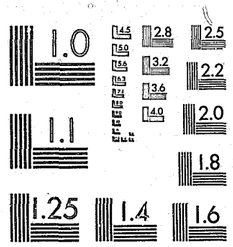

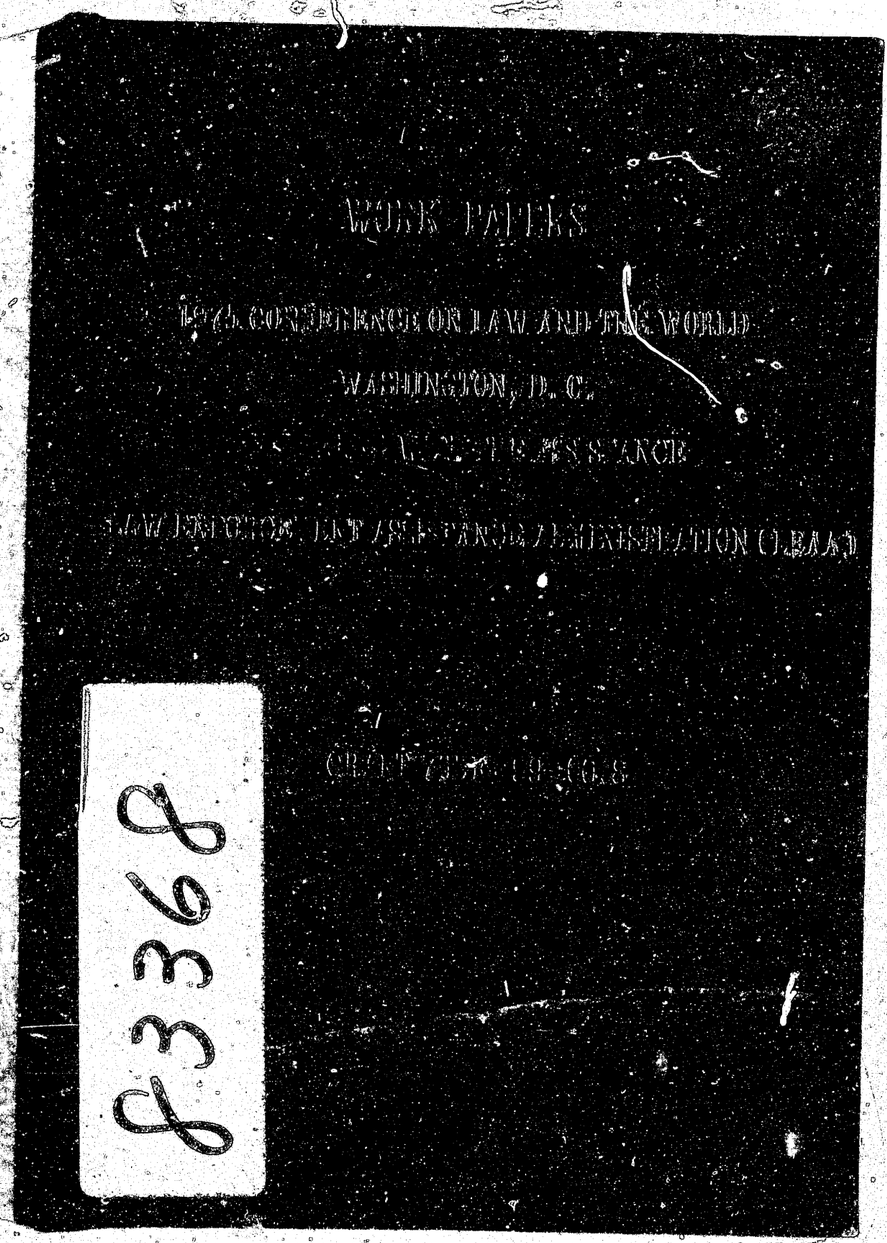

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WORK PAPER
ON
THE SOCIO-LEGAL STATUS
OF WOMEN IN SUB-SAHARAN AFRICA

By
Rachel N. Mayanja

Women's Rights in Africa

The subject of women's rights in Africa is a very broad one. It cannot be dis-ussed adequately within the confines of this paper. However as the world celebrates 1975 as the International Women's Year, it is only appropriate that attention should be drawn to the existing status of the African women. To that end this paper will focus on the educational, economic, social and political rights of the African woman, in independent Sub-Saharan Africa.

Educational

Education in a traditional African society was conceived of as a form of apprenticeship. The form of training that an individual would undergo was determined at birth by the individual's sex.[1] Society assigned a role to be played by each sex and the training that each individual received was in accord with that role. The woman was concevied of as a homemaker. As such she was charged with the duty of ensuring the good health and general welfare of the family, raising children and supervising the training of her daughters to assume a similar role. This period of training usually lasted until puberty at which stage the daughter would be ready to marry and assume her role as a woman member of the society.

The introduction of formal education meant an upset in the equilibrium of the traditional apprenticeship. It therefore received a mixed response. Parents were enthusiastic about their sons attending schools but not their daughters.[2] Very few girls availed themselves of this opportunity to attend school while many of those that commenced school dropped out before completing. This reaction to formal education was accounted for by the Economic Commission for Africa as follows:

"The division of rural labor accounts in large part for the failure of girls to continue their education, or in fact, in many cases to be enrolled at all. Young girls must help their mothers at home and on the farm; they carry water in smaller pots behind their mothers... Girls may be removed from school because of pregnancy or for early marriages. When family finances for school fees are scarce, boys receive preference."[3]

The response of the African society towards formal education for girls has thus been unenthusiastic. It is not surprising that, with the exception of Lesotho, the women comprise the majority of illiterates in Africa.[4] Yet education is essential for the full participation in the development process. The failure of girls and women to be educated leads to the marginal participation of women in development, inadequate qualifications for employment purposes, and perpetuates an inferior status of women to that of men. When women are educationally

incapacitated, no matter how many rights they may be guaranteed by their national constitutions and legislation, such rights cannot be realized. Equal access by both girls andboys to education at all levels must be ensured. Parents should be discouraged from withdrawing their daughters from school.[5]

Economic

The role of the African woman in the family of necessity made her an active person. The African woman is engaged on farms, in markets, cottage industries, brewing and baking. However, the process of economic development demands the transformation of traditional activities, reducing their relative importance, and introducing and expanding new activities.[6] The new activities demand a formal training, especially in the use of technology. As observed above, the traditional African woman lacks such training and is thus excluded from those new economic activities. One finds in Africa today that the process of economic development is increasingly squeezing out the traditional small-scale business woman.[7] If in fact the ultimate purpose of development is to provide increasing opportunities to all people, and to ensure a more equitable distribution of income and wealth so as to promote social justice and an efficient system of production, African states must recognize the significance of the traditional African woman's contribution to the economy

and the need to accord her equal attention with that accorded formal and large-scale industries. As long as the traditional sector of the economy continues to be overlooked by the African governments, the African woman, who comprises the large part of that sector, will be denied her right to participate fully in the economic development of her country.

There are women who have been included in the modern sectors. Women in those areas are not well represented. It is said of this group:

"Only among the educated are there good proportions of women workers. But when it comes to decision making, even these women lag far behind men. As increasing numbers of men seek jobs, the outlook for women may be even less promising than at present, since employers, including governments, appear to prefer men."[8]

This problem is most acute for urban women, where the vast majority is either illiterate or semi-literate and therefore not qualified cor the jobs offered. Yet, life in towns means a struggle to obtain an income. Unless this situation is corrected, equality of opportunities between men and women as provided by the constitutions of the African states may never be achieved.[9][10]

Social

"The extended family has served to perpetuate the low status of women in certain ways. A wife is expected to be subservient

to her husband, father-in-law, as well as to relatives extending beyond the immediate family of the husband. She is expected to contribute to their material well-being by giving them surplus crops, general care and financial help. She is not expected to give such assistance to her own family, especially in the parilineal societies."[11]

This description of the African woman in the home highlights the inferior status of the woman, which attitude commences at brith. In "The Missing Half Woman 1975," the FAO Information Division observes the following:

"The birth of a female is often viewed as a disaster, but the birth of a male child is cause for joy in all cultures. Certain cultures for example will sacrifice a lamb at the birth of a male. All the rites marking the stages of life stress the differences between the sexes. And these constraints are especially severe in many rural societies. The female child in these communities is prepared for marriage from the very beginning of her life. Often she is "passed on" to her new master by her father even before puberty. . . Neither the girl nor her mother has any say in the matter."[12]

Conceived of as an inferior being by society, the African woman grows up with a deep feeling of inferiority and incompetence. She assumes her role as she finds it and has done very little to change it. At times she responds rather

defensively to any criticism of her traditional role, thereby encouraging the perpetuation of her inferior status.

Formal education has opened social activities outside of the home and the family for the African women. In a number of countries, African women meet in women's clubs for a variety of activities.[14] Informal training in new methods of cooking, housekeeping, crafts, etc. are provided, while at the same time such organizations provide a forum for exchanging views and ideas. The extension of these organizations to the rural woman would be a means of realizing her right to associate as she desires with other members of the society.

Political

In most African societies political leadership has been the exclusive domain of men.[15] Audrey I. Richards writes of East African traditional systems:

"Within each tribe law and order is maintained, cases are judged, taxes collected and agricultural and health measures enforced by traditional authorities who have been given new functions under the British administration. These different authorities vary in type. They include kings with long lines of descent, princes, local rulers appointed to special posts by their king or by the British government, clan elders and district or village headmen, the latter often selected on the basis of hereditary descent... The higher chiefs include men with a secondary and even occasionally a university education...

Richards made these comments in 1959 when Britain was still a colonial power in East Africa. A similar situation was found to exist among the Bemba of Zambia and the Basuto of Botswana. The domination of the political arena by men seems to have operated in most African societies. Even in Dahomey where the traditional African woman is said to have played an active role in the political life of her society.[16] She assumed a subservient position; she was an observer or an overseer. She was not actively involved. She was never the leader.

Today, constitutions of the various African states guarantee political rights to every one irrespective of sex.[17] One would hope that more women could be politically involved. This has not been the case. There have been very few African women who have assumed this challenge. Many women still believe that politics is a man's game. At a time when attempts would have been made to eradicate this attitude, the African continent is witnessing a totally different form of political system, namely the rule of the military. Under this system, the political power that was vested among the people by the national constitution[18] is tranferred to the military by the military. In most of these countries, membership in the military is exclusively limited to men.

Legal Appraisal of the Status of the African Woman

The foregoing is brief assessement of the existing situation of the African woman. It is not intended to be exhaustive but rather to provide a background on which to base a legal analysis and appraisal of the situation.

Constitutional Guarantees

All independent African states incorporated into their constitutions the principles of the Universal Declaration of Human Rights.[19] The format and terminology of these constitutions can be divided into two groups (with few exceptions), namely the English-speaking and the French-speaking. Typical of the English-speaking countries' constitutions is the inclusion of a chapter on "Protection of Fundamental Rights and Freedoms of the Individual."[20] For example, the 1969 Constitution of Kenya provides under Chapter V:

S 70: "Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely --

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of the home and other property and from deprivation of property without compensation.

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

A typical French-speaking country on the other hand would endorse the principles of Democracy and the Rights of Man as defined by the Rights of Man and the Citizen of 1789 and the Universal Declaration of 1948 in the Preamble.[21] Then under a title that deals with the State and Sovereignty, which is usually Title I, the State would be charged with assuring to all people equality before the law without distinction as to origin, race, sex or religion.[22]

The language and format of these constitutions suggests an absence of independence on part of these states. The constitutions were written prior to independence and it is

conceivable that they are the result of a bargain with the then colonial powers. At variance with these typical constitutions is the August 4, 1973 Constitution of Equatorial Guinea.[23] In the Preamble to this constitution it is stated:

"The Revolution of Equatorial Guinea is striving relentlessly to remove all obstacles in its path and is carrying out a vigorous policy aimed at establishing a national economy free from all outside interference. The social policy has been designed to assist the working masses in the cities and the countryside to raise their living standards, to eradicate illiteracy, to promote national culture and to improve housing and health. It pursues a foreign policy of friendship and cooperation with all people of Africa and the world based on the principles of sovereign equality between States and the self-determination of peoples proclaimed in the Charter of the United Nations and the Organization of African Unity."

Under Title I, Articles 2 through 8 outline the duties of the state to the citizens and other nations of the world. I find this constitution more in accord with the ideas of Africans today. It addresses itself to the problems facing Africa and it remains to be seen how effective it will be as an instrument of social and economic change. Thus, examined from a formalistic approach, states in

Africa guarantee equal rights to all people irrespective of sex. However, once this constitutional veil is "pierced," one is confronted with a substantially different situation.

Many African states have, since the enactment of these constitutions, experienced military coup d'etats. As an incidence of these military takeovers, the constitutions have been suspended. In 1972, for example, Ghana received what is called the National Redemption Council (Establishment) Proclamation.[24] Article 2 (1) provides:

"With effect from the 13th day of January, 1972, and subject to the other provisions of this Proclamation and any Decree that the council may make, the operation of the Constitution of the Republic of Ghana which came into force on the 22nd day of August, 1969, shall be suspended." With the constitutional machinery thus withdrawn, the individual is deprived of the essential instrument for the guarantee of the said individual's rights.

Even in states where the constitutions are still in force, their effectiveness has yet to be felt. This is largely due to the ignorance of the people, both of the existence of a constitution or the particular provisions that guarantee the individual fundamental rights. Women, as has been observed above, comprise the largest proportion of the illiterates, and therefore the uninformed. As long as these women continue to occupy this position of ignorance,

elaborate and grandiose constitutional provisions would not contribute to the improvement of their status.

Legislation

Legislation repugnant to the constitution exists in many African countries. Under the Uganda Divorce Act, Section 5 provides as follows:

"5 (1). A husband may apply by petition to the Court for a dissolution of his marriage on the ground that since the solemnization thereof his wife has been guilty of adultery.

(2). A wife may apply by petition to the Court for the dissooution of her marriage on the ground that since the solemnization thereof --

(a) her husband has changed his proposition of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or

(b) has been guilty of --

(i) incestuous adultery; or

(ii) bigamy with adultery; or

(iii) marriage with another woman with adultery;

(iv) rape, sodomy or bestiality; or

(v) adultery coupled with cruelty; or

(vi) adultery coupled with desertion,

without reasonable excuse, for two years or upward."[25]

This section of the Divorce Act clearly denies the woman equal treatment with the man before the law. While all that is required of the man is an establishment of the commission of adultery by his wife, the woman is required to establish another offense in addition to adultery. This provision stands unchallenged.

Especially in English-speaking Africa, the judiciary has interpreted legislation to conform to tribal customs and tradition wherever such custom does not effend against "Justice." African custom has always favoured the man and treated him as superior t9 a woman.[26] M. Mbilinyi comments:

"Provision is made (under the Tanzania Marriage Act, 1971) for the payment of some maintenance of the wife and for the custody of children, who will normally stay with the mother up to the age of seven years, after which they revert to the father. This is in compliance with patrilineal customary law, where children are considered the property of the father and his lineage."[27]

The interpretation of legislation in accordance to existing custom weakens the efforts to bring about the equality of men and women. Customary law is by its nature discriminative and cannot be used as an instrument of change. Attempts should be made to eradicate the discriminative aspect of the customary law.

International Action

At the international level a number of instruments have been concluded for the elimination of sex-based discrimination. An excellent discussion of these instruments was made by M. S. McDougal, H. D. Lasswell and L. Chen in their article, "Human Rights for Women and World Public Order: The Outlawing of Sex-based Discrimination."[28]

The United Nations Charter provides as one of its purposes the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction on account of sex.[29] This theme of non-discrimination based on sex is further ennumerated in the Universal Declaration of Human Rights. While this has been endorsed and incorporated in national constitutions, the two International Covenants on Human Rights have not received similar response. The two Covenants are the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.[30] The former requires each contracting party to undertake steps to achieve the full realization of the rights to work under safe, just and favorable conditions, to form and join trade unions, to strike, to social security and insurance, to an adequate standard of living, health and education, and to participate in cultural life. On the other hand, the latter requires that the right to a fair trial, freedom of thought, conscience, religion, expression, association, privacy, movement and of equal protection of the law be ensured all individuals without any distinction as to race, color, sex, religion, or political inclination. These covenants will be legally binding on states that ratify them once the necessary number of ratifications is attained. Unfortunately, only three African states have ratified them.[31] Besides these covenants a number of conventions have been concluded in continual promotion of the principle of equality.[32]

On November 7th, 1967, the General Assembly adopted the Declaration on the Elimination of Discrimination Against Women.[33] The Preamble to the Declaration sets forth the convictions and concerns of the United Nations regarding discrimination against women, and emphasizes the importance of the women's role to development and the cause of peace. Article 1 of the Declaration provides:

"Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offense against human dignity."

Having thus stated the offense, the Declaration proceeds to propose measures by which such discrimination may be eradicated. The Declaration was adopted by all African states. However, a declaration is not legally binding upon governments. What is binding are the covenants. These

contain the same rights that are outlined in the Declaration. The rest of the African states should move to ratify these covenants. Besides these instruments, research by various bodies has produced invaluable information in respect to women's status.[34]

Proposals

One striking feature of the African women's status is her pride in and desire to maintain her traditional role. It is what makes her unique. The traditional system is a way of life, a method by which society relates to one another. Morris and Read comment on the traditional system:

"Law and custom which in their totality make up tribal culture are not merely an inventory of rules of conduct, but a coherent system of relationships between individuals and groups ... The maintenance of effective relationship."[35]

Tradition thus occupies a central role and is one of the instruments that perpetuate the inequality of the sexes. Any attempt to bring about equality must be directed to the traditional beliefs. In a commentary to Article 1 of the Declaration on the Elimination of Discrimination Against Women, it is observed that:

"Many widely held beliefs, traditions and patterns of behavior are derived from underlying notions of a natural distinction between men and women. It may well take a long

time for such notions, based on custom rather than on biology, to be recognized as discriminatory against women and as a fundamental offense against their human dignity."[36] Rather than making an outright attack on tradition, such specific activities that promote women's rights should be encouraged and promoted and emphasis should be given to women's education. Once women are given the opportunity to participate in non-traditional women's activities, they will gradually break out of their traditional "shells."

Coupled with activities should be a system of dissemination of information relating to women's rights. It has been found that many women do not know their rights and are thereby hindered from ever realizing them. To this end, women's organizations, adult education centers and radio and television should be utilized.

In the area of legislation, law reform commissions should analyse existing laws with a view to amending any which are discriminatory against women and establish adequate legal protection for equal rights of men and women. Existing constitutions should be re-examined in an attempt to bring them more in line with the United Nations Declaration on the Elimination of Discrimination Against Women. Where such already exists, constitutional provisions should be redrafted so that, not only do they enunciate stated norms, but also are accompanied with a proposal as to their

enforcement. For example, the Constitution of the U.S.S.R. provides:

"Art. 122. Women in the U.S.S.R. shall be accorded equal rights with men in all spheres of economic, state, cultural, and social-political life.

The possibility of exercising these rights of women shall be guaranteed by providing women with an equal right with men to labor, payment for labor, rest and leisure, social insurance and education, by state protection of the interests of mother and child, by state aid to mothers with many children and unmarried mothers by providing vacations for women during pregnancy with preservation of support, and by an extensive network of maternity homes, day nurseries and kindergartens."[37]

The political rights of the African woman cannot be realized as long as the military continues to occupy a monopoly over that sector. Either woman should be included in the armed forces or else the soldiers should return the power to the people. Whatever the choice a monopoly by any one group should be discouraged. Constitutions catering for the African culture and historical background may assist in establishing some political system that may be more stable than what Africa has so far. Political instability more often than not provides for the violation of individual liberty and for the ineffectiveness of the

judicial system.

At the international level African governments should ratify the two covenants on civil and political rights, so that their legal effect may be enjoyed by the peoples of Africa. Extensive research has been carried out by various bodies.[38] These have published proposals of methods by which equality of men and women may be realized. A regional seminar for Africa on the integration of women in development with special reference to population factors, proposed in March of this year, setting up at the national level National Commissions on Women and Development and at a regional level a Standing Committee which would co-ordinate the work of the National Commissions.[39] These commissions would be charged with disseminating information to the people, and making policy recommendations to the governments especially in the areas of education and training, employment, health, nutrition and social services. The seminar further proposed that legislative and administrative machinery should be applied as instruments for attitudinal changes towards the role of women, as a means of full integration of women.

The Organization of African Unity has not done much for the advancement of the cause of women. It has been very active in the liberation of Africa from colonialism and imperialism.[40] 1975, as International Women's Year,

should witness a birth of concerted effort by the members of the O. A. U. for the liberation of African women, and indeed, women throughout the world, from the domination of men which restricts their participation in the national development of their nations.

Conclusion

A detailed study of the situation of women in Africa would demand more time than we have at this conference. What is provided here is a background on which further study and action may be advanced. It is important to realize that while women all over the world have for centuries suffered domination by men, the African woman has had besides the oppression of colonialism. Efforts should be taken to assist her to overcome both these disabilities. Given the disparity between the sexes, a formal equality under the law would have the effect of preserving the status quo, and thus to some extent perpetuating the unfairness and injustices of the existing situation. Women have suffered various legal, social, and cultural handicaps as a result of which their economic and social position is greatly inferior to that of men. Derogations from certain rights should be permitted in certain circumstances to redress the imbalances.

The fact that 1975 was declared by the United Nations as International Women's Year is an important achievement. Compliments must be paid to the United Nations, its specialized agencies, and non-governmental organizations for the efforts taken in the advancement and realization of women's rights. No one expects all the rights to which women are entitled to be realized in just this year. However, one hopes that 1975 will witness new efforts towards the struggle for the equality of the sexes. Africa faces problems of development. Any successful fight against underdevelopment will require the mobilisation of all its human and natural resources. The continual perpetuation of an inferior status of women, rather than fight, will accentuate underdevelopment. Mbilinyi makes the following observation:

"The role of women, like that of men, in any society is dependent upon how they fit into the production process. Social values and attitudes arise out of the social structure which is based on that process. Therefore to participate fully and equally in economic development will ultimately require fundamental changes in the economy."

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18. Eg. Ghana, National Redemption Council (Establishment) Proclamation, infra.

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VI Blanstein & Flanz, Ivory Coast Supra no. 10.

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RESEARCH PAPER
FOR
SEMINAR ON JUSTICE AT THE TRIAL LEVEL

By

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Member of District of Columbia Bar

ARREST, SEARCH AND SEIZURE

Some of a trial judge's most complex decisions are involved with roblems of arrest, search and seizure. Fundamentally, an arrest is awful only if made pursuant to a warrant issued upon probable cause, or n exigent circumstances upon probable cause alone. A search or seizure s lawful, and the evidence obtained directly or indirectly therefrom dmissible, only if made pursuant to a warrant or incident to a lawful rrest or "stop and frisk". These propositions, however, only state the onclusions the judge must reach, and the content of the notion of robable cause is difficult to define. In Spinelli v. United States, 93 U.S. 410 (1969), the Supreme Court said:

> "...[W]e do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, and that their determinations of probable cause should be paid great deference by reviewing courts." 393 U.S. at 419.

et in that case the Court reversed defendant's conviction on the ground hat the search warrant which produced evidence necessary to the conviction as not supported by probable cause where the reliability of the police nformant was not documented and the recitation of the informant's "tip" id not contain a sufficient statement of the underlying circumstances from hich the informant concluded that defendant was engaged in illegal acts.

Particularly difficult problems come in connection with determining he area and extent of permissible search after arrest, which is limited by the circumstances which render the arrest permissible. or example, it is reasonable that a police officer in a "stop-and-risk" case be permitted a protective search for weapons within the uspect's reach, Terry v. Ohio, 392 U.S. 1 (1968), but he may not place is hands in a suspect's pockets to discover narcotics. Sibron v. New

York, 392 U.S. 40 (1968). In the case of a lawful, full custody arrest it is reasonable for the officer to search the whole person of the defendant even if the arrest is for a traffic violation, regarding which obviously no further evidence can be found on the person. United States v. Robinson, 414 U.S. 218 (1973). Yet it is not reasonable for officers having an arrest warrant but no search warrant to search any room other than in which the arrest occurs, or even to search desk drawers or other closed or concealed areas in that room. Chimel v. California, 395 U.S. 752 (1969). A search may be justified by consent, even that of a third party, if the circumstances indicate defendant's understanding that the third party might so allow. Cf. Stoner v. California, 376 U.S. 483 (1964)(hotel clerk cannot consent to search of guest's hotel room); Frazier v. Cupp, 394 U.S. 731 (1969) (cousin can consent to search duffle bag shared with defendant). Such distinctions are merely the outer constitutional limits which themselves are evolving as the Supreme Court enunciates Fourth Amendment doctrine. The reasonableness of arrest or search in the multitude of cases is a trial judge decision requiring rigorous exercise of judicial common sense.

BAIL

The Federal policy with respect to bail, as embodied in the Bail Reform Act of 1966, 18 U.S.C. §3146 et seq., is one of maximum release with minimum financial and nonfinancial conditions. The presumption of the defendant's innocence, the equal protection consideration concerning indigent defendants, the hardship incarceration imposes on defendant and his family, and crowded court dockets resulting in delay of trial, all justify this statutory policy. The common lack of information bearing on the likelihood of the defendant's appearance at trial if released nevertheless renders a judge's bail decision troubling:

> "On the one hand the defendant is now presumed to be entitled to release on personal bond, unless factors appear which reasonably suggest that such a procedure would not assure the appearance of the accused at trial. On the other hand, the burden is placed on the Court to justify any condition other than personal bond. In order to do this, the Court must point to reasons which it acts, but because [reports from bail agencies, prosecutors and defense counsel often provide little information] the Court is usually without sufficient information to make any informed decision, or to point to reasons for denying personal bond. The less the Judge knows about a defendant, the higher the risk in placing him on personal bond. Yet, the less the Judge knows, the more difficult it is to justify any condition other than personal bond." United States v. Penn, 2 Crim. L. Rptr. 3139 (D.C. Ct. Gen. Sess. 1968).

Another pressure upon the judge's bail decision is the perceived need to protect the community from the defendant likely to commit a dangerous crime, intimidate witnesses or tamper with evidence if released pending trial. While the Federal and common law theory of bail precludes taking this factor into account, it has long been clear that judges use high bail to "preventively detain" such defendants. The District of Columbia has a preventive detention statute designed to make this practice open and controllable. The constitutionality of this statute has been sustained as applied to the situation of a defendant with a record of assaultive offenses shown to have threatened witnesses. T.E. Blunt v. United States, 322 A. 2d 570 (D.C. App. 1974).

RIGHT TO COUNSEL

In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that the States were required by the Due Process Clause of the Fourteenth Amendment to furnish counsel to all indigent defendants charged with felonies. Since that time, the right to counsel has been extended and retrenched into a complicated doctrine that calls for appointment of an attorney at any "critical stage of the prosecution," including

custodial interrogation, arraignment, preliminary hearing, sentencing, hearing, deferred sentencing hearing, probation and parole revocation hearings. One of the most difficult problems raised for the trial judge is the application of the related constitutional rule excluding the use any evidence gained by the prosecution in violation of this right. Since the Court's decision in Kirby v. Illinois, 406 U.S. 682 (1972), a trial judge must apply the exclusionary rule to evidence deriving fro line-up or other identification of the accused in the absence of counsel after prosecution has been initiated by a formal charge or indictment, but not to identification evidence gained before that time. In the lat circumstance, the trial court must perform the problematic task of determining whether the identification was made under circumstances unnecessarily suggestive and conducive to irreparable mistake. In addition, the trial judge must exclude any evidence obtained in violati of defendant's privilege against compulsory self-incrimination during custodial interrogation in the absence of counsel, even if such arises before the prosecution is formally commenced.

Another problem facing trial judges with respect to the right to counsel concerns misdemeanor and petty offense cases not within Gideon v. Wainwright. In Argersinger v. Hamlin, 407 U.S. 25 (1972) the Court held that absent an intelligent waiver of his right, no defendant may be imprisoned for any offense unless he was represented b counsel at his trial. Many State petty offense statutes give the trial judge discretion to impose either fine or sentence. The Argersinger rule requires the judge to decide in advance of trial whether he will forego his discretion to impose some sentence, or whether he will appoint counsel.

PRE-TRIAL PUBLICITY

As Mr. Justice Holmes wrote, more than two generations ago:

> "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." Frank v. Magnum, 237 U.S. 309, 349 (1914).

Preservation of the impartiality of the jury is essential to effectuation of the Constitution's guarantee of a fair trial. It has ever been a simple task, but the problem of the "cause celebre" case as intensified with the advent in America of modern electronic communications.

The effect of publicity that arises during trial can be minimized y sequestering the jury, adopting strict rules for the use of the courtroom by newsmen, and other fairly straightforward devices. Curing he taint of pervasive pre-trial publicity is a much more vexing problem for the trial judge, because the opinion of the community from which the jury is chosen may already be set as to the defendant's guilt or innocence.

There are basically four steps a trial judge may take to remedy assive pre-trial publicity. First, he may allow defense counsel more than ormal latitude in the questioning of prospective jurors (voir dire), nd more liberally sustain challenges for cause. The judge may himself take an active role in voir dire. However, as the Supreme Court recognized in one of the many publicity cases of the 1960's, voir dire may not be adequate to protect the defendant because:

> "The influence that lurk s in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man... No doubt each juror was sincere when he said that he would be fair and impartial to [the defendant] but the psychological impact requiring such a declaration before one's fellows is often its father." Irvin v. Dowd , 366 U.S. 717 (1961).

Second, the trial judge may continue the case for a time in the hope that the effect of the prejudicial publicity will wane. However, the Sixth Amendment to the Constitution also guarantees the defendant a speedy trial. Thus, the Judge may put himself in the position of denying one constitutional right in the effort to afford another. Als in many notorietous cases, the publicity will inevitably be regenerate immediately before trial is to be held.

Third, the trial judge may order a change of venue to a court in a community less exposed to the publicity. Assuming the existence of a community, the move may still be ineffective because, as a trial jud ruled during one of the so-called Watergate cases:

> "The single way to create the most publicity is to take a case out of a big, major metropolitan area and transfe it to some backwoods town and then move into that town the national press and TV..." United States v. Chapin, Criminal No. 990-73 (D.D.C. 1974)(Gesell, J.).

Finally, the trial judge may decide that he must dismiss the cha against the defendant. This is much disfavored but in some cases when the prosecutors have helped to create the prejudical publicity, it may be the only thing the trial judge can do. United States v. Abbott Laboratories, 73 CR. 3897 (E.D.N.C. 1973).

In a society where the role of the media is as great as it is in America, the problem of prejudicial publicity will never be eliminated. The Supreme Court and appellate courts have made it clear that they wil measure what attempts the trial judge might have made to control its effects against what he did.

PLEA BARGAINING

Plea bargaining is a process of negotiating an agreement [illegible] the defendant enters a guilty plea in exchange for a reduced [illegible] commitment by the prosecutor to recommend a favorable [illegible] precise data is available, plea bargaining is certainly a phenomenon which American trial judges face very often. And while it has been vig critized on numerous grounds, plea bargaining continues to exist [illegible] "[t]here are simply not enough judges, prosecutors or defense coun to operate a system in which most defendants go to trial." Presid Commission on Law Enforcement and Administration of Justice, The Ame Report: The Courts 10 (1967).

By its very nature and because of the controversy that it creates, plea bargaining poses a delicate and uneasy situation for the judge. On the one hand, traditional considerations of judicial propriety and e authorities would have the judge completely detached from the negotiati For example, the American Bar Association Standards for Criminal Justic Standards Relating to Pleas of Guilty, Section 3.3(a) flatly state tha "the trial judge should not participate in the plea discussions." On the other, the case law requires the judge to determine whether the plea is a voluntary and intelligent choice by a defendant fully aware of the consequences. The trial judge's job is very difficult because he can get little information from the parties, who must represent that no promise or threat had induced the plea. The tension between the necessity to remain uninvolved and the responsibility to review the agreement is illustrated by Santobello v. New York, 401 U.S. 257,(1971)where the Supreme Court reversed a trial judge for failing to hold a new prosecutor to a commitment made by his predecessor. The decision whether to accept the negotiated plea is further complicated in the not uncommon instance

where the defendant pleads guilty on his attorney's advice that chances of acquittal are low, yet ardently protests his innocence. In North Carolina v. Alford, 400 U.S. 25 (1970), the Court upheld a denial of post-conviction relief by a trial judge who had accepted a plea under such circumstances, because the trial judge had held a hearing at which he reasonably determined that the State's evidence substantially negated defendant's claim of innocence.

JURY SELECTION : THE JUDGE'S ROLE

Supervising and controlling the selection of the jury is one of the trial judge's most fundamental responsibilities. The magnitude and complexity of this task have increased enormously in recent years with the utilization by defense counsel of computers and sophisticated psychological and sociological services designed to aid them in picking the most sympathetic panel.

The process by which jurors are questioned as to their qualification and impartiality is known as voir dire. In the Federal Courts, the judge may permit counsel to conduct the examination or he may conduct it himself, in which case he may allow counsel either to ask supplemental questions directly of the jury or to submit additional questions to be put to the jury by the judge. The judge must allow counsel an adequate opportunity to discover bases for challenge for cause (upon which the judge must rule, and which may be unlimited in number), and to gain knowledge enabling an intelligent exercise of peremptory challenges (a statutory privilege to cause a juror to be automatically excluded, limited in number). Undue restriction on counsel at this stage of the process might constitute a violation of the right to trial by jury and the right to effective assistance of counsel. On the other hand, the trial judge has an obligation to preclude counsel from abusing

the examination by prematurely beginning the battle of peremptories. The judge also has an obligation to curtail the delay that zealous counsel often cause by unnecessarily extended questioning.

One frequently occurring specific problem is the number of peremptory challenges to be allowed where several defendants are joined for trial. In Federal courts and in many States, all defendants must share the prescribed number of peremptory challenges, and the judge is given discretion to allow additional challenges to be exercised separately or jointly. Since defendants may well have different or even antagonistic interests in the composition of the jury, the exercise of this discretion by the judge is an important and delicate task.

TRIAL

One of the knottiest problems for a trial judge is that the lay jury often cannot reasonably be expected to understand and implement complicated legal doctrine requiring it to consider evidence for one purpose but to disregard it for another. One specific aspect of this is the situation presented in Bruton v. United States, 391 U.S. 123 (1968), where two defendants were joined for trial, the co-defendant had before trial made an oral confession which inplicated the defendant, and the co-defendant exercised his Fifth Amendment right not to testify at trial. The trial judge admitted testimony as to the co-defendant's confession, instructing the jury that it might be considered in determining the co-defendant's but not defendant's guilt or innocence. The jury convicted defendant but the Supreme Court reversed, holding that the encroachment of defendant's vital right to confront the witness against him was not mitigated by the judge's instruction because the jury could not be expected to "perform the overwhelming task...of segregat[ing] evidence into separate intellectual boxes." 391 U.S. at 131. The trial judge

now has essentially three options in this situation. He should require the prosecutor to elect between a joint trial at which the co-defendant's statement will not be admitted, a joint trial at which the statement will be admitted only after all references to the implicated defendant are deleted, or severed trials for the defendants. American Bar Association Project on Standards for Criminal Justice, Standards Relating to Joinder and Severance, §2.3 (a).

Another case of particularly difficult decision for the trial judge is that in which the defendant asserts insanity. The courts have been struggling for years to frame a workable definition, in part because the professional psychiatric community has never been able to fully agree on what it is. The insanity trial most frequently involves complex and conflicting expert testimony expressed in medical jargon incomprehensible to the jury (and often the judge). The judge must be careful to ensure that the expert testify to his observations about the accused's mental state, rather than just his conclusions, lest the jury abdicate its function as the trier of fact. Often the facts relating to defendant's commission of the illegal acts charged get lost in the jury's deliberations of defendant's legal responsibility for them if committed. One device which a trial judge in the Federal and some State courts may employ to preclude this problem is bifurcation - first a trial on objective guilt or innocence, then if defendant is found guilty a second trial on criminal responsibility.

Bifurcation may also be useful in those situations where the jury not only determines the issue of guilt or innocence but also passes sentence. In this way, a defendant may be afforded his Fifth Amendment right not to incriminate himself and yet be allowed to take the witness stand to be heard on the matter of punishment. The Supreme Court has left this question to the States. McGautha v. California, 402 U.S. 183 (1971).

A sensitive and important problem is posed by the fact that in the federal and some State courts the trial judge may take the case from the jury by deciding upon defendant's motion, after the evidence on either side is closed, that the prosecution has failed to prove an element of a crime necessary to sustain a conviction. In Jackson v. United States, 250 F. 2d 897, 901 (5th Cir. 1958), the Court held that if a defendant moves for acquittal at the end of the government's case, he should have the benefit of a ruling on that motion before deciding whether or not to present evidence on his own behalf. Many judges prefer not to grant such motions at that stage of the proceedings because evidence damaging to defendant may come out during presentation of defendant's case. Many judges also prefer to defer ruling on motions for acquittal made at the close of the evidence until the jury has returned its verdict, because if the jury finds the defendant innocent, there is no need for the judge to rule on the motion.

A problem which came to the forefront during the 1960's is that of the disruptive defendant or defense attorney. The trial judge has the obligation to use his judicial power to prevent distractions and disruptions of the trial. If the defendant's conduct is such that the trial cannot proceed in an orderly manner, he may be removed from the courtroom and the trial continued in his absence. Illinois v. Allen, 397 U.S. 337 (1970). If an attorney obstructs the trial, he is subject to a range of penalties including censure or reprimand, removal from the courtroom, suspension from practice in the court where the misconduct occurs, and contempt. Inherent power to punish summarily contempt committed in the presence of the court is well-established. Ex parte Terry, 128 U.S. 289 (1888); Cooke v. United States, 267 U.S. 517 (1925). However, the use of an inappropriately severe sanction may only increase the likelihood of exacerbated disruption of the trial. The judge may best reduce the

possibility of disruption by articulating in advance the special r
to be followed in his courtroom either routinely or for the partic
case, United States v. Barcella , 432 F. 2d 570, 572 (1st Cir. 19
and then imposing the least severe sanction necessary to correc
abuse and deter its recurrance. Sacher v. United States, 343 U.S.
(1952).

PRE-SENTENCE PROCEDURES

In the Federal courts and in most States pre-sentence report
be furnished to the judge by the probation or social services depa
of the court. As these departments are often overworked , underpai
and sometimes untrained, pre-sentence reports may be of uneven qual
and usefulness. Thus, the judge frequently lacks adequate factual
material to guide his discretion in imposing sentence, especially w
defendant's entry of a guilty plea precludes the development of a t
record or full utilization of discovery procedures.

Recent Federal litigation has reaffirmed that a trial judge
neither abuses his discretion nor violates defendant's Sixth Amen
rights in refusing to disclose the pre-sentence report or hold a h
on the contents thereof. United States v. Dockery , 447 F. 2d 117
145 U.S. App. D.C. 9 (1971); cert. denied 404 U.S. 950 (1970). Th
founded on the rationale that full disclosure and hearing would ca
inordinate delay in the sentencing process and tend to "dry up" va
sources of information for pre-sentence reports. On the other han
many agree with the statement of one Federal District Judge that:

> "Despite the latitude permitted by the Due Process Clause, a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it." Wyzanski, J., Comment, 65 Harv. L. Rev.

veral State courts have held that defendants are entitled to
sclosure of the pre-sentence report and hearing on any adverse material
levant to sentencing. See, e.g., State v. Kunz, 55 N.J., 128, 259
2d 895 (1969).

SENTENCING

Sentencing is one of the fastest-changing areas in American law.
sentencing statutes prescribing low minimum and high maximum terms,
d by an extremely narrow scope of appellate review, the trial judge
s heretofore been accorded almost unlimited discretion in order to
rther the objective of individualized justice in sentencing. Recent
tigation, however, demonstrates greatly expanded parameters of
pellate review, focusing on problems of sentence disparity and on what
idence may properly be considered by the trial judge in reaching a
ntence determination. The trial judge is caught in the vortex because
st statutes still leave him great latitude and enumerate few factors
guide the exercise of his discretion.

In United States v. Wiley, 278 F. 2d 500 (7th Cir. 1960) a trial judge
s reversed for candidly stating that he was imposing a more severe
ntence because the defendant had stood trial rather than pleading guilty.
e question of the propriety of this criterion is still very much alive
cause it is only the other side of the coin from the accepted proposition
at the entrant of a guilty plea shows penitence justifying lenient
eatment.

It has long been the general rule that the severity of sentence
posed by a trial court is not subject to appellate modification where the
ntence is within the legislative limits. Yet, in United States v.
niels , 446 F. 2d 967 (6th Cir. 1971), a trial judge was reversed where

he meted out the maximum punishment to a military draft evader because he stated that he thought it an egregious offense and uniformly gave the longest authorized term. Many trial judges have consistent sentencing policies for certain types of offenses; for example refusing to impose prison terms on first-time drug offenders, prostitutes, or homosexuals. Such policies would also appear to be condemned by the appellate court's rationale, which is that the sentencing judge must consider all of the mitigating and aggravating circumstances in each case.

A most difficult problem is whether evidence excluded at trial because illegally obtained may nevertheless be considered by the judge in passing sentence. In Verdugo v. United States, 402 F. 2d 599 (9th Cir. 1968), the Court of Appeals remanded for resentencing because the trial judge relied upon a pre-sentence report which was based on illegally obtained evidence. In United States v. Shipani, 315 F. Supp. 253 (E.D.N.Y. 1970), aff'd 435 F. 2d 26 (2d Cir. 1970), cert. denied 401 U.S. 983 (1971), the trial judge's consideration of evidence was sustained where the objectives of the exclusionary rule were not deemed frustrated.

PRE-TRIAL DIVERSION

Pre-trial diversion - the voluntary channelling of defendants into rehabilitative programs prior to an adjudication of guilt - is a new and innovative device the results of which cannot yet be ascertained. The approach has been highly praised as a means of preventing the acquiring of a conviction record and stimulating the use of community "treatment" rather than incarceration. However, despite the fact that these programs are considered to be voluntary, the defendant does waive a degree of liberty for the government's qualified pledge to hold the prosecution in abeyance. Thus, there is a coercive nature to these programs that requires scrutiny by a judge similar in scope to the review of a plea bargain. In fact, the National Advisory Commission on Criminal Justice Standards and Goals, Working Papers For National Conference on Criminal Justice, Standards 2.2 (1973) provides that the court should approve a pre-trial diversion agreement only if it would be approved under the aplicable criteria if it were a negotiated plea of guilty. The difficult problems in this regard are discussed in the section of this paper on plea bargaining.

A basic element of these programs is prosecutorial power to cause the reinstatement of charges if he subsequently determines that conditions of the diversion have been violated, e.g. Supreme Court of Pennsylvania Rules of Criminal Procedure, Rule 184 (1972). The court is very likely to be faced with problems of missing witnesses and stale evidence, especially if the diversion agreement may be of several years duration, e.g. Id., Rule 182(b).

PROBATION

The sentencing alternative of probation rests on the premise that an offender is more likely to be made capable of living a law-abiding life in the community if he is dealt with in the community rather than exiled to confinement in an institution. Many authorities recommend the use of probation in all but the most dangerous and serious offenses, and recommend the great increase in probation services staff and organization that would be required to accommodate the change. However, it has been and remains true that:

> "Too often a sentencing judge is faced with the Hobson's choice of a sentence to an overcrowded prison that is almost a guarantee that the defendant will emerge a more dangerous man than when he entered or a sentence to an essentially unsupervised probation that is little more than a release of the defendant without sanction, as well as without incentive to avoid the commission of a new offense." American Bar Association Project on Standards for Criminal Justice,

Standards Relating to Probation, 2 (1970).

Much of the success of probation depends upon, and much of the difficulty of the trial judge's task relates to, the formulation of conditions of probation. To be effective, such conditions must be precisely drawn and founded upon a detailed knowledge of the offende background which is often unavailable to the judge. Recent litigati has seen many probation conditions declared invalid by appellate co on constitutional and reasonableness grounds.

JUVENILE JUSTICE

The character of the juvenile justice system has in the last decade undergone a profound change. The original concept in the establishment of separate juvenile courts was that children had to k protected from the harshness of adult criminal courts and penal institutions, and that the emphasis should be on rehabilitation and ment rather than on guilt or innocence. It was thought that the ful process protections afforded adult criminal defendants would be dysfunctional to these objectives, and that they should be supplant by a juvenile judge sitting as a wise and benevolent parent to do t which the child offender's natural parents ought to have done.

In the late 1960's, the Supreme Court issued several decisions which have caused a revolution in this concept and a role-change fo the juvenile court judge. These decisions were founded on the perc that the development of adequate rehabilatative resources had not k pace with the need, and that as a consequence:

> "There may be grounds for concern that the child recei the worst of both worlds, that he gets neither the pro accorded to adults nor the solicitous care and regener treatment postulated for children." Kent v. United St 383 U.S. 541, 556 (1966).

In Re Gault, 387 U.S. 1 (1967), the Court held that the Due Process ause of the Fourteenth Amendment does apply to state juvenile court oceedings, and mandates fair notice of charges with adequate time prepare the defense, the right to counsel, the right to confront and ross-examine witnesses and the right to protection against self- crimination. In In the Matter of Samuel Winship, 397 U.S. 358 (1969), he court rejected the argument that juvenile proceedings were essentially ivil rather than criminal, and held that proof beyond a reasonable doubt s necessary when a juvenile is charged with an act which would constitute crime if committed by an adult.

As one juvenile court judge puts it, these developments have ostered a legitimate polarization of philosophies and approaches hat requires a posture from each juvenile court judge on constitutional sense. Garff, J., Handbook for New Juvenile Court Judges, 23, 25 (1972). e may apply these decisions strictly within the confines of the Supreme ourt language and continue to accept the basic tenets of parens patriae, r read into them many broad constitutional implications and the necessity o afford the full range of legal trappings applied in adult criminal rials. One area of particular controversy is the efficacy of jury rials, a question the Supreme Court has left to States.

A 1973 survey of all American judges with juvenile jurisdiction hows that they consider their number one problem to be inadequate acilities for detention pending trial. Other heavily mentioned reas of difficulty were the uncertainty about procedural requirements iscussed above, excessive judicial workloads, and insufficient probation r social service staff. K. Smith, A Profile of Juvenile Court Judges n the United States, Reprinted from Juvenile Justice, Vol. 25, No. 2 t 36 (August, 1974).

HABEAS CORPUS

The writ of Habeas Corpus, traditionally a vehicle for prisoners to challenge the validity and constitutionality of their underlying convictions, has expanded in recent years to include challenges to th constitutionality of prison discipline and conditions and the due pro afforded to prison discipline. The original "hands-off" doctrine which reasoned that courts were without power to supervise prison administration or to interfere with the ordinary prison rules and regultions has been rejected in some cases in order to assure to prisoners their retention of all those rights of ordinary citizens which have not been expressly or by negative implication, taken from them by law. Thus, in Johnson v. Avery , 393 U.S. 483 (1969) the Cou invalidated a prison regulation that prohibited prisoner assistance in the preparation of Habeas Corpus petitions, pursuant to which the petitioner had been confined to maximum security. Other areas of ju concern have centered on prisoner's freedom of religion and freedom f cruel and unusual punishment and racial discrimination. Chief among problems presented by these petitions is fashioning relief which is feasible and practical since the State should not be precluded, by re of an unrealistic court order from confining dangerous prisoners.

The resulting tide of Habeas Corpus petitions, while stemmed somewhat by a stiffening of procedural requirements in Preiser v. Rodriquez , 411 U.S. 475 (1973) has nevertheless, focused upon the judiciary the competing demands of today's penal system. The Court must balance the rights asserted by the prisoner against the needs of the prison and the exigencies of prison life. In addition the tradit presumption of validity which attaches to the expertise of prison

onstitutional rights.

WORK PAPER
ON
WORLD IMPLEMENTATION OF THE UNITED NATIONS STANDARD MINIMUM RULES FOR TREATMENT OF PRISONERS

By
Daniel L. Skoler

WORLD IMPLEMENTATION OF THE UNITED NATIONS STANDARD MINIMUM RULES FOR TREATMENT OF PRISONERS

by

Daniel L. Skoler*

The primary contribution of the United Nations to the cause of world penal system guidance and improvement has been the Standard Minimum Rules for Treatment of Prisoners, a set of precepts now 20 years old and with an interesting and not unproductive history of impact and influence. Indeed, since comparable rules or standards have not been enunciated by the United Nations to guide the operation of law enforcement agencies, the criminal courts or the prosecution and defense of accused offenders, it may be said that the Standard Minimum Rules constitute the UN's major standard-setting effort in the broad area of criminal justice administration.[1] As such, the Rules, their evolution and the extent of world implementation merit attention by those concerned with the "social defense" function and the advantages and limits of United Nations leadership in enunciating international norms for more effective methods of crime prevention and offender treatment. It is the purpose of this article to undertake such a review. In so doing, discussion and analysis will focus on four areas, i.e., (i) the background and adoptive history of the Rules within the UN structure, (ii) the extent of formal incorporation of the Rules or their substance in the correctional or penal codes and regulations of member nations, (iii) the extent of world implementation of the Rules in the actual administration of prisons and correctional systems, and (iv) the various national mechanisms and remedies which are currently evolving or in use to enforce the Rules or similar guaranties and codes of offender treatment.

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Prisons and prisoners have always been a sensitive area in society's efforts to maintain the rule of law. One need not share the pessimism of a George Bernard Shaw about the impossibility of prison reform, or the assessment of a Dostoyevsky that prisoner treatment is the ultimate test of a nation's humanity, to appreciate the boldness of the United Nations' initiative that led to issuance of the Rules. If the 20-year record unfolded in this analysis is less than startling in terms of achievement, speed, and international acceptance, this must be measured against a history of changing correctional thought and experience which not only confirms the difficulty of establishing humane and effective prison systems but today challenges the social utility of the prison itself.

I. Background, Adoption and Legal Status of the Rules

Adoption of the Rules

The Standard Minimum Rules for Treatment of Offenders were brought into existence as a set of international standards when approved and commended to the United Nations in 1955 by the First UN Congress on Prevention of Crime and Treatment of Offenders.[2] The new code had its roots in an earlier formulation of prison reform principles by the International Penal and Penitentiary Commission (promulgated in 1926 and subsequently revised in 1933 and 1951). It was only two years after the First Congress action that the UN Economic and Social Council approved the Standard Rules in August of 1957.[3] This action was subsequently endorsed by the General Assembly of the United Nations in two resolutions (1971 and 1973) recommending implementation and adoption of the Rules by member states.[4]

Through these policy actions, the United Nations placed its leadership and influence behind the rules as a body of doctrine representing "as a whole, the minimum conditions which are accepted as suitable by the United Nations" in the management, custody and treatment of offenders, and explicitly called upon the world's governments to give favorable consideration to the adoption of the Rules and their application in the administration of penal institutions.

Content and Scope

The Rules themselves consist of ninety-four individual statements of minimum corrections practice broadly covering such areas as medical care,

education and recreation, physical conditions of confinement, discipline and punishment, separation of categories of prisoners, prisoner complaints, treatment programs and concepts, and institutional personnel. They are amplified by special annexes on "Selection and Training of Personnel" and "Open Penal and Correctional Institutions" adopted concurrently with the Standard Minimum Rules.[5] The Rules format is divided into 30 groupings based on general subject matter and two major parts, one covering matters of general application and the other applicable to "special categories" (most content of which is directed to prisoners under sentence with shorter groupings for mentally disturbed prisoners, and prisoners awaiting trial).[6] The Rules do not purport to regulate management of juvenile institutions but are considered generally applicable in this area.[7]

As world awareness of correctional needs and problems has intensified, the Rules have been increasingly recognized as a generally acceptable body of basic minimal requirements. The Rules, for example, call for individual cell occupancy with adequate space and ventilation (Rule 9); clean and proper bedding, clothing and personal hygiene facilities (Rules 15-19); daily exercise (Rule 21); entry medical examinations and qualified medical and dental services at every institution (Rules 22); banning of corporal punishments and "cruel, inhuman and degrading punishments" (Rule 31); notice of offense, thorough investigation, and opportunity to present the inmate's contentions in all disciplinary proceedings (Rule 32); guaranty of right to make complaints, without censorship, to the central prison administration, judicial authority, or other proper authorities (Rule 36); non-discrimination on grounds of race, color, sex, language, religion or political belief in prisoner management (Rule 6); recognition of right to religious belief and practice (or non-participation in religious activity) (Rule 41); regular inspections of penal institutions and their operation (Rule 55); provision of aftercare services to assist in community reintegration (Rule 81); and general principles which prefer open institutions over secure institutions, seek to minimize differences between prison life and life at liberty which lessen responsibility or individual dignity, emphasize continuing community linkages, and safeguard civil rights and privileges of offenders (Rules 56-64).

From their very inception, the Rules enjoyed significant attention, particularly among the world criminological and prison administration community. That interest appears to have both broadened and expanded in recent years. The Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders (Kyoto, 1970) recommended, among other things, that the United Nations social defense program be given appropriate means to undertake research on implementation and to develop technical assistance for the promotion of the Rules, and that a special working group be set up to evaluate the international needs and future actions for encouraging implementation of the Rules. The Working Group of Experts was indeed established and has met on two occasions (New York in 1972 and Columbus, Ohio in 1974) and the "implementation research" mandate is reflected in the UN Secretariat's 1974 questionnaire survey in preparation for the Fifth Congress (Toronto, 1975).*

* The site of the Fifth Congress was changed to Geneva at a late date, after the Canadian Government and the UN were unable to arrive at a mutually acceptable contract on hosting the meeting.

Legal Status of the Rules

When approved by the Economic and Social Council in 1957, the Standard Minimum Rules became an officially endorsed set of minimum standards of the United Nations. The Council resolution called the attention of member governments to the Rules and recommended that (i) favorable consideration be given to their adoption and application in the administration of penal institutions (ii) governments arrange for the widest possible publicity for the Rules and (iii) the Secretary General review progress every 5 years in application of the Rules. The Rules remained in this status amid increasing concern that such sanction was insufficient to invest the Rules with the full legal status they merited. Indeed, in the fifteen years following adoption of the Rules, the General Assembly itself never took the occasion to affirm the rules or endorse the action of the Economic and Social Council. Accordingly, at the 1970 Fourth UN Congress in Kyoto, there was a full discussion of this matter under the agenda item entitled "The Standard Minimum Rules for the Treatment of Offenders in Light of Recent Developments in the International Field." [8]

The working paper of the Fourth Congress on the Standard Minimum Rules pointed out that as guidelines, the Rules depended for their effect upon incorporation in national and local law and regulations. The paper identified some dissatisfaction and concern with the fact that the Rules did not have the status of an international convention which, when adopted, would be obligatory on suscribing nations. Reference was made to the fact that in the past two decades, more than 20 international conventions in different areas of human rights had been concluded within the community of nations [9] and the Rules might well be considered for addition to this group. On the other hand, there was ambivalence about whether more formal status in international law would best achieve the end goal of the Rules -- actual adoption and recognition in the penal laws of member governments.

The 1970 Congress dealt with this dilemma by mandating further study of the problem and authorizing the establishment of a working group of experts to consider, among other things, the desirability of a reorganization of the Standard Minimum Rules to include a refined statement of basic principles "which might form an international convention."[10] The Fourth Congress did, however, take a positive and useful action in recommending that the General Assembly itself "should adopt a resolution approving the Standard Minimum Rules and recommending their implementation to member states." This was in fact responded to with reasonable promptness in two General Assembly resolutions (although it has been observed that neither amounts to a clear "adoption" of the Rules). In 1971 the General Assembly explicitly invited the attention of member states to the Standard Minimum Rules and recommended

> ". . . that they shall be effectively implemented in the administration of penal and correctional institutions and that favorable consideration shall be given to their incorporation in national legislation." [Resolution 2858 (XXVI)][11]

In 1973, having received the report of the Working Group of Experts authorized at the Fourth Congress and expressing its continuing concern and interest, the General Assembly recommended

> ". . . that Member States should make all possible efforts to implement the Standard Minimum Rules for the Treatment of Offenders in the administration of penal and correctional institutions and take the Rules into account in the framing of national legislation." [Resolution 3144 (XXVIII)][12]

For the time being, any move to either amend and reorganize the Rules or to seek their incorporation in an international convention appears to have been abandoned. The working group of experts appointed after the 1970 Congress reached the conclusion that this would not be the most productive avenue of action, advocating such practical action as wider dissemination of the Rules; development of commentaries, an introduction to the Rules and easily understandable brochures; continuing studies, research and data collection on implementation; regional and interregional seminars; and close cooperation with the overall UN program of human rights enforcement.[13] This action was seconded by the Economic and Social Council through its Committee on Crime Prevention and Control which

> . . . endorsed the Working Group's recommendations that there should be no convention on or any substantive change in the Rules for the time being and that attention should be given to their presentation and implementation."[14]

Thus, the Rules stand today as a set of United Nations guidelines that has received highest endorsement from the governing United Nations . . . has not been incorporated in any kind of international legal convention. It appears that this status and approach will continue to be the framework for continuing efforts to secure world adherence and national penal code adoption of the Rules along with any amendments or expansions of their scope.

II. Formal Incorporation in National Legislation and Administrative Regulations

The Limited Progress to Date

A major goal in formulating and approving the Standard Minimum Rules was to encourage their enactment (explicitly or in substance) in national penal codes. However, the record of actual incorporation of the Standard Minimum Rules in legislation and administrative regulations is hazy, not well documented, and largely disappointing. It is true that the Rules were not cast in "model penal code" form and this was probably sound in terms of the broad diversity of code structure, relative stage of penal development, and legislative/regulatory division of responsibility in different countries. However, UN data collection efforts appear to have yielded not much more than enthusiastic but vague declarations that the Standard Minimum Rules had "influenced" recent code enactments -- and this from only a minority of states surveyed. Indeed, one commentator concluded in a 1973 publication, reflecting on the unwillingness or inability of most governments to fully adopt the Rules, that

> "After almost 20 years, they are satisfactorily applied in less than 10 countries."[15]

Since adoption of the Standard Minimum Rules, the United Nations has conducted two surveys as to the extent of their implementation by member states and each specifically inquired concerning the degree to which the Rules have been incorporated in or have influenced national and local legislation. The first was in 1967 (preliminary to the Fourth Congress)[16] some 12 years after initial promulgation and the second in 1974 (preliminary to the Fifth Congress).[17] In the 1967 survey, 15 of 43 responding nations

indicated that new prison laws or regulations enacted since inception of the Rules in 1955 had actually "been influenced" by the Rules. Based on documentary or textual support of their assertions, it appears that perhaps half of this group (6-8 nations) could demonstrate a clear linkage with and substantial incorporation of the Rules or significant parts thereof[18] in a new law or regulation. Thus, the 1958 National Prison Law in Argentina and 1967 Federal Prison Service Law expressly cite the Rules in their preamble as principles taken into account in their respective formulations. In Chile, the Regulation on Fundamental Standards for the Application of a National Prison Policy, signed in 1965, state that the Standard Minimum Rules have sufficient validity to justify their entire embodiment in Chilean juridical standards. The revised and consolidated French Code of Criminal Procedure (1957) recited that its chapter on procedures for execution of penalties was broadly inspired by the Standard Minimum Rules and South Africa not only indicated that its revised Prisons Act (1959) and Prison Regulations (1965) were based on or taken from the Standard Minimum Rules, but were so drafted as to reflect the format of the Rules.[19] Several [illegible] reported that many of the Rules were taken into account in new revisions but it has been difficult to measure the exact extent of conformity in many of these cases and no analysis of this kind has yet appeared under United Nations or other criminological research auspices.

This ambivalence and uncertainty about the actual influence of the Rules on new penal legislation and directives was compounded in the 1974 survey. Here, after nearly 20 years of the Rules' presence, a great majority of the 62 responding countries "affirmed that both the prevailing prison

laws and the executive regulations had been influenced by the Rules." However, explanatory commentary was largely barren in the citation of actual instances or circumstances of adoption or inclusion (perhaps a fault of the questionnaire format) and only one country, Israel, expressly reported that parts of its prison regulations are a literal translation of the Standard Minimum Rules (again without illustrative commentary).[20] Observation and analysis of responses from correctional systems in the 50 states of the United States show a strong tendency to cite the Rules as an influence in prevailing legislation simply because they match the spirit and content of local legislation even where it was clear that there was no direct influence in the enactment of correctional codes. Thus, a third of the states in the United States reported such a legislative connection where it was evident that in many instances there was ignorance of the content (or even existence) of the Rules as such and the response was meant to indicate that local legislation in fact embodied much of the Rules' content.[21]

The Move Toward Explicit Adoption by Correctional Systems in the United States.

In 1971, representing a unique step within the American correctional systems, the Standard Minimum Rules were explicitly adopted as a "Bill of Rights" for prisoners in state institutions in Pennsylvania and then promulgated as an Administrative Directive by the State's Bureau of Corrections (No. 13C-ADM-001). This step attracted some immediate national publicity but little else was heard from the Pennsylvania action until late 1974 when a group of pioneering states -- possibly stimulated by the 1974 survey, the coming Fifth Congress (first on the North American continent)*

* As noted on page 5, the Congress site was ultimately changed from Toronto to Geneva.

and the joint advocacy of several national organizations concerned with correctional reform--proceeded to formally adopt and endorse the Rules for their state correctional systems. Such action has thus far been taken by five states in addition to Pennsylvania.

Executive Orders adopting the Rules have been signed by the Governors of South Carolina (November, 1974), Ohio (November, 1974), and Minnesota (December, 1974). In Connecticut, the Rules were adopted by the Council of Corrections and then incorporated as a preamble to the Administrative Directives of the Department of Corrections (November, 1974). In Illinois (where the least formal action was taken), the State Director of Corrections simply announced adoption of the Rules by the Adult Division of the Department of Corrections through a general office memorandum to all wardens (November, 1974).[22] The executive orders and directives issued thus far are excellent models which other states can apply to their respective situations and needs. These show how appropriate exceptions (which may be politically expedient) can be added without sacrificing the spirit and impact of a general adoption [illegible] of the Rules. For example, in South Carolina the executive order adopts and calls for implementation of the Rules to the extent they "do not conflict with the Constitution or laws of the state." In Connecticut, the directive is footnoted to except three situations where full compliance is not possible or appropriate (free use of detained person's own doctor, temporary overcrowding in one jail pending new construction, etc.). In Minnesota, the executive order adopts the philosophy, principle and purpose of the Rules and directs the Department of Corrections in execution of its duties to "adhere to and pursue their spirit and intent."

The group of U.S. states that have recently adopted the Rules involve systems dealing with perhaps 20% of the nation's prison population. It is believed that important state systems felt free to take the "executive regulation" approach and express their commitment to the international norms of the Rules for two reasons: (i) the Secretary General's 1974 survey revealed to such states that they are already in compliance with most of the rules and that the Rules remain a vital and viable force, and (ii) since the Rules were at least consistent with, if not fully covered by, present legislation and directives, it appeared that adoption could be achieved without the difficulty and trouble of new legislation or extensive revision of existing prison regulations.

Rules Reformulation by the Council of Europe

While in no sense to be considered comparable to national legislative enactments, an interesting development from Europe merits attention. This is the recent updating and revision of the Rules by the Council of Europe to better adapt them to the European framework and to the new needs and insights of modern correctional policy. The Council's Standard Minimum Rules (herein called the "European Rules") were officially adopted by the Council of Europe through its Committee of Ministers in January of 1973. The adopting resolution[23] recommends that member governments "be guided in their internal legislation and practice" by the European Rules with a view toward their "progressive implementation."

Ever since the inception of the Standard Minimum Rules and particularly after the first decade of their promulgation, there has been debate and concern about aspects of the Rules deemed "outmoded" and whether the Rules

should be amended to reflect modern trends, refinements, and knowledge in correctional practice. This has been a major issue for the UN Crime Congresses, the expert groups and policy committees convened to consider the Rules, and the UN Secretariat. In virtually all "confrontations" on the subject thus far, the responsible parties have avoided amendatory action or recommendations, motivated, it is believed, not only by belief in the general and continuing soundness and flexibility of the Rules but by a fear that amendment or reformulation would divide member states, perhaps produce irreconcilable disagreement, and thereby fail to achieve the impressive world consensus that permitted initial adoption of the Rules.[24] Against this backdrop, the action of the Council of Europe may justly be viewed as a bold and imaginative venture whose success has provided the kind of regional "legislation" or "guidelines" that cannot help but enhance further incorporation of the Rules (i.e., the European Rules) in the penal codes of Council states.

The European Rules involve numerous amendments and refinements to the Standard Minimum Rules, ranging from single word substitutions to [illegible] new provisions, all apparently developed with great care. Nonetheless, the basic wording and format of the Rules have been retained intact so that there is no doubt that the European Rules are an adaptation -- and they are easily recognizable as such. New provisions establish respect for human dignity as a basic principle of confinement (Rule 6), prohibit injurious medical or scientific experimentation with prisoners (Rule 22), proscribe "collective punishment" (Rule 27), call for more communication and cooperation between categories of staff in treatment of prisoners (Rule 51), and

require that prisoners be involved in the drawing up of their individual treatment programs (Rule 67). To the old rule on inspection of penal institutions (Rule 55) has been added a new measure providing for protection of prisoners rights through a control outside the prison administration (judicial authority or other duly constituted visiting body). Communication between prisoners and staff is to be facilitated to cope with tensions and insure prisoner acceptance of treatment programs (Rule 60). Thus, it can be seen that European Rules address some of the more sensitive issues of recent years. Elements of "obsolescence" are also dealt with, ranging from updating textural references on access to media from "wireless transmissions" to "radio or television," qualifying the older strict rules on separation of women and men and male/female staff (Rules 8 and 53) and abandoning the largely impractical privilege of untried prisoners bringing in food at their own expense (Rule 88).

There seem to be no plans for the Council of Europe to seek the "convention" status for the Rules that the United Nations has largely avoided. However, the Council of Europe has effectuated and is administering the European Convention on Human Rights,[25] regionally enforceable through the dual mechanisms of the European Commission on Human Rights and the European Court of Human Rights. Nearly half of all individual applications for protection or help thereunder emanate from detained or incarcerated persons. Thus, the Council is developing a substantial jurisprudence relating to the treatment of incarcerated individuals (see p. 30, infra) and, although keyed to specific guarantees of the Human Rights Convention (freedom of religion, correspondence, legal assistance, etc.), it may well be that the European

Rules will serve as at least a quasi-legal interpretation of the minimum demands and consensual meaning of provisions of the Convention dealing with related subject matters.

III. World Implementation of the Rules in Correctional Practice

United Nations Surveys

The 1967 and 1974 United Nations surveys, both included a rule-by-rule inquiry on the status of implementation. The object was to determine, regardless of legal status and statutory or regulatory prescription, the extent to which the Standard Minimum Rules were actually being followed in a given nation's correctional institutions.

The 1974 questionnaire was the most extensive, asking respondent nations to indicate, as to each of the 30 clusters into which the 88 substantive rules have been traditionally divided,[26] whether these were fully "implemented," "partially implemented," "recognized in principle" (although not implemented) or "not implemented." Some 62 member governments responded to the survey (approximately 45% of the total UN membership), thereby providing the most comprehensive review to date and a reasonably accurate picture, at least in terms of prison administration perceptions, of the status of world implementation of the Rules.

Regarding the de facto implementation of specific rules, the survey responses indicated that more than 70% of the total replies were in the "fully implemented" area. Nevertheless, it appeared that some of the most important Rules were being least effectively implemented. The chart on the opposite page offers a composite summary of the member state responses, based on 58 usable questionnaires from the 62 responding nations.[27] It will be noted that significantly less than full implementation was reported for the Rules on accommodation and living conditions (50%), separation of categories (62%), medical services (65%), discipline and punishment (65%), institutional

SUMMARY CHART*

RESPONSES OF MEMBER STATES TO RULE-BY-RULE SECTION OF 1976 UNITED NATIONS QUESTIONNAIRE ON IMPLEMENTATION OF THE STANDARD MINIMUM RULES FOR TREATMENT OF PRISONERS (59 NATIONS)**

	IMPLEMENTED	PARTIALLY IMPLEMENTED	RECOGNIZED IN PRINCIPLE	NOT IMPLEMENTED	NOT APPLICABLE	NO RESPONSE
RULES OF GENERAL APPLICATION						
Basic Principle (R. 6)	56	1	1			
Register (R. 7)	57	1				
Separate Categories (R. 8)	36	21		1		
Accommodations (Rs. 9-14)	29	23	6			
Personal Hygiene (Rs. 15-16)	53	4	1			
Clothing and Bedding (Rs. 17-19)	46	9	3			
Food (R. 20)	55	3				
Exercise and Sport (R. 21)	41	15	2			
Medical Services (Rs. 22-26)	38	19	1			
Discipline and Punishment (Rs. 27-32)	38	20				
Instruments of Restraint (Rs. 33-34)	57					1
Information and Complaints (Rs. 35-36)	46	10	2			
Contact with the Outside World (Rs. 37-39)	52	6				
Books (R. 40)	45	8	5			
Religion (Rs. 41-42)	45	5	3	4		1
Retention of Prisoner's Property (R. 45)	55	1	2			
Notification of Death, Illness, etc. (R. 44)	51	6		1		
Removal of Prisoners (R. 45)	53	4	1			
Institutional Personnel (Rs. 46-54)	32	23	3			
Inspection (R. 55)	48	6	1	2		1
RULES APPLICABLE TO SPECIAL CATEGORIES				-		
General Principles (Rs. 56-64)	33	18	7			
Treatment (Rs. 65-66)	40	14	4			
Classification and Individualization (Rs. 67-69)	34	19	5			
Privileges (R. 70)	45	8	2	2		1
Work (Rs. 71-76)	30	22	5			1
Education and Recreation (Rs. 77-78)	42	13	2	1		
Social Relations and After-Care (Rs. 79-81)	39	11	7	1		
Prisoners Under Insane and Abnormal Prisoners (Rs. 82-83)	43	10	5			
Prisoners Awaiting Trial (Rs. 84-93)	27	25	3	1	2	
Civil Prisoners (R. 94)	30	3	1		24	

**QUESTIONNAIRE RESPONDENTS

Australia	Fiji	Italy	Norway	Sweden
Bahrain	Finland	Jamaica	Pakistan	Syrian Arab Rep.
Belgium	France	Japan	Peru	Thailand
Bulgaria	German Rep.	Kenya	Philippines	Trinidad and Tobago
Byelorussian SSR	German Fed. Rep.	Kuwait	Poland	Turkey
Canada	Greece	Libyan Arab Rep.	Portugal	USSR
Chile	Guatemala	Luxembourg	Romania	Ukrainian SSR
Columbia	Haiti #	Malaysia #	Singapore	United Kingdom
Costa Rica	Hungary	Mauritius	Spain	United States
Cyprus	Iceland	Mexico #	Sri Lanka	Upper Volta #
Denmark	Iraq	Netherlands	Sudan	Yugoslavia
Egypt	Ireland	New Zealand	Swaziland	Zambia
	Israel			

#Responses not usable in tabulation.

*Derived from Annex I , Secretariat Working Paper on Fifth Congress Agenda Item 4, Document A/CONF. 56/6, at pp. 120-21 (1975).

personnel (55%), guiding principles for sentenced prisoners (57%), treatment (69%), classification and individualization (59%), work (52%) and prisoners awaiting trial (46%).[28] These "full implementation" figures are, indeed, probably overstated since based on the self-reported assessments of responding prison authorities rather than empirical observation of the actual conditions in prisons irrespective of announced law, regulation and policy of the central administration.

The Situation Today

What emerges then is a picture of spotty implementation, perhaps optimistic in terms of the true conditions, poor financing, and trained personnel shortages of most prison systems, but nevertheless showing a basic respect for and desire to adhere to the rules. It appears that the first section of the Rules (Part I, Rules of General Application) enjoys a fuller level of implementation than the second (Part II, Rules for Specific Categories) in virtually all countries.[29] Note should also be taken of several areas where non-implementation or partial implementation were the result of conscious policy and departure from the Rules rather than incapacity. For example, some Eastern European countries reported that the individual cell system had been abolished [advocated in Rule 9(1) and 86] in favor of the desirability, from a resocialization standpoint, of having several persons in one cell or dormitory (the latter being recognized by the UN Rules).[30] From this same area, doubts were expressed about the provision for appointment of religious representatives for prisoners (Rule 41) where official state policy prohibits governmental intervention or sanction of this kind.[31] Several nations indicated a conscious departure from the Rule permitting punishment by restricted diet when medically supervised (Rule 27) indicating that this mode of punishment is not recognized in any

circumstances. Departures from the Rule on separation of categories (Rule 8) were also not uncommon. For example, intermingling of juveniles with adults in special circumstances, bringing together youthful offenders and adults in prerelease activities, and joint treatment programs for inmates of both sexes were reported by several "advanced" countries as justifiable and in use.[32] In dealing with prisoners awaiting trial, many countries have felt the need to abandon or restrict the options (Rules 87 and 91) for inmates to procure food or use the services of personal doctors at their own expense.[33]

In terms of obstacles to fuller implementation of the Rules, the 1974 survey confirmed the same impediments that have been operative since initial adoption in 1955. These are not difficult to recognize and may be placed in four basic categories -- gaps in legislative authorization, inadequate financial resources, overcrowding and other shortages in accommodation capacity, and personnel problems (training, number, supervision and skills). The prospects for alleviation of these difficulties in a world of continuing financial stress, resource scarcity, and demand for expanding government services do not present an encouraging picture for the future. Indeed, it is encouraging to note the intensity of the continuing struggle for adherence to even the most basic principles of humane custody and treatment. On the one hand, there is the continued presence of severe overcrowding which taxes physical, treatment and moral capabilities to the utmost in prison administration. (This was a major feature in the low 50% compliance response for Rules 9-14 and prompted 20 countries to indicate the inability to comply in practice with the "separate room" 34 standard for pretrial prisoners under Rule 86.) But even where resources are not a significant factor, as in the

area of discipline and punishment, recent developments offer cause for pessimism.

The Rules have always included a clear prohibition against "cruel, inhuman and degrading punishment" for disciplinary action or offenses, including corporal punishment (Rule 31). This is perhaps the most basic "human rights" guarantee within the Rules charter, relating as it does to the inviolability of the individual's person and spirit. Yet, four nations openly admitted to use of corporal punishment for disciplinary offenses in the 1974 survey.[35] Even more disturbing have been other indications of the continuing vitality of cruel and inhuman treatment in detention institutions. In late 1974, reacting to reports of extreme and shocking abuses in the detention facilities of two nations, the UN General Assembly approved the "torture resolution" [No. 3218 (XXIX)]. This dealt with both police and penal practices and, in the latter area, expressly requested the coming Fifth UN Congress in its agenda item on the Standard Minimum Rules to include an elaboration of "rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman, or degrading punishment" and to report the results to the General Assembly's Thirtieth Session commencing in late 1975. Also, as late as the 1960's, judicial decisions in the United States were obliged to confront such cruel and inhuman conditions in the relatively sophisticated American penal system as "strip cells," extended solitary confinement, and official brutality.[36]

Rules Annex on Open Penal Institutions

Concurrent with its action on the Standard Minimum Rules, the United Nations Economic and Social Council also approved an annex to the Rules

containing Recommendations on Open Institutions.[37] Open institutions were defined as facilities "characterized by the absence of material or physical precautions against escape (such as walls, locks, bars, armed or other special security guards) and by a system based on self discipline and the inmate's sense of responsibility toward the group in which he lives." The nine recommendations presented endorsed the open institution "as an important step in the development of modern prison systems," recommended its extension, and offered a number of guidelines and principles for their successful administration. These were in addition to the Standard Minimum Rules, which by definition were to be applicable "to all categories of prisoners" (at least as to Part I), and therefore were also meant to govern open institutions.[38]

Unfortunately, UN Secretariat and other research efforts have never sought in any significant way to probe the extent of world compliance with the Open Institutions Annex and queries on this subject were not incorporated in the earlier UN surveys. It is true that the principles of the annex are frequently less specific and thus more difficult to measure in terms of implementation than most of the Rules. However, some of the Annex principles are sufficiently specific for survey investigation, e.g., whether institutions are independent institutions (Recommendation II), manner and criteria for selection of inmates (Recommendation IV), public cooperation, degree of geographic isolation, work programs, number of inmates (Recommendation VI). This gap in information on the utilization, characteristics and expansion of open institutions is particularly unfortunate in view of

the growing world interest in community corrections programs and community treatment alternatives and linkages.[39] It is to be hoped that the United Nations mandate for Rules data collection (also reflected in the Open Institutions Annex) will be translated into greater attention to the Annex in the future.

IV. National Mechanisms and Remedies for Enforcement of the Rules

As has been indicated, no international or multinational conventions or treaties exist to facilitate enforcement of the Standard Minimum Rules. In the same sense that the Rules depend on local law and regulation for enactment, reliance must be placed on the legal machinery of individual states for their enforcement when correctional and prison administrations fail to meet obligations in this area.

In the twenty years since adoption of the Rules, a number of national enforcement mechanisms and agencies have evolved or been adapted for assuring that prisoner guarantees and prison administration responsibilities toward inmates are, in fact, honored. These, of course, have rarely related to the Standard Minimum Rules as such but rather to the legislative and regulatory provisions of a particular government seeking to establish principles and rights similar to those embodied in the Rules. These arrangements have received too little study and attention in world efforts to improve penal administration. The specific approaches of a particular nation are not necessarily applicable to the needs of other nations, but a look at the varied systems offers insight into the several possibilities for development of viable enforcement machinery within different governmental systems. [39]

The United Nations Social Defense Research Institute in Rome ("UNSDRI") recently articulated the following prerequisites for effective protection of prisoners rights within governmental systems: (i) a detailed formal statement describing prisoner interests worthy of protection (including delineation of those peculiar to prison life), (ii) legal procedures readily accessible to prisoners, (iii) duly constituted and independent authorities (judicial or administrative) to carry out and apply the established procedures, and (iv) decisions that are really enforceable in view of traditional resistance of affected correctional agencies and prevailing divisions of governmental powers and authorities.[41] It is the last two elements, complementing prior discussion of Rules implementation by penal administrations themselves, that are the focus of this section.

The UNSDRI 1974 survey of "independent supervision" mechanisms has provided, despite its selective character, an excellent picture of available mechanisms and the functions and powers of bodies set up independent from the prison administration to look after prisoners rights.[42] Based on information from 25 selected countries well distributed across the world,[43] the UNSDRI inquiry established the existence or non-existence of "independent supervision" bodies and categorized them within two broad classifications -- judicial and non-judicial. The virtually unanimous [illegible] of all countries involved was that some independent activity existed for the protection of prisoners rights, but the diversity reported [illegible]

Judicial Mechanisms

In terms of judicial authorities, the public prosecutor is the [illegible] responsible for the protection of prisoner [illegible] the case in countries such as Hungary, Iraq and [illegible] be and is often specified in considerable [illegible] gary) and the prosecutor can serve as an [illegible] ters such as decisions of prison disci[illegible]

Courts are the authorities empowered with safeguarding prisoners rights in countries such as Argentina, Belgium, Germany, Mexico, Portugal, Spain, Yugoslavia and Poland. Their supervision may be accomplished by means of special courts (e.g., "courts for the enforcement of punishment" in Poland and "courts for the execution of sentences" in Portugal), or specific supervisory powers may be granted by law to the presidents or designated judges of trial and other courts (e.g., Yugoslavia, Germany, Argentina and Mexico). Somewhat similar to the last alternative is the designation of special "supervisory judges" to oversee the imposition of penalties and release procedures, and to visit prisons and hear complaints to assure that penal conditions and procedures conform to existing law and regulations (e.g., the Italian guidice de sorveglianza and the French juge d'application des peines).[45]

Special note should be taken of the manner in which a comprehensive jurisprudence of prisoners rights guaranties has evolved in the past decade from the application by Federal Courts in the United States of the Constitutional guaranties of the American "Bill of Rights" as applied to the states (U.S. Constitution, Amds. I-X, and Amds.XIV). Under these provisions, courts have intervened to enforce prisoner rights of access to courts, counsel and legal materials (14th Amendment), relief from cruel and inhuman conditions of confinement ranging from corporal punishment through extreme deprivations of food, shelter and amenities of life (8th Amendment), freedom from discriminatory treatment on grounds of race, religion or other unreasonable classification (1st and 14th Amendments), violation of procedural regularity and fairness in disciplinary, classification, and other proceedings substantially affecting prisoner liberty, e.g., parole or probation revocation (14th Amendment) and freedom to correspond, express views, have access to the press and literature, and practice religious belief (1st Amendment).[46]

Hundreds of appellate court decisions now define the foregoing areas of prisoner rights and this has all happened without the designation, as in other countries, of special courts to deal with prison regulation and cases and without federal legislation establishing substantive codes of prisoner rights. The enabling mechanism for this judicial "explosion" in assumption of responsibility for prisoner treatment abuses has been (i) an abandonment, largely voluntary, of a prior "hands off" doctrine under which the courts were unwilling to measure the actions of correctional administrators against principles of Constitutional right, and (ii) utilization by prisoners of the federal Civil Rights Act of 1871 (28 U.S. Code, S. 1983) under which they could sue the federal courts for prohibitory relief and damages with respect to mistreatment violating their Constitutional rights. While far from sufficient to remedy the deepening problems of American prisons in the 1960's and 1970's and no substitute for special legislative guaranties and grievance/redress machinery, this unusual development demonstrates yet another form of judicial protection, at least under federal constitutional systems such as prevail in the United States. It should be noted that this process of intensive litigation, both at state and federal levels, and with increasing involvement by the nation's Supreme Court,[47] continues in the effort to establish the bounds and contours of prisoner entitlement within American penal systems.

Non-Judicial Mechanisms

As regards non-judicial enforcement mechanisms, it has been suggested that three main types of authorities can be identified, i.e., (i) civil liberties bureaus, (ii) supervisory and visiting boards or justices, and (iii) the ombudsman.[48] Sometimes one or more of these entities operate "side-by-side" and usually as an additional resource to established judicial machinery. Normally, they are not empowered to redress specific violations of prisoner treatment guarantees. That is, their decisions are not binding on the penal administration and their authority is limited to making recommendations and exposing problems and injustices for the prison authority, the ministry of justice, the public, the legislature, or appropriate governmental and political leaders.

The Civil Liberties Bureau is a functioning organ of the Ministry of Justice in Japan with a central staff, over 250 offices across the nation, and a system of volunteer workers ("Civil Liberties Commissioners") empowered to investigate, collect information, and provide warnings and advice on all types of infringement of human rights. Within its annual caseload (over 10,000 grievances and 250,000 requests for advice), alleged violations of human rights are sometimes addressed to acts of officials of correctional institutions. However, it also deals with other public officials such as school authorities, police, and administrative agency personnel and the volume of prisoners rights cases appears to be rather modest.[49]

Visiting Justices or "official visitors" are the designated authority supervising prisoner treatment matters in Australia, Israel, Kenya and Singapore. They may include attorney general personnel, judges, local magistrates and justices of the peace, as well as government administrative officials. In Israel, citizens representing voluntary societies and social workers can be appointed. Similar functions are discharged in Great Britain by boards of visitors appointed by the Home Department Secretary. "Supervisory boards" in Austria and Netherlands, along with "administrative committees" in Switzerland and Belgium, have similar responsibilities but their composition varies as well as local divisions of jurisdiction. The powers of these supervisory and visiting groups may range from visits and inspections, to prisoner interviews and hearings, and even certain disciplinary and emergency suspension powers (e.g., Great Britain) although the basic advisory role (first to the penal administration and then to official reporting bodies on uncorrected violations or deficiencies) remain the dominant approach and mode of action.[50]

The Ombudsman

The parliamentary ombudsman has for many years taken an active role in prison cases and complaints. Generally vested with unrestricted powers to investigate wrong-doing by courts and administrative agencies, the ombudsman's powers derive from his ability to expose, complain and draw official, legislative and public attention to abuses of authority and violation of prisoners rights. Although, as in Sweden, there are explicit powers to order prosecution of criminal proceedings and disciplinary proceedings against competent authority (as well as advice, admonitions, and suggestions for change in law), the ombudsman's office may not itself change an administrative regulation or order an official to change a decision or otherwise intervene in an administrative procedure.

Ombudsmen systems are operative in all the Scandinavian countries--Sweden (responsible for original creation of the office in its 1809 Constitution), Denmark, Norway and Finland. Similar authorities also exist in Great Britain, Canada, Guyana, and Israel. By and large, the attention of ombudsman systems to prisoners rights and treatment problems appears to be modest. Reports indicate that the Danish, Norwegian and Scandinavian Ombudsmen spend about 5% to 10% of their time on complaints relating to prisoners (e.g., 280 such cases in 1973 for Sweden and 51 in 1972 for Denmark). In Finland, where the Ombudsman's jurisdiction is limited to the prisons and military forces, some 25% of the cases[51] have concerned detention facilities. Recently, ombudsman systems have arisen in the United States, both independent from and within correctional systems (in the latter case usually independent from local prison directors and reporting to the system head). This has been the case in Minnesota, Ohio, Connecticut, South Carolina and Oregon. Somewhat noteworthy is the volume of complaints being dealt with by such correctional ombudsmen, already well beyond the numbers reported for Scandinavian systems (e.g., over 900 annually in Minnesota for [illegible] more than 500 in Ohio for 1973 and nearly 400 for Connecticut in 1974/75. It appears from the limited descriptive material on Scandinavian cases, that the American ombudsmen handle much the same level and kinds of individual complaints and become equally involved in general penal system deficiencies [illegible] to broad scale changes in procedures.[52]

.. Procuracy and French Conseil D'Etat

It is somewhat difficult to classify these institutions within the [illegible] categorization of non-judicial mechanisms but they merit mention as [illegible]ditional administrative or quasi-administrative mechanisms for monitoring [illegible]d securing prisoner guaranties. The Soviet Procuracy is a peculiarly [illegible]asian authority invested with "supreme supervisory power to ensure strict [illegible]servance of the law" by all administrative bodies as well as officials and [illegible]itizens (USSR Constitution Article 113). The Procuracy is an organization [illegible] approximately 6,000 persons directed by the Procurator General of the [illegible]SR. The institution is found in other socialist countries such as Romania, [illegible]land, Yugoslavia, and the People's Republic of China. In the Soviet Union [illegible]e Procuracy has the duty to protest "illegal acts" to higher administra-[illegible]ve authority, to require production of documents and written explanations [illegible]d to submit "proposals" to administrative agencies (which must be considered) [illegible]r changes in regulations to achieve conformity with the law. Criminal, [illegible]ministrative and disciplinary proceedings may also be initiated. Complaints [illegible]om prisoners must be considered within one month, decisions must be rendered [illegible] writing, and the prisoner may appeal to the procurator. Complaints by [illegible]nvicted persons to the procurator must be forwarded within 24 hours.[53] [illegible]tatistics on the actual use of the Procuracy by prisoners do not appear to [illegible] available.

The French Conseil d'Etat is another advisory office, created by [illegible]poleon in 1779, which subsequently acquired jurisdiction, in addition [illegible] advising on all government bills, decrees and regulations, to adjudicate [illegible]ministrative cases. In the context of the Standard Minimum Rules, the [illegible]nseil has authority to pass upon the legality of the administrative acts [illegible]s they relate to human rights, including those particularly relevant to

prison situations (e.g., cruel and inhuman punishment, freedom of thought, conscience and religion). This would include the power to demand statement of the grounds for an administrative decision and requiring authorities to pay compensation for damages caused by personal fault or negligence.[54] As the Procuracy, data on the Conseil's specific involvement with prison matters does not appear to be readily available.

European Human Rights Convention

In previous discussion of the European Standard Minimum Rules, reference was made to the European Convention on Human Rights. The European Commission on Human Rights and the European Court of Human Rights, which were created by the Convention, stand out as a unique multinational enforcement mechanism for prisoner treatment complaints to the extent encompassed by the Convention. This enforcement machinery has, in fact, been quite active with respect to detainees (who form a major proportion of complainants). Considering that only 127 of 6,847 individual petitions from 1955-1974 were declared admissable, it is evident that the average prisoner (or free citizen that matter) cannot look to the Convention as a source of personal relief. Nevertheless important cases have been heard and disposed of by the Convention apparatus and significant definition has taken place of prisoner complaint issues cognizable under the Convention. In the former area, the Commission effected friendly settlements, including new government regulatory response in cases involving allegations of inhuman and degrading treatment in detention [Simon-Herald v. Austria, 38 Coll. Dec. 18 (1972)] and denial of right to consult with counsel in a civil suit against the prison administration [Knechts v. United Kingdom, 36 Coll. Dec. 1943 (July 1971)]. Also in the noted Greek case [Yearbook of the European Convention on Human Rights, Vol. 12 (1968)], the Commission fully adjudicated a multinational complaint against a Convention member, finding torture and inhuman and degrading treatment in police detention actions (ultimately leading to denunciation of the Convention by the Greek government). At the intake level, the Commission has also determined whether prison petition allegations stated cognizable violations of the Convention, e.g., whether certain forms of solitary confinement amount to cruel and degrading treatment (Article 3), whether prison labor performed on behalf of private firms constituted involuntary servitude or forced labor (Article IV), whether conjugal visiting fell within "right to family life" guarantees (Article 8) and whether denial of the right to grow a beard violated freedom of conscience and religion protections (Article 9). In most of these cases, determinations have been against allowing the petitions, but the machinery has nevertheless been established and is being utilized.[55]

Similar efforts to establish an Inter-American Commission on Human Rights (accomplished in 1960) enforcing a proposed American Convention on Human Rights (thus far ratified by only two countries and not yet operative) have not yet evolved into a similar force for action on prisoner rights and petitions although some pronouncements in the area of corrections have been made, including a major investigation and report on alleged torture and inhuman treatment practices in Chilean detention facilities.[56]

Enforcement Mechanisms as Critical

The foregoing review of national machinery for effectuation of prisoner rights shows a rich range of diversity and options but should not be considered

as implying either adequacy or effectiveness to enforce guaranties and norms such as those embodied in the Standard Minimum Rules. Research data is too fragmented and sparse to make intelligent comparative judgments of this kind. Moreover, the lessons of recent years indicate severe problems with prison confinement as a technique for social defense and prisoner rehabilitation that may call as much for a change in treatment philosophy as for a tightening up of enforcement mechanisms. Nevertheless, given the existence of prisoner guarantees as a goal of the civilized world -- and the Standard Minimum Rules speak to that aspiration -- it is critical that our legal enforcement apparatus stands in a coequal position with (i) the intentions of experienced and well motivated administrators in securing that objective and (ii) the rhetoric and articulation of prisoner treatment principles. As has been aptly stated:

> "Imprisonment means deprivation of liberty and therefore is in itself a limitation of individual rights; but this is not a good reason for assuming that prisoners do not have other rights which must be respected and protected in case of their infringement, nor that they have only those rights that may be granted by authority as an act of unmerited grace . . . Far too many of them have grown up with the notion that might is right, and if the prison, by reason of its possession of superior powers of coercion reinforces that impression by seeming to deny the prisoner the same kind of fairness and justice that is the inalienable right of the most guilty man in the courts, then it will work against rehabilitative goals of the prison system.[57]

Enforcement, then, must proceed hand in hand with enactment of prisoner guaranties.

V. Conclusions and the Road Ahead

This brief review of the history, legal status, implementation, and enforcement posture of the United Nations Standard Minimum Rules for Treatment of Prisoners leaves little room for complacency about this important segment of the international human rights agenda. It portrays a reasonably sound and progressive set of principles which enjoyed a surprising degree of world consensus and acceptance in original adoption and subsequent actions of endorsement. However, two decades of existence has produced rather meager evidence of progress toward (i) incorporation in national law, (ii) full implementation in actual penal practice, (iii) adjustment and updating to meet new correctional needs and insights, and (iv) establishment of workable enforcement procedures by which prisoners and society may seek redress of violations and deficiencies. To recognize this in a world where most major social and economic problems seem to elude our best attempts at rapid progress should in no way detract from the rather unique accomplishment represented by the Rules in international criminal justice standard-setting. We may be proud of this achievement and of the continuing interest, dialogue, and desire for further improvement measures that the Rules have stimulated.

All that remains is to refer to (i) implementation measures or aids of a non-legal nature that law-oriented groups might discount but which have occupied considerable attention and are by no means unimportant in a world where communication barriers are often more formidable than legal ones and (ii) some of the demands for expansion of the Standard Minumum Rules concept which future UN Congresses and the UN governing bodies must confront.

First, there has been general agreement that commentaries, technical assistance, regional and national conferences, additional translations, readily understandable pamphlets and introductory materials would help in developing familiarity with and better understanding of the Rules. Beyond that, however, serious proposals are being advanced and, hopefully, are ripe for action that would place the Rules in perspective and enlarge their scope and usefulness within the total sphere of correctional administration. Perhaps the most important is the recommendation, to be considered by the 1975 Congress, that a companion set of Rules be developed for convicted persons serving sentences in the community rather than in prisons, i.e., that

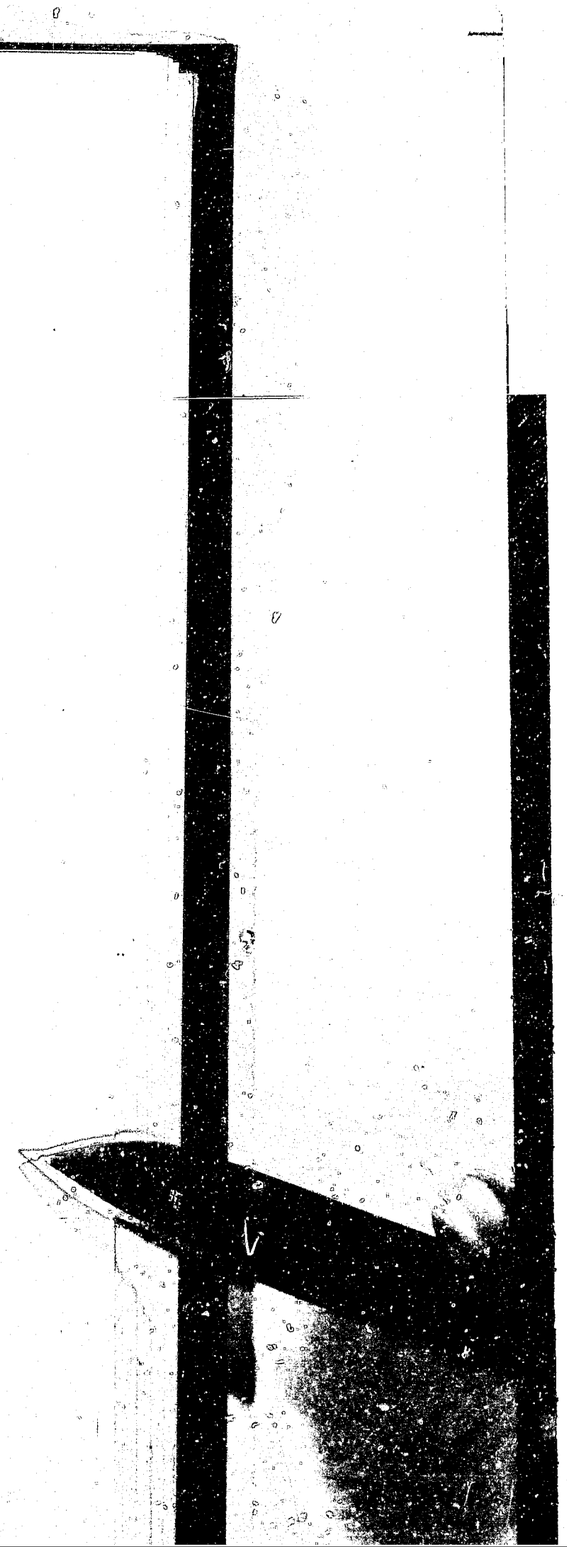
> ". . . the Secretariat prepare a new set of Rules on the treatment and supervision of offenders in the community which would be responsive to the growing world trend in the direction of using non-custodial correctional measures where appropriate.[58]

In similar vein, it has been suggested that inquiry be made as to the feasibility and need for rules which deal with (i) return to state of residence for the service of sentence by persons convicted of crime in a foreign country and (ii) correctional implications of the civil disabilities which accompany conviction and may adversely affect readjustment of prisoners to productive community life. Finally, under impetus of the General Assembly's "torture" resolution, an amplification of the Rules and new inspection, implementation and procedural measures may be developed to deal with gross violations of the Standard Minimum Rules amounting to cruel and degrading treatment. It will be noted that all of these expansions deal with current, pressing needs and can be considered without amendment of the original Rules (which appears to have been postponed for the immediate future).[59] An agenda of this kind,

coupled with continuing impetus for better implementation techniques for the Rules themselves, may well permit realization, in a more comprehensive sense than ever before, of the original hope that the Rules would

> . . . serve to stimulate a constant endeavor to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.[60]

Perhaps another decade of Rules "presence" will show unprecedented progress in their establishment, not only as minimum conditions tolerated by the United Nations but by the community of nations who, after all, must accept ultimate responsibility for what they do with their prisons and with the citizens confined in them.



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Footnotes

1. It is true that other codes such as the United Nations Universal Declaration of Human Rights include guaranties which have direct relevance to convicted prisoners and prison administrations (prohibition of inhuman or degrading punishment, freedom of religion and correspondence, etc.) but these do not purport to define the basic conditions and rights under confinement of criminal offenders.

2. Resolution adopted August 30, 1955.

3. Economic and Social Council Resolution 663(XXIV), July 31, 1957.

4. General Assembly Resolutions 2858(XXVI), December 20, 1971, and 3144 (XXVIII), December 14, 1973.

5. Resolutions of September 1, 1955 and August 29, 1955, First United Nations Congress on Prevention of Crime and Treatment of Offenders.

6. There are two rules relating to insane and mentally abnormal prisoners and 10 rules relating specifically to untried prisoners. The general two-part organization of the Rules has been criticized as not fully rational since Part I (rules of general application, nos. 6-55) include matters of detail indistinguishable from some of the Rules in Part II (rules applicable to special categories, nos. 56-94). See Secretariat Working Paper on Standard Minimum Rules, 4th UN Congress, at par. 100 (A/CONF. 43/3--1970).

7. See Rule 5 which refers to applicability of the Rules at least as to institutions "set aside for young persons such as Borstal institutions" and as to all young prisoners in adult institutions who come within the jurisdiction of juvenile courts (although it is affirmed that such persons should not as a rule be sentenced to imprisonment).

8. UN Document A/CONF. 43/3 (1970) , Section IV on "Legal Status of the Rules," pars. 40-53.

9. See Human Rights: A Compilation of International Instruments of the United Nations (UN Sales No. E. 68.XIV.6).

10. Report of Secretariat on Agenda Item (3) of Fourth Congress, pars. 197-199, Document A/CONF. 43/5. (Sales No. E.71.IV.8).

11. This resolution also included a reaffirmation of rights concerned with criminal justice administration as expressed in Articles 5, 10 and 11 of the Universal Declaration of Human Rights relating to humane treatment or punishment, fair and public hearings in criminal and civil proceedings,

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Correctional Association's 1870 Declaration of Principles of Prison Discipline (as restated in 1970) or the American Law Institute's Model Penal Code (1962) would look very similar to one based on the UN Rules and suggest a joint influence. Also, in the United States a new set of correctional standards from the National Advisory Commission on Criminal Justice Standards and Goals (1973) is enjoying great influence in correctional code revision and, while considerably more detailed, embodies many principles consistent with the UN Rules. See American Bar Association Corrections Commission, Survey of U.S. Implementation of Standard Minimum Rules for Treatment of Prisoners, pp. 6 and 11-12 (Dec. 1974). This survey, identical to the UN's world survey from the Secretary General, did include some responses suggesting explicit use of and reliance on the Rules in developing policies and regulations (e.g., Alaska and Delaware).

22. For more information on the U.S. trend and the actual texts of executive orders and regulations adopting the Rules in the six states described, see American Bar Association Corrections Commission, The UN Standard Minimum Rules and U.S. Approaches to Formal Adoption -- A Growing Trend in the States, Coordination Bulletin No. 28 (March 1975). Also, Skoler and Webb, U.S. Corrections and International Standards, RESOLUTION, Vol. 1, No. 2 (Winter 1975).

23. Council of Europe, Resolution (73)5. For an earlier effort at Rules modification by a special regional group, see Benelux Penetentiary Commission Revision of the Standard Minimum Rules for Treatment of Prisoners, International Review of Criminal Policy, No. 25 (UN Sales No. E.68.IV.7).

24. Secretariat Working Paper on Standard Minimum Rules, 5th UN Congress, par. 110 (A/CONF. 56/6--1975). See also Preparatory Report on Possible Modification of the Standard Minimum Rules (ESA/SD. AC. 1/1--1971).

25. Convention on Human Rights and Fundamental Freedoms (Rome, 1950), 1950 European Treaty Series No. 5, UN Treaty Series (1955), No. 2889, p. 221.

26. Although it appears from the UN formulation and numbering system that there are 94 Standard Minimum Rules, the first 5 numbered paragraphs are merely introductory and explanatory text and cannot be considered rules, standards, or principles. Thus, the Standard Minimum Rules really commence with Rule 6 (General Principles) and are limited to 89 in number (a numbering system that is itself less than rational since certain rules have subsections of sufficiently broad and significant scope to be divided into separate rules.

27. It should be noted that in federated systems such as the United States and Canada, the responses used were those of the Federal Bureau of Prisons (U.S.) and Federal Government (Canada). The UN survey provided a separate compilation of replies from federal units with such countries (48 states in the United States, all provinces in Canada, and two states in Australia) but this is not presented in this article although such units deal collectively with more prisoners than the national government units. Annex 1, Table 2, supra n. 17, at pp. 122-23.

28. The low affirmative response level for the standard on civil prisoners (Rule 94) has been ignored since so many responding states (over 40%) indicated that their laws do not permit civil imprisonment for debt. Also, the percentages of implementation shown would all be 3 to 4 percentage points lower if measured against the total survey response group of 62 rather than the 58 that completed the UN questionnaires as requested. Annex 1, Table 1, supra n. 17, at pp. 120-21.

29. Part I covers Rules 6 through 55 and Part II includes Rules 56 through 94. This conclusion as to wider receptivity in practice for the Part I Rules was also confirmed by an earlier study based on local investigator questionnaire interviews in 9 selected countries. See International Prisoners' Aid Association, International Survey on the Standard Minimum Rules: A Pilot Study, International Review of Criminal Policy, No. 26, pp. 97-100 (1968 -- UN Sales No. E.70.IV.1). It offers some support for those who propose that Part I be revised and structured as an international convention.

30. Annex I to Fifth Congress Secretariat Working Paper on Agenda Item Four, at p. 95, supra n. 17.

31. Id., p. 100.

32. Id., p. 93-94.

33. Id., p. 110.

34. Id., p. 109-10.

35. Id., p. 92.

36. Jordan . Fitzharris, 257 F. supp. 674 (N. D. Cal. 1964) and Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967) (strip cell cases); Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971) (extended solitary confinement); Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968) (flogging); and Holt v. Sarver, 442 F. 2d 304 (8th Cir. 1971) (combined prison conditions as cruel punishment).

37. Resolution 663C (XXIV), 31 July 1957.

38. Standard Minimum Rules, Rule 4(1).

39. See American Bar Association Corrections Commission, Analysis of Extent of Applicability of UN Standard Minimum Rules to Community-Based Supervision and Residential Care, 37 pp. (Nov. 1974). Also, Secretariat Working Paper on Standard Minimum Rules, 5th UN Congress, pars. 15-28 on "Alternatives to Imprisonment (A/CONF. 56/6--1975)".

40. See Webb, Enforcement of Correctional Standards At the International Level--A Review of Mechanisms in Other Nations, RESOLUTION, p. 42 (Spring 1975).

41. Perhaps the most advanced comparative work being conducted today in the area of enforcement and supervision of human rights and correctional treatment standards is that of UNSDRI. The UNSDRI program is extensive, incorporating a major comparative survey and separate evaluative studies in individual nations of mechanisms such as supervisory judges, constitutional enforcement within general court systems, prisoners' associations, civil liberties commissions, the ombudsman, and special prisoner grievance mechanisms. Interim Report on Prisoners Rights, Their Enforceability and Supervisory Mechanisms, UNSDRI 310 (Nov. 1974).

42. Vetere, Human Rights in Prison and Independent Supervision--Notes from an UNSDRI Survey, UNSDRI 53/74 (Nov. 1974--final report pending).

43. The reporting nations, representing a 90% response from the selected group, included Argentina, Australia, Austria, Belgium, Canada, Denmark, Germany, B.R.D., Hungary, Iran, Israel, Japan, Kenya, Mexico, The Netherlands, Norway, Poland, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States and Yugoslavia. UNSDRI Report, supra n. 42.

44. Id., pp. 8-10.

45. For more detail concerning the Italian and French supervising judges, see American Bar Association Corrections Commission, Remedies and Mechanisms for Enforcement of the UN Standard Minimum Rules for Treatment of Prisoners and Similar Guaranties and Principles of Offender Treatment, pp. 34-37 (monograph 1974).

46. See American Bar Association and American Correctional Association, Legal Responsibility and Authority of Correctional Officers--A Handbook on Courts, Judicial Decisions and Constitutional Requirements, 43 pp. (Rev. Jan. 1975); South Carolina Department of Correction, The Emerging Rights of the Confined, 222 pp. (1972).

47. Major Supreme Court decisions dealing with prisoner guaranties in the past decade have included Wolff v. McDonnell, 418 U.S. 539 (1974) (rights in disciplinary proceedings), Johnson v. Avery, 393 U.S. 483 (1968) (prisoner access to legal assistance from fellow inmates); Procunier v. Martinez, 416 U.S. 396 (1974) (censorship of ougoing prisoner correspondence); Younger v. Gilmore, 404 U.S. 15 (1971) (prisoner access to legal materials); Morrissey v. Brewer, 408 U.S. 471 (1972) (rights in revocation of parole and return to prison costody); Gagnon v. Scarpelli, 411 U.S. 775 (1973) (rights in revocation of parole and probation and return to prison); Pell v. Prownier, 417 U.S. 817 (1974) and Washington Post Co. v. Saxbe, 417 U.S. 843 (1974) (prisoner communication with press media); Richardson v. Ramirez, 418 U.S. 24 (1974) (voting rights); Lee v. Washington, 390 U.S. 333 (1968) (racial segregation); and McGinnis v. Royster, 410 U.S. 263 (1973) (prisoner rights to good time allowances).

48. UNSDRI Report, n. 42 supra, pp. 10-14.

49. Webb, Enforcement of Correctional Standards at the International Level--A Review of Mechanisms in Other Nations, RESOLUTION, p. 46 (Spring 1975).

50. UNSDRI Report, n. 42 supra, pp. 12-13.

51. ABA Corrections Commission, n. 45 supra, pp. 5-9.

52. See May, Prison Ombudsmen in America, and Raphael, Ombudsmen and Prisons--The European Experience, Corrections Magazine, Vol. 1, No. 3 (Jan./Feb. 1975). Also ABA Corrections Commission, Ombudsman/Grievance Mechanism Profiles, Nos. 1 (Minnesota), 2 (South Carolina), and 3 (Maryland) (1973-74).

53. See Webb, n. 49 supra, pp. 44-45 and ABA Corrections Commission, n. 45 supra, pp. 9-12. Also I. Timoshenko, Application and Further Improvement of the Standard Minimum Rules in the Byelorussian SSR, paper prepared for Working Group of Experts on the UN Standard Minimum Rules for Treatment of Prisoners (Columbus, Ohio, 1974).

54. ABA Corrections Commission, n. 43 supra, pp. 12-13.

55. See Case Law Topics, "Human Rights in Prison," European Commission on Human Rights, (Strasburg--1971); ABA Corrections Commission, supra note 45, pp. 17-27.

56. See ABA Corrections Commission, supra n. 45, pp. 27-29.

57. UNSDRI Report, supra n. 43, p. 18.

58. Report of the Working Group of Experts on the Standard Minimum Rules, Second Meeting, Doc. ESA/SDHA/AC.7/2 (Nov. 1974), par. 73(a). See also, Secretariat Working Paper on the Standard Minimum Rules, 5th UN Congress, par. 117-18 and 140 (A/CONF. 56/6-1975).

59. Report of Working Group, supra n. 58, pars. 69-73; with respect to the "torture" resolution 3218(XXIX) see Secretariat Working Paper, supra n. 58, Part V, pars. 125-133 and Annex III, pp. 132-139. Annex III is a detailed proposal of new "Implementing Procedures" for the Rules in response to the mandate of Resolution 3144 (XVIII) including, beyond basic adoption, widest circulation to officials and prisoners, expanded progress reporting with submission of actual views and regulations embodying the Rules, expanded UN technical assistance and, by way of enforcement, use of the Commission Human Rights to consider complaints referred from the Secretary General and UN bodies and to examine allegations of serious, repeated and insistent violation of the Standard Minimum Rules. The procedure also contemplates a centralization of advising, review, revision and policy responsibilities within the Committee on Crime Prevention and Control of the Economic and Social Council.

60. Standard Minimum Rules, par. 2.

WORK PAPER
ON
PREVENTION OF TERRORISM THROUGH THE DEVELOPMENT OF SUPRA-NATIONAL CRIMINOLOGY

By
Kerry L. Milte

PREVENTION OF TERRORISM THROUGH THE DEVELOPMENT OF SUPRA-NATIONAL CRIMINOLOGY

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This paper is largely in recognition of a plea made by Professor Julius Stone at the 1967 Washington World Peace Through Law Conference: "Whether in researches for the promotion of extending jurisdiction of substantive law, researches should move more and more to the level of fact finding, of articulation of the underlying policies when these conflict and of effort to suggest accomodation and compromise in these conflicts. I believe that it is here, rather than in technical legal issues through which conflicting policies become manifest, that we can best hope to make progress."[1]

Thus, it is intended to analyse available material relating to terrorism in order that fact-based recommendations may be made to assist the further development of international legal efforts to combat this phenomenon having the capacity to threaten the very foundations of international law and order.

For many years criminology has been preoccupied with the study of deviant behaviour, and violence, against national authority, without regard to forms of violence manifested at the international level against World law and order. There is now a pressing need for criminologists to join

with lawyers and others, concerned with the ever increasing problem of international terrorism as a corollary t[illegible]e already existing efforts to develop and sustain present international arrangements to deal with terrorism. Prominent amongst these are the development of an internation criminal law supported by a supra-national judicial structure and efforts secure an acceptable Convention against terrorism.

The study of supra-national crime has been neglected by criminologi who have found it difficult to conceive of crime other than in terms of their own parochial political culture and national institutions. We must appreciate that the forces of law and order now operate in a much transformed social context because the World environment is changing from one comprising individual nation states to one demanding more global integration and cooperation and "supra-nation institutions, or their functional equivalents would appear to be the only concrete interpretation of values that can synchronize with the rapidly emerging global environm

World peace will not be achieved until nations who are prepared to support and harbour terrorists and hijackers, or to intimidate their own citizens through violence, and discrimination against fundamental rights are brought to account before the higher authority of the Rule of Law. Therefore efforts must be directed towards the establishment of supranational organizations founded upon a universally respected international law able to displace the dysfunctional sovereignty of the nation state in favour of world institutions. Thus, the efforts of the International Law Foundation[3] have much to commend them, and when coupled with recent endeavours in the United Nations to secure agreement on a Convention against terrorism, inspiration is provided for a criminological analysis

of the phenomenon of terrorism as part of the overall international preventive effort.

Julius Stone in discussing the desirability of establishing a real international criminal law and an international tribunal to support it points out:

"The Hobbesian truth still broods over it that while the sword of justice and the sword of war, both rest in the hands of the State, international criminal responsibility and penalties cannot be brought home to those conducting the affairs of at any rate the more powerful States. For these are able by their power to turn attempted processes of 'justice' into 'trial by battle,' for which they themselves set the ground rules."[4]

This statement nicely sums up the source of the difficulties found in securing effective international agreement on measures against terrorism.[5]

The Individual in International Law

The argument presented herein turns very much on the place of the individual in international law, for obtaining sufficient international consensus to secure the punishment of terrorism under national law, is merely an early part of an evolutionary process toward World acceptance of the Rule of Law. The issue is whether there exists a sufficient judicial basis for holding an individual responsible to the law of nations without an express act of transformation by the national executive government. If this basis exists then it will be easy to overcome such problems as the terrorist obtaining protection and support from sympathetic nations and thus allow a terrorist to be tried by an international tribunal. Takano appears correct when he concludes: "that the status of individuals in international law is changing and developing

in the sense of being active as well as creating rights and duties under international law."[6]

He mentions some 12 cases in treaty practice this century manifesting a direct conferrment of international legal personality and locus standi upon individuals, as well as arguing persuasively that the recognition of a certain personality as having rights in a legal order means that the personality is able to legally exercise these rights. And, hence, independent rights are recognized under international law independently of national law.[7]

The Nature of Terrorism

There is presently a great deal of international controversy concernir a definition of terrorism which distinguishes between acts of international as opposed to domestic concern. And much of the debate has occurred in relation to the question of "motive" as some states have argued strongly that terrorism is not subversive to international order if it is directed towards the liberation of subjected persons, and, a definition of terrorism should only cover acts committed for personal gain or out of caprice for non-political purposes. Before this problem can be discussed it is necess to consider some preliminary issues.

In determining what is meant by terrorism it is necessary to make th conceptual distinctions. These are put clearly by von Baeyer-Katte: "In everyday use 'terror' describes the following -

(i) persecution for reasons of religion or political ideology, in particular persecution employing faked charges of political show trials

(ii) individual acts of terrorism committed within a revolutionary or anarchist strategy, or in consequence of guerilla, partisan or civil warfare;

(iii) the use of concentration camps for political re-education or for extermination."[8]

It is the second of these distinctions which is of main interest, (the seige of terror as apart from the regime of terror) because as May comments: "... revolutionary terrorism, derivative and reflective though it may be, exposes a level of perception into the world of killing that may be even more revealing than state terrorism - just as the burdens of the sick man may sometimes be more accurately perceived through his symptoms than through the disease."[9]

However, it will be pointed out how perceptions of state terrorism held by some nations influence their attitude towards revolutionary terrorism, and thus hamper international accord.

It is argued that acts of terrorism as part of the 'seige of terror' need to be examined within the framework of political extremism; in general, before any progress can be made towards international control. The operant concepts are:

1) Extremism is directed towards the elimination of dissensus within the body politic to create a perfect consensus.

2) Extremism is prepared to go beyond what is presently regarded as legitimate forms of political action to create change on an 'end justifies the means' basis,

with the amount of violence used being directly proportional to the degree of commitment to the utility of the overall political end to be achieved.

A useful beginning to understanding terrorism is the notion of 'political violence' proposed by Dowse and Hughes:[10]

"We define political violence as acts of disruption, destruction, injury who purpose choice of targets or victims, surrounding circumstances, implementation and/or effects have political significance, that is intended to modify the behaviour of others in a bargaining situation that has consequences for the social system."

Neale takes this definition a step further when he describes "terror" as a "Symbolic act entailing the use or threat of violence and designed to influence political behaviour by producing a psychological reaction in the recipient that is also known as terror. Terrorism is sometimes known as 'politics by violence' and the anarchist followers of Mikhail Bakunin called it 'the propaganda of the dead'."[11]

Thornton sees terrorism as "a symbolic act designed to influence political behaviour by extra normal means, entailing the use or threat of violence,"[13] which complements Neale who proceeds to describe the rationale behind the use of terror as attempting to gain social or political control over the target group.[14] Walter has categorized a process of terror which has three elements: (1) an act or threat of violence, which (2) causes an emotional reaction, and (3) produces social effects. A "seige of terror" is an attempt to destroy an authority system by creating extreme fear through systematic violence.

It is important so far as international efforts to control terrorism are concerned to be wary of interchanging the notions of "political violence" and "terrorism" and arrive at a useful distinction between them. Wilkinson offers a solution when he points out that terrorists:

"... are always prepared to justify any means to realize their ends without any moral scruple or regard for the degree of suffering of their victims. They attempt to instill the maximum fear and uncertainty among the members of the community or group they seek to intimidate, and this is achieved by a combination of ruthless severity and a readiness to engage in the indiscriminate murder of civilians."[14a]

He further argues that it is the amorality of terrorism which distinguishes it from other forms of violence. The possibility of criteria for a just war, or legitimate rebellion was even allowed for by Thomist philosophers, and, could be morally justified in the view of Aquinas even though the actions involved resort to extreme violence and murder. However, indiscriminate terror can never be so justified. In determining whether a specific act is terrorist or not, one is essentially making a "value judgment about the perpetrators of the alleged act, and about the circumstances of their actions",[15] and those who are prepared to condone terrorism "are generally ready to provide a rationale for such acts in other terms, e.g. political expediency, ideological or historical necessity."[16]

Maximum Disruption through Amplification

The actual amount of international terrorism taking place in the world is only slight when compared with the quantity of conventional violence.[17] Jenkins points out that there have been 486 incidents of international terrorism in the six year period from January 1968 to April 1974. This includes incidents whereby terrorists have attacked foreign officials, hijacked airliners or have gone

abroad to strike at targets, but does not include terrorist acts as part of urban guerrilla warfare such as the IRA operating in Northern Ireland.

The effect of this relatively small amount of violence is greatly amplified when one considers the widespread disruption and alarm produced within the community by the creation of uncertainty and fear which destablizes international order. This potential to create alarm is demonstrated by the reaction of authoritative commentators. An example in Wilkinson, who describes terrorism, in liberal democracies as war "on the lawful popularly elected Government" and in "the face of the gun and the bomb, it would be as foolish to argue with them as to present a protest note to an invading army."[18] More extremely Dr. Ilke, Director of the US Arms Control Agency said recently that his government had been overly generous in diseminating nuclear technology to the point where the US was now basically defenceless against terrorist or criminal nuclear attack, and went on to say that "our society and our political institutions might simply prove incapable of coping with this new age of imminent terror" and the nation might be "forced to resort to the most costly measures. The nation might decide to protect itself with an iron curtain, stopping nearly all the flow of goods and people across its borders ... In short, we might be driven to establishing a police state. This might protect our country physically but destroy it spiritually."[19] This type of national reaction has been advocated in England by influential commentators and newspapers in the wake of IRA bombings, and has resulted in the passing of the Prevention of Terrorism (Temporary Provisions) Act 1974 giving the Home Secretary and police, powers hitherto unheard of in peace time. The powers have been described by the Home Secretary as Draconian, and are presently being exercised frequently in the UK.

The strategy of terrorism can be described in one word - demoralization.

And, having regard to the greater technological sophistication of modern weapons and communications this is more easily achieved than in the days of the bandits and pirates of old. An IRA volunteer is recently reported as saying:

"This will sound callous but the only way to get the British out completely is an incident like Birmingham. A fierce campaign in England hitting at military and commercial targets would soon make the English sick of the whole problem."[20]

By obtaining maximum publicity for indiscriminate bombings and kidnappings the terrorist is able to create an atmosphere of fear and alarm. This causes people to "exaggerate the apparent strength of the terrorist movement and cause, which means that their strength is judged not by their actual numbers or violent accomplishments, but by the effect these have on their audience."[21] Since terrorist groups are physically small the violence must be dramatic and revolting to achieve full effect.

But of course in many cases indiscriminate bombings can be counter productive and produced severe reaction against the individuals and their cause which can either produce violent retaliation by the opposition, or disaffect any mass support that the more moderate groups might be gaining. This inconsistency of perpetuating violence which becomes dysfunctional can only be explained within the terms of the "ectasy" mentioned later; when terrorism becomes existentially self fulfilling and an end in itself.

Hutchinson[22] sums ups the attractiveness of terrorism as a political method as being due to the "combination of economy, facility and high psychological and political effectiveness." Terrorism is particularly attractive when alternative means of reaching revolutionary goals are absent." Hutchinson, also points out that once a terrorist strategy is under way, it gains momentum and "insurgents may find themselves trapped in cycle of terrorism and repression,

unable to abandon terrorism because of militant and popular pressures."

There is no doubt that terrorist atrategy has been successful for one c plainly see that the IRA has through its tactics and strategy achieved many concessions from the British Government, which the more moderate politic wing, the Provisional Sinn Fein, could not have obtained by negotiation. M spectacularly, the Palestinian Al Fatah and the Black September group have abled Yasser Arafat Chairman of the Executive Committee of the Palestine Liberation Organization to receive acclamation from the so-called third wor in the United Nations, and to obtain observer status for the PLO. The India Government has also allowed the PLO to open an office in New Delhi with ful diplomatic status. The reason for these successes is not difficult to find an stated simply it is: "One man's terrorist is another man's freedom fighter."

Terrorism seen Existentially

From expressions of social theorists such as Marx and Durkheim seein violence as a necessary part of the capitalist system there not unnaturally de veloped the counter-position adopted by revolutionary writers of not treating political violence as criminal or pathological but as an existential necessity for colonized peoples.

A few examples will illustrate this concept. The psychiatrist and revolutionary writer Frantz Fanon who championed the cause of Algerian indepen dence twenty years ago said that "At the level of individuals, violence is a cleansing force. It frees the native from his inferiority complex and from his despair and inaction."[23] Sartre in his introduction to Fanon's The Wretch of the Earth also puts the proposition "The native cures himself of colonial neurosis by thrusting out the settler through force of arms. When his rage

boils over he rediscovers his lost innocence and he comes to know himself in that he himself creates his self ..... to shoot down a European is to kill two birds with one stone, to destroy an oppressor and the man he oppresses at the same time."

The existential notion of violence was readily received into the United States as a philosophical justification means for black Americans to align themselves with the Third World and break their ties with Western values.

A pamphlet distributed by Al Fatah, the militant wing of the PLO says that "violence will purify the individuals from venom; it will redeem the colonized from inferiority complex, it will return courage to the countrymen."[24] While Kozo Akamoto[25] stated at his trial in Jerusalem for the Lydda Airport massacre that he and the other members of the Japanese 'Red Army' acted to promote the 'World Revolution' and that "both the executioners and their victims" united in death would be reincarnated as stars, and that their join illumination would shed "eternal peace on earth". Segre and Adler[26] saw Lydda as "A political tragedy incorporating mystic symbolism, with compulsive ideologized violence, exercised according to an ancient Bushido code, in a modern airport." Such an event is, as they add, difficult to foresee.

May[27] sees this "mystic violence" in terms of an ecstasy which he believes is characteristic of all terrorist regimes. "Ectasy" may include the elements of "frenzy", "irrationality" or "exhilaration" but he regards its literal meaning as to "stand outside oneself", "that is, to stand outside the limits of ordinary consciousness or to stand free of the restraints and limits of everyday behaviour." To illustrate this concept he draws upon

the well known study by Rose of Northern Ireland, entitled Governing Without Consensus where the "ecstatic" person is identified as "the protestant Ultra who supports the government but reacts to the catholic so vehmently that he refuses to obey the laws of his own country."[28] The Ultra often reacts to perceived threats to his society with a kind of frenzied overkill. Segre and Adler[29] compare the terrorist with the behavioural manifestations of the sociopath who reacts violently against dominant values and argue that "in modern society extremist alternatives to legitimate power are becoming self-fulfilling." We can now begin to see terrorism in its role which Von Baeyer Katte describes "as an anti-system opposing the immanent structural rationality of a given social order" and "by usurping and blocking the machinery and through widespread intimidation, terror disorganizes all social order."[30]

Terrorism and National Liberation

The common thread which runs through practically all of the major acts of organized destructive terrorism is its distinguishing political motive. The political philosophy of such groups as the Irish Republican Army, the Ustasha of Croatia, the Deve Genc of Turkey, the Tudeh of Iran shows that all claim to be national revolutionary groups seeking the liberation of their countries through violent means. Other terrorist groups such as the Japanese "Red Army", Al Fatah, the Popular Front for the Liberation of Palestine and Black September claim that national liberation can only be achieved through "World Revolution". Therefore the guiding political philosophy of the more extreme terrorist groups, and those creating most international disorder is that they are engaged in the struggle for "World revolution".

The concept of "World revolution" has its genesis in old anticolonial-anti imperialism philosophy, and the more recent anti-neo-colonialism notion. These concepts are certainly not new and have frequently been used to describe and justify the struggles of native populations in colonial regions to gain independence from foreign rule. However, once political autonomy is achieved the state may still be in a state of economic dependecy often described as neo-colonialism thus transforming the independence movement into the national liberation movement having as its aim the securing of economic independence.

But is there strength in the existential argument that this violence will "cleanse", and can the "World revolution" through liberation be achieved? Certainly "liberation" cannot mean a return to the old regime, but it does lead to at least a change of government and change of political philosophy, whether good or bad. It is difficult to see how the cycle of dependency can easily be broken for revolutionary leaders once in power must act quickly to raise economic standards so that their position and power base may be consolidated. This usually demands that they seek foreign aid and thus the cycle of dependency begins again. All too often foreign aid for development becomes military support and the "third world fails to attain the self sufficiency it aims at"[31] and thus becomes caught up in the interplay of Great Power politics, a situation which leads to further internal crises and further conflicts. Therefore a strategy of terror in the national liberation context depends upon an article of faith that the "World revolution" can be achieved to better the lot of the socially and politically deprived.

International Preventive Efforts

From the definition and strategy of terrorism it is now necessary to turn to international efforts to define and deal with the problem. Unfortunately

the picture presented is one of disunity where attempts to identify and proscribe acts of terrorism have all but failed. Initial efforts toward control first emerged in relation to the law of extradition when in the mid 19th Century international law held that, although certain offences having a political connotation were not extraditable, if the offence involved anarchistic acts, or an attempt on the life of a head of state, then the former nonextradition principle did not apply. The exclusionary provision in treati became to be known as the attentat or Belgian Clause. The rationale of thi principle found expression in Meunier's Case 1894 2 QB 455, 419 where an anarchist was described as not the opponent of one government but of all governments. The principle has endured in international law alongside the treasured right of states to grant asylum to political offenders.

The first Convention which might properly be described specifically as an anti-terrorism convention followed the assassination, in 1934, at Marsei of King Alexander I of Yugoslavia and Louis Bartlou, President of the Cou of the French Republic. The Convention, entitled the 1937 Convention for the Prevention of Terrorism; was signed by 24 States but ratified by only one and never came into force.

The Convention defines 'acts of terrorism' as "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or the general public."[32] Each contracting party is required to prohibit acts within its own territory calculated to kill or injure heads of State or persons holding public positions, damaging property belonging to another contracting party, and the dealing in arms or ammunition with a view to committing such offences. The Convention also re-affirmed "the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State."[33] A provision inserted at the behest of the United Kingdom is a saving provision to restrict the extradition of offenders by making the obligation to extradite subject to "any conditions and limitations recognized by the law on the practice of the country to which application is made"[34] thus maintaining a discretionary right to grant asylum to political offenders.

Since the second world war international response to terrorism has been mixed, although certain activities of a terrorist nature have been described as being contrary to international law. Of particular interest is General Assembly Resolution No. 2625 (XXV) of 1970 which affirms that it is the duty of contracting States "to refrain from organizing, instigating or participating in such acts of international terrorism or acquiesing in organized activities within their territories directed towards the commission of such acts, when the acts involve a threat or use of force." The resolution also requires States "to refrain from organizing, assisting, formenting, financing, inciting or tolerating terrorist activities directed toward the violent overthrow of the regime of another State."

When one looks at the problem of terrorism the relationship between the study of causes and the international problem of terrorism should be considered. Should the causes be regarded as factors capable of excusing the terrorist from liability? Franck and Lockwood raise the question: "If theyare to be regarded as mitigating, then they are properly placed in the category of remedies; if vitiating then they relate to the definition of

terrorism. This difference is fundamental. If certain kinds of acts are to be outlawed should the prohibition apply equally to all terrorist movements? Or should certain movements because of the justice of their cause, be exempt?[35] Dugard[36] argues that there should be no question of including considerations of motive in defining international terrorism. That is if the person has the intention of committing a terroristic act then he should be held liable regardless of motive. This approach is reflected in Article 2 (1) of the Draft Articles of the International Law Commission for the protection of diplomats. However, motive is a necessary ingredient in the US Draft Convention which endeavours to differentiate between acts of international terrorism from every day crimes covered by domestic criminal laws. The 1937 Convention clearly included the motive factor when it defined "acts of terrorism."

Franck and Lockwood summarize the situation:

"The principal benefit of a 'motive' test is that it excludes certain crimes already adequately punishable by national laws; but its disadvantage is that it would automatically and specifically catch all acts intended to terrorize any government, anywhere - thereby setting the state for some States to insist on excluding specific exceptions for national liberation movements. Others, while accepting the nobility of some liberation movement causes, feel that even worthy causes must be outlawed if pursued by indiscriminate means."[37]

Although one has much sympathy with the view of Dugar it would appear that in the present international climate there would be little chance for a Convention being adopted by the Afro-Asian and Arab States if the motive element was excluded from the definition entirely.

Another major obstacle to drafting a satisfactory definition of internation terrorism is the status of political offenders and the granting of asylum. But as Dugard points out the "international terrorist does not fall within the category of a political offender."[38] This is supported by Schtraks v. Government of Israel and Others (1962) 3 All ER -529 where Lord Radcliffe says (at p. 540)

"In my opinion the idea that lies behind the phrase 'offence of a political character' is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country... It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international aspects. It is this idea that the judges were seeking to express in the two early cases of Re Gastioni /(1891) 1 QB 149/ and Re Meunier (supra) when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power; and in my opinion it is still necessary to maintain the idea of that connexion."

Because of intense political pressure there has been more international accord in relation to the issue of terrorist conduct involving the hi-jacking and destruction of aircraft. The matter has been dealt with in three Conventions concluded by members of the ICAO whereby contracting States are obliged to make conduct endangering the safety of aircraft crimes within their own territorial jurisdiction. These conventions are the 1963 Tokyo Convention,[39] the 1970 Hague Convention and the 1971 Montreal Convention. These have resulted in some improvement in international airline security, however, efforts by the ICAO to strengthen measures against hijackers and States tolerating them failed due to the Arab States voting against all proposals, including a moderate US backed Soviet compromise.[40]

Conventions exist also to prevent the killing, kidnapping and otherwise

endangering diplomatic and consulat officials, as well as protecting the property of contracting States. The 1963 Vienna Convention on Diplomatic and Consular Affairs obliges States to take measures to protect Diplomatic persons and property. These measures have been incorporated in our national law. A similar convention was approved by the Organization of American States which seeks to punish such acts as murder, kidnapping, assaults, and extortion, directed against persons "to whom the State has a duty according to international law to give special protection."[41]

In 1970 the Inter-American Judicial Committee prepared a draft protocol which defined terrorism in wider terms than the Convention, but with some perception, called upon states to "remove certain domestic factors that increase the use of wanton violence."[42] The Convention on the other hand, raises an important issue for it makes it clear that political ideology or motive is irrelevant in determining guilty: it said

"The political and ideological pretext utilized as justification for these crime (ie.acts of terrorism) in no way mitigate their cruelty and irrationality or th ignoble nature of the means employed and in no way remove their character acts in violationof essential human rights."[43]

Following the intensification of terrorist activity in 1972, particularly the Lod Airport Massacre, the Munich Olympic Games incident, and the wave of letter bombings, the Secretary-General of the UN initiated action which resulted in the question of international terrorism being referred to the Sixth Committee. The communication included a request for considerati the causes of international terrorism.[44] As Dugard points out the debate of Sixth Committee was important because it makes perfectly clear the extent

to which wars of national liberation have been accepted by states. For instance, the United States in placing a Draft Convention for the Punishment and Prevention of Certain Acts of International Terrorism before the Sixth Committee pointed out that their proposals would not adversely affect the right of self determination.

The General Assembly reflecting the Afro-Arab approach by Resolution 3034 (XXVII)[45] invited states to make proposals on the matter to be considered by an ad hoc committee of 35 to report at the 1973 session of the General Assembly. In its third paragraph the Resolution

"reaffirms the inalienable right to self determination and independence of all people under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the General Assembly of the UN."

Observations were obtained and were passed on to the Sixth Committee by the Ad hoc Committee. The Sixth Committee referred the matter to the 29th Session in September 1974.

Further consideration of the matter was deferred by the General Assembly, probably, because of the serious political issues involved.

With some cynicism it might by hypothesized the progress with regard to the ICAO Conventions and the International Law Commission's Convention on the Protection of Diplomats is explicable on the basis of self-interest. That is to say accord is reached when states are affected in their self-interest. "Law does not operate as an autonomous force. Its rules on crucial matters gain effectiveness as their claims overlay perceptions of self-interest."

However, unanimity has not been reached in relation to a general Convention because of the issues of "motive" and "state terror."[46]

The Question of State Terrorism

Once it is assumed that an individual can be the subject of rights and duties under international law it is then necessary to determine whether proscriptions against terrorism (however defined) can be directed only against individuals and organizations, or can they be used against governments? For instance, it is of precious little use to be able to deal with individual terrorists when apprehended without sanctions being applied against governments that are prepared to train, equip and support terrorists. This issue resulted in some divergence of opinion during the deliberations of the Ad Hoc Committee wherein the Arab and non-aligned countries desired that initial action be directed against "state terrorism" defined as "Tolerating or assisting by a state the organizations of the remnants of facist or mercenary groups whose terrorist activity is directed against other countries." Individual terrorism is of no concern, in the Afro-Arab view if it is taking place in furtherance of a political cause.

The Western view is that Acts of government ought not be included within proscriptions against terrorism because they are already subject to international control. State terror is potentially subject to regulation by-laws against the use of indirect aggression, genocide and the like.

These debates tend to be devised as a red-herring to obscure the fact that terrorism is being used as a political tool for certain powers to increase world influence. Appeals to higher laws such as "anti colonialism"

merely serve to camouflage terrorist philosophies. Clearly, this is the central issue, and it is one so tied to politics that it is beyond immediate resolution while states cling tenaciously to principles of national sovereignty.

State terror has produced (and presently does in some parts of the world) grave injustices and cruelty. One can appreciate the illogicality of an international legal system which tends to favour the incumbent regime, no matter how brutal, provided it can justify its actions by recourse to appeals to "internal security" and protection against external subversion, concepts wedded to anachronistic notions of national sovereignty.

Prevention of Terrorism

An essential part of this analysis is an acceptance of two notions: first, that the individual is properly a subject of international law, and second, that we are presently within a transition period between a politics based on the sovereignty of the nation state and the creation of World government through international organs. Present day terrorism is taking place within this period which is inherently uncertain and often tense.

To sum up the present situation, it is becoming apparent that the causes of terrorism are complex and deep and while being closely associated with a desire for national liberation, terrorism and other acts of political violence appear to spring from groups which feel deprived and alienated from international and national society both materially and conceptually.[47]

This raises the question of future of terrorism. Jenkins is quite blunt in pointing out that on balance "we will see more destructive acts coupled with more extravagant demands" which "in part is propelled by the apparent

success achieved by terrorist groups thus far, and also by the fact that terrorist have to do something more extravagant to gain attention." he also predicts that there will be increasing links between various groups in various parts of the World. Having regard to the available evidence it is apparent that these predictions are justified and that terrorism will be with us for some time to come, particularly if terrorists continue to be supported as part of international great power struggles.

The apparent legitimation of wars of national liberation by the international community requires us to adjust to the reality of the situation. We must accept the situation and, perhaps, in some cases even give sympathetic support to movements to peaceful liberation against oppressive regimes in accordance with prevailing international custom and good sense. But we must also work to develop certain minimum standards of conduct which would find common support within the international community at large. One example where accord should be easy would be the taking of innocent hostages by terrorists in countries not related to their struggle.

Beyond this limited accord we must then work toward the creation of su, national institutions capable of making impartial and non-political judgments as to the moral worth of incumbent regimes. If they are undesirable and outlawed multi-lateral intervention would be justified to prevent "state crime" rather than persisting with the hazardous experiment of fostering indirect aggression to overthrow the criminal regime. Initially, this might be better accomplished through regional arrangements provided, however, that institutions created are responsible to a universal body. During the transition period we must be as ready to condemn state terrorism as individual terrorism, otherwise, strength might be lent to the criticism that in reality efforts against terrorism are a sham and merely serve to perpetua

and protect illegal regimes. A suspicion which can only hamper chances of future international agreement.

Current politics indicate that accord will only be reached if there are guarantees that action against terrorism is not directed toward preserving the status quo. Concurrently, mechanisms must be created to allow social change and progress to be achieved for those within colonial or discriminatory regimes.

We must build our hopes for the future upon the establishment of an international criminal law supported by an international criminal court to exercise jurisdiction over the offender who violates World law. Progress towards this objective will not be easy, however, it may well be achieved if the jurisdiction of the court and the range of offenses it can try are developed carefully and realistically. Terrorism and crimes against humanity would be an ideal starting point. To be fully effective there should not be "just one grand, remote world court, but a whole system whereby the existing structures of national courts are, first, authorized and then gradually required, to implement, the terms of supra-national law, as overriding any inconsistent national law."[48]

It will be the place of the international criminologist to work towards the creation of supra-national remedies and sanctions to be applied by a World criminal court. These must be worked out in a context presently alien to the national criminologist for as Schwarzenberger observed: "International society still lacks any of the conditions upon which the use of criminal law depends,"[49] namely, the State achieving a monopoly on violence and the application of sanctions. New sanctions against the terrorist State as well as the terrorist individual must be developed. The criminologist is well placed to bring together the disparate threads and play a vital role with the international lawyers in developing remedies to the problem of terrorism.

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WORK PAPER
ON
LEGAL ASPECTS OF AERIAL TERRORISM:
THE PIECEMEAL vs. THE COMPREHENSIVE APPROACH?

By

Claude Emmanuelli

Legal Aspects of Aerial Terrorism:

The Piecemeal vs. The Comprehensive Approach?

I. Introduction

The question whether international terrorism should be dealth with from a comprehensive or a piecemeal approach is a mind boggling issue, which has for some time now divided writers, just as it has divided members of the United Nations Ad Hoc Committee on terrorism in 1973.

This doctrinal conflict remains unanswered. This is true whether one takes a purely repressive approach and compares the efforts of the League of Nations to those of the U.N. family[1] or, on the contrary, whether one adopts a broader approach and combines repressive and preventive actions as the U.N. Sixth Committee attempted to do.[2] The international response to aerial terrorism sheds a new light on this conflict. Indeed, the action of the international community with respect to acts of unlawful interference with international civil aviation offers a unique example of the successive application of both doctrines to a special category of acts of terrorism and; therefore, allows a comparison between their respective application.

The international community has essentially chosen to deal with unlawful interference with civil aviation from a repressive viewpoint and as an individual problem treated in response to events. This attitude on the part of the international community with respect to aerial terrorism may be explained by the nature of the acts as well as

their consequences to the international community. Air transportation presents a special attraction for terrorists.[3] Apart from their spectacular effects and the fact that they afford, at the same time, a means to strike and flee, acts of aerial terrorism have symbolic overtones in the sense that they are directed against emblems of wealth and power as well as against emblems of our modern society. Moreover, air transportation is an essential part of our modern international communications network. Acts of aerial terrorism affect the interdependence of states and the international community as a whole by disrupting, if not totally severing, communication links among states. Conversely, the elimination of the causes of terrorism through international cooperation requires that the means of interstate communication be secured. Consequently, the necessity of securing the safety of international civil aviation for the sake of the international community as a whole has, from the beginning, appeared to be paramount.

Nevertheless, it is not suggested here that the attitude of the international community towards acts of unlawful interference with international civil aviation has reflected on the part of every State, a readiness to adopt all necessary measures to eliminate these acts. In fact, no matter how successful the legal and technical measures adopted at the national and international levels have been to curb acts of aerial terrorism, a number of loopholes remain in the system. The piecemeal approach appears to be insufficient in thwarting aerial terrorism as the problem of "haven States" can only be solved by means of a comprehensive approach.

The failure of the efforts to deal with "terrorist havens" in 1973 at Rome, seems to be in accord with the previous failure of the Sixth Committee in the general area of terrorism.

II. The Piecemeal Approach to Aerial Terrorism

Unlawful interference with civil aviation is not a new phenomenon, as it is often believed. On the contrary the first recorded act of an unlawful seizure of aircraft goes back to 1930 when members of a revolutionary movement diverted a Peruvian airplane.[4] However, since 1930, the frequency and the nature of these acts as well as the motives behind them have radically changed, leading the international community to adopt the pragmatic approach required by the evolution of this changing phenomenon.[5]

Under the piecemeal approach, the response of the international community has been quite thorough. Most cases of unlawful interference with international civil aviation fall within the purview of the three existing conventions signed under the auspices of the International Civil Aviation Organization (I. C. A. O.). Yet, these Conventions are not foolproof and as the phenomenon of unlawful interference with air transportation continues to evolve, a number of loopholes have become evident in the positive law of aerial terrorism.

A. The Successful Results of the Piecemeal Approach

The response of the international community to unlawful interference with international civil aviation corresponded to the wave of diversion of aircraft, mainly of U.S. registration, to Cuba.

The first provisions on what was then called "highjacking" or "skyjacking" are to be found in article 11 of the Convention on Offences and Other Acts Committed on Board Aircraft, signed in Tokoyo in 1963.[6] The provisions of this article are restricted to the question of regaining control over the diverted airplane, the resumption of the interrupted journey of the passengers and crew, and the return of the aircraft to the persons entitled to possession. As the menace of air terrorism increased, this first step was followed by the adoption of The Hague Convention on Hijacking of 1970[7] and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed in Montreal in 1971.[8] These conventions define acts of unlawful interference with international civil aviation as those which are covered by a principle of quasi-universal jurisdiction and, create an obligation for member States to extradite the offender or submit his case to their authorities for the purpose of extradition.

1. The obligations of member States vis-a-vis the victims of acts of unlawful interference with international civil aviation.

These obligations are included in the three existing conventions on unlawful interference with international civil aviation in the form of standard provisions which were adopted ıe Tokyo Convention and strengthened in the two subsequent agreements.

Basically, under these standard provisions, contracting States must take all practicable measures to prevent the occurrence of acts of violence against civil aviation as defined by

the Montreal agreement.[9] In cases of unlawful seizure of aircraft, they must take all appropriate measures to restore control of the captured aircraft to its lawful commander or to preserve his control of the aircraft.[10] In the case of the unlawful seizure of an airplane,[11] or delay or interruption of a flight due to acts of violence,[12] contracting States, in which territory the aircraft or its passengers and crew are present, must "facilitate the continuation of the journey of the passengers and crew as soon as practicable."[13] They must also "without delay return the aircraft and its cargo to the persons lawfully entitled to possession."[14] In this respect, it must be noted that the Hague and Montreal agreements extent the obligation in the Tokyo Convention to States other than the landing State and thus cover situations wherein the plane, passengers and crew are taken outside the territory of the State of landing.

2. The recognition of acts of unlawful interference with international civil aviation as an international offense.

Whereas article 11 of the Tokyo Convention was merely directed toward the remedial solutions to acts of unlawful interference with air transportation, the Hague and Montreal agreements have approached this question from a repressive viewpoint and have made these acts an international crime.

The combined provisions of the Hague and Montreal Conventions define the different acts of the general offense of unlawful interference with international civil aviation.

(1) Any lawful seizure or exercise of control of an aircraft in flight by a person on board by means of force, threat thereof or

any form of intimidation; or

(2) Any acts of violence against a person on board an aircraft in flight; destruction of, or damage to an aircraft in service; sabotage of an aircraft in service; destruction of, or damage to air navigation facilities or interference with their operation; communicatio of false information which is likely to endanger the safety of aircraft in flight; or

(3) Any attempt to commit any of the aforementioned acts; or

(4) Any complicity with anyone committing these acts.

The international element of the offense is clearly enunciated in the provisions of the conventions dealing with the scope of their applica It is emphasized that the Conventions apply only if the place of take-off or of actual (or intended) landing is situated outside the territory of th State of registration, or if the offender is found in the territory of a State other than the State of registration, or if the offense is committe in the territory of a State other than the State or registration of the air craft.

Under the Hague and Montreal Conventions, the contracting State further undertake to adopt the necessary measures in order to establis their legal jurisdiction over acts of unlawful interference with internati civil aviation. This duty must be complied with according to a number of jurisdictional principles, the application of which amounts to the establishment of a quasi-universal jurisdiction over acts of aerial terrorism. In addition to the traditional territorial and national jurisdiction of States of first landing of States in which the lessee has its principal place of business or permanent residence in the case of an

aircraft leased without crew, and of States where the alleged offender is present.

Moreover, according to article 2 of the Hague Convention and article 3 of the Montreal Convention, contracting States must make the offense of unlawful interference with international civil aviation punishable by severe penalties, the adoption and application of which are left to the individual member States.

Both Conventions contain provisions based on the principle aut dedere aut judicare. According to these provisions, contracting States have an obligation either to extradite the alleged offender found in their territory or to submit his case ot their competent authorities for the purpose of prosecution.

With respect to extradition, both Conventions emphasize that the offense of unlawful interference with international civil aviation must be deemed to be included as extraditable offenses in any existing treaty between contracting States and must be included in every future extradition treaty between these States. Also, contracting States which do not make extradition conditional on the existence of a treaty shall recognise acts of unlawful interference against air transportation as extraditable offenses between themselves.

With respect to prosecution, both Conventions specify that cases of unlawful interference with international civil aviation must be submitted to prosecution without exception and wherever the offense was committed. Furthermore, the authorities in charge of prosecuting the alleged offender must handle the case in the same

manner as in the case of any ordinary offense of a serious nature under the law of that State.[27] However, it is clear that prosecution is not mandatory and that there are no principles that regulate the question of concurrent jurisdiction in the case where more than one State requests the extradition of the offender.

B. The Loopholes Resulting from the Piecemeal Approach

A number of criticisms need to be addressed to the Hague and Montreal Conventions with respect to gaps in their scope of application as well as to weaknesses in their system of sanctions.

1. Gaps within the scope of application of the Convention.

For the purposes of their application, the Hague and Montreal Conventions consider an aircraft to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is open for disembarkation.[28] Therefore, it is clear that any act of violence against a person on board an aircraft committed before or after the aircraft is "in flight", in the sense of the conventions, does not fall within the purview of their provisions. Neither convention applies to aircraft used in military, customs or police services,[29] therefore, leaving outside the realm of their application acts of unlawful interference committed by warplanes against civil aviation,[30]

With regard to the Montreal Convention, the definition of acts of violence against civil aviation does not include attacks against persons within the premises of an airport.[31] Furthermore, the Montreal Convention, by virtue of the definition of an aircraft "in

service"[32] does not apply to acts committed before the beginning of the preflight preparation nor to acts committed after a period of 24 hours following any landing. The definition of unlawful seizure of aircraft does not include acts of diversion committed by another plane. This is especially unfortunate since article 15 of the Convention on the High Seas[33] regarding air piracy does not cover these acts, either. Finally, the Montreal Convention does not apply to navigation facilities which are not used in international air navigation.[34]

2. Weakness regarding the system of sanctions: aut dedere aut punire?

The weakness in the system of sanctions under the Conventions results, in a large part, from the provisions on extradition. For States which make extradition conditional on the existence of a treaty, the Convention is not automatically the legal basin for extradition.[35] Rather, the application of the Convention is optional, and extradition is subject to the domestic law of the requested State,[36] which may refuse extradition on the basis of nationality or on political grounds.[37] Furthermore, the Conventions do not provide for the establishment of a system of priority in dealing with extradition requests. This is exacerbated by the wide disparity in domestic laws dealing with extradition and with unlawful interference with international civil aviation.[38] The weakness that results is apparent in the case of concurrent requests of extradition from States having jurisdiction over the offense. For humanitarian as well as political

reasons, the requested State may be reluctant to extradite an offender to the requesting State which is likely to treat the offense in the harshest manner. Rather, the State might choose to prosecute the offender itself or to extradite the offender to another requesting State where he may receive only a token sanction. The effect is to defeat the purpose of creating a repressive system with respect to aerial terrorism, for the idea is not to apply just any sanction to this phenomenon, but one which will eliminate it.

Finally, the principle of universal jurisdiction does not apply to a number of acts[39] i.e., the destruction of air facilities and the communication of false information likely to endanger the safety to civil aviation. This appears to be another serious limitation to an effective system of sanctions.

The lack of a mandatory system of prosecution with respect to aerial terrorism must be emphasized. Despite the repeated efforts of some delegations[40] during the Hague and Montreal Conferences, the existing texts on aerial terrorism do not recognize a system of mandatory prosecution in cases of denial of extradition requests. On the contrary, the State authorities in charge of handling the prosecution may well decide that, according to their domestic law, the alleged offender should not be prosecuted at all. In this respect, the obligation to treat the offense as an ordinary one of a serious nature under the law of the prosecuting State does not prevent that State from taking into account the political motiviations behind the act for the purpose of prosecution,

in accordance with the domestic law and practice of the state. Therefore, the formula aut dedere aut punire, which is applied by many writers to the system of sanctions established under the Hague and Montreal Conventions, is not a correct interpretation on the postive law on the subject.

Finally, in view of the progressive adoption of international agreements on aerial terrorism and of the domestic implementation of their provisions, it became apparent to some members of the international community that the pieces of the legal puzzle had been gathered together and that the next step was to put them together. The move towards unification of responses to unlawful interference against international civil aviation was started. For some time, the comprehensive approach was to predominate over the piecemeal approach.

II. The Comprehensive Approach

This approach has been adopted by the international community with respect to the unification of safety standards at airports and in the area of sanctions against "haven States".

A. The Comprehensive Approach and the Unification of Safety Standards at Airports

Since the early days of hijacking, governments as well as airport authorities and air carriers have endeavored to develop technical solutions to unlawful interference with international civil aviation.[41] However, the difficulties relating to the thorough application of these preventive measures have hampered their

efficacy. Adding to these shortcomings, there has been a growing sophistication of the method used by air terrorists to thwart pre-boarding measures of control. An improvement of the coordination of responsibilities for security control at airports between States as well as the adoption of a unified system of safety measures at airports and on board airplanes by means of an international agreement was then advocated.[42]

The initiative to improve the efficiency of technical solutions was eventually taken by the I. C. A. O. Committee on the Unlawful Interference against International Civil Aviation. This body has recommended the adoption of a number of safety measures which have since been incorporated in existing Annexes to the Chicago Convention[43] as well as in a new Annex 17 entitled "Security - Safeguarding International Civil Aviation against Acts of Unlawful Interference." Annex 17 mainly provides a basis for cooperation between authorities responsible for the adoption of security measures at airports at the domestic level as well as at the international level.[44]

According to the constitutional provisions regulating the quasi-legislative powers of I. C. A. O., these measures, adopted by the Council of the Organization, apply to member States which do not express their opposition thereto.[45] Unfortunately, the international community has not expressed a similar readiness to cooperate in respect of the adoption of measures of concerted action against States sheltering persons who endanger the safety of civil aviation.

B. The Comprehensive Approach with Respect to Concerted Action

The success of any international agreement depends largely

on its widespread application by members of the international community. This is especially true in the area of aerial terrorism where offenders are in most cases able to escape to a State other than the one affected by their action and preferably a State supporting their cause.

In this respect, a number of States which have acquired the reputation of "terrorist havens" have not become parties to the Hague and Montreal Conventions[46] and only one of them is a party to the Tokyo Convention.[47] With respect to the question of extradition or prosecution of offenders, the gap created by the lack of universal acceptance is only felt in the case of politically motivated acts of unlawful interference with international civil aviation. Long before these treaties were adopted, it was standard international practice to send common criminals back to the country of nationality of the seized aircraft.[48] However, in other areas the lack of universal acceptance of the treaties creates problems irrespective of the motives of the offenders. For example, with respect to the return of the aircraft, passengers and property on board, there have been several instances of delay in the resumption of the journey of the passengers and crew and many cases of confiscation of the diverted aircraft along with the property on board. This has happened even when the offender was deported.

In light of the encouragement given to acts of interference with international air transportation by the existence of "hijack havens" the United States and Canada proposed at the seventeenth session of the I. C. A. O. Assembly in 1970, that measures of concerted action

against States which refuse to comply with existing conventions he adopted.[49] These efforts were spurred by the well known events of September 1970 during which several hundreds of passengers were kept hostages for several days and four aircraft were destroyed in the Middle East. The I. C. A. O. endorsed the idea of concerted action in October 1970 and for the following three years a number of proposals were envisaged within the framework of this organization. Nevertheless, the legal and political obstacles raised by a number of delegations prevented the adoption of a system of concerted action in Rome in 1973.[50]

1. The various approaches to concerted action.

Basically, three major approaches were taken with a view to securing the enforcement of positive law in respect of unlawful interference against international civil aviation. They were: (1) the bilateral, (2) the multilateral and, (3) the concerted action and amendment to the Chicago Convention.

The bilateral approach was proposed by Canada in 1970 and provided for a special clause to be inserted in bilateral air transport agreements. This clause would allow one party to suspend its air services with another party for non-compliance with the existing conventions. This approach was abandoned in 1971 in favor of a multilateral approach.

An application of the multilateral approach was proposed initially by the United States alone and then by the United States and Canada jointly. The U. S. -Canadian draft proposed that following an act of unlawful interference with civil aviation, any state, having

reasons to believe that the State of landing or the State where the alleged offender happened to be were in violation of the existing conventions, could convene a commission to examine the circumstances of the case.

Upon determination of the violation by the defaulting State, the various "interested States" involved in air services with the defaulting State would meet and decide on concerted action, including the suspension of air services to and from the defaulting State as well as "other measures to preserve and promote the safety and security of international civil aviation."

A different version of this multilateral approach was sponsored by Scandinavian countries. Under the so-called "Nordic proposal," the interested State could call upon the I. C. A. O. Council to deal with the alleged violation. Upon satisfaction that the complaint was well-founded, the Council could recommend that the defaulting State "take appropriate measures to remedy the situation." In case of non-compliance with the Council recommendations, the Secretary General of I. C. A. O., upon request of an "interested State," could convene a conference of the member States which would authorize the adoption of appropriate measures to remedy the situation.

The proposal of concerted action and amendment to the Chicago Convention was mainly put forward by the United Kingdom and Switzerland. It provided for the insertion in the Chicago Convention of the articles of the Hague and Montreal Conventions defining the offense of unlawful interference with international civil aviation as well as the obligations of States towards interrupted flights. Sanctions for non-

compliance with these provisions included suspension of the right
over-flight of defaulting States and suspension of their right to vo
in the I. C. A. O. Assembly. A variation of this proposal was intr
duced by France. The advantage of this approach was that it wou
bind, if adopted, all parties to the Chicago Convention to the pote
sanction of being excluded from membership in case of rejection
adopted amendment. However, there were many political and leg
obstacles to this proposal, as well as to the other alternatives, a
as a consequence they failed.

2. The legal hurdles attached to concerted action.

Two major legal issues were discussed within the context o
concerted action.

First, the competence of I. C. A. O. to adopt sanctions was
questioned. A number of States led by the U. S. S. R. felt that the
application of sanctions to States was within the exclusive jurisdic
of the United Nations Security Council. [51] In this respect, article 4
of the Charter provides as a sanction the complete or partial inter
ruption of air and other means of communications. However, the
repeated condemnations by the United Nations of acts of unlawful
interference with international civil aviation, combined with the
delegation of the problem to the I. C. A. O., seemed to support the
idea that the latter body had jurisdiction to adopt sanctions. [52]

Secondly, the question whether, sanctions could be applied
to third parties was raised with respect to the multilateral approa
since article 34 of the Vienna Convention on the Law of Treaties [53]

clearly states that no obligations or rights can be created for a
third party by a treaty without the consent of that third party. The
proponents of the adoption of a new agreement on concerted
action seemed to have viewed the provisions of the existing con-
ventions on aerial terrorism as a mere codification of customary
principles of international law. Among these principles, the
fundamental right of jus communications could be taken against
defaulting States for violation of universal principles of international
law rather than of conventional principles limited in their application.

Other legal issues were raised with respect to the compatibility
of sanctions with the Chicago Convention and the International Air
Services Transit Agreement, [54] the compatibility of new sanctions
and the provisions on dispute in the Tokyo, Hague and Montreal Con-
ventions, and the compatibility of sanctions with the rights and
duties of States under the law of war etc.

However, strong the legal difficulties happened to be, they
could have been overcome if there had been unanimity on the ne-
cessity to adopt measures of concerted action. The absence of
such unanimity was reflected during the joint meeting of the
I. C. A. O. Assembly and at the International Conference on Air
Law held in Rome in 1973. The draft protocol of amendment to
the Chicago Convention put forward before the Assembly as well
as the various proposals before the Conference were all defeated
during their joint meeting.

IV. Conclusions

In the final analysis, the piecemeal approach to social terrorism is responsible for two major achievements. The first is the clear enunciation and wide recognition of the principles regarding the continuation of the interrupted journey of the passengers and crew, and the return of the aircraft and its cargo to the persons entitled to possession. It is suggested that these principles, because of their universal application have become part of cutomary international law binding on all States and perhaps even part of the jus cogens. The second achievement is the adoption of the principle aut dedere aut judicare along with the application of the concept of universal jurisdiction to acts of aerial terrorism, which constitutes an important step towards the prevention and sanction of acts of aerial terrorism. In this respect, it must be emphasized that the principles developed with respect to the handling of perpetrators of acts of unlawful interference with international civil aviation have been extended to the protection of diplomats against acts of terrorism.[55] The conclusion of bilateral extradition agreements, as well as the domestic application of legal and technical measures to deal with terrorism, have completed the piecemeal approach adopted at the multinational level and have greatly reduced the rate of successful acts of unlawful interference with international civil aviation. In this connection, the adoption of Annex 17 by the I.C.A.O. Council in respect of the unification of security measure is an indication that the international community is slowly moving

towards a comprehensive approach to air terrorism, at least at the technical level.

On the other hand, the temporary failure of the comprehensive approach to unlawful interference with international civil aviation in the area of concerted action must be attributed primarily to the reluctance on the part of most States to restrict their sovereign discretion over political acts in a highly divided world. In this respect, it must be remembered that the provisions on extradition and prosecution of offenders under the Hague and Montreal Conventions afford to member States a certain degree of discretion in the handling of terrorist acts based on political motivations. The efforts to bring about an agreement on concerted action have ignored the compromises achieved by the previous conventions with respect to political motives and have attempted to leapfrog the problems left by these compromises. Hence, the failure of the comprehensive approach can also be attributed to the timing of this approach. This is reflected in the negative reaction of the world public opinion to the strikes organized by the International Federation of Airline Pilots Association to emphasize the need for concerted action against "hijack havens"[56] as well as in the failure of the U.N. Ad Hoc Committee on terrorism.

These comments are not meant to emphasize the superiority of one approach over the other nor to suggest that problems of terrorism should be exclusively dealt with from the viewpoint of a piecemeal approach. However, they do suggest that the basic

obstacles to a comprehensive approach should be solved at the piecemeal level before attempting further integration. Furthermor no worldwide solution to the problem on unlawful interference again international civil aviation can be reached until States realize the importance of international communications for the international community and agree to free this fundamental channel from political struggles.

In the short run, one can only reiterate the view that all States should endeavour to ratify or accede to the Tokyo, Hague and Montreal Conventions.[57] Moreover, between the lenient and the harsh approaches offered by the Hague and Montreal Conventions States should adopt the attitude best suited to protect the safety of international communications. In this respect, efforts should be devoted to fill the gaps left in the scope of these conventions. Efforts should also be devoted to the adoption of a system of priorities in extradition cases[58] along with a program of unification of domestic legislations.[59] It is also believed that States should continue to work within the realm of I. C. A. O. on the adoption of concerted action. At the same time, these States should be prepared to take unilateral action against "terrorist havens", if such action is required, and with respect to violations of widely recognized principles, such as those regarding the fate of passengers and crew.[60] Their unilateral action will hopefully set a precedent followed by other States and might in time open the road to a worldwide agreement on a comprehensive approach

to aerial terrorism.

Until such an ideal time is reached the passengers, "pauvres hommes assis a la place des anges", will, it is feared, keep wondering with anxiety: "Combien d'hommes encore s'entretuent auhourd'hui?"[61]

Footnotes

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(1) Gross, International Terrorism and International Criminal Jurisdiction (editorial comment), 67 Am. J. Int'l L. 508 (1973); Letter from John F. Murphy to the Editor-in-Chief, Professor Gross's Comments on International Terrorism and International Criminal Jurisdiction, 68 Am. J. Int'l L. 306 (1974).

(2) See Franck and Lockwood, Preliminary Thoughts Towards and International Convention on Terrorism, 68 Am. J. Int'l L. 69 (1974); Letter from Jordan J. Paust to the Editor-in-Chief, Some Thoughts on Preliminary Thoughts on Terrorism, 68 Am. J. Int'l L. 502 (1974).

(3) This attraction seems in accordance with the influence of collective reality on anti-social acts, which is suggested by R. Aaron, Introduction a la Philosophie de l'Histoire 208 (1937).

(4) See C. Emanuelli, Les Moyens de Prevention et de Sanction en cas d'Action Illicite Contre d'Aviation Civile Internationale at Introduction (1974) [hereinafter cited as Emanuelli.]

(5) See Evans, Articraft Hijacking: What is Being Done, 67 Am. J. Int'l 641, 644-663 (1973) [hereinafter cited as Evans].

(6) Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done at Tokyo September 14, 1963, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; 2 Int'l Legal Materia 1042 (1963) [hereinafter cited as Tokyo Convention].

(7) Convention for the Suppression of Unlawful Seizure of Aircraft done at The Hague, December 16, 1970, (1971) 2 U.S.T. 1641, T.I.A. No. 7192; 10 Int'l Legal Materials 133 (1971) [hereinafter cited as Hague Convention].

(8) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, September 23, 1971, [1973] 1 U.S.T. 564, T.I.A.S. No. 7570; 10 Int'l Legal Materials 1151 (1971) [hereinafter cited as Montreal Convention].

(9) Montreal Convention art. 10(1).

(10) Tokyo Convention art. 11(1); Hague Convention art. 9 (1).

(11) Tokyo Convention art. 11(2); Hague Convention art. 9(2).

(12) Montreal Convention art. 10(2).

(13) Hague Convention art. 9 (2); Montreal Convention art. 10(2).

(14) Id.

(15) Hague Convention art. 1(a).

(16) Montreal Convention art. 1(1).

(17) Hague Convention art 1(a); Montreal Convention, art. 1(2) (a).

(18) Hague Convention art. 1(b); Montreal Convention, art. 1(2) (b).

(19) Montreal Convention art. 4(2) (a).

(20) Hague Convention art. 3(3); Montreal Convention, art. 4(2) (a).

(21) Hague Convention art. 3(5); Montreal Convention, art. 4(3).

(22) Montreal Convention art. 4(2) (b).

(23) Hague Convention art. 4; Montreal Convention art. 5.

(24) Hague and Montreal Conventions art. 7.

(25) Hague and Montreal Conventions art. 8(1).

(26) Hague and Montreal Conventions art. 8(3).

(27) Hague and Montreal Conventions art. 7.

(28) Hague Convention art. 3(1); Montreal Convention art. 2(a).

(29) Montreal Convention art. 2(b).

(30) Convention on the High Seas, done at Geneva April 29, 1958, [1965] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. On the differences between hijacking and Piracy, see Poulantzas, Hijacking v. Air Piracy: A Substantial Misunderstanding Not a Quarrel over Semantics, (1970) Revue Hellenique de Droit International [Rev. Hellen. de Droit Int'l] 80; Emanuelli, supra note 4 at 76-83.

(31) It should be mentioned here that during the Rome Conference in 1973 a Greek proposal to cover such acts by means of a protocol to the Montreal Convention was ignored.

(32) Montreal Convention art. 4(5).

(33) Hague Convention, art. 3(2); Montreal Convention, art. 4(1).

(34) E. g., destruction in flight of a Libyan airliner by Israeli jet fighters, Feb. 1973, Diversion of an Iraqi Airways plane by Israeli fighters, Aug. 1973.

(35) Hague and Montreal Conventions, art. 8(2).

(36) Hague and Montreal Conventions, art. 8(2) &(3).

(37) See, Zotiades, The International Criminal Prosecution of Persons Charged with an Unlawful Seizure of Aircraft, 1971 Rev. Hellen. de Droit Int'l 13, 33-35; Abramovsky, Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention, 13 Colum. J. Transnat L. 381, 398-99.

(38) See Emanuelli, supra note 4 at 37-46; Evans, supra note 41, 656.

(39) Montreal Convention, art. 5(2).

(40) E. g., Ireland.

(41) McWhinney, The Illegal Diversion of Aircraft and International Law, 138 Academie de Droit International, The Hague, Recueil des Courts 263, 342-53 (1973) [hereinafter cited as McWhinney], Evans supra note 5 at 648-50; Emanuelli, supra note 4, at 9-24.

(42) Poulantzas, The Enti-Hijack Convention of December 16, 1970 An Article-by-Article Appraisal in the Light of Recent Developments 3 Anglo-Am. L. Rev. 4, 42-43 (1973).

(43) Convention on International Civil Aviation, done at Chicago, December 7, 1944, 61 Stat. 1180, TI. I. A. S. No. 1591, 15 U. N. T. S. 295 [hereinafter cited as Chicago Convention].

(44) Fitzgerald, International Terrorism and Civil Aviation (1974) Can. Council on Int'l L. Proc. 79, 104-05.

(45) Chicago Convention, arts. 38 and 90.

(46) Algeria, Cuba, Libya, Syria

(47) Libya

(48) Emanuelli, supra note 4, at 47.

(49) Fitzgerald, Concerted Action Against States Found in Default of Their International Obligations in Respect of Unlawful Interference with International Civil Aviation, 1972 Can. Y. B. Int'l L. 261 (1972)

(50) Id.; Emanuelli, supra note 4 at 118; Evans, supra note 5 at 667, McWhinney, supra note 41, at 309.

(51) The U. S. S. R. was urging the adoption of a protocol to amend the Hague and Montreal Conventions and providing for the compulsory extradition of offenders.

(52) See Emanuelli, supra note 3 at 94.

(53) Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U. N. Doc. A/CONF. 39/27 (1969) in 8 Int'l Legal Materials 679 (1969).

(54) International Air Services Agreement, signed at Chicago December 7, 1944, 59 Stat. 1963, E. A. S. No. 487, 84 U. N. T. S. 389.

(55) See Lee, The Development of the Convention on the Protection of Diplomats: Behind the Scenes (1974) Can. Council on Int'l L. Proc. 153.

(56) See, Emanuelli, supra note 4, at 105.

(57) As of January 1, 1975, 74 States were parties to the Tokyo Convention, 71 States were parties to the Hague Convention, and 59 States were parties to the Montreal Convention, U. S. Dept. of State, Treaties in Force 324-25 (1975).

(58) The obvious priority seems to be in favor of the State of registration of the aircraft and the state of the territory where air facilities are being attacked.

(59) Another possibility is to guarantee the same treatment as applied to nationals charged by the prosecuting State with the same offense.

(60) See Antihijacking Act of 1974, 49 U. S. C. A. §§ 1301, 1514-15 (1974); Evans, supra note 5 at 670.

(61) Rene de Obaldia, Priere qui monte aux levres d'un jeune homme croyant, volant en avion a huit mille metres d'altitude, quoted in the Pontavice, La Piraterie Aerienne: Notion et Effets 1960 Revue General de l'Air et de l'Espace.

WORK PAPER
ON
INTERNATIONAL TERRORISM AND THE DEVELOPMENT OF THE PRINCIPLE AUT DEDERE AUT JUDICARE

By
Declan Costello

International Terrorism and the development of the principle aut dedere aut judicare.

"But as it is not usual for one state to allow the armed forces of another to enter her territories under the pretext of inflicting punishment upon an offender, it is necessary that the power, in whose kingdom an offender resides, should upon complaint of the aggrieved party, either punish him himself, or deliver him to the discretion of that party. Innumerable instances of such demands to deliver up offenders occur both in sacred and profane history.... All these instances are to be understood not as strictly binding a Prince a people or sovereign to the actual surrender of the offenders, but allowing them the alternative of either punishing or delivering them up."

Grotius: "The Rights of War and Peace"
Chapter XXi.

Introduction.

A penal code to be of practical value must have effective machinery by which an alleged offender is tried and, if guilty, punished. Whilst the legal problems involved in both the concept of international terrorism and in effective arrangements to combat it are complex, basic to the topic is the provision of effective enforcement procedures. Difficulties arise in this connection firstly because of the "political" nature of many acts of terrorism and secondly because many terrorists become fugitives. A terrorist who is not a fugitive offender can be made amenable to the laws of the State in which the offence occurred. A terrorist who escapes from the State in which the offence occurred and who is not a fugitive "political" offender can be made subject to the ordinary well-established extradition procedures. But a fugitive terrorist who claims that his acts were politically motivated raises issues which can be both political as well as legal.

An international legal conference of this kind is not the forum in which to discuss the political problems which the subject of international terrorism raises. The existence of such problems should not, however, inhibit an examination of the legal aspects of the subject. Indeed, they should help to stimulate such an examination. For a study of the legal problems involved may well help in demonstrating ways of dealing with them which are not merely legally feasible but which may be also politically acceptable. It is in this belief that a study is here undertaken of one particular aspect of arrangements to prevent international terrorism, namely effective measures to ensure the trial of persons accused of terrorist acts.

Such a study can best commence with an examination of action taken on a world wide basis in the field of international co-operation to deal with internationally defined offences, and can best proceed chronologically.

Development by International Convention.

The first relevant Convention is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (The "Genocide Convention"). For a solution to the problem posed by the fugitive offender, reliance was placed mainly on extradition. The Convention provided that the "competent tribunal of the State in the territory of which the act was committed" would have jurisdiction to try the offender (Article 6). By the same Article it was provided that trial of a person charged with genocide could also take place by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which have accepted its jurisdiction".

The Convention made no provision for jurisdiction to prosecute to be given to a State in which the offender might be apprehended, but instead endeavoured to facilitate extradition procedures by providing that "genocide and the other acts enumberated in Article.11 shall not be considered as political crimes for the purpose of extradition." Furthermore, the Contracting States pledged themselves in such cases to grant extradition "in accordance with their laws and treaties in force". This method was designed to facilitate extradition by specifically excluding the offence referred to in the Convention from the category of "political offences". It has not been adopted in later Conventions. Nor has any later Convention referred to the possible jurisdiction of an international penal tribunal - a tacit but eloquent recognition of the failure of the international community to establish one.

On the 12th August, 1949, there were signed at Geneva four Conventions relative to the amelioration of the conditions of wounded and sick in armed forces in the field; the amelioration of the condition of wounded sick and shipwrecked members of armed forces at sea; the treatment of prisoners of war; and the protection of civilian persons in time of war (The "1949 Geneva Conventions"). A new formulation of a solution for bringing alleged offenders to trial was made. Each of the Conventions contained a provision which required the High Contracting Parties "to undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the grave breaches of the Conventions". In addition each High Contracting Pa was placed under an obligation "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, irrespective of their nationality, before its own courts". Thus States party to the Conventions

were required by them to enact legislation which would give jurisdiction to their courts to try offenders, whatever their nationality, and whether or not the offence was committed within their territorial jurisdiction Each Convention made reference to the rendition of offenders. Instead of adopting the formula of the Genocide Convention (and, accordingly, requiring States party to regard the offences as "non-political") it was provided in each Convention that each Contracting State could in preference to bringing persons charged with "grave breaches" before its domestic courts and "in accordance with the provisions of its own legislation" hand over for trial persons who are accused of grave breaches of the Convention or who have ordered such breaches to be committed provided the High Contracting State to whom they are to be handed over "has made out a prima facie case". Jurisdiction to prosecute an alleged offender is therefore to be taken by each Contracting State, but Contracting States are free either to prosecute or extradite the accused, in accordance with its extradition laws and treaties. If such laws and treaties precluded the extradition of an alleged "political" offender such a person could nonetheless be charged in the domestic courts of the State which had refused extradition.

The 1963 Tokyo Con v ention on Offences and certain other Acts committed on board Aircraft ("The Tokyo Convention") contained only limited provisions for the trial of persons accused of offences under it. Article 3 provided that "the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board", but did not require a State party to extend its criminal jurisdiction over acts committed extra-territorially by aliens in non-State aircraft. It made provision for the taking of delivery of a person in respect of whom an aircraft commander has reasonable grounds to believe

has committed a "serious offence" as defined but it placed no obligation on the receiving State to extradite such person to the country which had jurisdiction to try him for the alleged offence. Article 16 merely provided that offences committed on aircraft registered in a Contracting State were to be treated, for the purposes of extradition as if they had been committed not only in the place in which they had occurred but also in the terriroty of the State of registration of the aircraft. Without prejudice to that provision it was declared that "nothing in this Convention shall be deemed to create an obligation to grant extradition".

Attitudes changed between the signing of the Tokyo Convention and the 1970 Hague Convention for the "Supression of Unlawful Seizure of Aircraft", (The Hague Convention"). No doubt the growing threat of international terrorism induced a solution based on the approach contained in the Geneva Conventions. Paragraph (1) of Article 4 of the Hague Convention required each contracting State to "take such measures as may be necessary to establish its jurisdiction over the offence referred to in the Convention or any other act of violence against passengers or crew in connection with the offence", in the case, inter alia, when the aircraft on board which the offence was committed lands in its territory with the alleged offender still on board. The second paragraph of this Article required Contracting States to take similar measures to establish jurisdiction "in the case where the alleged offender is present in its territory and it does not extradite him" pursuant to a later Article. To establish the jurisdiction required by these provisions it becomes necessary for contracting States to legislate so as to provide that any person (be he a national of the legislating State or not) who commits outside its territorial jurisdiction an offence referred to in the Convention is guilty of an offence under its domestic law. The obligation of the Contracting States in respect of an alleged offender

is not to prosecute him, if it does not extradite him but "to submit the case to its competent authorities for the purpose of prosecution". Such authorities are required to take their decision in the same manner as in the case of an ordinary offence of a serious nature under the law of that State. Thus, if the evidence available does not establish a prima facie case, there will be no breach of Convention if a prosecution is not undertaken.

The Hague Convention did not contain an obligation to extradite. It facilitated the extradition of an alleged offender by providing (in Article 8) that the offence referred to in the Convention is to be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States and is to be included in every future extradition treaty to be concluded between Contracting States, as well as providing for the situation where a Contracting State does not make extradition conditional on the existence of a treaty. Article 8, however, makes it clear that extradition is to be subject to the conditions provided by the law of the requested State, and as the laws of the requested State may preclude in certain circumstances the extradition of the alleged offender (for example if he is a national of the requested State or the offence is regarded as a political one) the existence of the offence in an extradition treaty or its recognition as an extraditable offence does not result in mandatory extradition. But if a Contracting State does not extradite it must carry out its other Convention obligations and having taken jurisdication to try the accused, submit the case to its competent authorities for the purpose of prosecution.

The formulations contained in the Hague Convention were repeated in the 1971 Montreal "Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation" (The Montreal Convention"). Here again Contracting States are required to take such measures as would be

necessary to establish jurisdiction over the offence referred to in the Convention - inter alia, when the aircraft on board which the offence was committed lands in its territory with the alleged offender still on board, and also in cases where the alleged offender is present in its territory and the Contracting State does not extradite him. Provisions (similar to those of the Hague Convention) for the purpose of facilitating extradition were incorporated in this Convention as well as an obligation, if no extradition order was made, to submit the case to a "competent authority" for the purpose of a prosecution.

The methods to ensure the trial of alleged offenders contained in the Hague and Montreal Conventions were adopted in the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (the "Diplomatic Agents Convention") adopted by the UN General Assembly on the 14th December, 1973. By article 2 each State Party is required to make the acts referred to in the Article "a crime under its internal law". Each State Party is to take such measures as may be necessary to establish its jurisdiction over the crimes set out in the Convention in cases inter alia where the alleged offender is present in its territory and it does not extradite him. Provisions are contained similar to those in the Hague and Montreal Conventions relating to extradition and acts to be done if extradition is not ordered. The draft of this Convention was prepared by the International Law Commission. Although the draft contained in its Report on Work of its Twenty-Fourth Session was amended in some respects before adoption by the Assembly, the draft provisions relating to the matters presently being considered were not amended. Its comment on draft Article 6 (subsequently Article 7 of the Convention) was as follows:

"Article 6 embodies the principle aut dedere aut judicare, that is basic to the whole draft. The same principle serves as the basis of

article 5 of the OAS Convention, Article 7 of the Hague and Montreal Conventions, Article 4 of the Rome draft and Article 5 of the Uruguay Working Paper. The article gives to the State Party in the territory of which the alleged offender is present the option either to extradite him or to submit the case to its competent authorities for the purpose of prosecution. In other words, the State Party in whose territory the alleged offender is present is required to carry out one of the two alternatives specified in the article it being left to that State to decide which that alternative will be. It is,of course,possible that no request for extradition will be received in which case the State where the alleged offender is found would be effectively deprived of one to its options and have no recourse save to submit the case to its authorities for prosecution .... Some members of the Commission had been concerned to ensure that there is no impairment of the principle of non-refoulment. The article as drafted makes this point clear. Thus, if the State where the alleged offender is found considers that he would not receive a fair trial or would be subjected to any type of abusive treatment in a State which has requested extradition, that request for extradition could, and should be rejected." (page 246).

The reference in the Report of the International Law Commission to the "OAS Convention" is a reference to "The Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance", ("The OAS Convention") adopted by the OAS General Assembly in 1971. As pointed out in the Report this Convention gave effect to the concepts and procedures relating to the trial of offenders

contained in the Hague Convention. It can therefore be concluded that the method for bringing to trial fugitive offenders contained in the Hague, Montreal, Diplomatic Agents and OAS Conventions, is one which the international community favours and that the path indicated by the 1949 Geneva Convention rather than that of the 1948 Genocide Convention is the more generally acceptable.

Council of Europe.

Recent developments within Europe are of interest in confirming the trends which have just been noted. The Consultative Assembly of the Council of Europe expressed its concern with the problem presented by persons who had committed terrorist crimes but who relied on the claim that the crimes were political offences to avoid extradition. As a possible solution to this problem it sought changes in extradition laws and suggested (in its Recommendation 70) that the Committee of Ministers should invite member governments to draw up a common definition of "political offences in order to be able to refute any "political" justification whenver an act of terrorism endangers the lives of innocent persons." The Committee of Ministers, in response, requested that European Committee on Crime Problems to undertake the study of the application of the European Convention on Extradition to crimes linked with acts of terrorism.

The difficulty of obtaining a common definition of "political offence" in extradition matters is notorious and it was not surprising that no such definition was produced. Instead,the Committee of Ministers adopted a Resolution on the 24th January, 1974, expressing inter alia its conviction that the political motive alleged by the authors of certain acts should not have as a result that they are neither extradited nor

punished. The Committee of Ministers pointed out that extradition is a particularly effective measure of ensuring that the authors of acts of international terrorisms do not escape punishment and recommended certain principles which could guide member States when an extradition request is received. The resolution recommended that the governments of member States in which jurisdiction to try accused persons is lacking "should envisage the possibility of establishing it", and in the terminology of the Hague Convention recommended also that if extradition is refused and, if its jurisdiction rules permit "the government of the requested State should submit the case to its competent authorities for the purpose of prosecution. Those authorities should take their decision in the same manner as in the case of any ordinary offence of a serious natur under the law of that State".

Thus, the Council of Europe has lent support for extending rules of jurisdiction so that persons accused of crimes and whose extradition is not effected can be brought to trial.

* * *

The future development of these concepts and procedures which have been discussed above may well depend on the resolution of certain other problems to which their adoption may give rise. These will now be outlined.

Safeguarding the rights of the accused.

An important concept (and one not included in the Hague or Montreal Conventions) was developed in the Diplomatic Agents Convention. Specific clauses were adopted specifically designed to safeguard the rights of the persons accused of the offences referred to in the Convention.

The reluctance of States, in present world conditions, to agree to arrangements by which their nationals will become subject to the criminal jurisdiction of other States must be recognised. It is clear that if this reluctance (which stems from a concern to ensure that its nationals' rights are adequately protected) is not overcome then effective international action to deal with international terrorism may not be taken. Effective measures may therefore be required to safeguard the rights of accused persons. It was sought to provide such measures in the Diplomatic Agents Convention. Firstly, a right to communicate with the nearest diplomatic representative of an accused person's State is provided for. Under Article 6 a person against whom measures for the purpose of extradition proceedings or a prosecution are being taken is declared to be entitled to communicate without delay with the "nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights..." and such a person is also entitled "to be visited by a representative of that State." Secondly, a Treaty obligation is placed on Contracting States to guarantee "fair treatment at all stages of the proceedings" to any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in Article 2 of the Convention (Article 8).

In its 1972 Report the International Law Commission suggested that the object of the proposed "fair treatment" clause in the draft Convention was to incorporate "all the guarantees generally recognised to a detained or accused person" and pointed out that an example of such guarantees is to be found in Article 14 of the International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 2200 (XXI) of the 16th December 1966. Article 14 of the International Covenant provides inter alia that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty,

to be informed of the nature of the charge against him promptly and in detail, to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own chosing, to be tried without delay. If, therefore, there has been any breach of the rights referred to in Article 14 of the International Covenant in respect of a person charged with an offence under the Diplomatic Agents Convention it would be open to a Contracting State to allege that there has been a breach of a State's obligations under Article 9 of that Convention. In such an event, the matter could be made the subject of arbitration under Article 13 of the Convention. By virtue of Article 13 any dispute relating to the application of the Convention which is not settled by negotiation shall on request, be submitted to arbitration. If within six months from the date of the request the parties are unable to agree on the organisation of the arbitration, anyone of those parties may refer the dispute to the International Court of Justice. Sub-paragraph 2 of this Article, however, permits a reservation to be entered in respect of those arbitration procedures.

It is to be anticipated that any development in the concept of universal jurisdication in criminal matters will be accompanied by demands for strengthening the international machinery for the protection of persons accused of the offences included in any new Conventions. A number of methods suggest themselves. One possible way of achieving this objective would be by strengthening the machinery for the settlement of disputes so that, for example, no reservation in respect of an arbitration clause such as was included in the 1973 Convention would be permitted. Another possible way would be to make more explicit the "fair treatment" provisions of any future Convention. In this connection, the rights set out in the International Covenant of Civil and Political Rights could be expressly included in the Convention, or provisions similar to those contained in the European Convention for the Protection of Human Rights and Fundamental

Proceedings suitably adopted. The concept of the right of individual application to an International Tribunal is one that has been adopted with success in the European Convention and consideration to its extension to new Conventions should be given. It is obvious that the protection of the rights of an accused person would be strengthened if in addition to the State of which he was a national having the right to complain to an international tribunal of any breaches of the "fair treatment" clauses in a future Convention the right was accorded to the accused himself. As the number of cases involving offences under the anti-terrorist Conventions are not likely to be many, and as the number of complaints of breaches of the "fair treatment" provisions of the Convention would certainly be few, a right of individual application could be accommodated in existing international judicial machinery without unduly straining it.

It would also be advisable to consider the application of the rule on the exhaustion of domestic remedies so as to ensure that it could not be used to frustrate or delay action to implement the safeguards included in the Convention. As stated in the Interhandel Case (International Court of Justice Reports, 1959, p.6 at p.27). "A State may not even exercise its diplomatic protection, and much less resort to any kind of international procedure of redress unless its subject has previously exhausted the legal remedies offered him by the State of whose action he complains." The Commission of Human Rights established under the European Convention for the Protection of Human Rights and Fundamental Freedoms is developing the jurisprudence in this area, and in considering the admissability of a Petition the Commission will frequently join for a consideration with the merits of the application a plea of lack of jurisdiction for failure to exhaust domestic remedies in cases where such a plea is clearly bound up with the merits of the claim. When a claim

alleging breach by a Respondent State of a "fair treatment" clause in a future Convention is brought, provision could be made to enable a plea of failure to exhaust domestic remedies to be heard with the merits of the claim.

Territorial Asylum.

There is obviously a close inter-action between the principles of international law on which territorial asylum is sought and granted and existing Conventions dealing with international terrorist crimes and any future action which may be taken in this field. At the time of the writing of this paper it would appear likely that a Diplomatic Conference to adopt a Convention on Territorial Asylum will be convened under the auspices of the United Nations and, accordingly, a brief examination of the legal problems involved in such a Convention and its inter-action with international Conventions on terrorist activities is required.

On the 14th December, 1967, the General Assembly of the United Nations adopted a Resolution containing a Declaration on Territorial Asylum based on a draft prepared by a Working Group of the General Assembly's Sixth (Legal) Committee. The question of Territorial Asylum was taken up by the United Nations High Commissioner for Refugees and it was decided that the High Commissioner should consult with governments and report on the matter to the General Assembly at its twenty-eight session. The High Commissioner prepared a draft text of a possible future Convention relating to Territorial Asylum and sent it to Member States requesting their comments on it and also their views as to the desirability of concluding such a Convention within the framework of the United Nations. Having examined a further report at its twenty-ninth session, the General

Assembly, by Resolution No. 3272 (XXIX), decided to consider at its 30th session the question of holding a Conference of Plenipotentiaries on Territorial Asylum and decided also to establish a Group of Experts on the Draft Convention and requested the Secretary-General to submit proposals as to when such a Conference could be convened. By a Communication of the 27th March, 1975, the President of the Assembly informed the Secretary-General of the names of the States appointed to membership of the Group of Experts.

An examination of both the 1967 Declaration and the Draft Convention prepared by the High Commissioner for Refugees will assist in isolating the legal problems with which this paper is particularly concerned. Article 14 of the Universal Declaration of Human Rights declared that "everyone has the right to seek and to enjoy in other countries asylum from persecution" and this concept of asylum from persecution was incorporated in the 1967 Declaration and is again repeated in the Draft Convention. The Draft Convention would provide that a Contracting State should use its best endeavours to grant asylum to any person, "who, owing to well-grounded fear of (a) persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, or for reasons of struggle against apartheid or colonialism; or (b) prosecution or severe punishment for acts arising out of any of the circumstances listed under (a) is unable or unwilling to return to the country of his nationality, or if he has no nationality, the country of his former habitual residence". The asylum-seeker can, therefore, be described in general terms as a political refugee. A political refugee may, however, have committed an offence which he claims is, and which is regarded by the Asylum State as, a political offence. If, however, the alleged "political offence" is also an act prohibited by an anti-terrorist Convention the question arises, firstly, as to whether the "right to seek and to enjoy

asylum" may be invoked by such an offender and secondly, whether the Asylum State may, having granted asylum, institute proceedings against the accused person for an offence of a terrorist type committed extra-territorially which is a breach of the municipal law of the Asylum State.

Paragraph 2 of Article 14 of the Universal Declaration of Human Rights provides that the right to seek and enjoy asylum may not be invoked in the case of prosecutions genuinely arising.... from acts contrary to the purposes and principles of the United Nations. The 1967 Declaration on Territorial Asylum expanded this concept when it provided in sub-paragraph 2 of Article 1 that the right to seek and enjoy asylum "may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war-crime or a crime against humanity, as defined in the International Instruments drawn up to make provision in respect of such crimes". The Draft Convention suggests that paragraph 1 of Article 1 (which refers to the granting of asylum) shall not apply to "(i) any person with respect to whom there are serious reasons for considering that he is still liable for punishment for (a) a crime against peace, a war-crime, or a crime against humanity as defined in the International Instruments drawn up to make provision in respect of such crime; (b) a serious common crime; or (c) acts contrary to the purposes and principles of the United Nations". It has been suggested (see page 5 of Addendum to the Report of the United Nations High Commissioner for Refugees; U.N. A/9612/Add 3) that the concept of genocide and references to the Tokyo, Montreal and Hague Conventions could be referred to in a future Convention so as to make it clear that a person who had committed the type of offences referred to in these Conventions would not have the right to "seek and enjoy"Asylum. This suggestion could be amplified. The Convention on Territorial Asylum could provide that it would not apply to any person to whom there are serious reasons for considering that he is still liable for

punishment for an offence contrary to an International Convention dealing with terrorist type offences which it would specify.

If the solution suggested in the preceding chapter is not accepted and asylum is granted to a person accused of a terrorist type offence which is the subject of an International Convention the general rule relating to the non-extradition of persons accused of political offences may apply. The exercise by a State of its right to grant asylum to a "political" refugee does not preclude the application of the criminal law of the Asylum State in respect of an offence committed prior to the granting of asylum. By virtue of the principle of non-refoulment a person to whom asylum is granted is not subject to expulsion or compulsory return to any State where he may be subject to"persecution". The receiving State, however, does not act in any way contrary to the Declarations of the United Nations nor contrary to the provisions of the 1951 Geneva Convention relating to the Status of Refugees if, having granted asylum, it institutes proceedings against the asylee in respect of an offence referred to in an anti-terrorist Convention and which the domestic law of the receiving State grants jurisdiction to its Courts to try. It may be thought desirable to state this explicitly in any future Convention.

Development at Inter-State Level.

So far this study has been principally concerned with how the world community has attempted to solve the problems of terrorism on a world wide basis. There are, however, conflicts in different parts of the world which can require international action to be taken between the neighbouring States but which do not call for multi-national co-operation. An example of this type of conflict is to be seen in the situation which

of what was described as the "extra-territorial method" described in the Report, i.e., a method by which each legislature would confer upon its own municipal courts jurisdiction to try under municipal law offences committed extra-territorially. The agreed recommendation was accepted by the two Governments and at the time of writing this paper legislation is pending to give effect to the agreed recommendation.

In the Commission's view the taking of extra-territorial jurisdiction over a wide range of offences would not at present be justified in view of the incidence of politically motivated crimes of violence in Ireland and the ease with which the perpetrators of such crimes could pass across the Border between the two parts of Ireland. "The jurisdiction can be justified" the Report stated, "in International Law upon several generally recognised principles, such as the protective principle, the passive personality principle, the nationality principle and the universality principle. Morever, the jurisdiction would be taken with the consent of the State exercising territorial jurisdiction (see page 18 "Law Enforcement Commission Report" Prl. 3832). The proposed legislation will, accordingly, extend the criminal law, in the case of Northern Ireland, to acts committed in the Republic of Ireland, and in the case of the Republic of Ireland to acts committed in Northern Ireland. The extra-territorial offences thus created include the most serious offences against persons and property.

The legislation proposals now being considered called for the solution of legal problems which will arise whether action is being taken by agreement between neighbouring States or on a multi-national basis by means of a multi-national Convention. Certain aspects of these proposals are, therefore, discussed hereunder.

The prosecuting authority in a State in which an accused person happens to be will be presented with information made available from the State in which the offence was committed and will have to decide whether a prima facie case for the prosecution of the accused is made out and, accordingly, whether a prosecution is authorised. Witnesses to establish the case against the accused may, however, be unable or unwilling to give evidence in the territory of the Court asserting jurisdiction. If domestic law permits the tendering of evidence on sworn deposition, then a question arises as to how the evidence is to be taken. If domestic law acknowledges the right of the accused or a lawyer on his behalf to be present during the hearing of all witnesses giving evidence against the accused then it will be necessary to provide for the presence in the country of residence of the witness, of the accused or a lawyer on his behalf who can cross-examine the witness. If the domestic law of the Court asserting jurisdiction would not permit the acceptance of the evidence of a witness on sworn deposition then if a trial by jury is required the practical difficulties of transporting the whole jury to hear the evidence may well be unsurmountable. If, however, a trial by jury is not required then it would be possible to provide (as has been done in the draft legislation presently pending before the Irish and British Parliaments) that the judge or judges trying the case would attend where the witness is being examined and be at liberty to suggest questions to be put to the witness. By this means the judge or judges who have to determine the guilt or innocence of the accused will have the opportunity of seeing the witness and assessing his credibility.

When evidence is being taken for a foreign tribunal the right of a witness (for example a member of the security forces) to refuse to answer questions on the grounds of privilege requires to be considered. The various aspects of this problem would suggest that the most practical

answer to it is to provide that the law relating to privilege to be applied is the law of the State taking the evidence of the witness, and not the law of the State asserting jurisdiction.

It is extremely unlikely that the criminal law even of neighbouring States with the same legal traditions will be completely harmonised. It follows, therefore, that a person accused of a wrongful act may find that the ingredients of the offence and the nature of punishment may be different in the different States which have jurisdiction to try him. If would appear just, therefore, to provide that if a prosecution has been initiated against an accused person that he should be informed that, in lieu of trial in the State asserting extra-territorial jurisdiction he can stand trial in the State where the offence was committed, if an extradition request (or proceedings analagous to such a request) in fact, exists.

Two further aspects of the exercise of extra-territorial criminal jurisdiction call for consideration. The rule of speciality is commonly included in extradition treaties, so that a person extradited in respect of a particular offence may not, in general, be proceeded against for any other offence committed before his surrender. It would be desirable, therefore, to ensure that the rule applies to an offence committed extra-territorially before surrender under an extradition agreement so that in respect of such offences charges cannot be instituted in the State which has requested the extradition. The rule against exposing a person to double jeopardy will also require amplification. If a person is acquitted or convicted of an offence his right to plead his acquittal or conviction as a bar in any proceedings in another jursidiction for an offence consisting of the same acts should be clearly safeguarded. The principle should also be applied where a request for extradition is made after a person has been

convicted or acquitted if the request relates to the same set of facts. Accordingly, it should be made quite clear that the State who has tried an accused person should not be required to extradite him for trial in another jurisdiction on a charge arising from the same acts.

Conclusion.

Any discussion on international terrorism must be held under the shadow of the failure of the UN ad Hoc Committee on International Terrorism (established by Resolution of the General Assembly of the 18th December, 1972) to make an agreed recommendation "for the speedy elimination" of the problem of international terrorism. The work of that Committee showed the difficulty not only of agreeing on a common approach to the subject or on the underlying causes of the problem or on the measures to be taken for its prevention but also the difficulty of agreeing on the meaning of the concepts employed in the debate. From the recent past, however, modest successes as well as failures can be recorded - and lessons can be learned from both. The trends which are to be seen in the most recent four multi lateral Conventions (The Hague, Montreal, Diplomatic Agents and OAS Conventions) show that when limited objects are set to international action, and when that action is directed towards terrorist acts which are grossly offensive to the conscience of mankind then it is possible to reach agreement at a multi-national level on methods to be employed to prevent such acts. In the Study prepared by the UN Secretariat (UN A/C n/418) on the subject of International Terrorism it was pointed out that "even when the use of force is legally and morally justified, there are some means, as in every form of human conflict, which must not be used; the legitimacy of a cause does not in itself legitimatize the use of certain forms of violence especially against the innocent " (page 71. It may well be that future action could

best be undertaken by identifying the means which, by common consent, are never permissable (kidnapping, the taking of hostages, the killing of innocent civilians are examples of such impermissable means). If this can be done then the task of the International Community of Lawyers would be to elaborate and develop the concepts and procedures with which this paper has been concerned. This task is one which would be willingly undertaken by those who believe in the law as an important instrument for the protection of the weak and the innocent.

WORK PAPER
ON
LIMITS TO NATIONAL PENAL POLICIES CONCERNING
ARCOTIC DRUGS AS SET BY THE INTERNATIONAL TREATIES:
THE DUTCH EXAMPLE

By
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Limits to national penal policies concerning hard drugs as set by the international treaties; the Dutch example

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1 *Introduction*

The considerable increase in the use of drugs [1] during the last d
has been accompanied by a generally more tolerant attitude towards th
of drugs. Also there are tendencies in modern society to differentiate
between the various substances. Most national legislations, however, a
old and obsolete, so that re-enactment or fundamental amendment has pr
necessary. Some States of the U.S.A.[2] and the Netherlands have adopted
very liberal attitude in the prosecution of some categories of drug-of
ders. This paper will be confined mainly to the Dutch policy with reg
to the use of narcotic drugs.

It is clear that control of narcotic drugs encompasses more than
the use of drugs or repression by criminal law. The bigger part, it sh
be stressed, is international and national administrative law.[3] The ul
goal of this control is the limitation of the drugs in the drug-econo
to the quantities needed for medical and scientific purposes.[4] This ne
sitates control of cultivation, production, manufacture, import, expor
trade, distribution and use of narcotic drugs and psychotropic subst

So hereunder the international treaties on narcotic drugs will b
discussed with the primary view to set out the provisions concernin
law. Then a description follows of the Dutch legislation and the am
lastly submitted to Parliament. The next part will try to find out wha
space is left open to develop a national policy that can ensure more
tive prevention and suppression of the use of dangerous drugs taken int
account the different social and cultural conditions in different natio

2 *International narcotics treaties*

There have been concluded ten multilateral treaties on narcotic dr
that are meant to operate at a global level[5] and two on a regional lev
Several international organizations, global as well as regional, are o
way or another involved in questions with respect to control of narcotic
drugs.[7] Here we will confine the discussion to the Single Convention
the Vienna Convention 1971, the Geneva Protocol 1972 [8] and the Gene
vention 1936.[9] Where necessary, the international organizations will
treated.

2.1 *The Geneva Convention 1936*

The Geneva Convention 1936 [10] has primarily been concluded to co
the penal provisions included in the previous treaties and in the second
place to combat more effectively the illicit traffic. It requests its Parti
to punish severely, in particular by imprisonment or other penalties of de-
privation of liberty, *i.a.* the possession of drugs contrary to the provisio
of the relevant Convention.[11] The Geneva Convention 1936 does not request
its Parties to penalize the use of drugs. It is, however, difficult to see
how one can use a drug without any form of possession.

This treaty is left unaffected by the Single Convention 1961, except
for its provision with regard to extradition.[12] The Single Convention 1961
replaces, as between its Parties, this provision by its own article 36,
para. 2(b) unless a Party notifies the Secretary-General of the U.N. that
in its respect the provision concerning extradition will remain in force.[13]

2.2 *The Single Convention 1961*

The Single Convention 1961 [14] is concluded to lay down in one single
and generally acceptable instrument the whole international legal fra
concerning narcotic drugs. So it is, in the first place, concerned with th
control of the legitimate activities in the drug economy, such as culti-
vation, manufacture, trade, *etc.*.

The Single Convention 1961 contains also a body of provisions concer
penal law, so it imposes standards for the national criminal law of its Par
ties. As such standards should be mentioned: the prohibition of the posses-
sion of drugs except under legal authority;[15] co-ordination at the national
level of action against the illicit traffic and assistance and cooperation
with other Parties and international organizations in order to maintain
an internationally co-ordinated action against the illicit traffic;[16]
seizure and confiscation of drugs used for the commission of one of the
indicated offences.[17] As such offenses are indicated in an article contai
penal provisions *inter alia* possession. In this article the use of drugs

not mentioned.[18] Parties are, however, bound to limit exclusively to medi and scientific purposes the possession and use of drugs.[19] So, on the one hand the Single Convention 1961 does not impose the penalization of use as such, but on the other hand does not allow either the legalization of personal use. Moreover, as has been pointed out above, it is difficult to see how one can consume a drug without one or other form of possession of the same drug.

The article on penal law requests Parties to penalize the offences when committed intentionally and to penalize by penalties of deprivation of liberty the commission of serious offences. It is not indicated which of the offences deserve the predicate serious. It could be argued, however, that infractions upon the general obligations are to be regarded as serious offences since the general obligations are the real heart of the Single Convention 1961. On the other side the view is held that these general obligations refer to possession other than for personal use and use not in the sense of consumption.[20]

2.3 *The Geneva Protocol 1972 amending the Single Convention 1961*

The Geneva Protocol 1972 amends the Single Convention 1961 in its penal provisions also; it requests its Parties to send in, if appropriate, to the Commission on Narcotic Drugs[22] and the International Narcotics Control Board[23] data on illicit traffic, cultivation, manufacture etc. The most important amendments within the framework of this study pertain to alternatives for punishment and extradition. The first amendment opens explicitly the possibility to impose measures treatment and rehabilitation as an alternative to conviction or punishment, when one of the offences is committed by abusers of drugs. The treaty speaks of measures of treatment, education, after-care, rehabilitation and social reintegration.[24]

The second amendment, laid down in the same article, requests Parties to make all offences enumerated in art. 36 Single Convention 1961 extraditable offences. The treaty itself may be regarded as a legal basis for extradition. If a Party finds an offence not sufficiently serious such a Party has the right to refuse to grant extradition.[25]

Measures for the prevention of abuse of drugs and the education, treatment, rehabilitation, *etc.* are far more emphasized here than in the Single Convention 1961.[26]

2.4 *The Vienna Convention 1971*

The Vienna Convention 1971[27] is concluded to bring under control synthetic drugs (psychotropic substances) outside the scope of the Single Convention 1961. This treaty does not give a limitative list of punishable offences, it simply requests Parties to treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of obligations under the Vienna Convention 1971.[28] As a more or less general obligation is indicated the limitation, by such measures as are deemed appropriate, to medical and scientific purposes *i.e.* the use and possession of the substances included in the treaty. It is not necessarily by means of penalization that the above limitation should be reached.

The other provisions concerning penal law of the Vienna Convention 1971 have practically the same contenance as those of the Geneva Protocol 1972.[29] Here also treatment, rehabilitation as well as prevention are stressed.

3 *Dutch legislation*

The actual legislation concerning narcotics in the Netherlands is laid down in the Opium Act. This act has been drafted and adopted by Parliament on May 12th, 1928. The need for a fundamentally amended or a completely new act to replace the obsolete act was felt and in 1972 a government commission issued a report on "Backgrounds and risks of drug-use". In 1974 the government published a paper giving the main features of a new policy concerning narcotic drugs.

Then, in June 1975, a fundamental amendment of the Opium Act of 1928 was submitted to Parliament. Now, the procedure to be followed will take still a rather long time: first a Parliamentary Committee discusses the proposal and issues a Preliminary Report; second the Ministry publishes a Memory of Reply and, eventually amendments; third the bill is discussed in

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plenary session of Parliament. Procedures in the Parliament in the Netherlands tend to be long.

Also it must be noted that some drugs, in particular amphetamines, fall under the regime of the Provision of Medicines Act.

3.1 *The Actual Opium Act*

The actual Dutch Opium Act is adopted to comply with the obligations under the Geneva Convention 1925 and has lastly been amended on May 3rd, 1971. Amendments has been necessary as a cause of the accession to or ratification of the following narcotics conventions to which the Netherlands is still a Party:[31] Geneva Convention 1931, Paris Protocol 1948 and Single Convention 1961; other amendments mainly aimed at including new substances in the old regime.

The actual Opium Act provides for only one regime for all substances and prohibits not only trade, manufacture, *etc.*, but also possession, use and having available of drugs. The intentional commission of an infraction upon this act can be punished by a maximum imprisonment of four years; unintentionally committed offences are punishable with a maximum of six months. The act does not differentiate according to substances or possession for distribution and possession for own use. Substances in illegal possession or destined for illegal use are liable to seizure and confiscation.

The amphetamines, falling under the regime of the Provision of Medicines Act, are subject to a far less strict regime. Illegal possession, use and even trade, distribution etc. can be punished with a maximum imprisonment of three months only.

3.2 *The amendments submitted to Parliament*

Three major features characterize the amendments to the Opium Act that have recently been submitted to Parliament. The amendments involve: 1 the introduction of a far stricter penal regime for trade in amphetamines; 2 the distinction, as far as possible, between trade in products of Indian

Hemp and drugs with unacceptable risk; 3 the reduction from a crime to a misdemeanor of the possession for personal use of products of Indian Hemp.

So, amphetamines are now included in the regime of the Opium Act and will fall under the same body of regulations as opium, morphine, L.S.D., *etc.* The differentiation in penalization in the new act is far going. The maximum periods of deprivation of liberty or imprisonment vary from one month to twelf years, while the maximum fines vary from H. fls. 500.- to H. fls. 250.000.-. The highest penalizations are for smuggling, while the lowest are for possession for personal use of an amount of hashish of less than 30 grammes.

So, what will be the result of the new act once it has entered into force? Possession, whether for own use or not, of all drugs but products of Indian Hemp, can be penalized with a maximum imprisonment of four years or a fine of H.fls. 50.000.- or both. Possession of a product of Indian Hemp can be penalized with a maximum imprisonment of two years (if intentional) or one month (if not intentional). If the quantity in question is not more than 30 grammes only the maximum of one month or H. fls. 500.- is applicable. These last offences are misdemeanors.

It needs to be mentioned that the note of explanation accompanying the act gives a description of what should be understood by possession. The terminology is "to have available" wherever here is used possession for reasons of readibility. This "having available" is supposed to include the use of the substances involved. So, the simple use of products of Indian Hemp still will be an infraction upon the new opium act, be it punishable as a misdemeanor.

4 *Limits to national policies*

Under this chapter the discussion will be focussed mainly on two questions; what are the possibilities for a depenalization of the use and possession for own use of each of the substances covered by the treaties and second, what are the possibilities for a complete legalization of cannabis. The legalization of all substances is not subject of discussion since there are, at least in the author's knowledge, no indications that

in the nearer future any State will hold this view. Of course, also the measures that can be taken, varying from deprivation via fines to treatment and re-education, will be considered.

4.1 *Depenalization of the use of drugs*

Before broaching the discussion on this subject the notion of depenalization has to be defined. Depenalization means here to leave out the whole instrument of penal law when dealing with the drug-problem: *i.e.* no use of imprisonment, fines or even involuntary treatment or re-education. This approach, it has been argued, will make it easier for addicts to ask for help and treatment, which certainly is an advantage. It is most probable, however, that the number of addicts will grow considerably and that illicit traffic will go up on an equal footing. Depenalization of the use of drugs necessitates the depenalization of possession of drugs for personal use since, and it has to be stressed again, use of drugs is in practice not possible without any form of possession of this drug.[32]

The Single Convention 1961, nor any of the other treaties discussed, requests its Parties to regard the use of drugs as a penal offence.[33] The possession, however, is listed as a penal offence. The question arises whether this possession is meant to include possession for personal use or only the possession for distribution, manufacture *etc.* If the view is held possession in any form is to be regarded as a penal offence, this view can be defended by the fact that the text of the Single Convention 1961 makes no distinction to this effect. Nothing impedes, however, to impose only minor penalties since use and possession for own use can hardly be seen as "serious offences".

On the other side it has been defended that possession does not include possession for personal use. The arguments for this position are: the relevant article of the Single Convention 1961 deals with illicit traffic and not with drug-abuse,[34] as does the Geneva Convention 1936.[35] General obligations, however, impede Parties to allow the possession of drugs for other than medical or scientific purposes. So, even if a Party is not bound to

impose penal sanctions for possession for own use, it still is obliged to prohibit this possession. In this case a Party should prevent the possession of drugs for personal use by, for example, administrative measures.

More and more, Parties are requested to provide for treatment, re-education, after-care, *etc.*, as an addition to or an alternative for penal measures. This is particularly stressed by the Vienna Convention 1971 and the Geneva Protocol 1972.[36]

5.2 *Legalization of cannabis*

A complete legalization of the use of hashish and marihuana necessitates the legalization of cultivation, manufacture, distribution, *etc.* of this substance, whereas decriminalization or depenalization can be limited to the phases of consumption and possession for personal use. So, the legal consequences of such a step are very extreme, since the whole body of control regulations will not be any longer applicable to cannabis. To study the possibilities to legalize cannabis the Single Convention 1961 and the Geneva Protocol 1972 amending it are sources of reply while the Vienna Convention 1971 dealing with synthetic substances is not applicable.

The Single Convention 1961 lists cannabis in the most strict regime. It gives two reasons: cannabis is particularly dangerous and it has very limited therapeutical value.[37] So, all provisions of the Single Convention 1961 are applicable to cannabis and one special article is devoted to cannabis in particular.[38]

Limiting the discussion to the penal aspects, the conclusion must be drawn that the Single Convention 1961 requests its Parties to prohibit cultivation, production, manufacture, *etc.* contrary to the provisions of this treaty.[39] These activities shall be regarded as punishable offences, when committed intentionally and serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty. Regarding cannabis in particular, the Single Convention 1961 requests its Parties "to adopt such measures as may be necessary to prevent the misuse of, an illicit traffic in, the leaves of the cannabis plant.

It is clear that under the actual provisions of the Single Convention 1961 a complete legalization of cannabis is impossible. If a State Party to the Single Convention 1961 would legalize cannabis this would certainly be a breach of its treaty-obligations. So, the question arises what would be necessary in the legal field if a State Party to the Single Convention 1961 wanted to legalize cannabis. Three possibilities will be discussed respectively: 1 denunciation of the Single Convention 1961; 2 invalidation of the treaty with regard to cannabis only; and 3 amendment of the treaty.

Denunciation. A Party may denounce the Single Convention 1961 by depositing an instrument to that effect with the Secretary-General of the U.N. This denunciation will take effect after at least six months.[40] It is not possible to denounce only the provisions concerning cannabis. To denounce and accede afterwards making reservations regarding cannabis is not possible since such a reservation may be made only if the use of cannabis was traditionally permitted in 1961.[41] This is not the case in most of the States Parties to the Single Convention 1961.

So, denunciation will have to be a complete denunciation[42] and entail also the withdrawal from the control of the legitimate trade in narcotic drugs and the suppression of the illicit traffic in all other drugs than cannabis. This is certainly a serious attack on the effectiveness of international control of narcotic drugs and it is very questionable if the aim legalization of cannabis could justify such a step.

Invalidation. A treaty can be invalidated for several reasons. The reasons that could possibly be invoked here are error[43] and fundamental change of circumstances.[44] The basic reasoning to invoke the invalidity of the Single Convention would be to prove that the drafters of the treaty were of the opinion that cannabis was a dangerous, addiction producing substance, while it is not. In this case the drafters would have included cannabis for these reasons and if they would have know the real properties of cannabis, they would not have included cannabis in this treaty. The error of the drafters of the Single Convention 1961 would then be based on a fact, *viz.* the medical effects of cannabis on the human body.[45]

Also it could be tried to prove a fundamental change of circumstances, independently or in connexion with error. In this case a State would have to prove that circumstances have changed so radically that performance of the treaty-obligations is unreasonable. The fundamental change would have to be based on new findings concerning cannabis in medical science and new ideas in criminological science. The latter should have the effect that criminalizing cannabis is not proportial to the dangers involved in the use in this substance.[46] The application, however, of this principle has traditionally been based upon tangible changes, such as the change of the flow of a river. It is not beyond doubt whether this principle could be invoked in the case of legalizing cannabis, since the changes would be changes in human knowledge.[47]

Amendment. Amendments are possible in two ways; changing the scope of control and amendment of the treaty itself. Changing the scope of control by amending one or more of the schedules, is possible but not effective in the case of cannabis. Even if cannabis would be deleted from all of the schedules, then it remained to be controlled since the text of the treaty itself refers to cannabis.[48] So, if simply a change in the scope of control can not reach the legalization of cannabis, this should be done by an amendment of the entire treaty.

A Party may propose amendments to the Single Convention 1961. The proposed amendment is to be sent to the U.N. Secretary-General, who will communicate it to the Parties and ECOSOC. Then ECOSOC may decide to call a conference to consider the proposed amendments.[49] The proposed amendments should contain deletion of cannabis from schedules I and IV, and a revised text of article 2[50] and also a deletion of article 28 of the Single Convention 1961.

It is not very probable that a conference, if it were called to consider the above amendments, would adopt these modifications in the scope of control of the Single Convention 1961. The Conference that adopted the Geneva Protocol 1972 was not prepared nor requested to consider such amendments. It is not likely that a bigger number of States Party to the Single Convention 1961 has changed of opinion since 1972. It also is very much a time consuming procedure.

5 *Conclusions*

Although a rather tolerant attitude towards the use of drugs has developed in some modern countries, this is not reflected by the Geneva Protocol 1972 where it speaks of extradition. Extradition is made obligatory unless the Party that is asked to extradite finds the offence not serious enough. This leaves States much space to develop a national extradition policy by circumscribing the offences. States can not depenalize the consumption of drugs, irrespective of whether cannabis is concerned, or all drugs, since the existing treaties request the prohibition of possession of narcotic drugs. It is, however, left up to the Parties what sanctions they want to use to enforce this prohibition. By using adminstrative sanctions or minor penal sanctions, such as low fines, Parties can reach a decriminalization of the use of drugs, thus avoiding the disadvantage of criminalizing addicts and other drug-users that need help. This policy is likely to enable addicts to ask for help but will not reduce illicit traffic nor suppress the existence of a black market.

To destroy the black market is one of the objectives of those advocating the legalization of cannabis. This destruction of illicit traffic in cannabis will most probably be a favourable result of this policy. On the other side the number of users will, no doubt, increase considerable and with it the number of those in trouble because of cannabis will proportionally go up. If a State is of the opinion that its prevailing social and cultural conditions require a complete legalization of cannabis, it can not do so without breach of its treaty-obligations.[51] Denunciation of the entire Single Convention 1961 brings about disadvantages not compensated by enough positive results. Invalidating the treaty is legally difficult to defend.

The enforcement measures, reaching from a calling the attention of Parties to the matter to the recommendation of an embargo, will certainly withhold Parties from adopting legislation that will legalize cannabis, the more, since these measures can be taken even against non-Parties. These can be taken if there are reasons to believe that the aims of the Single Convention 1961 are seriously endangered.[52]

The most elegant way to reach legalization of cannabis is to propose amendments to the Single Convention 1961 by asking the ECOSOC to call a conference to consider such amends. To cause the adoption of such amendments, however, a *communis opinio* regarding the medical and biological properties of cannabis is necessary and this *communis opinio* is far from reached.

Utrecht, 24 July 1975

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Limits to national penal policies concerning narcotic drugs as set by the international treaties; the Dutch example

Footnotes

* After the completion of this study, the Protocol amending the Single Convention on Narcotic Drugs, New York 1973 (New York Protocol) has entered into force.

1 In this paper no difference in terminology is made; drug, narcotic drug and psychotropic substances are used as each other synonyms.

2 For example: California and Oregon.

3 See *inter alia*: *M.C. Bassiouni*, "The international narcotics control system: a proposal", 46 St. John's Review (1972), 713-766; *W. Bogaard*, "International control of the legitimate trade in narcotic drugs", 3 Netherlands Yearbook of International Law (1972), 97-133; *J.M. Samuels*, "International control of narcotic drugs and international economic law", 7 Canadian Yearbook of International Law (1969), 192-223; *I.G. Waddell*, "International narcotics control", 64 American Journal of International Law (1970), 310-323.

4 See: Single Convention 1961, art. 4 and Vienna Convention 1971, art. 5.

5 International Opium Convention, The Hague, 23 January 1912, 8 League of Nations Treaty Series, 189; International Opium Convention, Geneva 19 February 1925, 81 League of Nations Treaty Series, 318; Convention for limiting the manufacture and regulating the distribution of narcotic drugs, Geneva 13 July 1931, 139 League of Nations Treaty Series, 301; Convention of 1936 for the suppression of the illicit traffic in dangerous drugs, Geneva 26 June 1936, 198 League of Nations Treaty Series, 299; Protocol signed at Lake Success, New York 11 December 1946, amending the agreements, conventions and protocols on narcotic drugs concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 12 United Nations Treaty Series, 179; Protocol bringing under international control drugs outside the scope of the Convention of 1931, Paris 19 November 1948, 44 United Nations Treaty Series, 277; Protocol for limiting and regulating the cultivation of the poppy plant and the production of, trade in and use of opium, New York 23 June 1953, 456 United Nations Treaty Series, 56; Single Convention on narcotic drugs, New York, 30 March 1961, 520 United Nations Treaty Series, 204; Convention on Psychotropic Substances, Vienna 21 February 1971, 10 International Legal Materials (1971), 261 and U.N. Document E/Conf. 58/6; Protocol amending the Single Convention on narcotic drugs, Geneva 25 March 1972, 11 International Legal Materials (1972), 804 and U.N. Document E/Conf. 63/7.

6 Agreement concerning the repression of the manufacture of, internal trade in, and use of prepared opium, Geneva 11 February 1925, 51 League of Nations Treaty Series, 337; Agreement concerning the suppression of opium smoking, Bangkok 27 November 1931, 177 League of Nations Treaty Series, 373.

7 Global organizations such as: U.N., W.H.O., I.C.P.O. and regional organizations such as: Council of Europe, League of Arab States, Colombo Plan Bureau.

8 The Single Convention 1961 is concluded to replace *between parties* the previous treaties. So, although most of these treaties are still in force, control is primarily exercised in accordance to the Single Convention 1961. This accounts the more since that treaty mainly is a codification of the previous international legislation.

9 This treaty is to remain in force for the bigger part; it has, however, only few ratifications in comparison to other narcotics treaties.

10 Convention for the suppression of the illicit traffic in dangerous drugs, Geneva 26 June 1936; entered into force on October 26th, 1939. It was amended by the Lake Success Protocol 1946 and entered into force, as amended, on October 10th, 1946. See on this Convention: *J.G. Starke*, Convention of 1936 for suppression of illicit traffic in dangerous drugs", 31 American Journal of International Law (1937), 31-43.

11 Geneva Convention 1936, art. 2. The relevant previous treaties are: the Hague Convention 1912, the Geneva Convention 1925 and the Geneva Convention 1931. All of these treaties were primarily concluded to control and supervise the legitimate activities in the drug-economy.

12 Geneva Convention 1936; art. 9.

13 Single Convention 1961; art. 44, para. 2. Reservations concerning this provision have been made by France and Switzerland.

14 Single Convention on narcotic drugs, New York 30 March 1961; entered into force on December 13th, 1964. See on this Convention and its history: *L.M. Goodrich*, "New trends in narcotic control", 530 International Conciliation (1960), 181-242; *A. Lande*, "The Single Convention on narcotic drugs, 1961", 16 International Organization (1962), 776-797; *R.W. Gregg*, "The United Nations and the opium problem", 13 International and Comparative Law Quarterly (1964), 96-115. Most useful for the better appreciation of this convention is also: "Commentary on the Single Convention on narcotic drugs, 1961", U.N. Document Sales No. E.73.XI.1, New York, 1973. It is an article by article commentary.

15 Single Convention 1961, art. 33.

16 *Idem*, art. 35.

17 *Idem*, art. 37.

18 *Idem*, art. 36.

19 *Idem*, art. 4.

20 See Commentary, footnote 14 above, 111-114.

21 Protocol amending the Single Convention on narcotic drugs, 1961, Geneva 25 March 1971. The Protocol is not yet entered into force. The signature and ratification is open to Parties to the Single Convention 1961 only. After the entry into force of the Geneva Protocol 1972 States can accede only to the amended Single Convention 1961. The Geneva Protocol 1972 has been ratified by 34 States on 29 January 1975. It will no doubt enter into force by the end of this year.

22 The Commission on Narcotic Drugs is a functional commission of the Economic and Social Council of the United Nations. Within its competence fall matters of drug control, licit as well illicit activities. It is to be regarded as a policy making body.

23 The International Narcotics Control Board is a treaty-organ, founded by the Single Convention 1961. It is a semi-judicial organ with as its primary task to control the legitimate activities in the international drug-economy. See also *M. Battati*, Le contrôle international des stupéfiants, 78 Revue Général de Droit International Public (1974), 170-227, in particular at pp. 181-186.

24 Geneva Protocol 1972, art. 14 adding subpara.(b) to art. 36, para. 1 Single Convention 1961.

25 Geneva Protocol 1972, art. 14 amending para. 2, subpara(b) Single Convention 1961.

26 *Idem*, art. 15 amendingart. 38 Single Convention 1961.

27 Convention on psychotropic substances, Vienna 21 February 1971. This Convention has not yet entered into force. See on this Convention: *C.H. Vignes*, "La convention sur les substances psychotropes", 17 Annuaire Français de Droit International (1971), 641-656.

28 Vienna Convention 1971, art. 22, para. 1.

29 *Idem*, art. 21 (action against the illicit traffic), art. 22, para. 2 (extradition and taking into account of foreign convictions).

30 *Idem*, art. 20.

31 The Netherlands are Party to: The Hague Convention 1912, Geneva Convention 1925, Geneva Convention 1931, Lake Success Protocol 1946, Paris Protocol 1948 and Single Convention 1961 and the following regional treaties: Geneva Agreement 1925 and Bangkok Agreement 1931. The Netherlands have denounced the Geneva Convention 1936. It has signed but not ratified the New York Protocol 1953 and signed nor ratified the Vienna Convention 1971 and the Geneva Protocol 1972.

32 Compare above under 2.1 and 2.2.

33 Geneva Convention 1936, art. 2; Single Convention 1961, art. 36; Vienna Convention 1971, art. 21; Geneva Protocol 1972, art. 14.

34 Single Convention 1961, art. 36. Originally, art. 36 was included in a chapter headed illicit traffic, but the division in chapters has been deleted. Moreover there is a separate article on drug-abuse (art. 20) in the Vienna Convention 1971, where in similar, though more vague, wording has been chosen as in the Single Convention 1961.

35 Geneva Convention 1936, preamble.

36 Vienna Convention 1971, art. 20; Geneva Protocol 1972, arts. 14 and 15. The Geneva Protocol 1972 in its art. 14 speaks of treatment in addition to or as an alternative for punishment.

37. The quantities of cannabis used for medical and scientific purposes are increasing considerably in recent years: 1970: 15.237 kg, 1971: 1.956 kg, 1972: 36.045 kg, 1973: 67.711 kg, 1974: 65.034 kg. These are world totals. See Estimated world requirements of narcotic drugs and estimates of world production of opium in 1975. U.N. Doc. E/INCB/26, pp. VIII, IX. In modern medical science it has little therapeutical value; most of the quantity is used for scientific research.

38. Single Convention 1961, art. 28.

39 *Idem*, art. 36. The general obligation of the Parties is to limit all use of the substances (*i.e.* cannabis also) to medical and scientific purposes.

40 Single Convention 1961, art. 46.

41 *Idem*, art. 49.

42 Vienna Convention on the law of treaties, art. 44, U.N. Doc. A/Conf. 39/27. This treaty has not yet entered into force.

43 *Idem*, art. 48.

44 *Idem*, art. 62.

45 Compare: *Mark A. Leinwand*, The international law of treaties and United States legalization of marijuana, 10 Columbia Journal of Transnational Law (1971), 413-441, at p. 432.

46 *Idem*, at pp. 436, 437.

47 See *J.H.W. Verzijl*, International law in historical perspective, Volume VI, pp. 343-370 and a qualification of the *clausula rebus sic stantibus* at p. 344: "It was still at that juncture more a controversy of a highly political nature, often intended to disguise a breach of the law behind spurious legal arguments, than a true legal dispute capable of serious juridical discussion."

The prove of a fundamental change of circumstances has become much more difficult since during the Conference to consider amendments to the Sing Convention on narcotic drugs held as recent as 1972 no State has found i urgent enough to ask for a discussion on cannabis.
Also the Commission on Narcotic Drugs has adopted by 29 votes and 1 abst tion a resolution stressing the need for cannabis control.

47a Single Convention 1961, art. 3.

48 *Idem*, art. 2 paras. 6 and 7, and art. 28.

49 *Idem*, art. 47.

50 In art. 2, para. 6 the words "and cannabis to those of article 28" shou be deleted and in art. 2, para. 7 the words "the cannabis plant" and "a cannabis leaves" should be left out.

51 *Compare: Robert K. Scott*, The Single Convention on narcotic drugs vs. decriminalization of marijuana: A beginning or an end? California State Bar Journal (1974), 524-527 and 575-579, especially the conclusions at p. 579.

52 Single Convention 1961, art. 14. It is the International Narcotics Cont Board (see above footnote 23) that can take or propose these measures.

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