedure (including that requiring a two-thirds vote for re-consideration) can be altered at any time by a simple majority. Thus, if a simple majority had the will to carry it through, the procedural obstacles could not have prevented a decision inviting the P.R.G. That it was not done evidenced the balance of forces existing at the beginning of the Conference.

The closeness of the votes on the applicability of one or another rule to the issue of the representation of the P.R.G. at the conference in part hid a fundamental shift in international opinion towards that representation which had occurred during the year separating the first and second sessions.

Among the states that supported the rule which would have assured such representation at this session were 10 states who had abstained, been absent or voted against P.R.G. representation at the previous session. Australia which the previous year opposed such representation this year voted consistently in favour of provisions which would have made it possible. Finland, Ghana, Nigeria and Sweden who abstained last year now voted for the majority rule on the issue. In addition, Malta, Morocco, Mauritius and the Dem. Rep. of Vietnam, who had all been absent at the time of the vote last year now supported P.R.G. participation.

Two states which opposed the P.R.G. last year were absent from the first vote: Liberia and Haiti.

Finally five states who had voted against P.R.G. participation last year now abstained, i.e. Mexico, Venezuela, Columbia, Ecuador and San Marino.

The 38 states who had voted in favour of a two-thirds solution on all four votes were:

Austria, Belgium, Brazil, Cambodia, Canada, Central African Republic, Chile, Costa Rica, Cyprus, Dominican Republic, El Salvador, Gambia, Germany (Fed. Rep.), Greece, Guatemala, Honduras, Ireland, Israel, Italy, Japan, Jordan, Korea (Rep. of), Liechtenstein, Luxembourg, Malaysia, Netherlands, New Zealand, Nicaragua, Paraguay, Philippines, Saudi Arabia, Spain, Thailand, Turkey, United Kingdom, U.S.A., Uruguay, Vietnam (Rep. of).

The 17 states who abstained on all votes were:

United Arab Emirates (missed one vote), Columbia, Ecuador, Lebanon, France, Iran, Kuwait, Mexico, Norway, Pakistan, Panama, Portugal, Qatar, San Marino, Trinidad and Tobago, Tunisia, Zaïre.

The 28 states who were absent during the votes were:

Afghanistan, Bahrain, Barbados, Bhutan, Burma, Botswana, Burundi, Cameroon, Equatorial Guinea, Ethiopia, Guinea Bissau, Guyana, Iceland, Jamaica, Kenya, Laos, Lesotho, Liberia, Monaco, Nepal, Rwanda, Sierra Leone, Somalia, Swaziland, Tanzania, Togo, Yemen (Dem. Rep.), Zambia.

Senegal was absent for the 1st and 2nd votes but voted to overrule on 3rd and 4th votes. Bangladesh and Indonesia supported majority vote on first 3 votes but abstained on 4th vote. Nigeria supported majority vote on 1st, 2nd and 4th votes but abstained on 3rd vote. Venezuela abstained on all but 3rd vote where it voted to overrule. Morocco supported majority rule on first two votes but abstained on last two. Denmark and the Holy See abstained on all votes except 3rd, when they voted to uphold presidential ruling. Niger was absent for the first two votes, voted to overrule on 3rd and abstained on 4th vote. Chad and Oman voted for 2/3rds rule on first 3 votes but abstained on last vote. Switzerland, Argentina and Upper Volta abstained on 1st and 2nd votes, but voted to sustain on 3rd and 4th votes.

With such an important shift in positions of delegations how was it that a one vote margin against such participation last year, 38 to 37, ended up in only a 41 to 41 tie this year? The major factor in this result was the absence at this vote (or for the entire session) of 8 delegations which had voted for P.R.G. representation the previous year: Albania, Burundi, China, Guinea-Bissau, Mauritania, Cameroon, Senegal and Tanzania. Add to that 8 delegations which supported the U.S. on the procedural issue this year but had abstained on the substantive issue last year, Chad, Turkey, El Salvador, Ireland, Italy, Jordan, Liechtenstein and the Netherlands and three who supported U.S. this year but were absent at last year's vote: Austria, Gambia and Saudi Arabia.

By the time the second session of the conference closed on April 18, 1975, events on the battlefield had gone a long way to resolving the problem.

III. The First Protocol — International Wars

A. Decision of the First Committee

It will be remembered that at the first session of the Conference the activities of this Committee (as much of the conference itself) was dominated by the debate over the inclusion of national liberation wars in the category of international conflicts. By this session, the principle which had raised such heated debate previously was a basic assumption not requiring discussion and to be adapted to the specific provisions of the Protocol.

The First Committee could thus proceed to the consideration of other articles which had been assigned to it. Specifically, the Committee adopted for the First Protocol Articles 2(d) to 7 and Articles 70 to 73 (article 1 had been adopted at the first session and sub-divisions (a) and (b) of article 2 had been referred to the Drafting Committee at the first session and consideration of (c) postponed until after the adoption of Art. 74).

The first group of articles cover the time of application (Art. 3) and the legal status of the parties (Art. 4); but of greater importance was the consideration of the clauses related to Protecting Powers (Art. 2(d) and (e); Art. 5 and Art. 6), and to the possibilities of gathering an international conference to consider the application of the Conventions and Protocols.

The concept of "Protecting Powers" is a relatively ancient one in international law, although historically the function of a protecting power was primarily to represent diplomatically the interests of a state towards another when there were no diplomatic relations between them, or no diplomatic mission by the state whose interests were being protected. This relationship has traditionally required the appointment of a third state as such a protecting power by the state whose interests are to be protected, and the acceptance of such appointment by the state in whose jurisdiction the protection was to be exercised. The specific war related role of a Protecting Power was very limited until some visiting of war prisoner camps was permitted during the first World War.

In the 1929 Convention on Prisoners of War, the role of Protecting Powers in relation to prisoners was specifically recognized although they could only act at the request of their appointing power, and would only act upon such request at their own discretion.

Based on the experience of the Second World War, all of the 1949 Geneva Conventions had a common clause inserted (Art. 8, Conventions I,

II, III, Art. 9, Convention IV) which stated that the Conventions were to be applied "... with the cooperation and under the scrutiny of the Protecting Powers whose *duty* it is to safeguard the interests of the Parties to the conflict ...". Provision was also made for the possibility of substituting another state for a Protecting Power or having an organization agreed by the parties act in place of the Protecting Power, or where no Protecting Power could otherwise be arrived at, that a detaining power should request or accept the services of a humanitarian organization, such as the International Committee of the Red Cross (I.C.R.C.) to fulfill the humanitarian functions that would otherwise be the obligation of a Protecting Power.

Fundamental to the 1949 Conventions was the pre-existing standard of international law that the Protecting Power (or substitute) had to be "accepted" by the Party in whose jurisdiction it was to act. In practice the system of Protecting Powers provided in the 1949 Conventions had been inoperative and many had hoped that the "development" of humanitarian law would give life to that system.

At the outset, paragraph 1 of Article 5 of the Draft Protocol imposes a "duty" on the parties to the conflict to secure the invocation of the Protecting Power system (adopted overwhelmingly, 72 votes to 1, with 2 abstentions). In paragraph 2, they are called upon to appoint without delay their Protecting Power and to permit the activities of the Protecting Power appointed by their adversary "... which had been accepted by it as such ..." (agreed by consensus).

In the event of a Protecting Power not being appointed, paragraph 3 offers the possibility for the I.C.R.C. or other impartial humanitarian organizations to offer their good offices in arriving at the appointment of such Power (adopted by a vote of 61 to 0, with 4 abstentions).

Finally, in the most controversial decision, the product of much bargaining and only after a vote of 53 to 10, with 8 abstentions, paragraph 4 provides that if there is still no protecting power the I.C.R.C. or other similar organization may after consultations with the parties concerned offer its services to act as a substitute, and the Parties to the conflict "...shall accept without delay ..." such offer.

The injunctive character of the wording however, is misleading. First the I.C.R.C. went on record to state that it would not in fact offer its services unless it had previously been assured that its offer was welcome, and secondly, the clause itself provides that the "functioning" as distinct from the "appointment" of the substitute was subject to the consent of the parties.

A large number of delegates were not satisfied with this result and offered an amendment which would in the final analysis, if all else failed, have permitted the United Nations to appoint a body to undertake the functions of a Protecting Power. After an extended debate, where the battle lines were not at all the usual ideological ones, but rather major military powers and supporters against lesser military powers, the proposal was defeated 32 to 27 with 16 abstentions.

Thus the result is the introduction of much imperative language and the imposition of "duties" on the powers to a conflict but with the final result still dependent on the necessary approval of the party in whose jurisdiction the Protecting Power is to act. In a sense this is an accommo-

dation with reality, as when a major power is involved, there is no force that can compel it to accept the activity of the Protecting Power against its wishes. What the provisions of the Protocol do is to expose an obstinate Power which refuses all the possible alternatives to moral opprobrium.

The Committee dealt with yet another "protection" in the event of the Conventions and Protocols not being faithfully applied. This is in the form of a conference of all the parties to the Protocol "... to consider general problems concerning the application of the Conventions and of the present protocol". The adoption of this provision by consensus in the Committee hides the fact that the key element in the article, requiring the calling of such a conference upon the request of one or more Parties upon the approval of a *majority* of the Parties, was hotly contested by those who only wanted such a conference convened on approval by two-thirds of the Parties to the Protocol, and was passed by only 35 votes to 29, with 8 abstentions. As final adoption by the plenary will have to be by a two-thirds vote, the vote in Committee indicates that this provision may yet be revised before final adoption.

The hesitations on both of the above propositions may indicate an unspoken feeling on the part of many states that a situation may some day arise where there will be no state or organization whose neutrality would be accepted.

The other articles of Protocol I decided by the Committee, 70 to 75, cover such matters as those measures necessary for executing the obligations undertaken and the instructions for carrying out its provisions (Art. 70); the granting of facilities to the I.C.R.C. and similar organizations for their humanitarian functions (Art. 70 bis); the provision of legal advisers to military commanders (Art. 71); the dissemination of the provisions of the Conventions and Protocol to the persons who must apply them (Art. 72); and the communication between parties of laws and regulations adopted to ensure the application of the Protocol (Art. 73).

Of this group of articles the only point on which there was serious controversy concerned paragraph 3 of Article 72, which required that the parties report to the depository (the Swiss Confederation) and the I.C.R.C. every four years on the measures they have taken to disseminate the contents of the Conventions and Protocol. The opposition to this provision was led by the Soviet Union and was passed by the narrow margin of 22 to 17 with 19 abstentions. The effect of this vote was to cause the Soviet bloc to abstain on the entire article, adopted by a vote of 41 to none with 10 abstentions, although they had joined in the consensus on the first two paragraphs.

The narrowness of the affirmative vote on paragraph 3 suggests that it will not receive the necessary two-thirds support to go through the plenary next year.

The First Committee also agreed upon a new article dealing with journalists on dangerous missions in war zones. They are assimilated to civilians and are entitled to the same protections.

Still pending before the Committee are important additions to the provisions of the Conventions on enforcing criminal liabilities for serious breaches of the Convention and Protocols (Art. 74 to 79) and the formal provisions on ratification and entry into force.

B. The Second Committee

If the second session deserves the designation "session of consensus", then the second Committee can be rightfully designated as the pacesetter. Twenty-eight articles were approved and all but two paragraphs by consensus.

With all due respect to the hard work of the Committee, this honourable record is due in large measure to the fact that this Committee had to deal with the less controversial articles of the drafts. The Committee disposed of Articles in the field of application of the Protocol to the wounded, sick and shipwrecked; the protection and care of such persons as well as all detained persons. Particularly it considered the status of medical units bringing pre-existing rules up to date in terms of modern methods of warfare and means of transportation.

C. The Third Committee

The Third Committee probably has the most difficult responsibility of the three main committees as it must adjust humanitarian law to the technological development of warfare, and particularly to the protection of the civilian populations who more and more become the primary victims of modern warfare.

The Fourth Geneva Convention which dealt with the protection of civilian persons in time of war did not undertake to regulate methods and means of combat and their application to the civilian population. That this Conference has undertaken this difficult task is greatly to its credit.

Article 33, for example, sets down the general rules that parties to a conflict do not have an unlimited right to choose methods or means of warfare and must not employ weapons, projectiles and methods of warfare which cause superfluous injuries or unnecessary suffering or which cause widespread, long-term and severe damage to the environment.

Already in the first session the Committee had adopted Article 43 which sets forth the rule that the parties must always distinguish between combatants and the civilian population and between military objectives and civilian objects, and only direct their operations against combatants and military objectives. Articles 46 and 47 spell out this general rule and article 47 bis prohibits hostile acts against cultural objects and places of worship.

Prohibitions have been written into the Protocol which prohibit attacks on objects indispensable for the survival of the civilian population such as foodstuffs, crops, drinking water, irrigation works etc., (Art. 48), and Art. 48 bis spells out the prohibition against methods of warfare causing long-term, severe damage to the environment, already mentioned in Article 33.

Special provision is made to prohibit attacks against installations which contain dangerous forces such as dams, dykes and nuclear electrical generating stations (Art. 49).

Article 50 is a very interesting development as it purports to prescribe the precautions a military commander must take before deciding upon an attack, to avoid unnecessary loss of civilian lives. This includes verifying that the objectives are really military; the choice of means and methods

of attack; and effective advance warning, when possible, of attacks that may affect the civilian population.

The Protocol introduces a new concept of "non-defended localities", near a battle zone, which are demilitarized and subject to occupation. Such localities may not be attacked (Art. 52). The existing concept of neutralized zones (Art. 15 of the Fourth Geneva Convention) is expanded under the concept of "demilitarized zones" with a specific prohibition against military operations in such zones.

Still before the Committee are such important issues as the prisoner-of-war status of members of organized resistance movements, (Art. 42) and the provisions on the treatment of persons in the power of a party (Articles 63 to 69), including refugees and stateless persons. Special provisions are foreseen for women (Art. 67) and children (Arts. 68 and 69). The fundamental rights of persons in the power of a party are expected to be spelled out (Art. 65).

IV. The Second Protocol

The Second Protocol, that devoted to non-international armed conflicts, has had a chequered development. Originally envisaged as covering all conflicts not susceptible to the rules applicable to the traditional interstate wars, it lost a part of its "raison d'être" at the first session when one of the most important types of non-classical conflicts existing in our day, that of wars of independence against colonial powers, was elevated to the status of international armed conflicts.

There remained therefore the definition of those conflicts, civil wars, which would benefit from the protection of this Protocol. This task devolved on the First Committee and after very difficult negotiations a consensus text was achieved which arrives at its purpose both negatively and positively, that is by eliminating those conflicts subject to the First Protocol on one side, and those situations of internal disturbances and tensions such as riots, and isolated and sporadic acts of violence, on the other. To further narrow and delimit that which lies between, the text requires that the dissident armed forces or organized armed groups being under a responsible command, exercise such control over a part of the territory of the state as to enable them to carry out sustained and concerted military operations, and to be in a position to implement the present Protocol (Art. 1 Protocol II).

It is evident from the definition given, that guerrilla type conflicts which have been so frequent of late, will not obtain the protections of this Protocol, at least not until a stage in the conflict has been reached where control of a part of the territory has been achieved. Unfortunately, when this stage has been reached is a matter subject to interpretation and several delegates specifically reserved to their governments the final decision on when the Protocol would come into force in a particular conflict. Those conflicts not coming within the definition would have only the protections accorded by common Article 3 of the Geneva Conventions.

What appears to be covered by the definition is the civil war situation as occurred in recent years in Irak, Nigeria, Pakistan and Phillipines, in South Vietnam, to the extent involving conflict between local forces, and in Spain in the more distant past. It is therefore not surprising that most of the governments representing these states were active in submitting amendments to this clause, and generally with the object of limiting its

application. However, the provision goes beyond the classical civil war case as it does not require an opposing government but merely an "organized armed group".

In general, support for the Second Protocol came equally from the western bloc and the Soviet bloc with reservations and hesitations on the part of some third world countries, particularly those which have had such wars on their territory or fear the potential of such a conflict.

Considering the uncertainties and hesitations which have surrounded this draft Protocol from its inception, the amount of work accomplished on its text at this session has been remarkable, and in many articles it closely parallels the obligations approved for the First Protocol. It has been almost as though, the machinery having been set up and agreed, no delegation wanted to be the one to place spokes in the wheel of consensus. Nevertheless, reticence continued to exist, and found its most clear expression in the reservations as to the principle of the Protocol itself made by several delegations, led by India. The suspicion therefore exists that a well-worded Protocol will emerge from the conference, but that it will not find wide acceptance by ratification among states where it would be most likely to find application.

In the wake of this sentiment, two different approaches, one by Canada and the other by the Philippines, were submitted near the close of this session.

The Canadian approach was to pare down the guarantees and obligations incumbent on a government to a point which it considered a common denominator that would be acceptable to the majority of states. The Philippine proposal was to merge the two Protocols into one, with a common part covering the provisions that would be identical in the two types of conflicts and separate parts for those provisions differing in international and non-international conflicts.

VII. Work on Prohibition or Restriction of Some Conventional Weapons

At the outset of the Conference, at its first session, a proposal to set up an ad hoc committee on conventional weapons was adopted by a vote of 68-0. There were however various reservations among the non-voters as to the usefulness of such a committee.

These reservations stem from the reluctance of states having certain weapons in their military arsenals to see a possible limitation on their military potential imposed by international restriction. The Soviet Union goes further and questions whether the prohibition of specified weapons is within the framework of this Conference, arguing that these are matters for bodies dealing with disarmament.

When fundamental differences exist in an area related to national security, it is not surprising that the Committee has not as yet been able to achieve a specific agreement. Nevertheless, the logic of the discussions and the effectiveness of public opinion with respect to certain weapons, as evidenced by a United Nations resolution on incendiary weapons, is pushing the Committee forward to decisions on at least some of the weapons under discussion.

Between the first and second sessions of the Conference, a meeting of experts on the use of certain conventional weapons was held in Lucerne

and a second such conference in Lugano has been scheduled in January, 1976. These conferences have helped and are intended to help in further narrowing technical disagreements on the effects of certain weapons and in establishing certain standards to be applied to either restricting or prohibiting specified weapons.

In the cross-currents of the debates at this Conference it is difficult to determine what will be the area of agreement when it comes to the political decision of outlawing or restricting weapons, but by all indications if there is to be agreement at all, it will be with respect to incendiary weapons such as napalm.

Other types of weapons under discussion are small calibre projectiles; blast and fragmentation weapons; delayed action and perfidious weapons and also potential weapon developments.

There have been proposals at this session for holding regular conferences periodically to examine new weapons development.

VIII. Conclusion

What has already been said should be sufficient to demonstrate that the second session of the Diplomatic Conference had many accomplishments to its credit, and the international community is now poised, at the third and final session next year, to take a major step forward in the development of humanitarian law. There are, however, some problems which deserve comment.

The absence of China from the Conference is a serious weakness. As a major power, its failure to participate in the final session and to ratify the Protocols would weaken the universal applicability of humanitarian law, which is one of its greatest strengths.

That it did not wish to participate at this session is understandable given the fact that it had found itself in an isolated stand on the principle of applying criteria of "just" and "unjust" wars to humanitarian law. It is difficult to conceive how these concepts, which clearly have important political and ideological connotations (it would be a rare case indeed where a belligerent did not consider his case "just" and that of his enemy to be "unjust") could be profitably adopted to the various categories of protection contained in the Conventions. If the codified rules are thought of as "pacts with the devil" (the potential enemy) for mutual advantage during a conflict (the assumption being that wanton cruelty and destruction will not appreciably aid either party, and will leave long term problems for victors and vanquished alike) then there may be less inclination for introducing political criteria in the debates.

In this sense the explanation given of the Chinese absence from this session, the lack of sufficient experts in the field, is significant. It appears to confirm that the initial Chinese position had not been sufficiently examined in the light of humanitarian law, but had been a transposition from the political arena. Every effort should be made to convince the Chinese to return to the Conference next year in the spirit of consensus that marked this session.

The absence of the P.R.G. at the Conference to date is also regrettable. In terms of guerrilla warfare, weapons and methods of warfare it has an experience which is unsurpassed and can be of benefit to the work of the Conference. The P.R.G. will presumably be represented at the next session.

Political criteria which have their role to play in forums devoted to political matters, are singularly out of place on the issue of participation in a forum devoted to defining the Rules of War. If potential or past enemies were to be excluded it would greatly obviate the value of establishing such norms. Nor is it a question whether a particular government effectively represents the people in its territory, but rather whether it is a potential force that may be involved in armed conflicts and whose adherence to international rules is therefore desirable.

This reasoning has application to the case of South Africa as well. There was justified concern at the Conference that South Africa's decision not to send a delegation to this session put in question South Africa's observation of the rules of the Geneva Conventions to which it is a party, and a resolution was adopted asking the President of the Conference to seek assurances in this regard. Nevertheless, when the Credentials Committee report was submitted several delegates challenged the credentials of any delegates sent by the South African government on the ground that it was not a representative government and oppressed its people.

The factual statement is certainly true, but this does not diminish, if anything it enhances, the importance that this government be bound by the rules being adopted at this Conference.

The work on the second Protocol has been going so well that one hesitates to point a finger and say that the "emperor has no clothes", but as discussion of the matter is now assured under the initiative of the Canadian and Philippine resolutions, it must be said that there is a real danger of the emergence of a well drafted Protocol which will then become an archive piece by the non-ratification of countries where it is most likely to find effect.

In this context there is something to be said, in this observer's view, for the Philippine approach of combining the provisions into a single Protocol. While in the hypothesis of two Protocols it would be relatively easy for a state having reservations on the second Protocol merely to ratify the first and take no action on the second, it might be more difficult for a state to refuse to ratify a single, combined Protocol and thus exclude itself from the benefits of the international protections.

However this may be, the real force behind an accepted protocol for non-international conflicts must be a realization among governments that methods that provoke a sense of outrage do not in fact produce beneficial results, nor do they frighten away their opponents. Experience over recent years tends to support the conclusion that such methods tend only to isolate the government using them and further embitter the conflict.

There is another aspect, what may be considered the aspect of reciprocity in non-international conflicts, which stems from the growing number of successful revolts and revolutions. A government and its supporters resorting to abusive tactics in fighting its internal enemies would not be well placed to argue for humane treatment for its members and adherents in the event of a change of government.

The work of the ad hoc committee on weapons causing unnecessary suffering has been understandably slow, considering the military issues at stake. What would be unfortunate, however, would be a confusion over the role of this Conference and that of the various disarmament bodies. The purpose of disarmament is to limit military potential in order to balance or restrict the war-making ability of states. It is aimed at avoiding

war. This Conference pre-supposes the continued occurrence of war and seeks to limit unnecessary suffering caused by such wars.

To confound the two subjects would be to condemn humanity to suffer the consequences of indiscriminate weapons until such time as disarmament brings assured peace, which condition would by definition produce the "withering away" of humanitarian law. As this is being written there are reports of a new type of "depression" bomb having been used in South Vietnam which has the effect of soaking up the oxygen over an area and thus asphyxiating all living things found there. The speed with which modern technology can develop horror weapons makes it imperative that the banning or restriction of the most horrible not await the achievement of agreement on disarmament.

TORTURE AND THE 5TH UN CONGRESS ON CRIME PREVENTION

by

JO ANN DOLAN and MARIA LAETITIA VAN DEN ASSUM *

The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders will meet in Toronto from 1 to 12 September 1975. The UN General Assembly has asked the Congress to give urgent attention to the question of torture as it relates to its revision of the Standard Minimum Rules for the Treatment of Prisoners¹ and to the development of an international code of ethics for police and related law enforcement agencies (Resolution 3218 (XXIX)).

Torture of prisoners, and especially of political prisoners, seems to be spreading throughout the world in epidemic proportions with increasing refinement in techniques. According to Amnesty International, torture has been used against suspects and detainees in some 65 countries, rapidly becoming a state institution, a regular administrative practice, in more than 30 of them. Yet today torture is a form of violence that a state will always deny and even denounce publicly. There is probably no country in the world where torture is not already a criminal offence.

The need for political stability and social and economic progress are two of the pretexts most frequently advanced to justify repression, of which torture often forms a part. But in fact, violence creates counter-violence, and in the end, social and economic progress are threatened.

Amnesty's "Report on Torture" defines torture as the "systematic and deliberate infliction of acute pain in any form by one person on another, or on a third person, in order to accomplish the purpose of the former against the will of the latter." It is often pointed out that torture can take the form of psychological as well as physical ill treatment, intended to break an individual's mind as well as his physical resistance. It is difficult to establish permissible and impermissible methods of interrogation. Tech-

* Jo Ann Dolan, BS (Georgetown, 1970), JD (Syracuse University, 1973) is the Executive Secretary of the American Association for the International Commission of Jurists and ICJ Representative at United Nations Headquarters in New York.

Maria Laetitia van den Assum, JD (Amsterdam University, 1974), LL.M. (Columbia University, 1975), is a Columbia University intern in the office of the American Association for the ICJ.

¹ Reproduced in full in *ICJ Review* No. 4, December 1969.

niques of sensory deprivation and isolation, for example, are common practices and raise serious questions (see ICJ Review No. 11, p. 26).

The state's reasons for torture of prisoners can be put in four categories :

- a. to extract information
- b. to extract confessions or renunciations of previously expressed opinions
- c. to punish for suspected or supposed crimes
- d. to intimidate specific groups within the population.

The state may often use category a as a justification or concealment of the real reason, which may be category b, c or d. But does a state achieve stability through torture? One tends to think not.

The interest of international organizations in the problem of torture has increased considerably in recent years. For example, United Nations General Assembly Resolution 3059 (XXVIII) rejected any form of torture and other cruel, inhuman or degrading treatment or punishment. The Assembly further noted that reports of torture have been appearing in various UN organs dealing with human rights, presumably the Economic and Social Council, the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Ad hoc Working Group on Southern Africa, the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, the Special Committee Against Apartheid, the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Commission of Inquiry on the Reported Massacres in Mozambique.

This concern, although growing at the present time, is not new. The action of the General Assembly was based on Article 5 of the Universal Declaration of Human Rights, adopted in 1948, which provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The UN Charter specifically refers to human rights as a basic principle for which the United Nations was formed. It would therefore be contrary to the spirit of the Charter to deny that it contains certain obligations for some of the more essential and fundamental rights of man, particularly freedom from torture. It may even be argued that torture, a practice that shocks the conscience of mankind, is a violation of the Charter itself.

Provisions outlawing torture may be found in the four Geneva Conventions of 1949 on the treatment of the wounded and sick of the military², prisoners of war³ and civilians⁴. However the first provision in a United Nations instrument that expressly prohibited torture was Article II b of the Convention on the Protection and Punishment of the Crime of Genocide, adopted by the General Assembly the day before the adoption of the Universal Declaration on Human Rights.

Not only does Article 7 of the International Covenant on Civil and Political Rights prohibit "torture and cruel, inhuman and degrading

² Convention I, Articles 3 and 12
Convention II, Articles 3 and 12.

³ Convention III, Articles 3, 13, 17, 87, 88, 98.

⁴ Convention IV, Articles 3, 32, 68, 76, 118, 119.

treatment or punishment”, it further states that in particular, “no one shall be subjected without his free consent to medical or scientific experimentation”. It should be noted that Article 4 of the Covenant prohibits any derogation from this article even “in time of public emergency which threatens the life of the nation”.

Although there have been many suggestions for improving the machinery for implementing international law against torture, states seem unwilling to accept any effective international implementation at the present. Therefore many human rights experts feel the most effective action for the present time could be taken at the national level, in the form of legal procedures that would guard against the practice and be enforced by criminal and civil remedies whenever violated (see ICJ Review No. 10, p. 10 and ICJ Review No. 11, p. 23).

The United Nations has attempted to set out guidelines for such implementation. In 1963, under the auspices of the Commission on Human Rights, the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile produced the Draft Principles on Freedom from Arbitrary Arrest and Detention (E/CN4/826/Rev.1). Article 24 of those Principles provides: “No arrested or detained person shall be subjected to physical or mental compulsion, torture, violence, threats or inducements of any kind, deceit, trickery, misleading suggestions, protracted questioning, hypnosis, administration of drugs or any other means which tend to impair or weaken his freedom of action or decision, his memory or his judgment.” Apart from the torture provision, the Draft Principles provide guidelines for the police and the magistrate that, if properly enforced, could make the practice of torture impossible to conceal and thereby to occur. Although they have not as yet been considered by the Commission on Human Rights, they were considered again in 1974, both by the Sub-Commission and by the General Assembly.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities

The Sub-Commission took up the question of torture in the context of its debate on the human rights of persons subjected to any form of detention. This agenda item, created by the previous session of the Sub-Commission, was designed to permit that body to consider separately the abundance of individual communications with common allegations of arbitrary arrest and detention that the more general item on gross violations of human rights could not adequately deal with (see ICJ Review No. 3, p. 29).

The members considered the Draft Principles together with the Standard Minimum Rules in an attempt to confirm the concept of the prisoner as a human being and to find a balance between the needs of the prisoner and the security of society. Many lamented the lack of coordination between the UN organs dealing with social defence and with human rights. In light of their observations, it would certainly be useful for the Draft Principles, as well as the entire Study on Arbitrary Arrest, to be included in the documentation of the 5th UN Congress.

There are gaps in all instruments governing the treatment of prisoners. Sub-Commission Resolution 7 (XXVII) made a cursory attempt at least to combine those basic principles that require urgent attention in order properly to protect the detainee. Members were impressed with the effective-

ness of the Standard Minimum Rules and with their flexibility in a constantly evolving society. Although the Rules are somewhat inadequate to apply to many contemporary problems, members were satisfied with the proposed revisions that would extend their application to all prisoners in all places of detention. The Sub-Commission felt that there was no need to duplicate either the efforts of the Congress in the elaboration of guidelines or the prior efforts of the Sub-Commission in setting out the Draft Principles. It therefore set out in a new direction, the implementation of existing international standards through an annual review of reliably attested information on preventive detention and torture.

The United Nations General Assembly

In October 1974, debate in the General Assembly's Third Committee led to the adoption of resolution 3218 (XXIX), intended to assist the Fifth UN Congress to come to grips with the problem of torture. The resolution attempts to achieve some progress in the formulation of principles and guidelines for the prevention of torture. The General Assembly recognizes the UN Congress as the suitable forum for elaboration of principles. Such principles could ultimately form a basis for a legal framework resulting in an international convention or national legislation for the elimination of torture. Member states will make observations on Articles 24 through 27 of the Draft Principles, dealing specifically with torture and ill-treatment of prisoners. The UN Congress is requested, on the basis of the Draft Principles and the observations submitted, to include in the elaboration of the Standard Minimum Rules, protection of all prisoners subjected to any form of detention against torture.

The Standard Minimum Rules for the Treatment of Prisoners

The Fifth UN Congress will consider "the treatment of offenders in custody with special reference to the implementation of the Standard Minimum Rules." The question of torture will be most pertinent to any consideration of application or revision of the Rules. The idea of revision of the Standard Minimum Rules was of paramount concern to the Fourth UN Congress at Kyoto, Japan in 1970, upon the initiative of the UN Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders in 1965 and subsequently of the Congress' four regional preparatory meetings of experts in 1969. Since the original presentation of the Standard Minimum Rules to the Prague Congress of the International Penal and Penitentiary Commission in 1930, the only revisions were made 20 years ago when they were amended and expanded to the 94 rules that were adopted by the First UN Congress in 1955 and subsequently by the UN Economic and Social Council in 1957.

Five problem areas were singled out by the Fourth UN Congress in reviewing the Standard Minimum Rules:

- 1) the nature and scope of the Rules and their possible recasting to correspond with human rights and sound correctional practice;
- 2) possible extension of their application to all persons and to new correctional practices;
- 3) elevation of the Rules to the level of a declaration or convention;
- 4) implementation of the Rules nationally and internationally;
- 5) technical revision.

Upon the recommendation of the Fourth UN Congress the Committee on Crime Prevention and Control and the Group of Experts on the Standard Minimum Rules for the Treatment of Prisoners were created to review the Standard Minimum Rules and present their recommendations to the Fifth UN Congress.

The Fourth UN Congress suggested, however, that it was more important to ensure the effective application of the Rules than to revise the 1955 text, beyond those rules which truly require modification at the present time. The Congress indicated that for the present, all efforts should be directed toward encouraging the adoption of the existing Standard Minimum Rules through national legislation. Despite the need for revision, the first session of the Group of Experts expressed fear that amendments would undermine the wide respect among many countries that the Rules currently enjoy and would delay further incorporation of the Rules into national penal codes. The Group of Experts therefore recommended the revision of the Rules only after the collection of national reports, a review of the extent and limitations of implementation of the Rules and receipt of evidence justifying major substantive amendments.

Some members of the Group of Experts also envisage a permanent body of experts that would develop an explanatory commentary incorporating the suggested revisions. As the commentary would not have the force of the Rules, it is argued that they could be subject to more frequent revision. However, the Group of Experts acknowledges that this would reduce the flexibility of the Rules themselves.

It would be most unfortunate for the UN Congress to adopt such approaches. The Rules were acknowledged to require revision in 1970. Only a few nations have incorporated the 1955 Rules into their domestic legal system. Legislative incorporation, a lengthy, complicated process may further inhibit the revision of the Rules and thus, in the end, reduce their effectiveness. It could therefore be counter-productive to defer revision in favour of an immediate campaign for widespread adoption of the Rules before the needed revisions.

Implementation is, of course, crucial to the protection of prisoners' human rights. The recent trend of incorporating substantial guarantees of the Standard Minimum Rules into national penal laws may be as significant a development toward implementation as would be the ultimate adoption of a binding international convention. However, current efforts toward implementation should not prejudice or delay the revision of the Rules which have not kept pace with rapidly accelerating social changes. Revision and implementation are equally important and complementary. Neither should be given priority if the Rules are to retain their value in an ever changing society.

Proposed Revisions of the Standard Minimum Rules for the Treatment of Prisoners

The recommendations of the General Assembly made in October 1974 have afforded the Group of Experts on the Standard Minimum Rules and the Committee on Crime Prevention and Control little time to consider the requested elaboration of the Rules. However, the Group of Experts did review the Draft Principles at its meeting in 1972 and agreed that they should be taken into account in strengthening the Rules. The International Commission of Jurists has therefore prepared proposals for

amendments to be submitted to the Fifth UN Congress, based to a large extent on the Draft Principles.⁵

Although Rule 31 of the Standard Minimum Rules already prohibits many forms of corporal punishment, any redefinition of that rule should take into consideration existing human rights standards.⁶ However the General Assembly, realizing that prohibition alone provides little protection, has further requested an elaboration of the Rules to protect prisoners from torture more adequately. The practice will undoubtedly *continue undetected* unless the Rules provide for regular inspections of prison facilities⁷ and the right to legal proceedings to review allegations of torture.⁸ Furthermore, torture would be further deterred were the Rules to incorporate punitive sanctions against the official responsible⁹ and compensation for the victim.¹⁰

⁵ International Commission of Jurists, "Proposals by the ICJ on the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment," Geneva, April 1975. The ICJ has based its proposals not only on the Draft Principles on Freedom from Arbitrary Arrest and Detention, but on the Principles of Equality in the Administration of Justice (E/CN.4/Sub. 2/296/Rev. 1) and the Minimum Rules for the Protection of Non-Delinquent Detainees (Medico-Legal Commission of Monaco).

⁶ Article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant of Civil and Political Rights. ICJ proposal is to

Amend Rule 31 to read:

31. (1) No prisoner shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

⁷ Article 10 of the International Covenant on Civil and Political Rights, article 27 of the Draft Principles, and article 37 (b) of the Monaco Rules. ICJ proposal is to

Amend Rule 55 to read:

55. There shall be a regular inspection of places of detention by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that:

- (a) these places of detention are administered in accordance with existing laws and regulations, including the present Rules, and, when applicable, with a view to bring about the objectives of penal and correctional services and
- (b) all prisoners are treated in accordance with principles of humanity, justice and dignity.

⁸ Paragraphs 449, 576, 577 of the Arbitrary Arrest Study. ICJ proposal is to add a new Rule:

36B. A prisoner or his relative or other person acting in his interest shall be entitled at any time to take proceedings before a superior court alleging that he has been or is subject to torture or to cruel, inhuman or degrading treatment or punishment and seeking an order of the court for his protection.

⁹ Article 39 of the Draft Principles. ICJ proposal is to

Amend Rule 31 to read:

31. (2) Any official or other person who causes a prisoner to be subjected to torture or to cruel, inhuman or degrading treatment or punishment shall be subject to penal sanctions or disciplinary measures or both.

¹⁰ Articles 37 and 40 of the Draft Principles. ICJ proposal is to add a new Rule: 36C. Any prisoner shall have an enforceable right to obtain compensation from public funds for any material or moral damage he may have suffered on account of torture or cruel, inhuman or degrading treatment or punishment to which he was subjected while in detention.

In prohibiting corporal punishment as a form of discipline the Standard Minimum Rules overlook the practice when used to extract information or confessions, to compel renunciation of opinions or to intimidate groups of the population. Such forms of torture occur before the detainee is brought to court and is rare once the judicial process commences. As the Standard Minimum Rules have traditionally applied only to prisoners under sentence, prisoners awaiting trial and civil prisoners, the present provisions were sufficient in the past. But now that the Standard Minimum Rules may apply to all forms of detention, more adequate safeguards must be elaborated.

The Fourth UN Congress suggested that by amending Rule 84 (1) of the 1955 text so as to make the Rules apply to all prisoners detained for whatever reasons, such prisoners would be adequately protected.¹¹ However, a mere definitional amendment would not, in itself, protect those prisoners whose problems are often quite unique. Rules 84-93 in their present form apply only to prisoners awaiting trial and provide guarantees that respect the presumption of innocence and facilitate the preparation of a defence. Thus rule 93, in its present form, guarantees that legal counsel may be available only with a view to preparing a defence. However where a prisoner is not charged with a crime, some jurisdictions will argue that there is no need to prepare a defence and therefore no need for a lawyer.

Thus for the Rules to protect these prisoners, they must also include the right to habeas corpus (or amparo),¹² to communicate with family and friends,¹³ to be informed of the right to make representations against

¹¹ In addition, the ICJ proposal is to

Amend Rule 4 (1) to read:

4. (1) Part I of the Rules covers the general management of all places of detention and is applicable to all categories of prisoners, criminal or civil, untried or convicted, civilian or military, including prisoners subject to 'security measures' or to corrective measures ordered by the judge or detained without charge for any cause and by any authority.

¹² Article 9 (4) of the International Covenant on Civil and Political Rights and article 38 of the Draft Principles and paras. 573-575, 578-580, 582 of the Arbitrary Arrest Study. ICJ proposal is to

Add after Rule 36:

Remedies

36A. (1) A prisoner or his relative or other person acting in his interest shall be entitled at any time to take proceedings before a judicial authority to challenge the legality of his arrest or detention and to obtain his release without delay if it is unlawful.

(2) The proceedings before such authority shall be simple, expeditious and free of charge. The detaining authority must without delay produce the prisoner before the judicial authority before which the recourse is taken. The burden shall be on the prosecuting or detaining authority to establish affirmatively the legality of the detention.

¹³ Article 19 (3) of the Draft Principles and para. 290 of the Arbitrary Arrest Study. ICJ proposal is to

Amend Rule 92 to read:

92. An untried prisoner shall be allowed to inform immediately his family and friends of his detention and shall be given all reasonable facilities for communicating with them. He shall be entitled to receive visits from them, subject only to such restrictions and supervision as may be ordered by the competent authority for the purpose of preventing interference with witnesses or suppression of evidence or the passing of information which may assist the detained person to escape.

arrest or detention and of the right to legal counsel,¹⁴ to communicate confidentially with legal counsel of one's own choosing,¹⁵ to be brought within 48 hours before an authorized court,¹⁶ and thereafter to be removed from the custody of the arresting authority and authorities conducting the interrogation.¹⁷

The Standard Minimum Rules, as presently constituted, include three categories of prisoners: prisoners under sentence, prisoners under arrest or awaiting trial, and civil prisoners. Upon the extension of the Rules to all prisoners, specific Rules will be required for other categories of prisoners. For example, powers to hold suspects in administrative detention, often the result of a special grant of executive authority in emergency situations,¹⁸ may be abused. Such powers should be limited to arrest only by written order from competent authorities,¹⁹ and the prisoner should be properly informed, not only of the reasons,²⁰ but also of the right to

¹⁴ Article 35 (2) of the Draft Principles and para. 342 of the Arbitrary Arrest Study. ICJ proposal is to

Amend Rule 93 to read:

93. (1) Upon his arrival at the place of detention, the untried prisoner shall be immediately informed of his right to make a representation against the arrest or detention and to have legal advice, and such notification shall be duly recorded.

¹⁵ Article 20 of the Draft Principles and para. 342 of the Arbitrary Arrest Study. ICJ proposal is to include in Rule 93:

93. (2) An untried prisoner shall be entitled to communicate with and receive visits from his legal adviser and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within hearing of a police or institution official.

93. (3) Where an untried prisoner has no legal adviser or his legal adviser is not available he shall be entitled to select an adviser from a list of lawyers willing to act in that capacity. The detaining authority shall cooperate fully with him in his search for a legal adviser. Relatives, friends, or legal representatives of the prisoner shall also be allowed to select a legal adviser for him, subject to his subsequent approval.

¹⁶ Article 10 and 13 of Draft Principles. ICJ proposal is to
Add after Rule 93:

93A. Every arrested person shall be brought before a judge or other officer authorised by law within a period not exceeding forty-eight hours from the time of his arrest (excluding any necessary travelling time from his place of arrest) to decide whether he shall be released or held in custody.

¹⁷ Article 26 of the Draft Principles. ICJ proposal is to add a new Rule:

93B. After an arrested person has been brought before the judge or other officer authorised by law he shall no longer be held in the custody of the arresting authority. The officials responsible for his custody shall be entirely independent of the authorities conducting the investigation. No prisoner shall thereafter be removed from that custody for purposes of interrogation.

¹⁸ Para. 753 and 754 of the Arbitrary Arrest Study. ICJ proposal is to include in a section on administrative detention a new Rule:

95. (1) Persons arrested or detained under special powers granted to the executive authority in emergency or exceptional situations and who are not charged with a criminal offence will be referred to hereinafter in these Rules as "detainees".

¹⁹ Article 35 (1) of the Draft Principles. ICJ proposal is to add:

96. (1) Arrest and detention under special powers shall take place only upon written order from the competent authority indicating the reasons for the order and the facts in support thereof.

²⁰ *Ibid.*

counsel.²¹ There should also be a guarantee that all other protections under the Rules apply.²²

Torture is a major threat to prisoners under interrogation. Although these prisoners will be covered by general provisions, the Rules will need to provide for such additional rights peculiar to interrogation as: the right to be informed of the right to refuse to make a statement,²³ the right to have a lawyer present during interrogations,²⁴ the right to be examined by a physician,²⁵ the limitation on the length and times of interrogation,²⁶ freedom from physical or mental compulsion,²⁷ and a guarantee that any statement thus compelled will be inadmissible against him in any proceedings.²⁸ This could easily be done under separate categories, such as

²¹ Article 35 (2) of the Draft Principles. ICJ proposal is to add
96. (2) A copy of the order shall be given to the detainee at the time of his arrest and he shall be informed at the same time of his right to make a representation against the order and to have legal advice.

²² Rule 4 (2) of the Standard Minimum Rules. ICJ proposal is to add
95. (2) All the rules under Section C, applicable to untried prisoners, shall be applicable to detainees in so far as they do not conflict with the rules in this Section.

²³ Article 25 of the Draft Principles. In a new section on prisoners under interrogation, ICJ proposal is to add
98. Before any prisoner is interrogated he shall be informed of his right to refuse to make any statement.

²⁴ Article 22 (2) of the Draft Principles, paras. 348, 448 of the Arbitrary Arrest Study. ICJ proposal is to add
99. Before any prisoner is interrogated he shall be advised of his right not to be interrogated in the absence of his legal adviser, and if he has no available legal adviser he shall be entitled to choose one from a list of lawyers willing to advise him. His legal adviser shall have the right to put questions to him during an interrogation.

²⁵ Paras. 411, 445 and 447 of the Arbitrary Arrest Study. ICJ proposal is to add
100. (1) A prisoner shall be examined by a physician before and after interrogation. The fact that the prisoner underwent physical examination, the name of the doctor and the results of such examination shall be duly recorded.

(2) A prisoner's legal adviser or relatives shall have the right to request and obtain his physical examination by a physician at any stage.

²⁶ Paras. 411, 446, 447 of Arbitrary Arrest Study. ICJ proposal is to add
101. Consecutive interrogation shall not last more than a stated period and proper rest and meals shall be given to the prisoner between interrogations.

102. The length and times of interrogation sessions and of the intervals of rest as well as the names of the interrogators and guards shall be duly recorded.

²⁷ Article 24 (1) of the Draft Principles. See also Article 29 of the Principles in the Equality of the Administration of Justice. ICJ proposal is to add

103. (1) No prisoner shall be subjected to physical or mental compulsion, torture, violence, threats or inducements of any kind, deceit, trickery, misleading suggestions, protracted questioning, hypnosis, administration of drugs or any other means which tend to impair or weaken his freedom of action or decision, his memory or his judgment, or to violate his dignity.

²⁸ Article 24 (4), (3) of the Draft Principles. ICJ proposal is to add
103. (2) Any statement which a prisoner may be induced into making through any of the above prohibited methods, as well as any evidence obtained as a result thereof, shall not be admissible against him in any proceedings.

(3) No confession or statement by a prisoner can be used against him in evidence unless it is made or acknowledged voluntarily in the presence of his legal adviser and before a court or other judicial authority.

(4) Any court or other judicial authority shall make a thorough inquiry into any allegations by the prisoner that a confession or statement was induced by any

Prisoners Under Administrative Detention and Prisoners under Interrogation.

Such revisions are crucial to any attempt to prevent the practice of torture of all prisoners subjected to all forms of detention.

The Future for Social Defence and Human Rights

United Nations concern for balance between social defence and human rights was initiated by the Fourth UN Congress in 1970. However, the attitude that the protection of human rights was often an obstacle to police efficiency was still prevalent at the first session of the Committee on Crime Prevention and Control in 1972. Although criminologists recognize the importance of formal procedures for the protection of human rights, many feel that formal requirements of law are often misapplied as dilatory tactics or in a discriminatory manner. Despite such reservations there has been significant cooperation in subsequent sessions. Concern for delays in the administration of justice may prompt the Fifth UN Congress to recommend the creation of international guidelines that would streamline the judicial process. Recommendations recently were made to study the advisability of simplifying the rules on admissibility of confessions and evidence, reducing duplication in appeals, using summary procedures for minor offences, and eliminating trial by jury.

However any simplification in procedures would be very dangerous, were it to affect adversely basic principles of justice designed to protect the individual. Therefore any possible formulation of standard minimum rules on equality in the administration of justice requires consideration of pertinent articles of the Draft Principles on Arbitrary Arrest and Detention as well as the Principles of Equality in the Administration of Justice (see ICJ Review No. 10, p. 57).

In still another effort to balance police efficiency with respect for human rights, the Fifth UN Congress will consider the drafting of an international code of police ethics. Articles 1-10 of the Draft Principles on Arbitrary Arrest and Detention would lend much light to many human rights that should be protected in any such code.

Torture is, of course, the most flagrant breach of human rights upon arrest. It is most significant that this abhorrent practice has, in recent years, demanded the attention of many of the most respected scholars concerned with social defence, as well as human rights. This joint effort in the eradication of the practice of torture throughout the world can only set a pace for future cooperation in all fields of common concern.

of the above prohibited methods. The prisoner shall be allowed to testify and to present evidence on this issue. The prosecuting authority shall have the burden of showing that the confession or statement was made freely and voluntarily.

MEMBERS OF THE COMMISSION

T.S. FERNANDO (President)	Sri Lanka High Commissioner to Australia, former Attorney-General and former President of the Court of Appeal of Sri Lanka.
PER T. FEDERSPIEL (Vice-President)	Attorney-at-law; Copenhagen; Member of the Danish Parliament
FERNANDO FOURNIER (Vice-President)	Attorney-at-law; Costa Rica; former President of the Inter-American Bar Association; Professor of law
MASATOSHI YOKOTA (Vice-President)	Former Chief Justice of the Supreme Court of Japan
GODFREY L. BINAISA	Former Attorney-General of Uganda
ALPHONSE BONI	President of Supreme Court of Ivory Coast
BOUTROS BOUTROS-GHALI	Professor of International Law and International Relations, Cairo Egypt
ALLAH-BAKHS K. BROHI	Former Pakistan Law Minister and High Commissioner
JOEL CARLSON	Former representative of the ICJ in South Africa; U.S.A.
HAIM H. COHN	Supreme Court Judge; former Minister of Justice, Israel
CHANDRA KISAN DAPHTARY	Senior Advocate; former Attorney-General of India
ELI WHITNEY DEBEVOISE	Attorney-at-law; New York
TASLIM OLAWALE ELIAS	Chief Justice of Nigeria
MANUEL G. ESCOBEDO	Professor of Law, University of Mexico; Attorney-at-Law
ALFREDO ETCHEBERRY	Professor of Law, University of Chile; Advocate
EDGAR FAURE	President of Assembly; former Prime Minister of France
HELENO CLAUDIO FRAGOSO	Professor of Penal Law, Rio de Janeiro, Brazil
ENRIQUE GARCIA SAYAN	Former Minister of Foreign Affairs, Peru
LORD GARDINER	Former Lord Chancellor of England
BAHRI GUIGA	Counsellor, Court of Appeal of Tunisia
JOHN P. HUMPHREY	Professor of Law, Canada; former Director, U.N. Human Rights Division
HANS-HEINRICH JESCHECK	Professor of Law, University of Freiburg, Germany
SEÁN MACBRIDE	U.N. Commissioner for Namibia; Former Minister of External Affairs of Ireland
KEBA M'BAYE	President of the Supreme Court of Senegal
LUIS NEGRON FERNANDEZ	Former Chief Justice of the Supreme Court of Puerto Rico
MRS. NGO BA THANH	Secretary, Institute of Comparative Law, Saigon
TORKEL OPSAHL	Professor of Law, Norway; Member of European Commission
GUSTAF B. E. PETREN	Judge and Deputy Ombudsman of Sweden
SHRIDATH S. RAMPHAL	Attorney-General and Minister of State, Guyana
MOHAMED A. ABU RANNAT	Former Chief Justice of the Sudan
EDWARD ST. JOHN	Q.C.; Barrister-at-law, Australia
MICHAEL A. TRIANTAFYLIDES	President Supreme Court of Cyprus; Member of European Com- mission
J. THIAM-HIEN YAP	Attorney-at-law; Indonesia

Secretary-General: NIALL MACDERMOT

INTERNATIONAL COMMISSION OF JURISTS, 109, ROUTE DE CHÊNE, 1224 CHÊNE-BOUGERIES
GENEVA, SWITZERLAND

Report of Mission to Argentina

March 1975

The Report of a mission by Dr. Heleno Claudio Fragoso, Vice-President of the Brazilian Bar Association and Member of the ICJ, to enquire into the situation of defence lawyers unable to carry on their profession owing to arrests and detentions without trial, murders, bomb attacks and threats.

Price: Sw. Fr. 4.—, postage by surface mail free.

Report of Mission to Uruguay

April-May, 1974.

The Report of a Joint ICJ—Amnesty International mission to Uruguay, covering such matters as the legal basis for arrest and detention of political suspects; absence of notification of arrests; torture and ill-treatment; and procedures under system of Military Justice.

Price: Sw. Fr. 5.—, postage by surface mail free.

Report of Mission to Chile

April 1974

The Report of an ICJ mission to Chile, covering such matters as the Junta and the Constitution; State of Siege, State of War and State of Emergency; Suspension of Civil Rights and Fundamental Freedoms; the System of Military Justice in Time of War; Arrest, Interrogation and Detention of Political Suspects; etc.

Price: Sw. Fr. 5.—, postage by surface mail free.

International Commission of Jurists
109, route de Chêne
1224 Chêne-Bougeries/Geneva
Switzerland