

# **PUT OUR WORLD TO RIGHTS**

## **TOWARDS A COMMONWEALTH HUMAN RIGHTS POLICY**

**A report by a non-governmental  
Advisory Group chaired by the  
Hon. Flora MacDonald**

**August 1991**

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## FOREWORD

The furtherance of human rights is fundamental to the development of democracy. Political and civil rights, economic and social rights, the right to freedom from fear and freedom from hunger - the instinct to acquire and promote these rights is lodged deep in the soul of every individual. And yet in how many countries are people free to pursue these instincts?

Human rights must be accorded a higher priority on the agenda of Commonwealth relations than they presently occupy. The times and the needs cry out for decisive action in this regard. This is a challenge not only to governments and bureaucracies, but also to individuals and organisations throughout the 50 countries of the Commonwealth.

The determination on the part of several Commonwealth organisations to do something specific to advance the cause of human rights resulted in the setting up of the Commonwealth Human Rights Initiative (CHRI) and the naming of an Advisory Group in the Autumn of 1989. During the two years of its existence as a voluntary agency, the CHRI has concentrated on gathering information about the status of human rights in Commonwealth countries, promoting the need for improved standards, and assessing the steps that can realistically be taken to ensure that human rights are respected and upheld.

This report is the result of the work of the past two years. We hope that it will stimulate discussion and action at the forthcoming meeting of Commonwealth Heads of Government in Harare, Zimbabwe. We want it to provide encouragement for non-governmental bodies, and inspiration for communities and citizens.

This document is now, therefore, presented to the Commonwealth by our Advisory Group. It owes its existence to the efforts of many people, listed in the acknowledgements, and especially to the work of my colleague Professor Yash Ghai, and to Richard Bourne, Executive Director of CHRI. There can be many ways to express appreciation to all those who have helped advance human rights in the Commonwealth. The most acceptable will be a stronger, more practical commitment to the rights of our fellow-citizens.

Flora MacDonald

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# CHAPTER I

## THE CHALLENGE OF HUMAN RIGHTS

### I. Purpose of the Report

This report has been prepared by the Advisory Group of the Commonwealth Human Rights Initiative (CHRI). A summary of its principal arguments and recommendations, addressed to the High Level Appraisal Group of the Commonwealth (set up by the Commonwealth Heads of Government in 1989 to review the role and structure of the Commonwealth), was issued in June 1991. The present report is addressed to the Heads of Commonwealth Governments as well as to various groups and associations within the Commonwealth. The first chapter provides a summary of our approach, arguments and major recommendations. The remaining chapters provide detailed analysis which supports the arguments of the first chapter. The second chapter examines the principal international, regional and national instruments on human rights and fundamental freedoms, which establish the norms and standards to which the Commonwealth countries have committed themselves. The third chapter analyses some of the priorities for action on human rights within the Commonwealth, pointing to the major violations of these rights. The fourth chapter discusses the role of non-governmental organisations in the defence and realisation of human rights. The fifth chapter contains a list of all our recommendations. The report also includes five appendices which provide more detailed information on specific points.

The CHRI was constituted in 1987 by five Commonwealth non-governmental organisations: the Commonwealth Journalists Association, the Commonwealth Trade Union Council, the Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Medical Association. These organisations have an overlapping interest in human rights, both in order to protect the welfare and integrity of their members and to promote respect for human rights more generally. They were agreed that the Commonwealth framework should be more effective in enhancing human rights for its citizens. In 1989 they appointed an Advisory Group of seven persons, representative of the main regions of the Commonwealth and of the supporting interests, to report on how to make the Commonwealth a force for improvement in the human rights field, and what might be the major priorities for citizens in the 50 member states.

The Advisory Group met three times - in London in September 1989, prior to the Commonwealth summit in Kuala Lumpur the following month; in Auckland in April 1990, in conjunction with the Commonwealth Law Conference; and in New Delhi in December 1990, at the time of the World Congress on Human Rights. Members of the group consulted widely, including through a questionnaire to members of the supporting bodies and a survey of over 250 non-governmental human rights organisations throughout the Commonwealth. Some sponsoring associations held their own consultations with their members or executive committees, the results of which were conveyed to the Advisory Group. It secured the help of key Commonwealth experts in various aspects of human rights in the preparation of this report.

The report argues that the Commonwealth must embrace the promotion and protection of human rights as a central purpose of its existence for the 1990s and beyond. To fail to do so will betray the Commonwealth's most cherished objectives and put at risk its relevance to the community of

millions of people whose struggle for a better life the Commonwealth ultimately exists to support.

To bring the subject of human rights and the human suffering which results from their denial to the forefront of Commonwealth purposes will require new thinking by the Commonwealth as a community. This Report is therefore addressed to the Commonwealth as a whole: to member Governments, the institutions of the Commonwealth, non-governmental organisations of all kinds and to the people of the Commonwealth. The objective, the enjoyment of human rights, cannot be achieved by government action alone. It must involve a common strategy in which many groups and individuals play a part. In particular this Report will emphasise that the Commonwealth as an institution, and its member states, must recognise the importance of voluntary action and citizens' involvement in both the promotion and defence of human rights.

## **II. The Context**

In common with the rest of the world, there has been a revival of interest in human rights within the Commonwealth in recent years. Human rights have always underpinned the Commonwealth. The evolution of the empire into the Commonwealth was itself a testimony to the most basic of human rights, self-determination. The sense of family between peoples of diverse races within the Commonwealth was a powerful repudiation of one of the major threats to human rights, racism. Close and friendly relations between members of the Commonwealth have emphasised the common humanity of mankind, transcending differences of race, religion, language and culture. The Commonwealth has co-operated in pushing the frontiers of freedom internationally, particularly in its fight against colonialism and racism. Individual member states have played valuable roles in formulating international or regional instruments for the protection of human rights.

The members of the Commonwealth share the legacy of the common law with its strong emphasis on the rule of law and procedural safeguards secured through an independent judiciary. Many also share and uphold democratic values maintained through parliamentary political systems; and those countries which have modified or moved away from parliamentary systems, have nevertheless attempted to secure freedoms and rights within their new constitutional orders. A number of pan-Commonwealth and domestic non-governmental organisations (NGOs) serve to reinforce the values and practices of human rights.

The Commonwealth has undertaken a number of programmes and activities which aim to strengthen the capacity of governments to develop human and other resources of their countries. These programmes range over a wide area, from education to law enforcement, but focus centrally on economic development. These programmes have been of particular value to the poorer and the smaller states. The emphasis on economic development is important for many human rights can be effective or meaningful only if the basic needs of the people are met. Poverty is, in numerous ways, a great threat to human rights and its eradication has to be an essential aspect of a policy of human rights. Particularly in recent years there has been an emphasis on helping countries involved in the reintroduction or strengthening of democratic institutions, again an area with evident human rights dimensions.

Despite these considerable achievements, it has to be said that for the most part, the concern of the Commonwealth with human rights has been implicit rather than explicit. Except for its lead in de-colonisation, it has not made human rights a central plank in its priorities or policies. It has too

often turned a blind eye to abuses of human rights in member countries. There have been few Commonwealth initiatives for the promotion of human rights (though we should not forget The Gambia's proposal for a Commonwealth Human Rights Commission in the late 1970s). There is no important Commonwealth pronouncement on human rights, except for some statements against racism. No Commonwealth machinery exists to receive and redress complaints about the abuse of human rights or for the monitoring of the performance of member states in the observance of human rights. There are no Commonwealth NGOs which have as their principal function the promotion of human rights (though this is not to deny that some, such as this Group's sponsoring organisations, have concerns very germane to human rights). The economic development priorities and policies of the Commonwealth have not in general incorporated or been informed by a clear or systematic vision of human rights. When member states have wished to pursue global or regional strategies for human rights, they have chosen to do so through other associations, not through the Commonwealth.

Over the last three decades considerable progress has been made in the definition and elaboration of human rights; numerous conventions have been adopted and ratified at the international and regional level (see Chapter II). Many of these progressive measures have been paralleled at the national level through constitutions and other legislation. The progress in their implementation has, however, been slow. The contemporary international situation is propitious for fresh initiatives in human rights, particularly in their enforcement. The assertion of human rights in Eastern Europe through the exercise by the people of their power has shown the importance of government through consent as opposed to coercion. The economic difficulties that these countries faced point to the limits of economic growth when economic policies ignore the wishes and welfare of the people. The easing of East-West rivalries through detente has likewise emphasised the primacy of human rights. At the same time it has taken the issue of human rights out of the polemics of big power politics, from which it has suffered for a long time. It is now possible to see human rights for what they are: instruments to ensure human dignity, democracy and development.

The urgency of human rights is supported by the emerging concern for the environment and sustainable growth, which is fundamentally connected with equity and which can only be met through a recognition of basic human needs and new forms of co-operation. The almost infinite possibilities of control and mutation over human and natural process now available to humanity underscore the need to restrict and guide advances in science and technology within a framework of ethics which respects human dignity.

It is important that the Commonwealth should stand more clearly in the eyes of its members and the international community generally as a champion of human rights. Its priorities and policies should be based on the promotion of human rights. It should establish for itself clear goals and standards to guide action and to serve as a basis of evaluation of performance. It should strengthen institutional capacity for more effective monitoring and implementation of human rights.

In many ways the Commonwealth is at a crossroads. The liberation of Namibia and the imminent changes in South Africa bring to a close a significant phase in the history of the Commonwealth. Anti-colonial struggles have hitherto provided an important focus for the purpose and activities of the Commonwealth, and have underlined its commitment to moral values. With the end of colonialism, human rights provide a natural focus for the moral position of the Commonwealth. The Commonwealth begins the review of its priorities and activities for the next 25 years with the firm commitment made at the Kuala Lumpur Commonwealth Heads of Government Meeting (CHOGM) to the observance of human rights. It appointed a committee of government experts to

report on what the Commonwealth should do to promote human rights. The committee reported in 1990, and its recommendations will be considered by the next meeting of the heads of governments in Harare in October 1991.

A focus on human rights would provide greater coherence for the Commonwealth's activities and ensure that they do not lead to the denial of basic needs and dignity of the people in whose name they are undertaken. It would also respond to the wishes and aspirations of its people who have in recent years demonstrated once again their concern that the policies and practices of their government should reflect respect for human dignity and rights. If the Commonwealth is to retain the support of growing numbers of its citizens and organisations, it has to put human rights firmly on its agenda.

There is another special reason for the Commonwealth to commit itself collectively to human rights. Violation of human rights not only causes discontent and dissension domestically but may also threaten the comity among its member states. The common association within the empire and subsequently the Commonwealth has meant that citizens of one member state (or ethnically related to it) have taken up abode in another. The denial of the rights of these emigres, as in mass expulsions or overt discrimination, to say nothing of more serious victimisation, has frequently led to strained relations or conflicts among member states, leading in some instances to threats to the survival of the Commonwealth.

### **III. Human Rights Record within the Commonwealth**

Another reason for the Commonwealth to take human rights seriously now is that, on the whole, its members' record on human rights is poor. It is difficult to generalise across a range of states. Some states are distinguished by their scrupulous respect for human rights and others have made courageous efforts in difficult circumstances to uphold human rights. But it has to be admitted that in some countries the record has been deplorable and often appalling, shocking especially those of us who were brought up to think of the Commonwealth and its members as marked by just and humane administration.

At the formal level, the record of the Commonwealth is creditable enough. Its members have played an important role in the formulation and adoption of international and regional human rights instruments. Nevertheless it is worth noting that 29 of its 50 members have not signed the International Covenant on Civil and Political Rights and more than 50 per cent have not ratified the equally important International Covenant on Economic, Social and Cultural Rights (see Appendix V). Even those states which have ratified them have often failed to meet their reporting obligations under them (Appendix V). Frequently the reporting itself is rather formalistic, avoiding substantive issues or failing to give detailed, accurate replies. It is a matter of considerable regret that so many of the members of a major international association like the Commonwealth should not be part of the international system of human rights. This deficiency was recognised at the last CHOGM when all member states were urged to ratify the Covenants. The ratification of the Covenants is of course not conclusive evidence of a state's commitment to human rights - nor, indeed, is the converse true. A number of Commonwealth states which have not signed them have respectable records of the observance of human rights. Some 40 of the 50 members of the Commonwealth have domestic provisions guaranteeing human rights, generally entrenched in the constitution, with access to the courts for their enforcement. However, it has to be admitted that in many instances constitutional and legislative provisions are honoured more in the breach than in the observance.

Constrained as the Group was by limited time and resources, we were unable to undertake a complete survey of the record of human rights observance in the Commonwealth. However, we were able to establish a number of areas where gross violations have occurred or which for other reasons deserved to be treated as priorities for national and collective Commonwealth efforts, and these are discussed in Chapter III.

A number of states have suspended guarantees of all or some human rights for long periods of time. This is generally effected through proclamations of emergencies and the promulgation of executive regulations (during periods when there is really no serious risk to national security justifying repressive measures). In some countries derogations from human rights are permitted even under ordinary legislation, by-passing the few safeguards that might exist against the abuse of the promulgation and exercise of emergency powers. Powers under such regulations or legislation have been used to stifle legitimate opposition, suppress the press, and ban organisations.

One of the most deplorable features of such regulations or legislation is the almost unfettered powers of the government to detain persons it does not like, without trial, amounting to the suspension of the writ of *habeas corpus*. There is ample evidence that in many countries there has been gross abuse of powers of detention, which for the most part the courts have been unable or unwilling to prevent. These detainees, generally persons of great integrity and courage, have been frequently subjected to gross indignities and even torture. The purpose of detentions is not only to harass these brave persons, but also to intimidate others into silence and submission. Frequently non-political detainees also suffer indignities and maltreatment at the hands of police and prison authorities.

Some governments regard with extreme disfavour NGOs and lawyers who try to assist these and other victims of official power (see Chapter IV). The harassment of defenders of human rights has now been well documented. Some lawyers have themselves ended up in administrative detention, and others we know have been tortured.

Intolerance of opposing viewpoints has led some governments to deny groups the right to form associations, frequently using colonial type legislation, the Societies Act, under which all organisations have to be registered, but registration (and de-registration) is reserved for executive discretion. A few states still retain one party systems, with serious restrictions on political organisation and debate. Fortunately the days of military regimes seem to be waning - at least for the time being - , for those regimes too are based on denial of many fundamental rights of association and expression. Some Commonwealth countries have excessive restrictions on the press (including censorship or the banning of publications), either in their legislation or more frequently, as a matter of practice. Public media are used exclusively to put forward government propaganda and to deny any hearing to those with another view. There is not infrequently harassment of journalists.

The effect of these measures and practices is to stifle public debate and governmental accountability and ultimately the democratic process. They are frequently accompanied by heavy investment in armaments and other apparatus of oppression. This in turn lays the ground for the suppression of other human rights, social, economic and cultural. One consequence of the harassment of NGOs is that the forces fighting for the preservation of the environment are considerably weakened. Many Commonwealth countries have suffered extreme environmental degradation in recent decades. Some countries are suffering from increasingly desertification and

others are facing the destruction of tropical rain forests. Governments, bounded by short term perspectives on development are all too often careless of the consequences for the environment and intolerant of NGOs who remind them of their obligations to present and future generations.

Repressive and discriminatory practices lead to the pervasiveness of ethnic conflict, the humiliations heaped daily on lower caste communities and on members of indigenous and minority peoples. Large numbers of Commonwealth citizens live in constant fear for their lives, especially when they are victims of ethnic strife; civilised life or dignity becomes impossible in these circumstances. Neither the government nor the dissident forces respect the rights of civilians, disregarding the principles and rules of humanitarian law. Many are driven to seek refuge abroad at a time when the world seems to have turned its back on refugees and asylum seekers. Others live in such abject poverty or deprivation that even the discourse of human rights sounds obscene.

Women and children are prominent among victims of social discrimination and deprivation. Especially in poorer but sometimes even in wealthier countries women tend to be less well educated, less well-nourished, and to work harder for smaller returns. And children are in many countries employed for pittance in menial tasks, and are naturally vulnerable to diseases, malnutrition and to mistreatment by adults. Eighty per cent of refugees are women and children, and refugees generally, already fleeing from persecution or at least grave misfortune, are too frequently compelled to live in degrading conditions and to have their fates decided without adequate procedural safeguards. Workers are often deprived of the right to form unions and of decent wages and working conditions.

The Commonwealth and its members must take immediate and effective action to remedy its record on human rights. We must never allow in any of our member states the kinds of atrocities that were tolerated during Idi Amin's regime in Uganda. Nor must we tolerate any longer the exploitation of women, children and workers that we have described. We must ensure that all our citizens live a life of dignity and self-respect, victimised neither by government oppression nor by poverty.

#### **IV. Human Rights Policy for the Commonwealth: The Difficulties**

The Commonwealth's commitment to human rights cannot, however, be a simple matter of adherence to certain absolute norms and standards. Over the last forty years or so the international community has adopted a number of legal instruments to define human rights. There are three distinct phases in the formulation of human rights at the international level. The first phase, in the aftermath of the genocidal policies of the Nazis and the horrors of the second world war, was marked by pre-occupation with civil and political rights, which are sometimes called bourgeois rights. The principal instrument was a resolution of the General Assembly of the UN, the Universal Declaration of Human Rights. It was intended to elaborate these rights in a legally binding instrument, but progress was held up as, with the rise of the cold war, a competing paradigm of human rights appeared which placed primacy on economic and cultural rights.

The resolution of these competing views, marking the second phase, was achieved through the adoption of two different covenants, one incorporating civil and political rights (the International Covenant on Civil and Political Rights, ICCPR), and the other economic and cultural rights, the International Covenant on Economic, Social and Cultural Rights ICESCR).

The third phase was characterised by the concern for the environment, the emergence of “green rights”, the principal legal instrument of which is the Declaration of the United Nations Conference on the Human Environment 1971. The concern with the environment, which suggests a cautious approach to development, has been counterbalanced, at least on the part of the third world, with the assertion of the right to development, which places economic development at the centre of state policies. The emphasis in this phase is upon collective rather than individual rights, and on the rights of future generations as well as those alive today.

These developments at the international level have been reflected in national laws. The post-war period was also the era of decolonisation, itself based on the fundamental right to self-determination. Most states in the Commonwealth which arose out of the dissolution of the empire adopted bills of rights in their constitutions, so that, towards the end of that process, a bill of rights almost became mandatory. Even the older dominions which, following the British model, had no bills of rights, came to appreciate the value of a justiciable bill of rights. Canada led the way in 1960 (albeit with a weak Bill of Rights now replaced by the Charter of Rights and Freedoms) and New Zealand has recently adopted a Bill of Rights. The UK itself, as a signatory to the European Convention, offers its people some benefits of a bill. The vast majority of the Commonwealth states now are bound by legal guarantees of human rights. Others are additionally participants in regional schemes of protection, the most recent being its African members who led the campaign for the African Charter on Human and Peoples Rights.

The tension between political and economic rights, noticed at the international level, was reflected at the national level as well. India, with a social and economic system greatly in need of reform, was the first state in the Commonwealth to give serious consideration to the dilemmas of human rights. It sought to balance civil and political rights with social and economic rights, principally through the non-justiciable Directive Principles of State Policy which cast obligations on state institutions to pursue goals of social justice and equality. The combination of legally enforceable political rights with non-justiciable directives of policy - the domestic analogue of the two Covenants has now been widely adopted in the Commonwealth. The most recent constitutions (e.g., Papua New Guinea and Namibia) reflect also concerns with the environment.

The vocation of our times, to underpin the importance of particular values or standards by giving them the status of rights, confronts us with the task of reconciling different rights. It is sometimes said that rights are indivisible, that one set of rights cannot be pursued at the expense of another, that they have to be implemented simultaneously. Others have argued that there are indeed conflicts, but are disagreed as to the priority to be accorded to different rights. These conflicts have animated discussions within the Commonwealth, consisting as it does of some of the world’s most affluent as well as the most poverty-stricken countries, and need to be faced up to in the formulation of a Commonwealth policy on human rights. The key controversies on human rights in the affluent parts of the Commonwealth tend to be those like gender equality within a broadly fair framework of industrial and social laws, specific restrictions on press freedom within a legislative framework that acknowledges the value of the freedom of expression, and the amelioration of the economic conditions of the poorer sections of the populations through adjustments in the welfare state. These are far removed from the principal human rights concerns of the poorer countries where the bare right to exist has yet to be acknowledged in the praxis of governments and where a supreme court decision that a public authority must give street dwellers reasonable notice to take themselves off to another, largely non-existent place, could be hailed as a major triumph of humanitarianism.

The conflicts between the first and second “generations”, which originally reflected the competing ideologies of the western capitalist and socialist states, are therefore not the only, nor the most serious, hurdles in the way of an unequivocal Commonwealth human rights policy. The Commonwealth is a community of diverse cultures, religions and histories. Human rights, as encapsulated in international, and many national, instruments reflect the concerns and culture of the west. Some have criticised these rights as glorifying the selfishness of the individual, alienated by and yet dependent on the market and responding to the problems of the individual who has been alienated from the community. The twin but related emphases on rights and individualism are alien to many cultures within the Commonwealth. These cultures are rooted in the richness and primacy of the community. Individuals find their identity in interpersonal relationships, in the ties of reciprocity, and in the affirmations of values that cohere in the community. Too much talk of human rights, and not enough of duties to the community, is seen to threaten traditional values and institutions which alone can give individuals a sense of identity and dignity. This emphasis on community is not in our view, as will be seen later, at odds with human rights, but rather the contrary; and it is particularly significant that “community” in many cultures extends to future generations, a dimension now being rediscovered in the countries of the “North”, especially in the light of their current concerns about the environment.

Quite apart from this philosophical difference, the issue of human rights remains problematic. Most of the classical human rights do not speak to the actual conditions of developing Commonwealth countries, whose people are preoccupied with problems of a more basic kind, like physical survival. Moreover, the frequently absolutist language of rights ignores the difficult choices that have almost always to be made. One has to balance the imperative of equality with the demands of compensatory justice. The right of property has to be weighed against equity and basic human needs. The freedom of speech may threaten communal peace. Many Commonwealth states, endowed with the mixed blessings of colonial map-making, have heterogeneous populations divided by race, ethnicity, religion and language. These divisions are constantly seen to threaten the fragile foundations of statehood, and have frequently erupted into violence. In these circumstances it is easy for leaders of governments to think that a greater control over society than is compatible with a liberal regime of human rights is necessary to retain the integuments of statehood, and maintain minimal conditions of law and order.

The problems of ethnicity are compounded by the pervasiveness of poverty, which links the struggle for scarce resources to the disruptive influences of communalism. Poverty in turn calls for a stronger state, to promote development as well as to contain the tensions generated by it, but weakening public participation in and accountability over state institutions. In such circumstances the ideology of development may have greater appeal than that of human rights.

The present polemics of human rights aggravate problems of implementation. Resentment may arise from hectoring and conditionalities by foreign states, who tend, cynically and opportunistically, to use human rights as just another tool of international politics and pressure. Unless western states adopt a more consistent approach to the use of human rights as criteria for aid, they may well discredit the whole notion of human rights in the eyes of the governments and peoples of the third world. Nor should one forget that many of the more serious violations of human rights in the third world are perpetrated with the active support of western powers, as in the early days in Amin’s Uganda. A part of the Commonwealth human rights policy must be that no member state would arm or in other ways aid another in furtherance of the violation of the rights of its people. Expediency must yield to human rights.

## **V. The Human Rights Policy of the Commonwealth: The Approach**

These are formidable difficulties in the way of a Commonwealth policy of human rights. It is necessary to face them squarely rather than sweep them aside as misconceived or mischievous. The challenge of human rights in the Commonwealth is to reconcile opposing views of the salience and universality of human rights and to accommodate the different cultural perspectives on them. Because these differences exist within a common heritage of the rule of law and democratic institutions, the Commonwealth human rights policy also provides the promise and potential of reconciliation. The Commonwealth has developed unique methods of negotiation, based on respect for its various cultures and religions, and operates largely through consensus. Its members are familiar with the problems faced by other members. Personal relations among its leaders are on the whole marked by mutual respect and often cordiality. Official ties are reinforced by other forms of non-governmental associations, including those which sponsored this Initiative, bonds of common university education, collaboration in professional groups, and so on. Pressures from a fellow member are as a rule resented less than from a non Commonwealth state. The promise of these circumstances should be used to provide Commonwealth leadership for the world and strengthen the global search for a consensus on controversies about and strategy for human rights.

A basis for reconciliation lies in the principal purpose of human rights. In our view human rights are important because they recognise the worth and dignity of the human person; worth and dignity not in some splendid isolation of the individual, but in life within the community. Dignity of the human person requires freedom from poverty, oppression and fear. It is premised on full participation in the affairs of the community. A democratic public life is not only in itself constitutive of civil and political rights, but also a pre-condition for other rights. A commitment to democracy, which is the internal aspect of the fundamental right of self-determination which the Commonwealth has repeatedly espoused, must be a central feature of a human rights policy. Human rights pre-suppose the fulfilment of the potential of the person and the community, the cultivation of spiritual and artistic values and talents. Human rights are not, in our view, an ideological argument for the preservation of particular forms of economy (though it is difficult to conceive that satisfactory safeguards for human rights can exist in any state where power, economic or political, is monopolised by a handful of people). They exist to ensure for the community the vitality of its life and values and the dignity and freedom of its members. They serve to prevent the perversion of the state by defining the proper purposes and limits of public power. We believe that it is within this framework that a Commonwealth human rights policy should be formulated.

The general tendency is for the state to acquire greater dominance over individuals and the community. The threat to communal traditions and values comes from the claims' and practices of the state, which itself is in most instances an alien institution. Communal values and institutions have been eroding rapidly under the impact of the market and the state, so that the community is less able now to provide protection and identification to its members. The primary relationship that individuals have is with the state and not the community. It is therefore necessary to provide an appropriate basis for the relationship of citizens to the state, which we believe can be done adequately only through an assertion of human rights. A part of that relationship is the role of the community in mediating between the state and the individual. We consider that the community, far from being undermined, will be reinforced by human rights, especially the rights of association, supporting collective economic organisations like co-operatives and public participation in public affairs. The community and the group are increasingly being recognised as beneficiaries of rights, as with the

conventions on non-discrimination and indigenous peoples. It is true that certain traditional practices are incompatible with human rights - the unequal position of women or various forms of oppression, like untouchability, - but no one committed to human rights would seriously defend these. Indeed most countries in which these practices have prevailed have constitutional or legal prohibitions against them. It is widely recognised that community values and practices are not static, but subject to changing norms and circumstances. The value of human rights is precisely that they establish standards of fairness and reasonableness to regulate community as well as state practices. It must not be forgotten that it is not only governments which violate human rights.

We believe that our framework can also accommodate the demands of state and nation building, particularly in multi-ethnic countries. Problems of nation building are exacerbated when human rights are denied. Although government leaders do not always wish to acknowledge it, the protection of human rights minimises tensions among groups and between them and the state. When in a multi-ethnic state the government tries to impose the values of one group upon the rest, bitter and violent conflicts arise. In such situations the common secular basis of citizenship and community (which underpins most human rights) provides the surest foundations of the polity. Decentralisation and the empowering of communities can add to rather than detract from the capacity of the state. Our framework will also reconcile the imperatives of development, equity and freedom. It would be unrealistic to deny that the different "generations" of human rights vary in their orientation and priorities. Priorities may vary between one country and another. But we believe that all human rights address themselves to values and pre-conditions of human life in dignity, security and happiness. Viewed within this underlying purpose, we believe that trade-offs are possible, reflecting the different social and economic circumstances of each country and the choices of its people. So controlled, the trade-offs do not undermine the basic rights of the community and the individual. Development is no narrow doctrine, as is now recognised in the elaboration of the right to development proclaimed by the United Nations. The development and the realisation of the human spirit, the empowerment of communities, and the making and implementing of choices by the people are essential aspects of development. It is also true that the realisation of the human spirit cannot take place in conditions of poverty and want. The link between human rights and dignity and development is thus obvious, but it can be properly established only when political rights are firmly secured, so that it is mediated through a democratic process. Otherwise there is a great danger that the ideology of development will be used by governments to suppress human rights and freedoms. A democratic process will also insulate the state from the opportunistic use of human rights issues by outside powers.

## **VI. The Commonwealth Policy on Human Rights: The Strategy**

A human rights policy will enrich the Commonwealth. It will re-reaffirm the moral basis of this community of nations and add to its prestige both among its members and outside. The stage is now set for new commitments and initiatives by the Commonwealth. It has played a part in liberating Namibia from colonial rule and pushing South Africa towards an internal dialogue which augurs well for a free and democratic state. Its repudiation of the racist policies of Fiji has emphasised that in a multi-racial community of nations, there is no place for a racist state. The Commonwealth has taken various initiatives which demonstrate its concern with human rights - the establishment of a Human Rights Unit within its Secretariat, the importance attached to the improvement of women's status, the recognition and support of voluntary organisations, the exploration of the application of international human rights jurisprudence in domestic law, the promotion of the protection of the environment, and election observance teams (emphasising its

commitment to a fair and democratic political system). However, these activities are often pursued in isolation from each other, and are rarely perceived as part of human rights endeavours. The adoption of an explicit Commonwealth human rights policy will provide a focus for these and other activities. We set out below the elements of such a policy.

We are presenting a strategy whereby human rights become constitutive of the Commonwealth in which at the same time its resources are deployed to ensure ever-improving respect for human rights of individuals and groups. The legitimacy of governments must be judged by the respect they accord to human rights. We believe that the starting point is the adoption of a Commonwealth statement of human rights principles. We are aware that there exist several international statements and declarations on the subject and we do not consider that the purpose of a Commonwealth Declaration is to add to the substance of these other statements. But we believe that a Declaration drawing upon well accepted principles of human rights and relating them to the specific problems of the Commonwealth, will establish the aspirations of the Commonwealth, its governments and people, provide a focus for Commonwealth human rights activities and provide standards by which to educate people and judge governments.

Such a Declaration, while having some moral force, would have little real impact if left as words upon the pages of the ever-growing volumes of international instruments. It will require laws at the national level, educational back-up and institutions and procedures for monitoring and enforcement. In terms of institutions and activities, there are three principal levels for the implementation of the Declaration. For our purposes, we regard the Commonwealth as consisting of its official bodies, particularly the Secretariat, the governments of member states, and its citizens. They all have to work towards a common purpose, frequently in collaboration, although the NGOs must preserve their independence and be free to criticise governments.

Little needs to be said about our emphasis on action by the Commonwealth and national governments. Many threats to human rights spring from policies and acts of governments, although we have found that private groups and dissident groups are also responsible for massive violations of human rights. But governments have the resources which are necessary to implement many human rights. They can, and have the obligation to, provide the machinery whereby challenges to human rights violations can be heard and redressed. Most human right instruments, whether international or national, are addressed to governments and other public authorities, and many seek to limit the powers of governments in their dealings with their citizens and aliens.

The Commonwealth provides a machinery for the adoption of common policies and objectives and for co-operation among its member states for their pursuit. It sets some standards which the member states have at least a moral obligation to follow. It can sometimes provide a forum whereby pressure can be applied to a particular government to improve its policies and treatment of its own citizens. It also facilitates co-operation among NGOs and other professional groups within the Commonwealth. Not insignificant Commonwealth resources are deployed through its Secretariat and the Commonwealth Fund for Technical Co-operation (CFTC) to promote co-operation and development. The official policies of the Commonwealth can have an important influence both on the outside world (as in its policies on southern Africa over the years as well as in monetary reform) and on institutions within the Commonwealth.

A little more needs to be said to justify our emphasis on non-governmental organisations, since the key role played by them in the formulations of standards and the enforcement of human rights is not widely appreciated (see Chapter IV). There also tends to be some hostility on the part of

governments to their activities. Perhaps because of the high profile of some international civil liberties groups and the effectiveness of their activities, a reference to a “human rights” group frequently brings to the public mind the fight against torture, arbitrary detentions and other “gross” human rights violations. Few make the connection between the struggle for human rights and an association of doctors; between international standards and the local group of factory workers who are fighting their employer for basic standards of safety; between state obligations and the youth group carrying out a campaign of awareness about the pollution of its local waters, or social workers organising a literacy programme among local mothers.

Diverse in their purposes, methods and organisation, NGOs comprise a human rights movement that has taken us from a world order in which governments were free to treat their citizens however brutally, callously or arbitrarily they pleased to one in which political authorities are now accountable to internationally-defined standards of human rights. They have been the dynamo that has driven the struggle for self-determination, the struggle for democratic pluralism, and the struggle for a more just economic order.

NGOs contributed to ensuring that human rights were inscribed into the United Nations Charter, and in a major way to the elaboration of the international Bill of Human Rights, and they were in the forefront of the push to move the UN system beyond human rights promotion to protection or implementation. They continue to provide inter-governmental organisations with the information essential for action in enforcing these standards. They can also provide governments with information essential to judicious policy-formulation and can assist in implementing these human rights policies. Some provide legal advice and assistance to local citizens, sometimes in poor and remote areas, others give advice and support to minorities or refugees, or fight to eliminate discrimination against the elderly or victims of AIDS. The principal functions of the NGOs can be summarised as follows:

- (1) information gathering, evaluation and dissemination;
- (2) advocacy to stop abuses and secure redress;
- (3) provision of legal aid, scientific expertise and humanitarian assistance;
- (4) lobbying national and international authorities;
- (5) promotion of legislation to incorporate or develop human rights standards;
- (6) education, consciousness raising or empowerment;
- (7) building solidarity;
- (8) delivery of services, especially in the area of economic and social rights;
- (9) keeping open the political system.

Most importantly, these NGOs provide a countervailing and humanising force to the centralising tendencies of the modern state. They provide a means whereby people seek greater control over their lives and destiny. As a rule, they are participatory institutions which provide valuable experience in democratic practices.

The Commonwealth has a particular reason to support NGOs, as they constitute an essential part of the structure of contacts and relationships that define and strengthen the Commonwealth. The reality of the Commonwealth emerges, and its bonds are reinforced, not only when the heads of governments and their officials meet, but also, and perhaps more importantly, when its doctors, social welfare workers, lawyers, teachers, journalists, trade unionists, and sportspeople exchange experiences and collaborate. The Commonwealth is first and foremost a commonwealth of its peoples. In the decades to come, the strength of the Commonwealth will depend upon the strength of its NGOs.

The paragraphs which follow set out the details of the strategy we propose; however, it is important to realise that this is a strategy - an overall proposal for action, not simply a bundle of suggestions. These proposals are supplemented or elaborated in chapters III and IV.

## **Commonwealth Governments Acting Together**

### **(1) A Declaration**

Since the policies and activities of what we may call the official Commonwealth are determined by the governments of its member states, an essential first step in the Commonwealth Human Rights Policy is a declaration by the heads of government. We recommend that at its next meeting in Harare in October 1991, the CHOGM should adopt a Declaration of Principles on Human Rights. The Declaration should contain a commitment to the principal international instruments on human rights. It would require the member states to take steps to implement the provisions of these as well as national provisions on human rights. It would establish an agenda for Commonwealth human right activities, including education. It would set out the responsibilities of the Commonwealth Secretariat and other Commonwealth institutions to promote human rights, monitor the record on human rights and investigate allegations of abuses of human rights within the Commonwealth. It would recognise the valuable role of NGOs in the promotion and implementation of human rights.

The Declaration would in itself promote awareness of human rights. It would establish the values and the framework within which the Commonwealth, its governments and other institutions would formulate their policies and conduct their activities so as to enhance human rights and co-operate to promote their cause.

### **(2) Role in ethnic conflict**

Since, as we have argued, a major cause of the violation of human rights, as well of tensions between member states, is ethnic violence, we recommend:

(a) that the CHOGM should commission a study of causes of ethnic conflict and the ways, including constitutional reforms, that can be undertaken at the national and Commonwealth levels to prevent or ameliorate such conflict. The commission should consist of non-government members. One or more major research institutes should be commissioned to produce the study, which would be discussed at the following CHOGM. (b) The Commonwealth should also institute machinery for its good offices in mediation and conciliation when there is a threat to peace due to ethnic conflict. We recommend below that it should be one of the responsibilities of the Secretary-General to provide such machinery in the first instance. (c) CHOGM should emphasise the importance of adherence to the principles and rules of humanitarian law in armed domestic conflicts. Commonwealth citizens have suffered greatly from such conflicts.

### **(3) Funding**

The CHOGM should establish a Commonwealth fund for human right activities. Contributions should be made through a combination of mandatory and voluntary payments by member states. Money should also be raised from other sources. A substantial part of the Fund must be used to assist NGOs in their human rights work. The administrators of the fund should ensure that the fund is accessible to the NGOs concerned, is responsive to their needs, and that the decision-making structure is as independent of governments as possible.

## **Individual Governments**

### **(1) National commitment to human rights**

The counterpart of a programme for the institutions of the Commonwealth is a commitment by individual governments to devise and implement a national policy on human rights. However the cornerstone of such a policy must be one of implementation of national constitutional commitments and international covenants relating to human rights. Furthermore, in respect to international covenants, governments must undertake to fulfil the requirements of ratification, for example the preparation, comprehensively and promptly, of periodic reports to international bodies. Where such treaties provide for a right of individual petition these should also be ratified. As a first step, all Commonwealth states should ratify the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its Optional Protocol. However, a national policy should commit the government to ratify progressively all human rights instruments.

### **(2) Ensuring that the law and practice comply with the standards**

Governments must establish procedures to ensure that their national constitutions or laws protect human rights and that the legislation is implemented. It should be a special responsibility of law officers, particularly the Attorney-General, to ensure that legislation as well as government policies and acts are compatible with human rights provisions. He or she should scrutinise every bill presented to the legislature for conformity with these provisions, and the bill should contain a statement that he or she is so satisfied. It is important also to scrutinise existing legislation, especially that enacted before independence in the case of former colonies. Much old repressive legislation is still used, although it is incompatible with constitutional provisions on human rights. The office of the Attorney-General should have at least one expert on human rights. We believe that law officers have a major responsibility for ensuring the observance of human rights. We would remind them of the resolution of the General Assembly of the UN on the responsibilities of law officers (1979), which emphasises that in the performance of their duties, they shall respect and protect human dignity and maintain and uphold the human rights of all persons (art.2).

### **(3) Educating officials**

We believe that many violations take place because of the ignorance by government officials of human rights provisions. This is often the case at lower reaches of the administration, and in rural areas where there are few checks on the actions of officials. Governments should institute or strengthen education in human rights for their officials so that they become aware of the kinds of action that are unlawful as constituting violations of human rights. Courses in human rights law would be of particular value to the police and prison staff. Courses should also be provided for legal draftsmen to minimise the enactment of legislation incompatible with human rights provisions. Most international and regional human rights instruments require member states to institute educational programmes to increase awareness of the rights guaranteed.

### **(4) Strengthening the legal system**

In most Commonwealth countries there is urgent need to strengthen the legal system for the

protection of human rights. It is essential to the effectiveness of the legal system that judges and lawyers should be well qualified, courageous and independent. The independence of the judiciary has been under attack from the government in some countries. Governments need to discard the notion that a human rights oriented judge or lawyer is *ipso facto* subversive. The courts must give a liberal and broad interpretation to human rights provisions, as many of them, including the Privy Council, have now accepted. It is necessary that all individuals or groups should have easy access to courts for the protection of their rights. The procedures for bringing suits should be simplified, and the rules as to who may bring actions relaxed, as the Indian Supreme Court has done (see Appendix III); relevant NGOs should be permitted to bring actions on behalf of individuals or in the public interest. Legal aid should be provided where an individual or group cannot afford legal costs. Human rights instruments and legislation and case law should be readily available. We note with dismay that in several countries, law reports have either ceased or are hopelessly behind schedule, and it is sometimes difficult to obtain up-to-date texts even of primary legislation.

### **(5) Non-judicial institutions**

We prefer to regard recourse to courts as an ultimate remedy. Governments can do much to promote human rights by establishing special institutions with responsibility for their monitoring and enforcement. A number of countries already have these institutions. Perhaps the best known of these is the ombudsman, which now operates in 28 member states (see Appendix I). The aim of this office is the pursuit of administrative justice for all citizens in a manner which is confidential, informal and flexible. Access to the office is easy and cheap. Ombudsmen may have responsibility for either general administration or for special areas, like race relations, women, refugees and children (like the Commissioner for Children in New Zealand). Another institution which has been established in some countries is the human rights commission, which has a broad responsibility for the promotion of human rights (see Appendix II). Their duties include monitoring the implementation of human rights, raising public awareness of human rights, setting standards and proposing legislative changes, and dispute resolution. Other countries have established specialised bodies or officers for particular groups, like the Commissioner for Scheduled Castes and Scheduled Tribes in India or the Commission for Racial Equality in the UK.

### **(6) Public education**

One of the most effective ways to promote human rights is through education. In the section on NGOs, we recommend a programme of human rights education. But governments have a primary responsibility, at least so far as formal educational institutions are concerned. We recommend that education in human rights should begin in primary schools. A few Commonwealth countries have excellent educational materials for teaching human rights in schools. The Secretariat should help to distribute these to other states, so that they might be used with necessary adaptations. The curricula at various levels should be scrutinised to eliminate prejudice and bias against particular communities and religions, and to encourage tolerance and respect for human rights.

### **(7) The role of NGOs**

Governments should recognise the role of NGOs in the promotion of human rights. At present human rights oriented NGOs, including trades unions and women's organisations often suffer from various disabilities and harassment. In some states there is in reality no right to form associations (despite constitutional guarantees). In some states NGOs are prevented from raising funds or receiving them from abroad. Some states make a practice of detaining human rights

activists or harassing them in other ways. There is a sustained campaign to discredit them by false accusations or innuendos. In extreme cases governments use vigilantes or the para-military to eliminate activists. Governments should undertake that they will neither sponsor nor countenance by others attacks of these types on human rights organisations and individuals.

Human rights groups should be free to come into existence, and to operate within the law, without harassment. Governments should make clear commitments to freedom of association and to an atmosphere which at least permits, and preferably encourages, the work of NGOs engaged in the protection and promotion of human rights. This requires commitment to the freedoms of expression, information, assembly and conscience. Governments should see the non-governmental groups concerned to defend human rights as partners in making their policy effective. They should be consulted on the implementation of human rights instruments. Just as many NGOs enjoy a consultative role with international agencies, so should domestic NGOs have a special standing on human right questions with their governments. They should be free to gather information for reports to local and international bodies set up to monitor the implementation of human rights. The specific activities of the NGOs that need to be recognised and promoted we discuss in the subsection on NGOs later in this report.

## **(8) The press**

A particular role exists for the press, a role which makes freedom of speech one of the key human rights. All too often governments insist that the press must be “responsible” by which they mean not criticising government. But it is crucial that the press should be free to expose the shortcomings of government, and of others whose activities may affect the rights of citizens, including powerful corporations and other groups and individuals. A free press almost certainly means a press which is not wholly owned by government.

## **The Commonwealth**

### **(1) Standing Commission on Human Rights**

A Standing Commission, consisting of 10 or so independent experts of distinction, should be appointed by Heads of Government to advise them on general issues affecting human rights within the Commonwealth. Its functions would be advisory, consultative and monitoring. It would publish a report prior to each Heads of Government meeting on the record of human rights in the member states and make recommendations to them on how to improve the situation. Among the issues of which it would take account would be the freedom of action of and support for NGOs in member states. It would advise the heads of governments and the Secretariat (including the Human Rights Unit). It would also address, independently, human rights issues across the Commonwealth and would take account of the contributions of national governments and of NGOs, as well as of official Commonwealth bodies. It would be empowered to receive reports from Governments, NGOs and Commonwealth citizens direct and, where appropriate, could ask governments or the Secretariat to comment on particular matters. It would be a resource that the governments and the Secretariat could draw upon, particularly in its efforts to mediate in ethnic conflicts. We do not at this stage envisage an adjudicatory role for the Commission. We, however, support the proposal for a Commonwealth machinery for investigation and adjudication, and urge the next CHOGM to set up a committee to make recommendations on its establishment.

The main purpose of the Commission would be educational in the broadest terms: to demonstrate

to the Commonwealth and its citizens that this is an association committed to human rights, that the counterpart to rights is obligations by citizens as well as governments, and that the whole process requires a continuous effort which goes beyond legislation or adherence to international agreements. We recommend that a fund for research and education in human rights should be placed at the disposal of the Commission, and that it should be empowered to commission studies and hold conferences.

The commission would not require much of an infrastructure. It would work in co-operation with existing human rights institutions, both official and non-governmental. What little administrative support it requires would be provided by the Human Rights Unit.

The Commonwealth Governmental Working Group of Experts has recommended the establishment of a programme advisory committee. The functions of this committee would overlap with those we have recommended for the Standing Commission. However, the functions we have proposed are broader. We have in mind a more prestigious body, largely independent, with a substantial majority of non-governmental members. It would be undesirable to have both a standing Commission and an advisory committee. We see our proposal as modifying the proposal of the committee of experts, rather than as advocating an additional body.

## **(2) Secretary-General**

The Commonwealth has a modest institutional structure for the promotion of human rights which needs to be strengthened if it is to prove effective for the Commonwealth Human Rights Policy. We support the current human rights related activities of the Secretariat. Our recommendations deal largely with additional activities that must now be undertaken.

Following acceptance of a Human Rights Policy by the Heads of Government, the Secretary-General, as the Chief Executive of the official Commonwealth, should undertake the primary role in implementing a human rights policy throughout the official Commonwealth agencies. Thus, the Secretary-General should develop a consistent practice of addressing issues of human rights within the Commonwealth. This has occurred in the past from time to time but an effective Commonwealth commitment to human rights would require the Secretary-General to address these issues more often in public statements. The Secretary-General should develop links to relevant regional and international institutions concerned with the promotion and protection of human rights.

The Commonwealth needs to have positive cooperative relations with inter-governmental agencies which have competence in this area. Thus the Secretary-General should strengthen links with the ILO, UNESCO, the Food and Agriculture Organisation, the World Health Organisation, the UN High Commission for Refugees, UNICEF, the International Red Cross and the UN population and family planning programme. All of these assist with the implementation of human rights and, through coordination, effective policies of promotion and protection at the Commonwealth level can be enhanced.

A further dimension of an active human rights policy could involve the Secretary-General in discussions with governments on human rights issues between CHOGMs. We envisage the Secretary-General playing a major role in implementing the Commonwealth role in mediation in conflicts within or between member states which threaten human rights. The Secretary-General might appoint a special representative or rapporteur to assist him in offering advice and help to

governments on matters related to human rights.

Finally, the Secretary-General, the Secretariat and the Commonwealth Foundation can, through clear recognition of the role of NGOs in all aspects of human rights activity, enhance and encourage such organisations throughout the Commonwealth.

### **(3) Commonwealth Secretariat Human Rights Unit**

The role of the Commonwealth Secretariat Human Rights Unit is critical. In order, however, to perform that role, its resources, in terms of staff and money, will have to be increased significantly. Its future role was discussed by the committee of government experts; this committee made a number of recommendations which we are pleased to endorse. The principal recommendations include advisory assistance to member states on training their officials and judiciaries about their responsibilities under human rights instruments and helping governments to fulfil their obligations of implementing and reporting under international conventions. In conjunction with the Legal Division, it should facilitate the exchange of information on human rights developments within the Commonwealth, in particular the dissemination of judicial decisions touching human rights.

Working closely with the Standing Commission on Human Rights we have proposed and with NGOs, it would have a special responsibility for education in human rights. It should frame a variety of programmes with appropriate professional associations and NGOs around the Commonwealth, in such fields as access to law, and promotion of women's, children's and trade union rights. Support should be given for the networking of resource centres, by which information about judicial decisions, campaigns and services may be more widely spread. The Unit should also encourage liaison between official and statutory bodies in the Commonwealth, such as human rights commissions, and comparative work on the experience of national legislation (eg. Bills of Rights), and of Commonwealth experience of different types of international machinery (eg. the UN covenants and the main regional instruments). Specifically in support of NGOs it could support the development of a Directory of Commonwealth human rights NGOs.

### **(4) The Commonwealth Fund for Technical Assistance and the Commonwealth Foundation**

We have recommended that a special Commonwealth fund for human right activities should be set up. Pending the establishment of a substantial fund, we recommend that the CFTC and the Foundation should devote a significant part of their resources to human rights work, and that their support should extend to the NGOs.

### **(5) Commonwealth of Learning**

We have already indicated the importance we attach to education in human rights. The establishment of the Commonwealth of Learning provides an excellent opportunity to develop and transmit distance learning programmes in human rights. We recommend that the Commonwealth of Learning should give priority to human rights education. It should collaborate with the Commonwealth Legal Education Association to develop suitable courses.

## **Non-governmental Organisations**

### **(1) Recognition of NGOs**

It is essential that the Commonwealth and its member states recognise the key role of NGOs in the promotion of human rights. National laws must ensure that no unnecessary legal impediments are placed in the way of the formation and functioning of NGOs. The laws and administrative practice must ensure their autonomy. Governments must recognise the legitimacy of the NGOs to speak on behalf of their constituencies, and their responsibilities for the defence and enforcement of human rights.

### **(2) The role of NGOs**

We have already listed the principal human rights functions of NGOs. We endorse activities already undertaken by them and recommend that facilities should be provided for the extension of these activities. We have already recommended that the Commonwealth should provide funds to promote their activities. National governments and the Commonwealth Secretariat should undertake collaborative projects with the NGOs (an illustration being the successful judicial colloquia on human rights case law organised by the Secretariat in conjunction with the International Centre for Human Rights (Interights)). NGO representation on the policy making and advisory machinery of the Commonwealth would be secured through the Commonwealth Standing Commission on Human Rights. Although these forms of help and collaboration are important, it is vital to avoid a situation where NGOs are merely co-opted by government and lose their independence. It is necessary that there should be a fruitful tension between the governments and the NGOs.

### **(3) NGOs and education**

We recommend that NGOs should give special attention to education about human rights. Various specialised NGOs (e.g., trade unions, women's organisations, etc) already provide instruction to their members on those aspects of human rights which touch them professionally or socially. We believe that there is considerably more scope for this type of education. There is need also for more general education on human rights. We recommend that one of our sponsoring organisations, the Commonwealth Legal Education Association, should take primary responsibility, in conjunction with the Human Rights Unit and other appropriate bodies, for a survey of what is currently going on in this field and to prepare teaching materials, at different levels. Materials should also be prepared for the Commonwealth of Learning. We have already emphasised the teaching of human rights from primary school onwards.

### **(4) NGOs in support of the legal system**

Courts and other tribunals have provided an important forum for the protection of human rights. In many countries there are inadequate legal resources available to the NGOs in their struggle for human rights. Although we have cautioned against an overly legalistic approach to human rights, there is little doubt that legal resources can greatly strengthen the cause of human rights. In some countries the courts provide the only forum where questions of human rights can be raised. We recommend various ways in which the legal resources of the NGOs can be strengthened. In every state there should be at least one legal resources centre which would provide legal aid to other NGOs and individuals who are involved in human rights litigation. It would establish an expertise

in human rights law and would be the source of documentation, comparative case law, etc. It would also undertake education in the legal rights of specialised groups, like workers, women and journalists. It would also remind the government about the deadlines for the submission of reports to international monitoring bodies and help to co-ordinate the submissions of the NGOs to these bodies.

#### **(5) International links for legal resource centres**

The work of the national legal resource centres would be made more effective if they could link with centres in other member states. We consider, in addition, that there is a need for a Commonwealth NGO to provide back up support for national centres and to facilitate the exchange of information, case law, etc. Among its other responsibilities might be the publication of Commonwealth human rights decisions and a newsletter on litigation strategies.

We have not had the time to consider detailed proposals as to how such a centre might be established. We recommend that a committee consisting of a number of national centres (e.g., the Legal Resources Foundation, Zimbabwe, the Indian Law Institute, Interights, London, and the Ottawa University Human Rights Centre) be appointed (perhaps by our sponsoring organisations) to consider the feasibility of a Commonwealth legal resources centre and advise on modalities.

#### **(6) Professional codes of conduct**

We recommend that NGOs of professionals (including our sponsoring organisations) should examine the codes of conduct applicable to their professions. If no code exists at present, one should be adopted. The codes of conduct would incorporate the principle of the observance of human rights, so that it would be unethical to participate in activities that involve violations of human rights and the dignity of individuals and communities. The earliest initiatives to use Codes of Conduct for this purpose was in the context of a human rights violations of long-standing, pressing and continuing concern: torture. As early as 1948, the newly formed World Medical Association first adopted the Declaration of Geneva. The adoption in 1949 of the International Code of Medical Ethics expanded the Declaration and in 1982, following the endorsement by WHO, the Principles of Medical Ethics were adopted by the UN General Assembly. Earlier (in December 1979) the General Assembly had adopted the Code of Conduct for Law Enforcement Officials.

We recommend that Commonwealth professional NGOs should adopt and, where relevant, review their codes and ensure that they conform to international standards. The Commonwealth codes should be used to educate the professions in their responsibilities. They could also be used to fight against the manipulation or abuse of their skills or knowledge by the government or private groups to commit violations of human rights.

#### **(7) NGO networks**

The work of each of the NGOs would be enhanced by collaboration with other similar NGOs, within the same country as well as across the Commonwealth. We therefore urge that our sponsoring organisations and other suitable NGOs should help to promote networks among similar NGOs.

## **(8) Commonwealth human rights conferences**

In order to enhance networking, promote lobbying and provide greater importance to human rights, we recommend that human rights oriented NGOs should organise a Commonwealth conference on human rights every two years, in advance of the meeting of the heads of governments. The conference would be held in the same place as the meeting of heads of governments. It would review the record of governments on human rights and focus on whatever the organisers considered to be human right priorities at the time. Its recommendations would be forwarded to the heads of governments who we hope would take them into account when they considered official reports on human rights and decided on policies and strategies.

## **The Future of CHRI**

A number of our recommendations, particularly those addressed to the NGOs will require follow up action for their implementation. We see therefore the need for a body which would continue the work started by the CHRI, a need which will be all the greater if the next CHOGM does not accept the proposal for a new Human Rights Commission. It is not inevitable that our sponsoring organisations or the structure they have adopted for the initial phase of their work would be the most suitable for the next stage. The base of such an initiative needs to be broadened and should include key NGOs active on the ground. We propose that those sponsoring organisations should consider how best they might continue their support for human rights in the future, in collaboration with other, more grassroots, NGOs.

## **CHAPTER II**

# **THE DEVELOPMENT OF NORMS AND STANDARDS OF HUMAN RIGHTS**

### **I. Introduction**

This chapter summarises the provisions of the principal instruments on human rights. The first part considers international instruments, the second regional arrangements for the protection of human rights, and the third some aspects of constitutions and laws of Commonwealth countries relating to human rights. These are the three levels at which protection is provided for the enjoyment of human rights and freedoms. Several Commonwealth countries are subject to all three regimes of protection, but some (particularly in Asia and the Pacific) are not members of any regional arrangements.

The vast majority of the international instruments have been adopted since 1948, following the establishment of the United Nations whose Charter proclaims the protection of human rights as one of its principal purposes. Agreement on many of these instruments was reached only after long and hard negotiations, reflecting the different and sometimes opposing cultural traditions and economic philosophies of the member states. However, they do now represent a consensus of the international community on the rights and values that it is necessary to preserve in order to protect the dignity of men and women.

Most international instruments contain a set of rights and freedoms which they seek to protect. Some are general, such as the Universal Declaration of Human Rights, while others deal with specific rights, for example the rights of association and collective bargaining, or for specific groups, like women, children and indigenous peoples. The instruments also contain authorisation to suspend or limit the rights in certain specified circumstances and for specified purposes, although a few rights are absolute, like the protection against torture or slavery. Most instruments establish some machinery for their supervision and enforcement. These are more elaborate in later than in earlier instruments. But most impose an obligation on the member states to report periodically to an international body on the measures they have adopted to implement the provisions of the instruments, while some also provide procedures for individual petitions or inter-state complaints against violations of rights. Increasingly, instruments contain provisions on technical assistance to enable states to carry out their obligations when these require specific forms of development. The experience of enforcement has been rather poor, and little use has been made of the provisions for inter-state complaints. It was in part because of the weaknesses of the international system in respect of supervision and enforcement that initiative for regional arrangements were made. Regional arrangements are in general stronger, including the compulsory jurisdiction of regional courts, except for those under the African Charter, which are weaker in some respects.

The history of the international instruments shows a gradual development of consciousness and priority of rights. In the earliest phase civil and political rights received the greatest emphasis. Then economic, social and cultural rights were placed on the agenda, and the tension between these two held up the international consensus on rights and procedures for a considerable period of

time. In more recent years yet a third set (or generation as it is sometimes called) of rights has demanded attention and action. Two of them have been particularly prominent, the right to a safe and healthy environment, and the right to development. The right to development provides a different emphasis than others, for it seeks to enlarge the power of governments to promote economic and social development, and is sometimes seen to clash with individual rights. While it would be idle to pretend that there are not occasionally conflicts, at least in terms of priorities, among the different sets of rights, the international community is committed to all of them; one set cannot be postponed while another is pursued. The contemporary challenge is to incorporate all the rights within a single unity, for they are all inter-related, and each set of rights depends for its full enjoyment on the realisation of other sets of rights and freedoms. That the distinctions are misleading is borne out by several of the newer instruments, concerned to safeguard what are essentially "first generation" rights, like the rights to equal treatment of women and children, which contain many positive obligations on the part of states. These conflicts are also reflected at the domestic level, and a principal way of resolving them within several Commonwealth countries is to balance the individually oriented rights with directive principles of state policy for collective good. Paralleling the international efforts to integrate the different sets of rights, the Supreme Court of India, where the directive principles have been particularly important, now holds the view that there is no contradiction between rights and directive principles of policy.

Individual rights are balanced not only by directive principles, but occasionally also by duties. The notion of duties is particularly influential in some cultures, especially those which emphasise the principle of reciprocity and the importance of the community. Of the international instruments, the most explicit are the American Declaration of the Rights and Duties of Man and the African Charter of Human and Peoples' Rights. The Declaration imposes duties towards society, to parents and children, to receive instruction, to vote, obey the law, to serve the community and the nation, to pay taxes and to work. It also includes the duty to refrain from political activities in a foreign country. The African Charter includes duties on the individual to "respect his parents at all times, to maintain them in case of need", and to preserve and strengthen social and national solidarity, particularly when the latter is threatened". It also imposes the duty to "preserve and strengthen positive African cultural values in relation with other members of the society, in the spirit of tolerance, dialogue and consultation and in general, to contribute to the promotion of the moral well being of society". Of the Commonwealth constitutions, India, Namibia and Papua New Guinea are among those which refer to duties. Papua New Guinea has the most extensive formulation of duties (where they are called basic social obligations, declared as "obligations to themselves and their descendants, to each other, and to the Nation"). They include respect for the constitution, active participation in the development of the national community, the exercise of constitutional rights, protecting the national wealth, resources and environment in the interests not only of the present but also of future generations, respect of children for parents, and, for parents, support and education of children. Other instruments may not contain explicit reference to duties, but they include provisions to limit the rights given under them, generally in the interests of the state and the community. This method of balancing individual rights with community needs is an indirect way of acknowledging duties to the community.

When we examine the international as well as domestic Commonwealth instruments, it is obvious that the rights and the protection accorded to them are impressive. However, there is considerable discrepancy between aspirations that these instruments represent and the reality of their achievement. In part this arises from inadequate machinery, as at the international level, and in part from the reluctance of governments to subject their conduct to the discipline of human rights. The great progress in the elaboration of human rights and freedoms now needs to be consolidated

through their effective implementation. It is towards that objective that the Commonwealth Human Rights Initiative has been established, and this report has been prepared.

## **II. International Developments**

### **(1) Universal Declaration of Human Rights**

The international movement for human rights goes back to the treaties for the protection of minorities in east European states in the 1930s under the supervision of the League of Nations. During the same period the International Labour Organisation promoted some conventions to improve conditions of work and to protect the rights of trade unions. Both these initiatives were limited in their scope. The contemporary search for general international norms of human rights and their legal protection began in the mid 1940s, with the defeat of the fascist regimes in the second world war. The desire to safeguard human rights was a response to the horrors of the holocaust and the other atrocities of Hitlerite Germany and its allies, and lay in the recognition that the denial of human rights was a potent cause of injustice and wars. When the United Nations Organisation was set up, its Charter committed it to the promotion and protection of human rights as an inseparable part of the objectives of the UN and its member states (Articles 1(3) and (4) and 55). Specific machinery, particularly the Economic and Social Council and under it the Commission on Human Rights, was set up to assist the General Assembly to develop, adopt and enforce instruments on human rights.

The General Assembly laid the groundwork for this task by the adoption of the Universal Declaration of Human Rights on 10 December 1948. The Declaration was impressive evidence of the consensus on and commitment to human rights on the part of the nations of the world. The preamble to the Universal Declaration contains some of the justifications for the protection of human rights: the inherent dignity and the equal and inalienable rights of all members of the human family are the foundations of freedom, justice and peace in the world; the disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind; it is essential, if man or woman is not to be compelled to have recourse to rebellion against tyranny and oppression, that human rights should be protected by the rule of law; and that the protection of human rights is essential to promote the development of friendly relations between nations. The purpose of the Declaration was to establish a common understanding of the rights and freedoms to which the member states of the UN had committed themselves. The General Assembly proclaimed the Universal Declaration as a “common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States and among the people under their jurisdiction.”

The premise underlying the Declaration is that all human beings are born free and equal in dignity and rights, are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. It follows from this no one should be discriminated against in his or her enjoyment of the rights and freedoms proclaimed in the Declaration on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A number of substantive rights are proclaimed, covering political and civil as well

economic, social and cultural rights. The former include the right to life and liberty and protection against arbitrary arrest, detention or exile, the freedom of religion and conscience, the freedom of expression and association, the freedom of movement (including the right to leave and enter one's country), and the protection of the legal system, including the right to a fair trial. Also protected are the political right of free and equal franchise, and an elected government; and the right of equal access to the public service. Prominent among the latter rights are the right to work and to organise in trade unions, to social security, education and to a standard of living adequate for health and well being. Well being is defined as the adequate provision of food, clothing, housing and medical care, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond a person's control. In relation to education, the Declaration enjoins that it be directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms, and to promoting understanding, tolerance and friendship among all nations, racial or religious groups.

The Declaration recognises that individual or group rights like this have to be balanced against the needs of the community. It does so by emphasising that everyone has duties to the community in which alone the free and full development of an individual's personality is possible. The rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations. Rights and freedoms may be restricted only for the protection of the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare. The restrictions are valid only if they can be justified in a democratic society and are provided under law, and not exercised merely through administrative fiat.

## **(2) The International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights**

The Declaration was a resolution of the General Assembly, not in itself binding on the member states, and intended to establish broad parameters within which a legally binding instrument would be drafted and adopted by them. It was assumed that agreement would be forthcoming speedily. In the event it took the United Nations 20 years before reaching agreement on two Covenants which would give effect to the Declaration. Meanwhile the Declaration was widely cited and used as a standard. As new states joined the UN, they were presumed to have accepted the Declaration, and it soon assumed the status of *jus cogens*, that is, customary international law, particularly as it had been adopted unanimously by the General Assembly. The Universal Declaration can therefore be regarded as establishing legally binding norms. However, it is to the two Covenants that one normally turns to find obligations as regards human rights binding on the member states, in particular because of their more precise language, but also because of special machinery each covenant has established for the supervision and enforcement of their provisions. The delay between the adoption of the Universal Declaration and the agreement on the two Covenants is explained by the rise of the Cold War, with the confrontation between western, market based states and east European, socialist states. The former states supported civil and political rights, and resisted economic and social rights, as in their view the latter distorted the autonomous operations of the market (and threatened the privileges of the propertied classes) while the socialist states argued that political and civil rights, which they called bourgeois rights, were not only intended to maintain the structures of privilege and inequality, but were also meaningless in the absence of economic and social rights that ensured minimum levels of literacy, economic well being and social security. The differences between them precluded agreement on a single covenant which would deal with all the rights and freedoms proclaimed in the Declaration. The only way to reconcile the differences was to draft two separate Covenants, one dealing with "bourgeois"

rights and the other with “socialist” or collective rights. The Covenants were adopted in December 1966, but did not obtain enough ratifications to come into force until early 1976. The Universal Declaration and the Covenants are referred to as the International Bill of Rights. So far 93 states are parties to the International Covenant on Civil and Political Rights (ICCPR) and 97 to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Of the 50 Commonwealth states, 21 have ratified the ICESCR and 19 the ICCPR.

Central (and common) to both Covenants are the right of self-determination of all peoples and the right to equality. The right enables a people to freely determine their political status and pursue their economic, social and cultural development. It has both external and internal aspects. The external aspect relates to a people’s sovereignty, and indigenous control over its natural wealth and resources. It has been the basis of decolonisation since the end of the second world war. The internal aspect means that the people must be free to choose their own political and social institutions, and rests primarily upon the free exercise by the people of their democratic rights to choose their own representatives and government. Both Covenants also emphasise the rights of equality and non-discrimination on the grounds listed in the Universal Declaration.

The Covenants spell out in detail the rights and freedoms proclaimed in the Declaration and oblige states to ensure their realisation. However, the nature of the obligations under the two Covenants is different. The ICCPR legally binds the states not to infringe upon the rights granted, while the ICESCR requires the states to take steps, “to the maximum of its available resources”, to achieve progressively the full realisation of the rights. Nevertheless the provisions of both Covenants reinforce the principle of the U N Charter that the infringement of human rights is a breach of international law, and therefore a state cannot plead that such infringements are domestic matters in which the international community cannot interfere.

The Covenants also set up procedures and machinery for the supervision and the enforcement of state obligations (see also Appendix IV). The principal institution under the ICCPR is the Human Rights Committee, consisting of 18 members chosen from the nationals of signatory states. There are three ways in which the Committee helps in the enforcement of the rights and freedoms under the Covenant. It receives and examines periodic reports from the member states on the measures they have adopted to give effect to the rights and the progress made in their enjoyment. Its comments are sent to the member states as well as the Economic and Social Council. The main mechanism is therefore that of investigation (which is helped considerably by submissions made by NGOs), adverse publicity and international pressure to take remedial action. However, it has no means to compel states to file reports when they are due, and as we show in Appendix V, a number of Commonwealth states have defaulted in the submission of national reports.

The other two methods have elements of a compulsory jurisdiction, but they depend on a state having assumed specific obligations. A member state may declare that another member state, which has made a similar declaration, may report it to the Committee if it breaches its obligations. If the matter is not resolved to the satisfaction of the states concerned, the Committee may deal with it once it is satisfied that the all available domestic remedies have been exhausted. It may try to reconcile the parties, but if that is unsuccessful, it has to prepare a brief report on the facts and the submissions of the parties.

The third method operates under the Optional Protocol to the Covenant and applies to those states which have ratified it. Any individual subject to the jurisdiction of a state which has ratified the Protocol who claims that his or her rights under the Covenant have been violated (and he or she has

exhausted domestic remedies), may complain to the Committee. The state has to report to the Committee, which pronounces on the complaint after reviewing all the evidence available to it. Normally the Committee would offer its opinion whether there has been a violation of a right, and recommend a remedy, although it has no means to compel the submission of evidence or to enforce its recommendations. However, its opinions have been of great help in clarifying the exact reach of the different rights and freedoms. The system of supervision and enforcement is far from perfect and needs to be strengthened, but it does offer possibilities of airing complaints, examination (although the power to undertake investigations is limited) and some form of adjudication.

The ICESCR provides a different kind of machinery, as the obligations under it are less precise. Here too the member states have to submit periodic reports on its implementation; but the responsibility for their examination is that of the Economic and Social Council, which has established a Committee on Economic, Social and Cultural Rights, made up of 18 experts elected in their personal capacities, to help it. The Council may also transmit reports to the Commission on Human Rights. They are also sent to the specialised, relevant UN agencies, which in turn report to the Council. The approach taken is that member states should be helped to achieve levels of development that make possible these rights, and there are provisions for advisory and technical assistance--an approach which has been adopted in some subsequent conventions.

### **(3) Right to Equality and Group Rights**

#### **(i) Convention on the Prevention and Punishment of the Crime of Genocide**

The International Bill of Rights has been supplemented by a number of instruments dealing with specific rights. The UN General Assembly adopted, as a response to the holocaust, the Convention on the Prevention and Punishment of the Crime of Genocide in December 1948, which entered into force early in 1951 (see Appendix V). It makes genocide, whether committed in time of war or peace, a criminal offence under international law, regardless of the status of the perpetrator, so that he or she can be punished by any national or international tribunal. Genocide is defined as the commission of certain specific acts "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such". The specific acts are: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group. By outlawing the destruction of national, ethnic, racial and religious groups, the Convention formally recognises the right of these groups to exist as groups.

Protection to groups is also provided through the criminalisation of apartheid by the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973). Apartheid is defined as the domination of one racial group over any other racial group and its systematic oppression through a number of policies, including the separation of races, systematic discrimination in jobs, the murder of members of one group, or the infliction on them of serious bodily or mental harm, the infringement of their freedom or dignity, or subjecting them to torture or cruel or degrading punishment. Those who participate in the establishment or maintenance of apartheid are guilty of an international offence, for which they may be tried in any member state.

## (ii) **Indigenous Peoples' Rights**

Indigenous or aboriginal peoples have through history suffered great hardships and privations at the hands of incoming conquerors and settlers. They have been deprived of their land and other valuable property; forced into compulsory labour little different from slavery; subjected to alien systems of law, administration and culture; discriminated against in the enjoyment of all kinds of laws; and in some cases, exterminated. The international community has been slow to acknowledge the injustices done to these people or to take any effective action to redress their increasing marginalisation in their own countries. Indeed the first important instrument to alleviate their hardships, the 1957 Indigenous and Tribal Peoples Convention and Recommendation sponsored by the International Labour Organisation, was premised on the assumption that the remedy lay in their assimilation to the culture and way of life of the communities which had dominated them. However, this paternalistic approach has now been abandoned, and the new instrument on the subject, the Convention on Indigenous and Tribal Peoples in Independent Countries adopted in 1989 recognises the value of their culture and ecology, and their dignity as a people.

The underlying principle of the Convention is the enjoyment by indigenous people of both sexes of the full measure of human rights and fundamental freedoms without hindrance or discrimination. Special measures, consistent with the freely-expressed wishes of the people concerned, shall be adopted for safeguarding their persons, institutions, property, labour, cultures and environment. Another important principle is that these people shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or use, and to exercise control as far as possible, over their own economic, social and cultural development. The application of their own laws and customs is to be secured, where not incompatible with well recognised fundamental rights; and, when national laws are applied to them, account is to be taken of customary values and practices. The Convention contains a number of provisions to protect their lands, which normally has a special relationship to their culture and spiritual values. Their rights of ownership and possession of their land must be respected; and effective safeguards must be provided when their land is to be taken for a national project. Special provisions exist to safeguard their rights as workers (and protection against compulsory personal service) and to health and social security.

Throughout, the Convention seeks the empowerment of these people by emphasising their participation in decisions and administration that affect them, and in the provision of effective programmes and remedies.

## (iii) **The Convention on the Elimination of All Forms of Racial Discrimination**

Other measures short of genocide directed against a community are prohibited by a number of instruments, the most important and comprehensive of which is the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the General Assembly in 1965 and entered into force in 1969. Its scope is wide. It prohibits "racial discrimination" which it defines as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" having the purpose or effect of "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". The Convention imposes on the member states the legal obligation to eliminate racial discrimination in their territory and to enact whatever laws are necessary to ensure

non-discrimination in the exercise and enjoyment of various human rights. This obligation attaches to a long list of civil, political, economic, social and cultural rights, including those set out in the Universal Declaration and the two Covenants. It applies not only to official, but also to private, discrimination for it requires each state to “prohibit and bring to an end, by all appropriate means, including legislation..., racial discrimination by any person, group or organization”. However, the Convention allows affirmative action to help disadvantaged groups, so long as such measures do not lead to the maintenance of separate rights for different racial groups and are not continued after the objectives for which they were taken have been achieved.

The Convention establishes a strong enforcement mechanism. It sets up a Committee on the Elimination of Racial Discrimination of 18 members elected by the member states but who serve in their individual capacities. The Committee receives periodic reports from the member states on the implementation of the Convention, which it examines, and passes its recommendations to the states as well as to the General Assembly. It has jurisdiction to hear complaints by one state that another state is not complying with its obligations under the Convention. Any state which has with another a dispute which is not satisfactorily resolved by the Committee or through its good offices, may refer it to the International Court of Justice for adjudication (although certain countries have entered reservations to this provision). It can receive and deal with individual petitions provided that the state concerned has recognised the right of private petition.

#### **(4) Personal and Family Rights**

International instruments place the family, as the basic unit of society, in a special position. They also deal with various relationships within a family, like the right and consent to marry, adoption of children, and the rights of certain members of the family, like women and children, both within the family and with the state and society. In this section, we discuss some of the principal provisions on personal and family rights.

##### **(i) Convention on the Elimination of All Forms of Discrimination Against Women**

Discrimination against women is the subject of the Convention on the Elimination of All Forms of Discrimination Against Women, which was adopted in 1979 and entered into force in 1981. It prohibits discrimination against women, discrimination being defined as any distinction, exclusion, or restriction made on the basis of sex which denies them the equal enjoyment with men of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The Convention outlaws discrimination in various specific fields, such as participation in public life (including the representation of their state abroad), education, employment, health, nationality, and marriage. In addition it imposes positive obligations on the states. For example states are required to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and of customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. They are also obliged to ensure that family education includes a proper understanding of maternity as a social function and the common responsibility of men and women in the upbringing and development of their children. The states are required to take special measures to remove the difficulties and inequalities faced by rural women. The Convention allows affirmative action in favour of women so as to ensure their *de facto* equality with men, but not so as to maintain unequal or separate standards, and only for so long as is

necessary.

The Convention requires the member states to submit periodic reports on the implementation of its obligations to the Committee on the Elimination of Discrimination against Women, which consists of 23 experts elected by the states but who serve in their personal capacities. The Committee reports to the UN Commission on the Status of Women as well as to the General Assembly, and may make recommendations for general or specific measures. No right of individual petition is provided, but presumably a state may lodge a complaint against another that it is not conforming with its obligations; if there is no settlement between them, the dispute is submitted to arbitration, failing which either party may go to the International Court of Justice. However, a state is free to disapply this provision when it signs the Convention, and only states which have accepted it may invoke it against another state.

## **(ii) Convention on the Rights of Children**

The Convention was adopted in 1989 (see Appendix V), in recognition of the fact that in all countries, there are children living in exceptionally difficult conditions, who need special protection. The Convention seeks to assure to all children most of the rights and freedoms guaranteed in the International Bill of Rights, like life, liberty, the freedom of expression and conscience, nondiscrimination, and privacy. More specifically children's rights include provisions such as that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the interests of the child shall be a primary consideration; member states shall take measures to combat the illicit transfer and non-return of children abroad; a child's application to join his parents in another state shall be sympathetically considered; and children shall not be separated from their parents against their will, except when decided by competent authorities, who are subject to judicial review, that such separation is in their best interests. Special provisions for the education, health and employment of the children are enjoined. They are to be protected against sexual abuse, and to be helped with physical and psychological recovery and social integration when they have been victims of this or other forms of abuse. A committee of experts serving in their personal capacity has been set up to monitor the implementation of the Convention. It may seek the assistance of specialised agencies, and is required to facilitate the provision of technical advice and assistance to countries in need of them in order to fulfill their obligations under the Convention.

## **(iii) Rights to Nationality and Asylum**

Nationality is crucial to the exercise of many other rights and freedom. It may in particular determine the right to residence and movement. The right to a nationality is, therefore, guaranteed in the Universal Declaration. Also important is a person's right to seek and obtain asylum abroad when she or he is persecuted at home. A series of instruments have been adopted for these purposes.

Responding to the situation in many countries whereby the nationality of a woman depended on her husband's, the Convention on the Nationality of Married Women (whose provisions have been reinforced in the Convention on the Elimination of All Forms of Discrimination Against Women), which was adopted in 1957, provides that "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife". Likewise neither the voluntary acquisition of the nationality of another state nor the renunciation of its nationality by the husband

shall prevent the retention of its nationality by the wife. It also gives to a wife who is not the national of her husband's country the right to easy access to that nationality. Private parties are not given a right of petition, but disputes between two or more states may be referred to the International Court.

The Convention on the Reduction of Statelessness (adopted in 1954 but not effective until 1975) has a number of provisions to reduce the number of persons without a nationality. It operates principally by requiring a state to give nationality to a person with specific connections with it but who would not otherwise qualify under its normal legislation, if the failure to grant nationality would result in the person becoming stateless. Nor may a state deprive a person of his or her nationality if he or she thereby becomes stateless. A person's renunciation of a nationality is ineffective unless that person has acquired another nationality. A state cannot deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. When a person may lawfully be deprived of nationality, he or she should be given the right to a fair hearing by a court or other independent body. The Convention envisages, but does not directly provide for, a body to which individual complaints may be made, and gives a state which alleges that another member state has infringed its provisions the right to refer the matter to the International Court if the dispute is not otherwise resolved.

Two important instruments deal with the situation of stateless persons and refugees. A refugee is defined as a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The instruments are the Convention relating to the Status of Stateless Persons (1954) and the Convention relating to the Status of Refugees (1950) and the Protocol relating to the Status of Refugees (1967). The rights they provide are broadly similar: they seek to ensure that the treatment they receive is no worse than that accorded to other aliens, in areas such as the opportunity to seek gainful employment, freedom of movement, housing, public education, public relief, labour legislation and social security. There should be no discrimination against them, and they should have at least the same guarantees for the exercise of their religion as nationals. They are protected against expulsion from the state where they live, except on grounds of national security or public order. Their naturalisation and assimilation into society are to be facilitated. They should be provided with travel documents. Neither a stateless person nor a refugee is given rights of complaint, but a member state that considers that another has been in breach of its obligations may take it to the International Court.

## **(5) The Rights of Workers**

A series of instruments, negotiated under the auspices of the International Labour Organisation, protect the rights of workers (and employers). In 1949 the ILO adopted the Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise. It obliges member states to ensure to workers and employers, without any distinctions, and subject only to the rules of the organisation concerned, the right to join organisations of their own choosing without prior authorisation. These organisations, which are defined as these for the purpose of furthering and defending the interests of workers or employers, are guaranteed their autonomy and freedom from government interference. They may not be dissolved or suspended by administrative authority, nor may their existence be subjected to conditions which infringe their autonomy and rights under the Convention. They are free to join federations of workers' or employers' organisation, including international organisations.

The second principal instrument is the Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, adopted a year later. It protects workers against acts of anti-union discrimination in respect of their employment. The right shall apply in particular to acts calculated to make the employment of a worker conditional on his or her not joining a union or relinquishing trade union membership, or cause the dismissal of or otherwise prejudice him or her by reason of union membership or participation in union activities. The organisations of employers and workers are each guaranteed against interference by the other, and in particular the organisations of employees are protected against domination by the employers' organisations.

These two conventions are not applicable to the employment of armed forces or public service. Convention No. 151, however, extends their protection to the members of the public services (in view of "the considerable expansion of public-service activities in many countries and the need for sound labour relations between public authorities and public employees' associations").

Another convention (No. 122, Concerning Employment Policy, 1966), although not giving rise to precise juridical rights as do the previous conventions, is based on the provision in the Universal Declaration that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. It commits the member states to an active policy designed to promote full, productive and freely chosen employment, and to consult with the representatives of workers and employers in the implementation of the policy.

As is customary with ILO conventions, no special machinery is provided for the supervision or enforcement of the rights under the above conventions. Instead, they are subject to the usual machinery of the ILO for enforcement, based on the tripartite committees (of representatives of states, workers and employers) which are among the most effective of international arrangements for the supervision of treaty obligations.

## **(6) Human Rights in the Administration of Justice**

A number of conventions and General Assembly resolutions aim to secure to arrested, detained and accused persons the right to be treated in a humane way, and to a fair trial. The right of protection against retrospective criminal offences and penalties and to a fair trial are provided for in the International Bill of Rights. These have been supplemented in other documents. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) prohibits the use of torture or degrading treatment to secure a confession or other information, or to punish someone for an offence or suspected offence. Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted, for the above purpose, by or at the instigation or with the acquiescence of a public official or some other person acting in an official capacity. No person may be extradited to another state if there is reason to believe that he or she would be tortured. The Convention seeks to ensure that those guilty of torture are punished. Member states have to ensure that education regarding the prohibition against torture is fully included in the training of law enforcement personnel, medical staff, public officials and other persons who may be involved in the custody, interrogation or treatment of any person who is arrested, detained or imprisoned. Member states must keep under systematic review procedures for interrogation and methods of custody to eliminate torture and ensure prompt and impartial investigation of allegations of torture.

The enforcement machinery under the Convention, apart from the specific obligations on the states,

includes a committee of independent experts, which is to receive periodic reports from them on the implementation of the Convention. A member state may by separate declarations admit the right of other states to complain against its violations of the Convention and of individual petitions. However, the committee may investigate on its own initiative if it receives reliable information that torture is being systematically practised in a member state. Although the investigations are confidential, the findings of the committee may be included in its annual report to the states parties and the General Assembly.

A number of UN resolutions aim to ensure that law enforcement officials are representative of and accountable to the community. They should respect and protect human dignity and maintain and uphold the human rights of all persons, use only such force as is strictly necessary and respect the law and provide full protection for the health of persons in their custody (“Code of Conduct for Law Enforcement Officials”, 1979). The point about health is reinforced in another resolution which is addressed to health personnel, particularly doctors, and which sets out a code of conduct, emphasising that they should not participate in torture or other degrading treatment (“Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, 1982). Other resolutions are meant to reinforce the independence of the judiciary (“Basic Principles on the Independence of the Judiciary”, 1985) and to establish minimum standards for the administration of juvenile justice (“United Nations Standard Minimum Rules for the Administration of Juvenile Justice”, 1985).

## **(7) Humanitarian Law**

Humanitarian law has been defined as “the human rights component of the law of war”. It is based on four Geneva conventions which were adopted in 1949 and two Protocols signed in 1977. They seek to introduce humanitarian rules as to the treatment of prisoners of war, protection of civilian populations, and the care of wounded and sick members of the armed forces. It would be unnecessary to deal with them in this report were it not for the fact that they also deal with internal strife, and unfortunately the members of the Commonwealth have had their share of such strife. We mentioned in the previous chapter that civilised life has become impossible in many parts of the Commonwealth due to internal armed conflicts, with both the state armed forces and the dissidents involved in massive violations of the law and the rights and freedoms of others, including the freedom from torture and the right to life.

The original conventions were aimed primarily at inter-state conflicts. However, certain minimal provisions are contained in all four conventions (in a common form in their articles 3) which apply to “armed conflict not of an international character”. It requires the government and the insurgents to treat “humanely” all persons taking no active part in the hostilities, including members of armed forces who have laid down their arms or are for other reasons disabled. No discrimination in treatment based on race, colour, religion or faith, sex, birth or wealth, or other similar criteria is allowed. There is prohibition also of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognised as indispensable by civilised peoples. The same article permits the International Committee of the Red Cross to offer its humanitarian services to the parties in conflict; this provision has enabled it to offer valuable assistance to victims of civil wars

and similar conflicts.

However, the scheme of article 3 is skeletal, and, with the increase in wars of liberations and other internal strife, it became necessary to extend its scope. This has been done through the two Protocols. The first Protocol extends the provisions of the Conventions to “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination.” It also provides additional protection by prohibiting methods of warfare that cause superfluous injury or unnecessary suffering as well as widespread, long term and severe damage to the environment. It outlaws the starvation of civilians and bars military attacks on or destruction of objects necessary for the survival of the civilian population.

Protocol II extends the protection of article 3 to conflicts not covered by Protocol I, between the armed forces of a member state and dissident armed forces or other organised forces, provided that the dissident forces are under “responsible command” and exercise significant control over a part of the territory of the state. Although the definition is narrow, once a conflict comes within its scope, a number of safeguards are provided to detainees and the civilian population in an attempt to humanise the conditions in which the conflict is carried out.

## **(8) The Right to Development**

The right to development is different from other kinds of rights. It does not belong only to individuals, but also to states. It is not justiciable, being in the nature of principles rather than substantive entitlements. At the moment the right is based on a resolution of the General Assembly, the Declaration on the Right to Development (1986). It is possible that as further work proceeds on it towards a more binding instrument, many of the points that are ambiguous or obscure will be clarified. At the present time the importance of this right is largely political. If the scope and the ingredients of the rights could be clarified, and substantial agreement reached on them, it is possible that the right could play a valuable role by providing a basis for reconciling different kinds of rights and indicating a way towards their realisation. It is also valuable in providing a broad definition of development, moving away from narrow economic criteria to a more holistic view in which the participation of the people and their political and cultural development are emphasised. At the moment most western states are opposed to this right, paralleling as it does North/South controversies.

The Declaration asserts rather than defines the right to development, although the preamble proclaims that “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits therefrom”. It states that the right to development is an inalienable human right whereby all human beings and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and freedoms can be fully realised. All human rights and fundamental freedoms are indivisible and should be equally implemented. The human person is the central subject of development and should be an active participant and beneficiary of the right to development. Nevertheless, it is the state which has the primary responsibility for development. Poorer states should be helped by the richer to promote their development and a new international economic order should be established. The call for greater international co-operation is counter-balanced by the emphasis on national sovereignty.

It is not possible now to examine in detail the implications of the right to development. A majority of the members of the Commonwealth, who fall within the category of developing countries, attach great importance to it. They are right to do so in so far as it is evident that the full enjoyment of civil, political and cultural rights in their countries requires rapid economic and other forms of development. However, by elevating development to the principal priority and by vesting the primary responsibility for it in the government, it may shift the balance between the individual and the state that the more traditional rights have established. One needs to be on guard that the Declaration is not used by governments as a further excuse to erode the autonomy of civil society or the rights of individuals or groups. It will also be necessary to resolve conflicts between this right, which encourage the full utilisation of natural resources with the right to a safe and healthy environment and the preservation of resources for generations to come.

### **(9) The UN machinery for dealing with gross violations of human rights**

Apart from the procedures for complaints and supervision discussed under each specific instrument, there is more general machinery for dealing with gross violations of human rights. Details of this and some other aspects of the international complaints system are provided in Appendix IV, and it will suffice here to provide a brief summary. The two principal UN bodies for this purpose are the UN Commission on Human Rights, which consists of representatives of governments, and its Sub-Commission on Protection of Minorities and Prevention of Discrimination, which consists of persons appointed by the Commission but who act in their personal capacities. They have been authorised by the Economic and Social Council to examine information relevant to gross violations of human rights and fundamental freedoms. The Commission may make a thorough study of situations which reveal a consistent pattern of violations of human rights, and report to the Council. Another resolution of the Council authorises the Sub-Commission to establish a small working group to examine communications received by the UN (from individuals and NGOs, running into thousands annually) to identify those that appear to reveal a consistent pattern of gross violations. Its examination is conducted in closed session, but it may draw the attention of the Commission to any situation of gross violation that it finds. The Commission may itself, at the request of a member, hold public meetings on allegations of gross violations. Special working groups or a rapporteur may be appointed for detailed studies of particular violations. The ultimate responsibility under these procedures lies with the Council and the General Assembly (where, as in the Commission itself, political factors have minimised enthusiasm for affirmative action).

## **III. Regional Instruments and Arrangements**

Although very considerable progress has been made in the formulation and adoption of norms and standards of human rights at the international level, the machinery for their enforcement is weak. Even when there are potentially effective procedures, they depend on the initiative of another state. This has so far proved to be a fatal flaw, as states are reluctant to complain against each other. The result is that the enforcement (as opposed to the supervisory) machinery of most conventions has remained a dead letter. It was partly to overcome these deficiencies that various regional human rights treaties and arrangements have been established. Another reason for them was the slow progress on the Covenants and the recognition that agreement on regional norms and machinery might be easier to achieve than on an international basis. The regional arrangements on the whole have more effective enforcement machinery than the international conventions (although this is

perhaps not necessarily true of the African Charter of Human and Peoples' Rights). Now the regional arrangements are seen not as an alternative but as complementary to the international system. There is also a growing tendency towards common formulations and jurisprudence, as the decisions of tribunals under one regional system are accorded considerable respect in tribunals of other regions.

Of the various regional arrangements (among which one must now include the Helsinki Accord), there are three principal ones which are relevant to this report. These are the European Convention on Human Rights, the Inter-American System under the Organisation of American States and the African Charter of Human and Peoples' Rights. There have been some discussions to formulate and adopt a regional convention for the Pacific and Australasia in which Commonwealth countries have taken a major initiative.

### **(1) The European System**

The oldest regional system is the European, which, in terms of both substantive rights and procedures, has influenced developments elsewhere. The European Convention was signed in 1950 under the auspices of the Council of Europe and came into effect in 1953. The Commonwealth countries which have ratified the Convention are the United Kingdom, Cyprus and Malta. The Convention guarantees the following rights: life, liberty, security of person and due process of law; protection against torture, inhuman or degrading treatment and punishment; freedom from slavery; freedom from ex post facto laws and punishment; private and family life; freedom of thought, conscience and religion; freedom of expression and peaceful assembly; right to marry and found a family; and non-discrimination in the enjoyment of rights given in the Convention (but not a general non-discrimination clause). Subsequent protocols added: rights to property and education; an undertaking by the member states to hold free and secret elections at reasonable intervals; prohibited imprisonment for contractual debts; guaranteed the right of movement; and banned forced exile of nationals and the collective expulsion of aliens. The death penalty has been banned; aliens guaranteed various due process safeguards in determining whether they may be expelled from the country in which they are residing; spouses are guaranteed equality of rights and responsibilities; and there is protection against double jeopardy as well as the right to compensation in cases of miscarriage of justice.

The rights under the Convention are enforceable under national as well as regional law. In some countries, the Convention is part of domestic law, and therefore enforceable in national courts. In the United Kingdom this is not so, although British courts take the Convention into account when interpreting British legislation. In countries where the Convention is not directly enforceable, their residents may seek redress in regional institutions. However, the residents of a member state can seek redress directly only if that state has accepted the right of private petition by a special petition (which the United Kingdom has). Otherwise they must rely on another member raising the matter of the violation of the Convention.

Two principal bodies, the European Commission of Human Rights and the European Court of Human Rights, deal with complaints against a state. All complaints, whether raised by private petition or state action, go in the first instance to the Commission, which consists of members (equal to the number of signatory states), elected by the Committee of Ministers but who serve in their personal capacities. In every case, all avenues in the individual country must have been exhausted, but if the issue is raised by a private petition, the Commission has also to be satisfied that it is admissible (i.e., that it is not incompatible with the Convention, manifestly ill-founded or

an abuse of the right of petition). The Commission investigates facts through hearings, examination of witnesses, etc., and has the power to dismiss the case then, but rarely does so. The Commission then tries to bring about a friendly settlement between the parties. If these efforts fail, it reports to the Committee of Ministers its examination of the facts and its view whether or not there has been a violation. The Committee may dispose of the case itself (in which decision political considerations may well dominate, and it requires a two-thirds majority for it to decide that there has been a violation). Or it may refer it to the European Court, and if the case arises from a complaint by or against a state, the state also has the right to refer it to the Court, provided in either case that the state complained against or complaining has accepted its jurisdiction (which most states, including the United Kingdom, have done). Its judges (whose number equals the number of signatory states) are elected for nine year terms by the Parliamentary Assembly of the Council of Europe. The judgment of the Court is final and binding on the state concerned, which may, apart from any specific relief to be granted to the victim of the violation, have to change its law.

The European system is generally acknowledged to be effective. A large number of complaints have been made, and the Commission and the Court have developed an impressive body of case law, which has also influenced the approach of the United Nations Human Rights Commission and other international and domestic tribunals. The record of compliance by member states with the decisions of the Council of Ministers and the Court is likewise impressive. The failure of the United Kingdom to give effect to the Convention in its domestic law, however, results in protracted litigation, since its national courts are unable to apply the Convention and complainants have to go through local courts and procedures before they can raise the issue of the violation of a Convention right before the European institutions. Various proposals, so far unsuccessful, have been made to incorporate the Convention in domestic law.

Another criticism of the European system is the failure to provide social and economic rights in the Convention, although a protocol does now protect the right to education. The Council of Europe members have, however, adopted another instrument, the European Social Charter (1961) for the protection of these rights. The rights and principles proclaimed in the Charter include the right to work, to just conditions of work, to safe working conditions, to fair remuneration, to organise and to bargain collectively. It recognises the right of the family to social, legal and economic protection, the right of mothers and children to social and economic protection, and the right of migrant workers and their families to protection and assistance. The Charter also protects the right to vocational guidance and training, to the protection of health, to social security, to social and medical assistance, and the right to benefit from social welfare service, including the right of physically and mentally handicapped persons to training and rehabilitation. Although called "rights", they are more in the nature of directive principles and policies that the states undertake to implement. On signing the Charter, a state undertakes to give effect to at least five out of seven principal provisions. There is no juridical enforcement of these rights, but member states are required to submit periodic reports on the implementation of their obligations, which are in the first instance examined by a committee of experts (assisted by a consultant from the ILO). The conclusions of this committee ultimately reach both the Committee of Ministers and the Parliamentary Assembly; the Committee of Ministers may then make recommendations to the member states. The system is far from perfect (inevitably charged with political considerations), and proposals to include some of these rights in a protocol to the legally binding and juridically enforceable European Convention of Human Rights have been put forward. Cyprus and the United Kingdom have ratified the Charter; indeed the latter was the first state to do so. However, researchers have suggested that the Charter has made little impact on the UK.

## (2) The Inter-American System

There are two schemes of human rights within the Inter-American system, which interact and overlap, and the same body, the Inter-American Commission of Human Rights has the principal responsibility for the enforcement of both. The first, and older, is based on the provisions in the Charter of the Organisation of American States, which was signed in 1948 and came into effect in 1951, and applies to all the members of the Organisation, which include the Commonwealth Caribbean Countries and Canada. The other is the American Convention on Human Rights which was adopted in 1969 and became effective in 1978. The Charter proclaimed the fundamental rights of the individual without distinction as to race, nationality, creed or sex. At the same time its founder members adopted the American Declaration of the Rights and Duties of Man, which although in its origin a non-binding resolution, is now regarded as an authoritative declaration of the rights proclaimed in the Charter. The Declaration contains 27 rights and 10 duties, covering civil and political rights as well as economic; social and cultural rights. The former category includes the rights to life, liberty and security of person, equality before the law, religion, expression, assembly and association, residence and movement, privacy, property, fair trial, protection from arbitrary arrest, due process, nationality and asylum. The other rights are to health, education, culture, work, leisure and social security. Among the duties are those towards society, to parents and children, to receive instruction, to vote, to obey the law, to serve the community and the nation, and to pay taxes and to work.

The Convention is binding only on those states which have ratified it; the Commonwealth members are Barbados, Grenada, Jamaica, and Trinidad and Tobago. It protects civil and political rights, which include the right to juridical personality, life, personal liberty, humane treatment, freedom from slavery, fair trial, freedom from *ex post facto* laws, compensation for miscarriage of justice, privacy, conscience and religion, thought and expression, right of reply, right of family, movement and residence, property, and participation in government. There is a general protection against discrimination. The member states have also undertaken to take progressive measures for the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the OAS.

The enforcement machinery for the two systems is different, although it overlaps in part through the common functions of the Inter-American Commission on Human Rights. Under both systems, there is the right of individual petition to the Commission. Petitions may also be brought by groups, including NGOs. Such a petition is admissible only if local remedies have been exhausted and it is “not manifestly groundless or obviously out of order”. A case may also be referred to the Commission under the Convention by a member state if that state or that against whom a complaint is made has accepted this special jurisdiction of the Commission (thus reversing the normal rule under the European Convention which requires a special declaration for individual petitions and not for inter-state complaints). The Commission may make such investigations as it considers necessary, and seek explanations from the government concerned. In the first instance it will seek to promote a friendly settlement, and if that fails, to make recommendations to the state in dispute. If its recommendations are ignored, it may report its views of the facts and the law to the General Assembly of the Organisation. If the case arises from the Charter provisions, the final decision is up to the Assembly, which can only make recommendations; the usual practice appears to be that no action is taken by the Assembly. If, however, the dispute arises under the Convention, it is possible for the Commission or interested states (but not, paralleling the European Convention, the petitioner) to refer the case to the Inter-American Court of Human Rights.

The court will have jurisdiction only if the “defendant” state has accepted its jurisdiction over contentious cases (none of the Commonwealth members have so far done so). It may do so on the basis of reciprocity, in which case the applicant state will have to have accepted the jurisdiction, although this provision does not bar a reference by the Commission on an individual petition. The court’s decision is final and it has the power, apart from requiring remedial action on the part of the delinquent state, to award monetary damages to the injured party.

The second major aspect of the system for enforcement lies in the general promotional, advisory, consultative and investigatory powers of the Commission. It helped draft the OAS human right instruments, including the Convention, and is regularly consulted by the OAS Permanent Council and the Assembly. It has sponsored conferences and published several human rights pamphlets. It has played a significant role in mediating and protecting human rights in situations of civil war, international armed conflicts and the taking of hostages. One of its most important roles has been the preparation of country studies, which it may initiate when it considers that a government is engaging in large scale violations of human rights; it may reach that decision on the basis of communications from individuals or groups like an NGO. It is often able to visit the country in question and hold hearings and receive evidence in other ways. The country is required to co-operate with the Commission and facilitate its work. These reports, which have been influential, are published and debated in the Assembly, whose recommendations carry considerable weight. This method, intended to deal with situations of mass violations, supplements the procedure for individual or inter-state complaints which concern the infringement of individual rights.

### **(3) The African System**

The African Charter on Human and People’s Rights (ACHPR) was adopted in 1981 by the Organisation of African Unity (OAU). It came into force in 1986 when the requisite number of states had ratified it. Of the Commonwealth states, the following are members of the Charter: Botswana, Gambia, Nigeria, Sierra Leone, Tanzania, Uganda, Zambia and Zimbabwe.

The Charter of the OAU itself, adopted in 1963, when a large part of Africa was still under colonialism and most independent states were new, contained few provisions on human rights, and indeed by its emphasis on state sovereignty and non-interference in the internal affairs of other states, may actually have damaged the cause of human rights. Certainly the OAU did not denounce the atrocities committed by Idi Amin, Macias Nguema or Jean Bedel Bokassa. ACHPR is therefore important in providing the African regional system with a mandate for the protection of human rights.

Although the ACHPR draws upon classical and international instruments of human rights, it also attempts to incorporate African conceptions of the individual and of law. It thus places a special emphasis on the importance of the community and the duties of the individual towards it as well as on conciliatory rather than adjudicatory procedures for enforcement of the rights. It also provides pride of place to the right of development (without which it argues that civil and political rights cannot be enjoyed), recognising the central role of the state in the administration of African societies. As a consequence the Charter provides a less secure system of individual or group rights (and larger limitations on the rights) than either the European or the American Conventions of Human Rights.

The rights covered by the Charter include the usual civil and political rights of equality before the law and the equal protection of the law; respect for the dignity inherent in a human person; respect

for life and the integrity of the person; to justice and fair trial, including the presumption of innocence and the prohibition of retroactive penal laws; freedom of conscience and religion; to property; to information, expression and dissemination of ideas; freedoms of assembly and association; the right of movement, including the right to leave and return to one's own country and to seek asylum; protection against mass expulsions of non-nationals aimed at national, racial, ethnic or religious groups; the independence of the judiciary; and the right of every citizen to participate freely in the government of his country, either directly or through freely chosen representatives. It also covers economic and social rights to work; health; and education. It protects the rights of women and children as stipulated in international declarations and conventions. It requires the state to promote and protect morals and traditional values recognised by the community and to assist the family which is the custodian of moral and traditional values recognised by the community. Third generation rights like those of social solidarity such as the right to peace, security, healthy environment, and economic, social and cultural development are likewise covered. The right of the people freely to dispose of their wealth and natural resources is recognised; and the member states have undertaken to eliminate all forms of foreign economic exploitation, particularly as practised by international monopolies.

Unlike the European and the American Conventions, the African Charter does not provide for a court. The principal institution for supervision and enforcement is the African Commission of Human Rights composed of 11 members elected by the Assembly of Heads of States and Governments and serving in their personal capacity. The Commission has both promotional and quasi-judicial functions. As part of the former, it may undertake studies, convene conferences, initiate publication programmes, disseminate information and collaborate with national and local institutions concerned with human and peoples' rights. It may also give its views and make recommendations to governments; it could use this authority to draw to the attention of governments serious violations of rights. It may formulate principles and rules to solve legal problems relating to human and peoples' rights and freedoms for adoption by African governments.

Its quasi-judicial functions are two-fold. It has authority to interpret all the provisions of the Charter at the request of a member state, an institution of the OAU or an African organisation recognised by the OAU. The Commission may refer to various international and African human rights instruments for the interpretation of the Charter, allowing possibilities of broadening the scope of its provisions. The other function relates to the handling of complaints, which may be brought by states or by individuals. If a state refers a complaint against another member state for violation of a provision of the Charter, the Commission, once it is satisfied that local remedies have been exhausted, seeks to obtain all relevant information bearing on the case, from the parties as well as other sources: If it fails to bring about a settlement based on the respect for human and peoples' rights, it must submit a report to the states concerned and the OAU Assembly on the facts, its findings and recommendations. The action that the Assembly may or must take is not prescribed by the Charter.

The Commission may take up an individual complaint (which may be made by a person, non-governmental organisation or another entity) on a decision of a majority of its members. The complaint must not only show that local remedies have been exhausted, it must also reveal a series of serious violations or mass violations, so that the procedure cannot be used to deal with isolated or individual violations. However, even then the Commission cannot investigate the complaint unless it is expressly authorised to do so by the Assembly. If so authorised, its report remains confidential to the Assembly, which may decide not to publish it. The Assembly has similar

powers in relation to the general or annual report of the Commission on its activities.

The African system is too recent to allow an assessment of its efficacy. However, an examination of its substantive provisions (with their limitations) and the machinery under it reveals the extreme caution with which African states have proceeded towards their regional scheme. The key role of the Assembly, not noted hitherto for its sensitivity to or concern with human rights, does not unfortunately augur well for the protection of rights and freedoms under the Charter. Such guarantees and protection as citizens and residents of Commonwealth African states may enjoy for the time being will depend essentially on their domestic instruments.

#### **IV. Domestic Instruments on Human Rights within the Commonwealth**

Today most member states of the Commonwealth have provisions on human rights in their domestic law, principally in their constitutions, which supplement and reinforce their international and (where relevant) regional obligations. Most of these provisions were enacted after the second world war, and were an integral part of the process of decolonisation, which itself was based on the fundamental right to self-determination (an exception is Tonga which included various rights in its constitution as early as 1875). This late provision for legally protected human rights is accounted for by attitudes towards the legal guarantees of human rights that traditionally prevailed in the United Kingdom (and are still influential there): The traditional British attitude has been that a combination of the common law and representative democracy was in itself sufficient guarantee of the protection of human rights. Britain did not enact a bill of rights (as understood these days), nor did it provide one for the older dominions. The (old) Canadian Constitution merely contained safeguards for certain denominational schools against encroachments on their privileges by provincial legislatures and provided for the equality of the English and French languages for specified purposes. The Constitution of Australia is slightly more expansive; it provides for just terms for the acquisition of property by the state, jury trial for indictable offences against federal laws, free movement between its states, and prohibits federal authorities from the establishment of a state religion or religious qualifications for public office, while the state governments may not discriminate against residents of other states. New Zealand came closest to the British model, not only in not having any legal provisions for human rights, but also in not having a written constitution. The picture in the older parts of the Commonwealth has of course altered in recent years. Canada was the first to enact a Bill of Rights in 1960 (although it was not entrenched and future legislation could evade its provisions, defects which have been partially remedied by the Charter of Rights and Freedoms adopted in 1982). It has been followed in this decade by New Zealand which has also passed a Bill of Rights as ordinary legislation without entrenchment. Efforts to provide one in Australia have so far failed. The reason for the adoption of the bills of right is the realisation that many areas of discrimination and unfairness, especially when they concern minorities, cannot be dealt by the common law or parliamentary politics. These reasons are even more compelling in the newer states within the Commonwealth.

The widespread adoption of bills of rights in the Commonwealth countries does not, however, owe much to these initiatives; indeed it pre-dated them. The first significant attempt was made in the Indian Constitution which was adopted by the Indian Constituent Assembly in 1950. Indian nationalist leaders had agitated for many years for a bill of rights when India was under colonial rule. But the British always poured cold water on their attempts (as indeed they did in Sri Lanka

and Burma), although it might be assumed that a bill of rights would be eminently suitable for a multi-cultural and multi-religious country. However, in the British view minority problems were solved through the partition of the Indian sub-continent into two states, each with a distinct religious majority. Consequently it was not until Indians devised their own Constitution three years after independence that a bill of rights became effective there. Pakistan's first short lived home grown constitution (and its successors) have included a bill of rights. Sri Lanka's independence constitution did not contain a bill of rights, but provided protection for religious freedom and from communal or religious discrimination.

The Indian example did not influence subsequent decolonisations, as is evident in the absence of a bill of rights in Ghana's constitution (1957), barring a guarantee of religious freedom and of compensation on the taking of property and protection from racial discrimination, although the Ghana government promised a bill of rights based on the Indian model; instead it gradually eliminated all guarantees. It is true that the Malayan and Singapore constitutions included bills of rights, but the former constitution was based on the recommendations of a Commonwealth constitutional committee in which Indian and Pakistani members were influential. The British attitude to bills of rights changed, however, as a result of the ethnic problem in Nigeria. Some ethnic groups had lobbied for the constitution to ensure for each major ethnic group autonomy over its internal affairs. The British opposed to such fragmentation, appointed a commission to enquire into the problem. It recommended a bill of rights as the solution. Ironically, from having previously such contempt for a bill of rights, the British turned to it as a panacea for what has proved to be the most enduring of constitutional and political problem in Commonwealth countries, that of ethnicity. Their attitudes were no doubt also influenced by Britain's then recent adherence to the European Convention of Human Rights.

The Convention became, not surprisingly, the model for bills of rights in colonies which acquired independence subsequently (replacing the Indian model which had influenced the bills of rights in W. Samoa, Malaya and Singapore). Henceforth the presumption was that a bill of rights would be included as part of the independence constitution, unless the local leaders were opposed to it, as in Tanganyika. (Zanzibar did have a bill, but the constitution was short lived, and it was not until 1989 that Tanzania adopted a bill of rights in its constitution as a result of popular pressures). However, the objection of local leaders would be overruled if the British considered that a bill of rights was essential to a satisfactory settlement, especially to accord assurance to minorities, as in Uganda, Kenya and Zimbabwe. In fact it became customary for the British to include justiciable bills of rights in the constitution at the self-governing stage of a colony, usually a few years before independence. The tendency towards the adoption of the bills of rights was reinforced by the fact that by now decolonisation was speeded up under pressure from, if not the actual sponsorship of, the United Nations which was committed to the legal protection of human rights. The UN influence was particularly significant in the trust territories, like W. Samoa, as it had specific responsibilities for their independence. As a result, bills of rights have become standard in the Caribbean and the South Pacific. As we have seen, they have also spread to the older dominions, with Canada replacing its non-entrenched Bill of Rights with a much stronger, constitutionally based Charter of Rights, as an essential part of the settlement for the repatriation of its constitution.

Space does not allow for a detailed analysis of the provisions of the various human rights instruments of Commonwealth countries. In brief, most provisions are part of the constitution (at least two exceptions being Lesotho and New Zealand) and so enjoy a superior status over other laws and a degree of entrenchment. In most cases the rights covered include the usual civil and political rights, although a few protect economic and cultural rights as well. Few rights are granted

in absolute terms. There are also provisions for proclamations of emergencies, normally at the subjective discretion of the executive, when a large number of rights and freedoms can be suspended or curtailed, frequently by executive regulations (the provisions in both these regards going well beyond what is permitted under international instruments). The styles of drafting vary, principally between that adopted by India, Malaysia, Singapore, W. Samoa, Nauru, Vanuatu, Jamaica, Canada, New Zealand and Tanzania and that adopted by Nigeria, Kenya, Uganda, Zambia, Zimbabwe, most of the Caribbean and the South Pacific which have followed, in the main, the model of the European Convention of Human Rights. The former are rather brief, with a limited number of explicit exceptions, while the latter have a more detailed specification of both the rights and the exceptions. In fact the list of exceptions is long and, in the hands of governments and judiciaries unsympathetic to human rights or political protests, they can negate the entire substance of the rights. In recent years the Privy Council (itself once a proponent of a rather restrictive approach to human rights) and other senior Commonwealth courts have encouraged a broad and liberal interpretation of human rights provisions, so that the exceptions are seen for what they are, exceptional, and the rights as normal. The courts need to adopt the same attitude to the declarations of emergencies and the use of emergency legislation.

A particular strength of the system of human rights in Commonwealth countries is that, tied in to the common law which emphasises remedies, it provides for the enforcement of human rights and the redress of infringements of these rights through the courts. In states like India and Canada, the courts have played a central role in the elaboration of human rights and in their enforcement. In some countries, like Kenya and Singapore, the judiciary has been less active. The record of the courts as defenders of human rights has been mixed, although in recent years it has improved. Rules of standing have been liberalised and more progressive interpretations of rights and freedoms are being adopted. Indian courts have developed a wholly new jurisprudence for social action litigation to enable disadvantaged groups and associations to bring their grievances to courts (see Appendix III). The courts in India and Bangladesh have emerged as powerful defenders of the constitutional order. Especially noteworthy is the doctrine of the 'basic structure' of the constitution which serves to prevent even constitutional amendments eroding human rights, the independence of the judiciary, and the open political process. Liberal and progressive judgements of a strong Commonwealth court can have beneficial effects beyond its own jurisdiction, as courts of Commonwealth countries tend to accord considerable respect to decisions of fellow judges in other Commonwealth states.

However, the dependence on courts as the primary enforcement mechanism for human rights is not without some negative effects. Access to courts is still difficult for most disadvantaged groups; the scope of challenge is limited, as are also the kinds of remedies that courts can provide. There is also the danger of over-legalisation, of policy and administration, and the weakening of popular politics. It is therefore necessary to supplement judicial approaches with other forms of action to secure respect for human rights, from the activities of NGOs to more formal bodies like human rights commissions (see Appendix II), to involve the community itself in the defence of human rights. Some Commonwealth states do well in this respect, but not many.

The emphasis in the Commonwealth instruments is on traditional civil and political rights. However, India, with a social and economic system greatly in need of reform was (drawing some inspiration from a former member of the Commonwealth, the Irish Republic) the first of the current member states to give serious consideration to the dilemmas of human rights. It sought to balance civil and political rights with social and economic rights, principally through the non-justiciable Directive Principles of State Policy which cast obligations on state institutions to

pursue goals of social justice and equality. The combination of legally enforceable political rights with non-justiciable directives of policy - the analogue of the two International Covenants - has been adopted by several other Commonwealth countries (for example, Nigeria, Sri Lanka, Papua New Guinea, Bangladesh and Namibia).

The directives vary from place to place. In India they now require the state to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, informs all institutions of national life. In particular the state is required to strive to minimise inequalities in income and eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Other directives require that the state ensure equal pay for men and women for equal work (and their right to an adequate means of livelihood), that the ownership and control of the material resources of the community be distributed in a way which best subserves the common good and that the operation of the economic system not result in the concentration of wealth and means of production to the common good. More specifically, the state is enjoined to ensure equal justice and provide free legal aid if necessary; to respect rights of children, including the provision of free and compulsory education; to promote the educational and economic interests of the weaker sections of the community; to improve standards of health and nutrition; and to protect and improve the environment and safeguard forests and wild life, etc.

The Papua New Guinean constitution, addressed to all persons and bodies, corporate and incorporate, requires them to promote (a) integral human development, (i.e., for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each person shall have the opportunity to develop as a whole person in relationship with others); (b) equal opportunity for all citizens (especially women) to participate in and benefit from, the development of the country; (c) national sovereignty and self-reliance; (d) to conserve national natural resources and the environment, and to use them for the collective benefit of all citizens, and to replenish them for the benefit of future generations; (e) and to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organisation. The directive principles in Sri Lanka are addressed to Parliament, the President and the Cabinet in the enactment of laws and the governance of the country for the establishment of a just and free society. The principles include the welfare of the people, raising their moral and cultural standards, the equitable distribution among all citizens of the material resources of the community and the social product, and the realisation by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of social and cultural opportunities.

The directive principles were meant to be more than rhetoric. The Papua New Guinea constitution states clearly that it is the duty of all governmental bodies to apply and give effect to them as far as lies within their powers, and bodies charged with the application and interpretation of the law are enjoined to take them into account. In India too the principles enjoy an important status. At first legislation to implement them was repeatedly struck down by the courts as violative of political and civil rights (provoking an amendment of the Constitution in 1951 to disapply the supremacy of the fundamental rights to legislation providing for state acquisition or redistribution of property). The scope for derogation from these rights in order to implement the directives was further extended in 1971 to include all fundamental rights. At first the Supreme Court held these amendments unconstitutional, but later changed its mind.

## **Conclusion**

Commonwealth states, through their participation in the international instruments and regional arrangements as well as in their domestic law, provide impressive formal guarantees of human rights and freedoms. Unfortunately in many states they remain merely paper guarantees. They have failed to influence policy or administration. They have failed to inculcate in these societies a culture of human rights or a spirit of tolerance and pluralism. The institutional machinery for securing respect for human rights is weak, reflecting the lack of a real commitment on the part of many governments to human rights. In the following chapter we examine some critical areas where the Commonwealth record leaves a great deal to be desired. We have made no attempt to be exhaustive in our survey of the violations of human rights; we had neither enough time or resources for this purpose. Rather late in our work, for example, our attention was drawn to the legislation in numerous states which criminalises homosexual acts, thereby causing great pain, humiliation and suffering to large numbers of people. Such legislation is incompatible with the respect for the rights and personalities of others, and serves little public purpose. By the topics we have chosen to deal with in the next chapter we do not wish to suggest that all is well in other areas.

## **CHAPTER III**

### **HUMAN RIGHTS PRIORITIES FOR THE COMMONWEALTH**

It has not proved possible for us to carry out a comprehensive survey of the state of human rights observance in the Commonwealth. We have, however, selected for consideration a few key areas, of particular importance or where violations do appear to give rise to especial concern. By pinpointing these there is no intention either to suggest that all is well in other human rights fields in the Commonwealth, nor to belittle the struggles for equality of other groups of Commonwealth citizens. It is a premise, and a theme, of this report that human rights are universal. The concept is meaningless otherwise. It would be nonsense for a society to claim that everyone in it had equal rights except slaves, or women, or black people, or people who are HIV positive, or gay people or the disabled. Human rights are not for some, they are to enable every person to fulfill his or her potential, to develop as best suits him or her as an individual, and to contribute fully to the society of which he or she is a part.

The basic premise of the International Bill of Rights is that all the rights which the United Nations has set as universal entitlements are interrelated and interconnected. Commonwealth Heads of Government gave their clear endorsement of that thinking at the CHOGM in Kuala Lumpur in 1989 and much of the work which has been undertaken by the Commonwealth Secretariat in recent years reflects that premise. It is not possible to protect civil and political human rights without attending to economic, social and cultural issues.

The various sections which make up this Chapter, while they focus on what might at first sight seem to be separate issues, in fact underline this reality. Although each focuses on a group of people, or on an issue, for which human rights appear to be particularly problematic, there is a considerable degree of overlap between them. The same groups of people tend to be the victims of a variety of human rights abuses. And violations of political and civil rights go hand in hand with violations of economic, social and cultural rights.

Nor are the linkages only between the issues identified in this chapter. This chapter requires to be read with the rest of this report, with the emphasis laid elsewhere on enforcement: on the role of independent judges and lawyers, of NGOs, and on the necessity for new institutions and approaches.

Each section identifies some of the main international and national provisions intended to ensure the protection of rights. It then highlights a few illustrative violations of those rights, before embarking upon a brief discussion not only of problems and abuses, but also of approaches to implementation of rights.

## **DETENTION**

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

#### *Article 3*

Everyone has the rights to . . . liberty and security of person.

#### *Article 9*

No-one shall be subjected to arbitrary arrest, detention or exile.

#### *Article 5*

No-one shall be subjected to torture, or to cruel, inhuman or degrading treatment of punishment.

### **ICCPR**

#### *Article 9*

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### *Article 10*

(1) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

### **CONSTITUTION OF JAMAICA**

#### *Section 15*

(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law

An essential aspect of the right to the liberty and security of the person under international instruments, the laws of all Commonwealth countries, and the common law is that no person may be arbitrarily arrested, and that no person may be held in detention except for the purpose of bringing him or her speedily before a court for trial on a criminal charge or to serve a sentence of imprisonment. Whether held in detention pending a trial or serving a sentence, the detainee enjoys various rights, including protection from torture or other degrading treatment, and to minimum standards of health and nutrition. A number of Commonwealth countries, however, have enacted laws which authorise the executive to deprive a person of his or her liberty and to hold him or her in detention for long periods.

- Several thousand people have been detained under emergency legislation in Punjab.
- In the United Kingdom the Prevention of Terrorism Act permits detention without trial.
- Administrative detention has been used in recent years by a large number of other

Commonwealth countries including Malaysia, Singapore, Kenya, Malawi, Sri Lanka, Swaziland, Zimbabwe and Zambia.

- In a number of Commonwealth countries there is a disturbingly high incidence of deaths in police or prison custody, often disproportionately among members of disadvantaged groups.

The decision to detain a person is made by the executive, normally by the head of government or a senior minister; the laws may specify the grounds on which a person may be so detained (the principal one being a threat to the security of the state), but in general the courts have been reluctant to review the decisions of the executive. Such laws frequently exclude or attenuate the jurisdiction of courts and there is little scope for a challenge to the legality or bona fides of the decision of the executive. The laws may provide for a review by an administrative tribunal, but in general the tribunal has no authority to examine the legality of the detention order. It may at the most determine whether the continued detention is still justified in the public interest. Its findings carry no more weight than a recommendation to the detaining authority, and are confidential to it. Brave words that are usually found in constitutions are often qualified as one finds in the Constitution of Jamaica:

#### Section 15

- (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the section to the extent that the law in question authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency.
- (6) If any person who is lawfully detained by virtue only of such a law as is referred to in subsection (5) of this section so requests at any time during the period of that detention not earlier than six months after he last made such a request during that period, his case shall be reviewed by an independent and impartial tribunal established by law...
- (7) ...the tribunal may make recommendations concerning the necessity or expediency of continuing the detention to the authority by whom it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendation.

Laws which provide for administrative detentions in this way, largely at the absolute discretion of the executive, without any right to a fair trial before an independent and impartial court, offend fundamentally against the Rule of Law. Neither the Universal Declaration of Human Rights nor the ICCPR expressly provide for administrative detentions. The Declaration has a general provision for limitations on rights: only such limitations are allowed as are provided under the law solely for the purpose of protecting the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society. The provisions for administrative detention cannot therefore be valid unless they are compatible with the principles of a democratic society, which have been held to include respect for pluralism and tolerance of opposing views. The ICCPR reinforces this principle by permitting derogation from the right to personal liberty and security only in times of public emergency which threaten the life of the nation and to the extent strictly necessary to deal with the exigencies of the situation. These provisions acknowledge implicitly that detentions may sometimes be necessary, but they also strike a balance between that need and the protection of the most basic of all human rights, the right to liberty.

Many Commonwealth laws on administrative detention do not satisfy these tests. In a large majority of instances, the provisions for the detention are set out in the constitution and require the proclamation of an emergency, but in some (like India, Kenya, Tanzania, Singapore and Malaysia), provision is also made under ordinary law and no special provisions in the nature of safeguards are established. Even where the proclamation of an emergency is pre-requisite, the controls on the exercise of the power to detain are not as strict as would satisfy international tests. Several Commonwealth countries have maintained states of emergencies for long periods when there is no objective necessity for them; so much so that the emergency regulations rather than the constitution have provided the essential and normal framework for the exercise of executive powers and the rights, or rather the lack of rights, of individuals and associations.

The powers of administrative detention have been extensively used in several Commonwealth countries. Sometimes persons are held for unreasonably long periods under the ordinary law before being brought before a court, and are then released then without being charged with an offence. This practice is an abuse of the law, and amounts to administrative detention. They are frequently held in appalling and humiliating conditions, and subjected to unacceptable pressures and harassment (amounting in some instances to torture) to “confess” or to implicate their “accomplices”. Contrary to their international obligations, the governments or the courts rarely make any attempt to investigate complaints of torture. The detainees are sometimes denied access to their lawyers or members of the family. Sometimes undue pressures are exerted on members of the family, and lawyers willing to act for detainees frequently become themselves targets of attack and harassment in consequence.

There is reason to believe that the extraordinary powers of detention have been frequently abused, although the secrecy surrounding detentions and the limited possibilities of challenge in open tribunals make a definitive assessment difficult. However, there is enough evidence of their abuse. Governments have used the detention powers to stifle legitimate expression of views or dissent, in an attempt to impose some political orthodoxy on the people or to ward off challenges to the ruling party or elite. They have been used to cripple an opposition party duly registered under the laws of the land. Sometimes they have been employed when the government cannot meet its aims through the normal processes of the criminal law. At other times they have been used for a purely personal and vindictive reason, for the gratification of officials or politicians ranging from a petty bureaucrat to a capricious head of government. In Singapore Cilia Thye Poh was held for nearly 25 years, on allegations of being a communist agitator, when he has always denied such allegations, and in any case where a “communist agitator” could hardly be any threat to that prosperous and well secured state.

Administrative detentions not only frequently cause injustice to the individual detainees and their families, they have other pernicious effects (which may well be the real motivation of governments in using them). They frequently victimise and incapacitate men and women of high moral integrity, intelligence and dedication. They promote poverty of ideas and the imagination. They impoverish and may even cripple the political life of the country. They breed anxiety and fear in others: the media, universities, trade unions, and private as well as public associations. They also weaken the processes of the law and set the executive above both it and the judiciary. They allow in their wake many other abuses of the law and administrative powers, for in the dark and damp world of administrative detentions, there is no public answerability or accountability or information.

There are many instances of detainees, whether held administratively, without trial, or held for

ordinary criminal offences before trial, or while serving sentences of imprisonment, who have been subjected to degrading treatment, or even treatment which can only be described as “torture”. Sometimes this has been to extract confessions, sometimes it is unnecessarily harsh forms of restraint. Sometimes the behaviour has been almost inexplicable, except that it shows an attitude on the part of the law enforcement authorities, either towards prisoners generally or towards prisoners of a particular class, which involves a denial of human rights in the fullest sense - a denial of treatment as a human being. Excessive solitary confinement, beatings, use of leg irons, deprivation of light all come in this category. Regrettably large numbers of Commonwealth countries have instances of such behaviour staining their record, including the United Kingdom, Australia, Singapore. Among the more horrific episodes have been the blindings of prisoners awaiting trial (awaiting endlessly) in Bihar, and the prisoners who suffocated to death in a “Black Maria” left in the sun in Lagos (not perhaps deliberate in the latter case, but still manifesting the same tendency to view prisoners as less than human).

Only very recently has there been a movement in the direction of recognising that imprisonment does not, or should not, mean the end of all human rights. In the case of a sentence of imprisonment, as it is often put, the convicted person is imprisoned as a punishment, not for punishment. The judges of the United Kingdom have ceased to consider that all that goes on in prison is beyond the purview of the courts, although they have recently declined to hold that damages for false imprisonment are payable to someone who is wrongly held in solitary confinement while in gaol; and the Supreme Court of India, with the cooperation of the bar, has been determinedly attacking some of the grave violations of human rights which the press and public interest litigation have brought to light in Indian prisons.

## **RECOMMENDATIONS**

The reform of the law and practice of detention should therefore be high on the agenda of the Commonwealth as its member states seek fresh paths to more democratic and participatory political systems.

1. The Human Rights Division of the Commonwealth Secretariat in conjunction with a body like Interights, should prepare a paper on the international, regional, and best Commonwealth standards on administrative detentions, including the grounds and the procedure for detentions. With that paper as reference, all Commonwealth states should review their legislation on detention to ensure compliance with these standards.
2. Administrative detention should be a remedy of last resort. The laws of all Commonwealth countries contain numerous provisions to deal with seditious and treasonable activities, and they have intelligence services. In most cases these provisions are sufficient to deal with threats to national security. Indeed it may well be a requirement that a government has to establish to an independent tribunal why the provisions of the criminal law are not sufficient before a detention would be valid.
3. There is an urgent need to strengthen safeguards against arbitrary administrative detention.
  - (a) The power to detain should be available only on the proclamation of a state of emergency. An emergency can validly be proclaimed only when there is a serious and demonstrable threat to national security.

- (b) The proclamation as well as the continuation of an emergency should be subject to the control of the legislature as well as the courts.
- (c) The grounds for which a detention may be ordered should be clearly and narrowly specified so that it is valid only if the person detained has engaged in unlawful acts which are a clear threat to national security and which cannot be dealt with in any other way. The courts should have full powers of review of decisions to ensure that there is no abuse of the power. If necessary, part of the evidence can be presented in camera, as is provided in the laws of all the states.
- (d) There should be adequate publicity of all detentions. All detentions should be announced in the gazette or in some other public way.
- (e) The detainee should be provided in clear language of the charges and allegations against him or her in sufficient detail that it is possible to attempt to rebut them, and an early opportunity should be given to the detainee to answer the charges and allegations.
- (f) The detainee should be given full opportunities to promptly consult with a lawyer of his or her choice, and to have the right to be represented by that lawyer, if need be at public expense.
- (g) The rights of a detainee to fair and humane treatment during detention, and in particular to protection against torture, must be fully secured.
- (h) A detainee any of whose rights have been violated or who has been unlawfully detained should be entitled to high damages from the state and officials who have abused his or her rights.

# **FREEDOM OF EXPRESSION AND INFORMATION**

## **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

### *Article 19*

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

## **AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

### *Article 9*

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

## **AMERICAN CONVENTION ON HUMAN RIGHTS**

### *Article 13*

1. Everyone has the right to freedom of thought and expression. This right includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - (a) respect for the rights or reputations of others; or
  - (b) the protection of national security, public order, or public health or morals.

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

### *Article 10*

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary,

## **CONSTITUTION OF NAMIBIA**

### *Article 21*

1. All persons shall have the right to:
  - (a) freedom of speech and expression, which shall include freedom of the press and of other media;
  - (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher education

As the European Court of Human Rights has recognized, “Freedom of expression constitutes one of the essential foundations of a democratic society,” (*The Sunday Times v, UK 1979*), It is the right which safeguards the enjoyment of all other rights; when restrictions are placed on the right to express information and ideas, especially those critical of the ruling government or offensive to the majority culture, all other rights are placed at risk.

Nonetheless, we find that in all Commonwealth countries threats of one sort or another to freedom of expression exist:

- In Malaysia journalists face a one-year mandatory prison sentence for publishing information found to be “secret”.
- In most Commonwealth countries the government controls all or most radio and television stations.
- In Ghana, the Ministry of Information controls the supply and allocation of almost all press equipment from newsprint to typewriters; the one privately-owned newspaper often is not published due to lack of newsprint, sometimes for as long as six months.
- In 1988, Bangladesh censored reports of deaths from starvation and cholera and imposed strict restrictions on reporting about the flood, thereby precluding an adequate and timely relief response from the international community.
- Canada administratively seizes a relatively large number of books on grounds of obscenity.
- The National Association of Nigerian Students has been banned since 1986, and students have been injured and killed when police used force to disband demonstrations.

While freedom of expression is a fundamental right it is not absolute; all international standards recognize that governments may restrict the exercise of the right in certain narrow circumstances. The qualified nature of the right makes assessment of government compliance exceedingly complex. Monitoring groups must assess the value of the free flow of information and ideas against governmental claims of competing interests such as national security, public order and the rights and reputations of others. Moreover, in addition to a negative obligation not to infringe freedom of expression, governments may also possess a positive obligation to ensure that the market place of ideas is neither monopolized by particular viewpoints nor blighted of its vitality by, for example, inadequate supplies of newsprint.

### **Commonwealth Commitments to freedom of expression**

Freedom of the media is an important component of freedom of expression. To encourage co-operation in media development, the Commonwealth Heads of Government established in 1979 a Commonwealth Media Development Fund which offers financial support for the procurement of needed resources by media organizations and the training of media workers. In order to guide the Fund in making disbursements, the Secretariat produced in 1985 a survey of media resources and needs in the Commonwealth with particular reference to developing countries.

While all Commonwealth governments are bound to respect the right to freedom of expression and information as set forth in the Universal Declaration of Human Rights, relatively few have adhered

to the major treaties which codify the obligations and provide mechanisms for redress of violations. The ICCPR, ratified by 93 countries, has been adhered to by only 19 Commonwealth countries. Of these only 10 have accepted the enforcement mechanism supplied by its First Optional Protocol. An additional seven Commonwealth countries are parties to regional instruments that contain freedom of expression guarantees. Although ratification of human rights treaties by Commonwealth countries has been relatively low, a more positive picture is presented by the protection of freedom of expression in domestic law. Twelve Commonwealth Caribbean countries have enshrined in their constitutions the protection of freedom of expression in terms similar to those in the European Convention on Human Rights, and an additional 25 Commonwealth countries have included guarantees of freedom of expression in their constitutions. Nonetheless, several countries, including the UK, neither have a constitutional protection of freedom of expression nor any mechanism by which individuals may seek redress for violations of treaty rights; and in many countries which do offer such protections, the laws are not fully respected in practice.

### **Governments and freedom of expression**

In many countries, the control exercised over broadcasting media extends to excluding virtually all views critical of the government and denying broadcasting time to political opponents even during election periods, including Antigua and Barbuda, Brunei, Ghana, Kenya, Lesotho, Malaysia, Malawi, Seychelles, Singapore, Sri Lanka, Swaziland, Tanzania, Uganda, Vanuatu, Zambia and Zimbabwe. The lack of balanced radio and television coverage substantially distorts the democratic process especially in countries which have low literacy rates and in the geographically larger countries where candidates cannot hope to reach the electorate without access to the media. A few countries, including the UK and India, have privately owned stations which are subject to government regulation.

Government control of newsprint in several countries provides a mechanism by which the government is able to promote editorial policies supportive of the government and to encourage self-censorship of critical news and views. In Uganda newsprint is very expensive and independent papers must obtain government approval to import. The Indian Government has consistently rejected press requests to import newsprint directly, and controls all newsprint distribution. In Sri Lanka and Bangladesh, newspapers must apply to the government for newsprint and may lose their quotas if they displease the government. The Government of Trinidad and Tobago lost a lawsuit in 1989 to a newspaper, generally critical of the government, which successfully established that the government had unconstitutionally reduced its foreign exchange allocations for newsprint.

Mandatory licensing and/or registration of journalists and newspapers is a common method by which governments control the media and promote self-censorship. Nigeria requires all journalists to be licensed, and Ghana, Nigeria, Malaysia, Maldives, Sierra Leone, Singapore and Tanzania all require some form of registration by newspapers, printers and distributors. In 1990, the Government of Sierra Leone reportedly closed a newspaper for improper registration despite the fact that it had been publishing for more than five years.

Several countries use their customs laws to exclude foreign publications which their governments find offensive. India banned *The Satanic Verses* under a customs provision which permits exclusion of goods for any "purpose conducive to the interests of the general public". In 1990, Singapore adopted new legislation which strengthens the government's already extensive control over the foreign press by which it, among other measures, strictly limits circulation of *Asiaweek*,

the *Far Eastern Economic Review* (FEER) and the *Asian Wall Street Journal* (AWSJ). Malaysia similarly has banned issues of the FEER, AWSJ and *Newsweek* for unflattering portrayals of Malaysia's economic situation; Brunei has banned issues of *Newsweek* for articles concerning Salman Rushdie and the Gulf war; and Kenya has banned issues of *Newsweek* and *Africa Confidential* for, among other matters, suggesting impending chaos in Kenya and alleging that President Moi's ethnic group dominates the security forces and civil service. The Government of Bangladesh also exercises considerable discretion in excluding publications.

A number of smaller Commonwealth governments are struggling to balance the value of the free flow of information against their interest in protecting the cultural identity of their people. For instance, in Solomon Islands there is no television broadcasting and the importation of satellite dishes is strictly controlled. The Government and several churches oppose the introduction of television believing that outside images of violence, sex and materialism could have a negative influence on the Islands' culture. Countries in the Caribbean face difficulties in developing national television programmes owing to the pervasiveness of television and satellite broadcasting from the United States.

Freedom of expression tends to be most seriously restricted in countries which are essentially single-party systems (e.g., Kenya, Malawi, Seychelles, Sierra Leone and Singapore) or absolute monarchies (Swaziland); or have been governed for considerable periods under military rule (Ghana, Nigeria and Lesotho) or emergency legislation (Bangladesh, Brunei, India - in relation to Jammu and Kashmir, Punjab, Assam and other states - Malaysia, Pakistan, Sri Lanka, the United Kingdom - concerning Northern Ireland - and Zambia). Most such states have laws which authorize detention without charge or trial. Governments often use these laws to deny freedom of expression to government critics and to silence journalists and editors.

A number of countries, including Brunei, Kenya, Lesotho, Malawi, Nigeria, Seychelles, Swaziland, Tanzania, Uganda and Zambia, have laws which impose heavy penalties for criticizing the head of state or government ministers, for disseminating "false news", or for sedition. On occasion, people are convicted and sentenced for such offences; more commonly, governments detain critics without trial, sometimes, as in Malawi until recently, for several years. Governments harass journalists and government critics by detaining them for brief periods, while the threat of long-term imprisonment hangs over their heads. More sinister than the detentions themselves is the substantial chilling effect on government criticism caused by the constant possibility of arrest. Many journalists and human rights defenders have been jailed, harassed and threatened merely for seeking to pursue their professions with objectivity and dedication. The Kenyan Government arrested several journalists, lawyers and government critics as part of a major crackdown in July 1990; in September 1990 it banned the *Nairobi Law Monthly* (which, however, was permitted by court order to continue publishing pending determination of its challenge to the constitutionality of the ban); it detained the journal's editor, Gitobu Imanyara in July 1990 and from March through May 1991; and it has banned other publications including *Beyond* and the *Financial Weekly*. Journalists have also been detained and harassed in Bangladesh, Ghana, Malawi, Nigeria, Tanzania, Uganda, and Zimbabwe and papers were closed during 1990 either permanently or for several issues in Bangladesh, Malaysia and Nigeria.

Some governments have sought, often successfully, to limit international coverage of internal disturbances by excluding foreign journalists from areas where disturbances are occurring. Foreign journalists were excluded from Kashmir during the early months of 1990, and from the north and east of Sri Lanka during parts of 1989 and 1990. The only two foreign journalists based

in Malawi since 1988 were expelled in February 1990. Foreign journalists were also expelled from Kenya, Papua New Guinea, Singapore and Vanuatu during 1990, and one was denied entry to Zambia.

The closure of universities and the firing of academics is another means by which governments have silenced political dissent and suppressed public debate. The University of Zimbabwe was closed for several weeks in 1989 after riot police broke up a student seminar on government corruption, and the Tanzanian government closed the University of Dar es Salaam in May 1990 for several months following student and faculty protests against the President's policies and extensive government corruption.

### **Non-governmental threats**

“Media concentration” poses many of the dangers of, and often accompanies, government control of the broadcasting media. With ownership of print as well as electronic media becoming increasingly concentrated in the hands of a few individuals and companies there is a potential for decline in the level, range and quality of debate on issues of legitimate public interest. Media concentration and increasing foreign ownership are particularly significant in several of the Caribbean countries as well as in the UK, Canada and Australia. Some countries have introduced legislation to limit foreign ownership and cross-media ownership in addition to excessive ownership in any single media market but, as yet, the trend towards concentration has not been noticeably affected.

The communications revolution has vested tremendous power in the hands of the media which now possesses an instant, global reach. Direct television broadcasting via satellite offers attractive possibilities even as it poses certain threats. The latter include the danger of throttling local broadcasting systems, especially in newer developing countries, and of swamping local culture.

### **Physical violence and freedom of expression**

The ultimate form of censorship is murder. In India, Pakistan, Sri Lanka, Malawi and Nigeria human rights defenders, outspoken critics of militant groups and newspaper personnel have become particular targets of extrajudicial killings and other violent attacks by both armed opposition groups and government-backed death squads. An exiled Malawian journalist was killed in October 1989 in a firebomb attack on his home in Lusaka, allegedly by Malawian security agents.

While the case against official censorship is well-defined and well-understood, a new menace is censorship imposed upon communities and the media through terrorist groups. Dramatic evidence of this is available in Punjab, and Jammu and Kashmir in India. The guidelines sought to be imposed on the Indian media in or concerning Punjab by the so-called Panthic Committee which controls several terrorist groups is a case in point. One group of newspapers based in Jalandhar has over the past decade lost 50 employees, including editors, reporters, hawkers and others, to terrorist violence.

In India the director of the government television station in Srinagar was murdered in February 1990 allegedly by Kashmiri militants, and the station director of All India Radio in Punjab was murdered in December 1990 allegedly by Sikh separatists. Four journalists were killed in Pakistan during 1990, three apparently by Sindhi militants and one by Islamic militants.

A few governments have on occasion appeared unwilling to investigate attacks on journalists.

Richard de Zoysa, a prominent Sri Lankan journalist and government critic, was found murdered in February 1990. Despite credible eyewitness testimony identifying one of his assailants as a police superintendent, the government has declined to prosecute the case or appoint an independent commission of inquiry into the circumstances of his death. Kumaraguru Kugamoorthy, a producer for the Sri Lankan Broadcasting Corporation, was abducted and disappeared in September 1990, allegedly with police complicity.

### **Freedom of information**

The right to receive official information of legitimate public interest is an important component of the freedom of expression. Without access to information about government decision-making the public cannot participate effectively in the democratic process. It is noteworthy that of the dozen or so countries around the world that have enacted freedom of information legislation, three, Canada, Australia and New Zealand, are members of the Commonwealth. Nonetheless, most Commonwealth countries do not recognize a right of access to information of public interest. Several, including Australia, Barbados, India, Jamaica, Malaysia, Mauritius, Nigeria and Zimbabwe, have adopted legislation, modelled on the UK's Official Secrets Act of 1911, which expressly prohibit disclosure of broad and vaguely defined categories of government-held information. Most of these acts do not permit disclosure even when this would serve the public interest by revealing criminal activity, abuse of authority or other misconduct, and place the burden of proving that information is not "secret" on the person seeking to disclose it (rather than requiring the government to prove that the information has legitimately been classified).

Freedom of information goes far beyond merely liberalising official secrets acts and involves a positive right to know. While freedom of expression and information are obviously important in relation to civil and political rights, they are no less important in empowering the poor and disadvantaged in seeking to exercise their economic, social and cultural rights. Thus, freedom of information legislation such as is now sought to be introduced in India is seen as having the potential to make the poorer sections aware of their human rights and socio-economic entitlements under various regulations and development programmes and therefore better able to enforce them.

### **Signs of hope**

The situation concerning freedom of expression is by no means uniformly bleak. In approximately half of the countries of the Commonwealth freedom of expression and media are by and large respected and violations are the exception. In addition, the independent press in Nigeria, Sierra Leone, Uganda and Zimbabwe is healthy, despite intermittent government harassment.

Several countries have recently taken steps towards greater democracy. The parliamentary elections held in Bangladesh in February 1991 were widely viewed as the first free and fair elections in the country's 20-year history. In December 1990, following 26 years of single-party rule, Zambia officially became a multi-party state and undertook to hold general elections by the end of 1991. In February 1990, Julius Nyerere, the former President, called for open debate of Tanzania's political future which, while not leading to any concrete commitment to legalize opposition parties, did result in greater public criticism of government policies than previously had been allowed. In July 1990, the government of Zimbabwe lifted the 25 year-old state of emergency and, in September, dropped its plans to legislate a single-party state.

Several countries, including Brunei, Zambia and Zimbabwe, made gestures of political conciliation in 1990 by releasing all or virtually all political prisoners. At the end of 1990, the Government of Malawi undertook a review of political detentions which has resulted in the release

of more than 80 political detainees, including several who had been detained for long periods.

Namibia's new Constitution includes the exemplary provisions, thus far generally respected in practice, reproduced in the box at the beginning of this section.

Several governments took steps in 1990 towards greater broadcasting freedom. The Indian Parliament adopted the Prasar Bharati (Broadcasting Corporation of India) Act which calls for the formation of (a) a corporation accountable to Parliament and directed by an independent board of governors drawn from media professionals whose appointments are to be insulated from government interference, and (b) a council to examine complaints of unfairness or bias in programmes. However, the chances for its implementation in the near future appear dim. While the government of the Bahamas continues to control all broadcast media, it agreed to permit greater access to broadcast time for opposition politicians. Pakistan licensed the first semi-private TV channel, which has broadcast foreign news programmes to Islamabad for up to 20 hours daily, with occasional black-outs of pictures found morally objectionable.

## **RECOMMENDATIONS**

1. The Commonwealth should provide technical advice and other assistance to member governments concerning incorporation in their constitutions and other laws of provisions protective of freedom of expression and information, and ways to implement such provisions.
2. The Commonwealth should continue to conduct training courses for journalists and editors in order to promote high professional standards and to discuss common problems in collecting and publishing information about matters of legitimate public interest. The Commonwealth Media Development Fund should be enlarged to provide greater financial assistance to the struggling press, especially in countries where small populations and low literacy rates all but make impossible the economic viability of independent papers.
3. The Commonwealth should undertake a study of internal security, prevention of terrorism, official secrets and similar acts in order to develop guidelines for identifying when considerations of national security and public order may and may not supply justifications for restrictions on the freedom of expression and information.
4. The Commonwealth should undertake a study of various methods by which governments regulate the print and broadcasting media with a view to developing guidelines on appropriate methods by which to ensure editorial independence and diversity consistent with legitimate government interests.
5. The Commonwealth should undertake a study of the ownership of media throughout the Commonwealth and mechanisms by which member countries have sought to regulate foreign ownership and oligopolistic domination of markets in order to analyze the advantages and disadvantages of media concentration and to propose methods by which governments may regulate media ownership without discouraging needed infusions of capital and technology.
6. The Commonwealth should undertake a study of the availability of newsprint throughout

the Commonwealth in order to consider ways in which the Commonwealth might promote ways to ensure availability of adequate amounts and equitable distribution of newsprint in countries that do not have convertible currencies or which impose import restrictions.

7. The Commonwealth should commission a study on licensing and registration for journalists and newspapers, particularly in light of the advisory opinion of the Inter-American Court of Human Rights finding that licensing requirements offend the freedom of expression.
8. Commonwealth NGOs should collect information on attacks on journalists and restrictions on newspapers, and bring the information to the attention of governments.
9. The Commonwealth should undertake a study on permissible measures under international law by which governments may regulate foreign broadcasts receivable in their territories when necessary to protect the cultural identity of their people.
10. The Commonwealth of Learning should facilitate programme exchange between broadcasting media throughout the Commonwealth.
11. Professional associations and press or broadcasting councils are well placed to keep at bay pressures on the media, and to keep a watch on monopolistic tendencies, and should be encouraged to do so.

## **INDIGENOUS AND TRIBAL PEOPLES**

### **ICCPR**

#### *Article 27*

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

### **AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

#### *Article 20*

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

### **DECLARATION OF PRINCIPLES OF INDIGENOUS RIGHTS**

(Adopted by World Council of Indigenous Peoples 1984)

#### Principle 4

The tradition and customs of indigenous people must be respected by the states and recognized as fundamental sources of law.

### **CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES (1989)**

#### *Article 3*

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

#### *Article 5*

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these people shall be recognised and protected and due account shall be taken of the nature of the problems which face them both as peoples and as individuals;
- (?) the integrity of the values, practices and institutions of these people shall be respected.

### **CONSTITUTION OF INDIA**

#### *Article 29*

- (1) Any section of the citizens...having a distinct language, script or culture of its own shall have the right to conserve the same.

#### *Article 46*

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

### **CANADIAN CHARTER OF RIGHT AND FREEDOMS**

#### *Section 27*

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.

People should develop along the lines of their own genius and we should avoid imposing anything on them. We should try to encourage in every way their own traditional arts and culture. Tribal rights in land and forests should be respected. We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will, no doubt, be needed, especially in the beginning. But we should avoid introducing too many outsiders into tribal territory. We should not over-administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through, and not in rivalry to, their own social and cultural institutions. We should judge results, not by statistics or the amount of money spent, but by the quality of human character that is evolved.

Jawaharlal Nehru, 1959

Almost no Commonwealth country is ethnically homogeneous. The names of a number of countries riven by factional violence come all too readily to mind. But this section concentrates more specifically upon a specific type of minority. Almost all Commonwealth countries have indigenous or tribal minorities. These groups have distinctive cultures, a strong linkage to ancestral lands and a high vulnerability to economic and social changes initiated from outside their communities. During the early colonial periods persecution of indigenous peoples was often of the crudest type, amounting to genocide in some instances, to the point that the original inhabitants of Tasmania and some of the Caribbean islands are extinct. Elsewhere the assault on indigenous peoples was less vigorous or less physical, but populations were very substantially reduced, lands were taken away and ways of life and self-respect destroyed. Most of the worst excesses are a thing of the past, though their consequences linger. The indigenous peoples are typically the poorest, most marginalized and most vulnerable groupings within their countries. Paradoxically they are often promoted as exotic in government tourist publications.

- 400,000 ethnic Bengalis have been settled in the Chittagong Hills of Bangladesh; the indigenous people have been swamped, and are being forced to adopt Bengali culture.
- The Aboriginal people of Australia have far lower life expectancy and far higher rates of infant mortality (2.6 times), unemployment (nearly 3 times) trachoma in people over 60 (4 times) than other Australians, and the highest recorded imprisonment rate in the world.
- In India and Malaysia logging has seriously endangered the way of life of indigenous people. In 1991 the Penan people of Sarawak complained that a reserve designated by the state government was already substantially devastated by logging, with no wildlife, fish or jungle produce remaining.
- Tribal peoples of Guyana are threatened by a road, which has in some places been driven straight through their villages.
- Although plans to build a NATO training base on the land of the Innu people in Canada have been shelved, in 1989 NATO air forces flew 9000 flights over Innu land, a number which may increase to 20,000 a year.

Modern international law is attempting to address the situation of indigenous and tribal peoples. The only existing instrument is International Labour Organization Convention 107 of 1957.

Convention 107 was redrafted in 1989 as Convention 169 in order to eliminate the assimilationist language of the earlier text. The United Nations Working Group on Indigenous Populations is currently drafting a declaration on indigenous rights for eventual approval by the General Assembly. A similar initiative has begun within the Organization of American States of which a number of Commonwealth states are members. Each of these bodies has rejected assimilationist ideas in favour of the recognition of a right of indigenous and tribal peoples to survive and develop in the light of their own traditions and insights, as Jawaharlal Nehru suggested in 1959.

Concern with indigenous and tribal peoples in World Bank projects became unavoidable after tribal resistance led to the cancellation of the Bastar forestry project in India in 1981. The World Bank prepared a policy document in 1982, *Tribal Peoples and Economic Development: Human Ecological Considerations*, to guide in any future project assessments. The same issues have arisen for other developmental bodies. The Asian Development Bank is involved in financing rubber plantations in the Chittagong Hill Tracts of Bangladesh, a tribal area. Concerns with indigenous and tribal peoples now regularly arise in the planning of intergovernmental aid programs. Such issues are often discussed in the various consortia of aid-giving countries.

Issues concerning indigenous and tribal peoples in Commonwealth countries have been communicated to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights and through the confidential procedure established by the Economic and Social Council under resolution 1503. As well, such issues are often aired in various U.N. deliberative bodies such as the Human Rights Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. While indigenous and tribal issues have been raised in the U.N. conferences and seminars on racism, seminars specifically on indigenous issues began in January, 1989, in Geneva, with a second seminar on self-government expected to be held in Canada. In recent years issues have been discussed in these fora involving Australia, Bangladesh, Belize, Botswana, Canada, India, Kenya, Malaysia, Namibia, New Zealand, Sri Lanka and Tanzania.

Indigenous and tribal peoples have formed local, national and international organizations. One of the first international organizations, the World Council of Indigenous Peoples, was founded in Canada in 1975 and is accredited as a Non-Governmental Organization by the United Nations Economic and Social Council. In line with Canadian policy in relation to Canadian based NGOs, some official developmental funding is channelled through the World Council. There are three additional accredited indigenous NGOs from Canada and Australia, as well as indigenous NGOs based in the United States and Latin America.

### **Equality**

A fundamental issue for indigenous and tribal peoples is economic and social equality with other sectors of national populations. Even in economically advanced states like Australia, Canada and New Zealand, indigenous and tribal peoples have dramatically lower life expectancy, economic position and education than national averages. The Special Committee of the Canadian House of Commons on Indian Self-Government noted in 1983 that infant mortality in the first four weeks was 60% higher for Indians than the national average, and life expectancy for those surviving their first year was 10 years less than for non-indigenous Canadians. Such startling discrepancies have led to the funding of special health, housing and treatment programmes in many countries.

Many states have special economic developmental programmes targeted at indigenous and tribal peoples. In India there are reserved seats for tribals in universities, legislatures and in the public

service. In Canada affirmative action programmes assist native Indians to train as teachers lawyers and other professionals.

### **Land and economy**

A second fundamental issue is the protection of traditional lands and established economies, as Nehru recognized in 1959. Indigenous and tribal peoples usually live in less developed, hinterland areas of states. Their lands are often the site of programmes or projects designed to serve the interests of others. It is often the case that the existing livelihoods of indigenous and tribal people are sacrificed in the process. In the 1960s in Bangladesh the Kaptai hydro-electric project flooded tribal agricultural land in order to provide power for the national population. Government officials now recognize that the impact of the dam and the failure to fully rehabilitate those who were displaced was a significant cause of the unrest and insurgency still troubling the Chittagong Hill Tracts. There are current disputes about hydro-electric projects and tribal peoples in both India and Canada. We have seen forcible resistance to logging by tribal groups in British Columbia, in Canada, and Sarawak in Malaysia. Such disputes increasingly are covered by international media.

Traditional lands may well have been taken illegally or improperly. This kind of dispute has concerned many governments. The government of Canada has a policy of negotiating settlements of such claims. A number of settlements have occurred, many about specific pieces of land and some about very large traditional territories. The Aboriginal Lands Commissioner continues to hear claims in the Northern Territory of Australia. In New Zealand the Waitangi Tribunal was set up in 1975 to investigate, and recommend redress for, breaches of the 1840 treaty under which the Maori retained (in the Maori version) or ceded (in the English version) sovereignty to the British Crown. It includes both Maori and non-Maori members and has been an innovative experiment in reviewing past dealings and suggesting contemporary solutions, although some have complained that more recently it has been “overloaded, underfunded ... bureaucratic, formal and legalistic”. Litigation on land issues continues in many states, with major cases before the courts in Canada, Australia and Tanzania in 1991.

### **Autonomy**

The basic issue for most indigenous and tribal peoples is variously described as autonomy, self-government, self-administration and self-determination. The term preferred by the United Nations Working Group on Indigenous Populations is “autonomy”. Whatever terms are used, the essential concept is indigenous or tribal control over their own communities on matters affecting their survival and development as distinctive peoples. As Nehru said, the state must defer to the social and cultural institutions of the tribal people. It is widely recognised that this goal is neither secessionist nor in conflict with goals of national development. Indeed governments recognise that national development may be seriously jeopardized if indigenous and tribal peoples are not accommodated in the structures of the state. The government of Canada endorses the goal of “self-government” for the indigenous “First Nations” within Canada. The Constitution of India provides for the separate administration of tribal areas. In the last decade new state structures in the north-east have given autonomy to particular tribal groups within the Indian union.

There is a rich variety of experience within the Commonwealth. Much of its has not been shared in any systematic manner. Australian government scholarships have allowed individual Aboriginals to travel to other parts of the world to study indigenous policy. Australia has also extended scholarships to tribal peoples to other Commonwealth countries, such as Bangladesh, for study in Australia. Some government staff exchanges have occurred between Australia and Canada. The Commonwealth Law Conference in Auckland, New Zealand, in April 1991, featured a set of

speakers on indigenous issues in various parts of the Commonwealth.

## **RECOMMENDATIONS**

1. Commonwealth human rights policy must recognize the special situation of indigenous and tribal peoples. It must recognize their marginalization, their vulnerability and the legitimacy of their goals of distinct group survival. It must recognise that:
  - (a) The disparity in health, education, employment and income between indigenous and tribal peoples and other sectors of national populations constitutes a continuing denial of human rights.
  - (b) Development projects must be carefully assessed to determine their impact on the land rights and economies of indigenous and tribal peoples. It must be recognized that the economic, social and cultural impacts of projects in indigenous and tribal peoples can outweigh the benefits to other sectors of the national and international economy.
  - (c) Indigenous or tribal autonomy, self-government or self-administration will best solve the goals of the survival and development of indigenous and tribal peoples. Policies based on assimilation are no longer acceptable.
2. The Commonwealth should prepare a report on the various approaches to indigenous and tribal peoples issues among its member states, especially with regard to land rights and cultural autonomy. Such a report would facilitate exchanges between indigenous and tribal peoples, between government officials and between academics. It could also serve as a Commonwealth contribution to the ongoing work of the United Nations Working Group on Indigenous Populations.
3. The Commonwealth and its member states should facilitate political participation of indigenous and tribal peoples within states and in Commonwealth bodies and initiatives. The Commonwealth should encourage visits and exchanges. In particular, scholarships for indigenous and tribal peoples to visit their counterparts abroad or to study in other Commonwealth countries are an excellent long-term investment.
4. The Commonwealth should respond to the United Nations Year of Indigenous Peoples with a conference devoted to the on-going issues of relations between indigenous and tribal peoples and the state governments in the Commonwealth.

## REFUGEES

### **Universal Declaration of Human Rights**

#### *Article 2*

Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### *Article 14(1)*

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

### **ICCPR**

#### *Article 2(1)*

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the right recognised in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### **ICESCR**

#### *Article 2(2)*

The States Parties to the present Covenant will undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### **CONVENTION RELATING TO THE STATUS OF REFUGEES**

(as amended by 1967 Protocol Relating to the Status of Refugees)

#### *Article 1A*

For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

- (2) Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it...

#### *Article 31(1)*

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

#### *Article 32*

- (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
- (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law...

*Article 33*

(1) No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion.

- There are over 15,000,000 refugees in the world today
- Malawi has over 600,000 refugees and a GNP per capita of US\$160, Pakistan is home to well over 3,000,000 Afghan refugees and has a GNP of US\$350, Zambia hosts 131,000 refugees and has a GNP of US\$240
- People have been forcibly returned from Kenya to Somalia (500), from Kenya to Uganda (237) and from Zimbabwe to Mozambique (3000) after what the 1989 World Refugee Survey described as “questionable refugee status determination procedures”.
- In 1989 thousands of Vietnamese asylum-seekers were pushed away from the Malaysian and Thai coasts. Pirate attacks in that year almost doubled the number of those of 1988.
- There are estimated to be some 54,000 refugees from Sri Lanka in Europe.
- In 1991 the UK government announced plans for streamlining consideration of applications for asylum which refugee organisations said would in some ways reduce safeguards for applicants.

As well as the 15,000,000 refugees mentioned earlier there are untold millions of other people “in refugee-like circumstances.” Half of the world’s 15,000,000 refugees are children (80% of them are women and children). Many of these children are “unaccompanied minors” who, separated from their families in the events causing their flight, arrive across borders in search of asylum totally alone. Almost all refugees have been traumatised, some have been detained and tortured for their social origin, religion or race, witness to severe political repression and human rights abuses, to arbitrary murders, or brutality in warfare, starvation and other hardships. The average refugee camp is not a satisfactory solution to their problems. Female refugees commonly are subjected to violence and physical abuse both during flight and in camps. Armed attacks are deliberately made on some refugee camps. Elsewhere refugees are recruited into belligerent forces.

In some of the camps there is insufficient water and food. Supplies which do exist may be stolen by villagers from outside. The villagers themselves may have been uprooted by establishment of the camps. For a variety of reasons there may be ill-will from the local population towards the refugees. Many refugees live in closed camps surrounded by barbed wire and guarded (or kept in) by armed personnel. Some have been in such camps for over 10 years. Many children know no other life and camp life is neither a substitute, nor an adequate training, for a normal free existence. Men who prior to flight had paid work outside the home can no longer provide this support to their families. Women tend to do all the remaining work: the household chores, any crop growing that is possible, child care (children are frequently extremely difficult to handle, even babies born in refugees camps show symptoms of stress) and the fetching of food and water. The men lose their self esteem, the women are exhausted. The resultant stresses produce severe mental strain and

violence both within families and within the closed refugee community.

At the end of 1989 the Office of the United Nations High Commissioner for Refugees estimated the refugee population living in Commonwealth countries to be: Australia 90,900; Belize 30,100; Botswana 2,100; Canada 380,220; Hong Kong 15,400; India 6,600; Kenya 12,500; Lesotho 3,850; Malawi 628,150; Malaysia 104,400; New Zealand 4,200; Nigeria 5,200; Pakistan 3,257,600; Papua New Guinea 9,200; Tanzania 265,150; Uganda 102,000; United Kingdom 101,300; Zambia 143,600; Zimbabwe 174,500. (Countries which had given asylum to fewer than 500 refugees were not listed and, although in some instances people not formally recognised as refugees have been included here because they were reported by governments to the UN as being “in refugee-like situations”, the figures do not, for the most part, encompass asylum-seekers not recognised as refugees. For example there are over 60,000 boat people held in Hong Kong. Many refugees today are escaping from Commonwealth countries, in many cases to avoid persecution.

Refugees are people in particular need of international protection. By definition they are outside their own country and, owing to fear of persecution, are either unable or unwilling to turn to its authorities for assistance. In addition they may not have complied with the entry requirements of the country to which they have fled. By the very nature of their circumstances they generally will not have obtained the relevant visas, and may not possess valid passports. They frequently cross borders illegally. Furthermore, the country in which they have arrived may, for various reasons, not welcome immigrants from the refugees’ country of origin (they may be traditional enemies). In addition refugees may be stateless. Most urgently require assistance, yet there may be no government authorities to which they are able to turn for help. It is only comparatively recently that the need for a system of international protection for refugees has been realised and, to a degree, implemented.

During the twentieth century a body of international refugee law has gradually developed. International conventions have provided its main source. At first the conventions were drawn up in response to particular situations; to protect refugees escaping from specific problems (to protect, for example, people fleeing from Russia after the Bolshevik Revolution and a little later Armenians leaving Turkey) and provided simply for the granting of essential documentation to those groups. The first attempt at formulating a definition of “refugee” in a general, as opposed to a specific, manner was made in 1933 in the Convention Relating to the International Status of Refugees of that year. Today the major international convention giving protection to refugees is the 1951 Convention Relating to the Status of Refugees as supplemented and made more relevant to modern conditions by its 1967 Protocol. Although currently there are 107 states parties to the 1951 Convention and/or its 1967 Protocol (becoming a party to the latter involves accepting the terms of the former), many countries which do harbour large numbers of refugees, and are vitally concerned with refugee problems, are not yet parties. (See Appendix V for the current position).

The 1951 Convention has three main functions, firstly to provide a general definition of the term “refugee” (as contrasted with the early definitions related to specific events), secondly, to provide a charter of rights which ratifying states undertake to accord to refugees, and thirdly to make provision for implementation.

Due to the requirements of the Convention definition (the applicant must establish a “well-founded fear of persecution” for reasons of race, religion, nationality, membership of a particular social group or political opinion), granting refugee status can be a delicate political matter. It can be seen as involving a comment upon the internal affairs of the country from which the person has fled. It

amounts, in effect, to a statement that severe human rights abuses are occurring there. Because of this many states, for considerations of a purely political nature, deny refugee status to people who in fact quite clearly fall within the Convention criteria. Another consideration which can, and does, result in wrongful denial of refugee status is the apprehension of governments that, if applicants of a particular nationality are granted refugee status this may encourage, in anticipation of further such favourable responses, the arrival of waves of further asylum-seekers from the same country of origin. Undoubtedly, but for this reason, some of the many applicants from Sri Lanka whose applications have been refused, for example by Australia and the United Kingdom, would have succeeded. Not all can legitimately be dismissed under the label “economic refugees”.

In addition large numbers of people may in fact be refugees but are undocumented, unregistered or for some other reason fall outside the legal protection mechanisms of international agencies and receiving states. Estimates of the numbers involved here vary widely and information is fragmented. Tables drawn up in 1989 World Refugee Statistics show some of these people to be in Commonwealth countries - for example a reputed 25,000 in Belize. Some undocumented people have not applied for refugee status due to inadequate refugee determination procedures, or low acceptance rates, in the countries to which they have fled.

The definition itself, linked as it is to specific causes, does not cover everyone outside his or her country, in a situation of distress, and unable to return home. People may be unable or unwilling to return to their own country due to circumstances such as natural disasters - famines, floods or earthquakes, or to man-made circumstances such as local civil disturbances and the consequent breakdown of food supplies, medical assistance, transport facilities and normal civilian life. Such circumstances, however, are not included within the criteria specified in the Convention definition and, without more, people in these situations do not qualify as Convention refugees.

In addition, substantial numbers of people are displaced within their country's borders. Although they too may share many characteristics with Convention refugees they fail to satisfy the criteria of the Convention definition which requires them to be “outside” their own country and are generally not eligible for international refugee assistance. It is estimated there are 300,000 such people in Uganda and 500,000 in Sri Lanka.

To fill these gaps in protection over the years, the UN Office of the High Commission for Refugees (UNHCR) has been authorised by the UN General Assembly to assist specific groups of people otherwise not falling within its mandate. This has been done through the utilisation of the reference in the UNHCR Statute definition to “groups of refugees” and through expansion under the “good offices” function of UNHCR. The office was established in 1950 under Article 22 of the UN Charter as the UN body with the international mandate to protect refugees.

In this way the Office of UNHCR has been enabled to provide assistance in many repatriation programmes, particularly on the continent of Africa. In the late 1980s over 290,000 refugees who had fled to the Sudan and 30,000 who had fled to Zaire returned home to Uganda either spontaneously or with UNHCR assistance. UNHCR has recently assisted thousands of refugees in their return to Zambia from Angola. It should be noted that although UNHCR is the body with the mandate of the UN to protect refugees many other UN agencies are involved also, and UNHCR depends heavily on the support of non-governmental bodies. They frequently provide the bulk of the services to refugees both in camps and in terms of assistance to refugees when they arrive in resettlement countries. More than 75 NGOs are regularly invited as observers to the annual meeting of the Executive Committee of the High Commissioner's programme. The scope of NGO

programmes and the strength of their financial resources can exceed those of UNHCR and, importantly, they can act independently to assist refugees in circumstances where UNHCR is not able to intervene.

In its second important aspect the 1951 Convention has been called the Magna Carta of refugees. The rights which states parties agree to confer on refugees include: freedom of association and movement; the right to acquire movable and immovable property; rights in literary, artistic and scientific works; protection of industrial property; the right of recognition of qualifications; provisions regarding welfare; housing; public education; transfer of assets; the right to freedom of religion; to naturalisation; to access to courts; to identity and travel documents, the right to engage in self-employment or wage-earning employment. Most important of all is Article 33, which places on states parties the obligation of *non-refoulement*, i.e. not to return a refugee to a country where his/her life or freedom would be threatened for one of the reasons stated in the definition. This obligation is not only a basic premise of the 1951 Convention (no reservations are allowed to it), many would argue it has also become a rule of customary international law and is, therefore, binding on all states whether or not they are parties to the 1951 Convention and/or its 1967 Protocol.

The third major section of the 1951 Convention contains implementation provisions. All contracting parties agree to co-operate with UNHCR, in particular facilitating its duty of supervising the application of the Convention. They also undertake to submit reports to the United Nations.

Despite the provisions outlined above and despite the existence of many other human rights instruments (international, regional, specific and general) which contain provisions which confer protection of refugees, there are, nonetheless, millions of refugees and people in “refugee-like circumstances” many of them existing in appalling conditions. Various possible permanent solutions are proffered to the problems which face both these people, and their host countries, which frequently are struggling with almost insuperable obstacles to support them.

The first is voluntary (not forcible) repatriation. This is considered to be the most desirable, and the least disruptive and expensive, solution both for the refugees themselves and for the rest of the world community. The largest repatriation programme yet mounted was in the early 1970s. UNHCR, in cooperation with the governments of Bangladesh and India, assisted 10,000,000 refugees who had fled from East Pakistan, as it then was, to return to newly independent Bangladesh. After the Indo-Sri Lankan Accord, agreed between the President of Sri Lanka and the Prime Minister of India in July 1987, UNHCR encouraged a voluntary return programme for Sri Lankan Tamils who had earlier fled to southern India.

However, in many cases repatriation simply is not possible because the situation from which the refugees have fled shows no sign of improvement (or, as in the case of Sri Lanka, after initial improvement many deteriorate again.) It was hoped that large scale return to Afghanistan (over 5,000,000 of that country’s population of 15,000,000 have fled over the last decade to Pakistan and Iran) would be possible after the 1988 Peace Accords there. However, continuing conflict in some areas of the country, together with the widespread destruction in many other parts, mean that immediate return of large numbers is not likely. Some spontaneous repatriation did occur in 1990 mainly into rural areas in the southern southwest of the country. To encourage and assist in this repatriation UNHCR, together with the government of Pakistan and the World Food Programme, has initiated a pilot project to provide a payment of cash and food rations to refugees who wish to

return. By mid-November 1990 65,000 people had taken advantage of this project but over 3,250,000 Afghan refugees remain in Pakistan.

The second most desirable solution is generally considered to be the absorption of the refugees into the countries to which they have fled. There may be similarities in such matters as culture, economic conditions, ethnic composition of the population, climate and language. African countries have been exceptionally generous in this regard - an amazing number of refugees from neighbouring countries there have been absorbed by receiving states. In February 1990 over 800,000 Mozambican refugees were reported to have made their way to Malawi. In some areas the refugees were outnumbering the locals by four to one. The resultant strain on Malawi's resources is causing an environmental crisis. The UNHCR magazine, *Refugees*, reported in September 1990.

“The country is being rapidly deforested. The refugees felled or stripped 12 million trees in the last year alone to build their huts and for use as firewood. Meagre roads have been ravaged by convoys of international aid trucks delivering emergency relief.

Yet unlike the developed world, which increasingly regards refugees with cynicism or as an embarrassing inconvenience, Malawians accept them with the humbling generosity of those who have little, and who are prepared to share the little they have.”

Refugees from Mozambique have been taken in by four other nearby Commonwealth countries as well: Swaziland, Tanzania, Zambia and Zimbabwe. Some of these governments have generously provided opportunities for the refugees to create and run their own communities and build lives in which they can be self-supporting and have self-respect. In 1987 the Zambian government allocated 150 square kilometres of land for use by refugees from Mozambique. By the end of 1990 there were 62 villages on the site each located around a borehole and each accommodating some 300 people. There are schools, clinics, community centres, warehousing space and a grinding mill. The refugees are growing a great variety of crops already and are breeding fish, pigs, poultry and rabbits.

Tanzania, long host to refugees from Mozambique (it provided shelter in the 1960s and 1970s when the Mozambican people were struggling for independence from colonial rule), in 1988 allocated 25,000 hectares of land to the 72,000 Mozambicans fleeing from more recent conflicts who arrived in the late 1980s. Various non-governmental and inter-governmental organisations are involved with the refugees in building a viable community.

Assimilation is not easy however and there may be many local problems to overcome before grants of land are possible. Many of the asylum-granting countries are extremely poor and have undernourished populations of their own - the cost of hosting refugees may be crippling. There may be other difficulties as well. In the case of Malaysia the problems posed by the arrival of thousands of Indo-Chinese refugees is not seen as one of finding them accommodation, food and employment. Malaysia is a country which has a delicate balance of races. The government fears that an influx of large numbers of one of these races could upset the ethnic balance and cause internal problems. Malaysia, in common with several other South-East Asian states refuses to accept Indo-Chinese refugees on any basis other than a temporary one, until resettlement places are found in other countries.

This leads to the third solution for refugees - resettlement in countries other than the country of

first asylum. This is considered to be a solution of last resort because it is disruptive, both to the refugee and to the country of resettlement, and can pose many problems of assimilation. Under resettlement programmes people are relocated to countries often having dramatically different stages of development, cultures, climates and work opportunities, to those of their experience hitherto. Indo-Chinese refugees have been resettled in such diverse locations within the Commonwealth as Australia, Canada, Caribbean states, New Zealand, the United Kingdom and Vanuatu.

Not all refugees receive any benefit of these solutions. For many refugee status applicants there is no full and early access to fair determination procedures. This leads to a denial of the benefits which conferral of refugee status would bring. In many countries asylum seekers are detained in camps or detention centres with less than the minimum acceptable accommodation standards. Many refugee camps are “closed”. In some places they are subjected to armed attacks.

Recently there have been threats of forcible repatriation to Vietnam coupled with screening mechanisms reported likely to result in a denial of refugee status to genuine claimants. In such circumstances return by mistake of people who satisfy the Convention criteria and who should have been accorded refugee status is possible. Their return is a clear breach of the obligation of *non-refoulement*.

International funding is so short that in many camps even the maintenance of life saving operations is prejudiced. The sheer size of refugee populations in countries which have a very low gross national product make the maintenance of these refugees, without significant international assistance, a crushing burden for the hosts.

Added to this is the “compassion fatigue” of developed states. Developed Commonwealth states (along with other western industrialised countries) have resorted to a variety of techniques which amount in effect to breaches of their international obligations to refugees. These techniques include introducing criteria additional to those of the already narrow Convention definition and requiring these new criteria to be satisfied before refugee status will be granted. A requirement of “being singled out for persecution” was for a period consistently imported into the definition criteria by the Australian refugee status determination body (sometimes condoned, and recently clearly corrected, by the Australian courts). Another technique has been the assertion by governments that the obligation of *non-refoulement* does not apply to people in detention when local law by a convenient fiction “deems” those people not to have entered the country. This is an attempt at a redefinition of international law obligations by a domestic provision - something it is not open to states to do. A third technique is to direct the state’s immigration authorities that no obligations are owed to refugees who are regarded as another state’s responsibility even when it is doubtful that the other state will comply with its international obligations to the refugee (a position taken by U.K. authorities and found to be in breach of the *non-refoulement* obligation in a 1987 case which reached the House of Lords, *Bugdaycay v Secretary of State*).

As summarised in December 1990 in the *Refugees* magazine,

“... the number of refugees has almost doubled in the last ten years, the resources available to UNHCR have hardly increased at all. The basic needs of many uprooted people are not being met. Many of the world’s poorer countries, where the largest concentrations of refugees are to be found, are struggling to cope with the pressure that the new arrivals have placed on scarce resources.

In the Third World, there is now a discernible tendency to make asylum and protection

conditional upon adequate levels of assistance. In the industrialized states, both politicians and the public have reacted negatively to the growing number of people seeking sanctuary in their territory. The principles of refugee protection, painstakingly developed over the course of the last 40 years, are increasingly being challenged ...”

A stark reminder that there is absolutely no room for complacency.

## RECOMMENDATIONS

1. In order to be at all effective the attempt to solve the world refugee problem must be made at the level of international co-operation. In *Janus* Arthur Koestler said,  
"The continuous disasters in man's history are mainly due to his excessive capacity and urge to become identified with a tribe, nation, church or cause, and to espouse its credo uncritically and enthusiastically, even if its tenets are contrary to reason, devoid of self-interest and detrimental to the claims of self-preservation."

It is for reasons such as this that we have created refugees: people who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

The structure provided by the Commonwealth must be used to provide an arena to facilitate discussion, the joint undertaking of projects, and to foster increased awareness, and appreciation, of different viewpoints, ideologies, cultures, traditions and systems. Commonwealth Human Rights Policy should have as one of its priorities the creation within the Commonwealth of a spirit of co-operation, awareness, and identification with humanity in general, as opposed to a small fraction of it. If this can be achieved it will be possible to move towards a real solution to the refugee problem - removal of its underlying causes. Other approaches are simply sticking plasters, though sticking plasters which are essential until the problem is solved.

2. A major segment of a Commonwealth Human Rights Policy must relate to the human rights of refugees. The Commonwealth Secretariat should prepare a comprehensive report on the situation of refugees in Commonwealth countries to be made available to the next Commonwealth Heads of Government meeting. The initial study should be factual and indicate the numbers and situation of refugees in the different Commonwealth countries, the roles played by international agencies, by governments and by non-governmental organisations, including the Commonwealth Parliamentary Association which has recently given much attention to the problems of refugees. In it the strengths of the Commonwealth, particularly the sharing of experience, and the immense contribution which has been made in the provision of assistance to refugees by NGOs and by some governments should be recognised. The Commonwealth Secretariat should identify and give publicity to effective measures and initiatives already introduced.
3. This factual report should be used for follow up studies - for example to explore how different approaches could increase the protection accorded to refugees in the Commonwealth. Governments should be encouraged to exchange views with non-governmental bodies and also to learn from each other. Debate and the sharing of ideas should be encouraged within a Commonwealth framework with the aim of building a firm basis from which the protection of refugees afforded by Commonwealth countries might

be strengthened.

4. 80% of refugees are women and children yet in most countries refugee men run the decision-making camp committees and occupy positions of power. It is essential that refugee women be brought into camp decision-making processes. Refugee women themselves can provide the best insights into problems which affect their needs, their rights, their children and their safety. The Commonwealth should help in the development a plan by which refugee women can be integrated camp leadership and decision-making.
5. The Commonwealth should take positive steps to create awareness about, and to encourage the ratification of, the 1951 Convention and its 1967 Protocol. Official agencies should be used to provide technical assistance (using the Commonwealth Fund for Technical Cooperation where possible) to assist the processes both of ratification and accession, and to assist governments with subsequent obligations of implementing, reporting and co-operating with UNHCR in the provision of assistance to refugees.
6. Commonwealth programmes and reports should, as a matter of routine, be required to assess the impact of their activities and recommendations upon refugees. Non-governmental organisations should be encouraged and assisted to help with the provision of information for these reports and to publicise and monitor the operation of the 1951 Convention.

## WOMEN

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

#### *Article 2*

Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other status.

### **ICCPR**

#### *Article 3*

The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### **ICESCR**

The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

### **INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 1979**

#### *Article 1*

Prohibits: any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, civil or other field.

### **COMMONWEALTH HEADS OF GOVERNMENT COMMUNIQUE LONDON 1977**

Heads of Government recognised that unless women are active participants both in contributing to the process of development and as beneficiaries, the goals of social and economic growth would not be fully realised. They therefore agreed that all projects of the [Commonwealth] Secretariat should reflect this awareness.

### **COMMUNIQUE OF COMMONWEALTH MINISTERS RESPONSIBLE FOR WOMENS' AFFAIRS, LONDON 1990**

Ministers recognised that economic equality between women and men is an important dimension of gender equality and economic advancement of women as well as a basic premise for all human rights and national economic development. They noted, however, that its achievement has been constrained by national and international policies and programmes formulated without regard for gender issues.

Half the population of the Commonwealth consists of women and, judged by virtually every index of gender comparison, their enjoyment of human rights is inferior to that of their brothers. This is not just a matter of economic inequity, important as that is. A continuing inequality of status persists in spite of the fact that five Commonwealth countries have recently had women Prime Ministers, the Head of the Commonwealth is a woman, and there have been three meetings of Commonwealth Ministers Responsible for Women's Affairs since 1985. Raising the status of women must be a priority for a credible Commonwealth Human Rights Policy.

The International Convention on the Elimination of all Forms of Discrimination against Women (the Women's Convention) was adopted by the United Nations General Assembly in 1979. It was the first comprehensive code of women's rights in international law. It was seen as a vital tool for dealing with widespread discriminatory practices which continued to operate against women.

In 1985, at the close of the United Nations Decade for Women, a world conference was held in Nairobi, Kenya, where a detailed review of the status of women took place. The conference, which was the occasion for the first meeting of Commonwealth Ministers Responsible for Women's Affairs, agreed that limited progress had been achieved. But for anyone who suggests that the battle for equality has been won in the Commonwealth, or is redundant or tedious, the following facts should be considered:

- Women in Australia make up 75% of the total number of people living in poverty.
- Due to poor diet an estimated 65% of pregnant women in developing countries suffer from anaemia, as do 50% of those who are not pregnant.
- Women work longer hours than men in virtually every part of the Commonwealth.
- Some 65% of the world's illiterates are women.
- In 1987 in Trinidad and Tobago 16.7% of parliamentary seats were occupied by women, 11.7% in Jamaica, 8.3% in India, 6.3% in the UK, 6.1 % in Australia and 1.7% in Kenya.
- One third of girls aged between 6-11 years in developing countries receive no primary education at all, compared with only one fifth of boys.
- In Bangladesh, the mortality rate for girl children from 1 to 4 years of age may be 70% greater than for boys, even though female babies are biologically more robust than male babies at birth.
- Some 80% of the world's 15 million refugees are women, and children for whom they are responsible.

As the Canadian scholar, Professor Rebecca Cook puts it, "Women of all ages disproportionately suffer avoidable premature death. Women of all ages disproportionately suffer avoidable sickness. Women of all ages disproportionately suffer disadvantages in education, economic and social opportunities."

Some Commonwealth countries have failed to ratify the Convention, others which have ratified have failed to report their performance, and still more have filed such significant reservations as to make their support for the convention of only modest value. By the end of 1990, following ratification by Belize in October, there were still 22 Commonwealth countries which had not ratified the convention.

However, even where a country has ratified, Professor Cook points out that "Commonwealth State Parties as diverse as Australia, Bangladesh, Canada, Cyprus, Jamaica, Mauritius, New Zealand and the United Kingdom have filed a total of 25 reservations, which in some way or another reserve the obligations of a country to implement the Convention". Reservations occur where

discrimination is part of a religious or cultural tradition affecting marriage and the family. She adds that Bangladesh has found that the Article 16 obligation to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations conflicts with Islamic law. Some reservations, she concludes, “may be so contrary to the object and purpose of the Women’s Convention as to amount to a derogation from ratification or accession. The issue of these reservations is critical in the continuing inequality of women, and presents an obstacle to the achievement and exercise of human rights through this convention.”

Article 18 of the convention requires states which are party to it to report on the “legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions.” These reports are then received and examined by the Committee on the Elimination of Discrimination against Women. However on 1 February 1990 there were 13 Commonwealth states-almost half the Commonwealth states which have adhered to the convention -which had yet to report: Barbados, Cyprus, Dominica, Ghana, Guyana, Kenya, Mauritius, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sierra Leone, Uganda and Zambia. It was timely, therefore, that Ministers Responsible for Women Affairs, at their meeting in Ottawa in October 1990, should have recommended the Commonwealth Secretariat to organise regional workshops on the convention, and on its ratification and reporting obligations.

But ratifications and reporting only deal with symptoms. At the heart of discrimination against women lie deep-rooted cultural traditions, in both developed and developing countries. Professor Cook quotes a Sri Lankan lawyer: “In many ways, the issues of women’s rights have accentuated the constant tension between tradition and modernity. Women have been classically regarded as the bearers of tradition from one generation to another. The transformation of their role in society is seen as an erosion of the foundations of traditional cultures. When the alternative to tradition is westernisation, there is an in-built cultural prejudice which is often the justification of the denial of equal rights for women.”

Cultural bias against women exists in almost every Commonwealth society we know, as in the world at large. But when cultural bias is combined with extreme poverty, the results for women are devastating. For in any impoverished state, women are the poorest of all. A crucial reason why the rights of women must be a priority issue for the Commonwealth lies in the poverty of a large number of member countries.

Only four out of the 50 Commonwealth countries are not classified as “developing”. The United Nations Development Programme (UNDP) has devised a “human development indicator” for purposes of comparison. In 1990 a majority of Commonwealth states to which the indicator had been applied fell into the “low” human development category and only 8 were in the highest category. Adverse economic trends in the 1980s affecting all developing countries, and structural adjustment programmes, which have borne heavily on women, have meant that the 1980s have been a decade a stagnation for women. The informal economy, of most significance to women, has been hardest hit. The momentum of the UN Decade for Women, which ended in 1985, has been lost.

The Commonwealth as a whole, and individual member countries, have sought to mitigate these trends through legislation, economic and other policies. As part of its Women and Development programme the Commonwealth Secretariat commissioned a report to look at the impact of structural adjustment on women. Called *Engendering Adjustment for the 1990s* and based in part on 9 country case studies, the report called for a recognition of the burden which the current

economic situation is placing on women. It urged that governments should give more attention to the impact on women in their future economic planning.

This report was followed up in the Ottawa meeting in October 1990 of Ministers Responsible for Women's Affairs. They proposed a continuance and preferably an increase in spending on measures which would help women to participate in market economies in the fields of nutrition, health, education and timesaving technologies. They also recommended more participation by women in policy-making that will affect them: the setting up of steering committees in Ministries of Finance and other appropriate Ministries to ensure that gender issues are properly considered, and more support for women's organisations, including those concerned with credit and finance.

The Ministers in Ottawa also pursued other issues of significance to women in the Commonwealth: their role in ecologically sustainable development and the enhancement of the environment (where a Commonwealth expert meeting was requested); their central role in family planning (where educational programmes were supported, and a closer liaison requested between Ministries responsible for Health, Development, Social Services and Women's Affairs); the problem of violence against women (where Secretariat publications on police training and curriculum materials for legal studies were commended); and the potential of non-governmental organisations (with which governments were urged to cooperate, and where criteria were adopted for pan-Commonwealth bodies to participate as observers in meeting of Women's Affairs Ministers).

As in other human rights fields some Commonwealth countries have advanced legislative provisions and instruments for women, and the real problems lie more in public awareness and implementation. It is worth mentioning, for instance, that a number of Commonwealth constitution, including those of India, Namibia and are strong on the equality of women; that a number of countries (for instance Britain, with its Equal Opportunities Commission, or New Zealand and Canada, with their Human Rights Commissions) have statutory bodies concerned to promote and enforce existing legislation for gender equality. The role of women's movements, not least in African countries, has been important at community and national levels.

But a great deal more has to happen before human rights for Commonwealth women are a reality. Indeed the status of women is not always seen as a human rights issue. It was therefore most welcome that, in the third paragraph of their communique from Ottawa, Ministers Responsible for Women's Affairs stated that they "recognised that economic equality between women and men is an important dimension of gender equality and economic advancement of women *as well as a basic premise for all human rights* and national economic development" (our emphasis).

Furthermore the Commonwealth and member countries could do more to give a lead by the promotion and recognition of women. The international community is often better at saying than doing. Out of 86 senior positions in the United Nations system not one was held by a woman in 1990 until an appointment at the end of that year. Commonwealth agencies are slightly more balanced, but there is room for improvement. It is also curious that the spouses of High Commissioners, in many cases professionally qualified women from countries where trained talent is precious, are prevented from furthering their experience by working in the states where they temporarily reside.

## RECOMMENDATIONS

1. A major segment of a Commonwealth Human Rights Policy must relate to the human rights of women. On grounds of equity, fundamental rights and balanced national development women have unarguable claims. The scope should be broad, not limited to economic matters alone, and should recognise the strengths of the Commonwealth (particularly the sharing of experience, and the contribution of NGOs).
2. Commonwealth programmes and reports should, as a matter of routine, be required to assess the impact of their activities and recommendations upon women. Cultural bias against women should be recognised where it exists. Economic measurements should include estimates of the value of women's labour and, where they fail to do so (for example in conventional recording of gross national product) this should be acknowledged.
3. The Commonwealth Secretariat should make a follow-up report to *Engendering Adjustment*, to be made available to Ministers Responsible for Women's Affairs no later than 1995. This should indicate how far international agencies, governments and other bodies have changed their practices following the first report, and how the changing economic situation affects the rights of Commonwealth women then. There should be close cooperation between the Women in Development and Human Rights units within the Commonwealth Secretariat on projects and matters of mutual interest.
4. Governments and NGOs should incorporate women into decision-making processes, being prepared to take affirmative action where necessary. The Commonwealth Secretariat and official agencies of the Commonwealth should set an example. Further publicity should be given to national policies which seem effective (for instance in Zimbabwe, which has sought to integrate women's concerns in its economic planning by focal points in ministries, monitoring by women's bureaux, gender sensitisation for officials, and the empowerment of women in village communities.)
5. Governments and other agencies should analyse and spotlight where sexual discrimination may affect economic development, employment, immigration, refugee policy, health care and a diversity of other issues.
6. Governments should exchange views with religious and non-governmental bodies on religious and cultural obstacles to the realisation of human rights for women; should encourage open debate on such issues, and the sharing of ideas within a Commonwealth framework.
7. Ministers Responsible for Women's Affairs and Law Ministers should exchange views with NGOs on the problems of domestic violence. Good Commonwealth practice should be circulated to interested parties, causes analysed, and justice for injured women upheld.
8. The significance of family planning in enhancing the human rights of women should be stressed. Family planning concerns their rights to bear children when they wish, their right to health and their right to personal development. It also affects the human rights of children to a minimum living standard, as well as broader rights involving the development of whole populations and equity between generations.

9. The Commonwealth should do more to support the ratification and obligations of the Convention on the Elimination of All Forms of Discrimination Against Women. Official agencies should provide technical assistance (using the Commonwealth Fund for Technical Cooperation where possible) to assist the processes of ratification and reporting. Non-governmental bodies should publicise and monitor the operation of the Convention.
10. Ministers Responsible for Women's Affairs should be given more support, by official and unofficial bodies in the Commonwealth, recognising that the rights they promote will require time and education for achievement. Jointly with Commonwealth Ministers of Education they should commission a study on the impact of formal education systems on human rights for women.

## CHILDREN

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS,**

#### *Article 25*

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

### **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS,**

#### *Article 24*

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

### **CONVENTION ON THE RIGHTS OF THE CHILD**

#### *Article 3.1*

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

#### *Article 34*

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

### **WORLD DECLARATION ON THE SURVIVAL, PROTECTION AND DEVELOPMENT OF CHILDREN (30 SEPT. 1990)**

2. The children of the world are innocent, vulnerable and dependent. They are also curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and cooperation. Their lives should mature, as they broaden their perspectives and gain new experiences.

### **HONG KONG BILL OF RIGHTS,**

#### *Article 20.*

1. Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

Children are by their very nature vulnerable and easily exploited and abused. They are unable to protect themselves from the superior power of adults, and from socio-economic, civil and political and other conditions over which they have no control. The exploitation and abuse of children occurs, in different forms, in all Commonwealth countries, the form varying according to different stages of development, conditions, and cultures.

- In Kenya children have been estimated to constitute 25% of the farming labour force.
- Jamaica has had to cut welfare expenditure, which perhaps explains the fact that between 1978 and 1984 the number of children admitted to one hospital with malnutrition doubled; and of those with malnutrition-related gastro-enteritis tripled.

- In England and Wales it has been estimated that child abuse increased by 70% between 1979 and 1984.
- In Malawi the proportion of government spending on education in 1972 was 15.8%, in 1986 it was 11.0%. In Tanzania the proportion fell from 17.3% to 7.2% in the same period.
- Clubs in the United Kingdom advertise sex tours to countries (such as the Philippines and Sri Lanka) and provide clients with information regarding the availability of young boys, the risks involved, how much to pay and how to avoid being arrested.
- Children are recruited, contrary to international law, into the armed forces (or armed liberation movements) in many different countries including Sri Lanka and Uganda.

Topic headings incorporated in a database on children's rights set up by Defence for Children International (an NGO concerned with the protection of children's rights) provide an indication of the wide variety of areas in which children require protection. These topic headings include: physical and sexual abuse, adoption, apartheid, armed conflict, child labour, child marriage, corporal punishment, death penalty, detention, disappearances, drugs, economic assistance, education, employment, family, food, food relief, foster care, health, homeless and abandoned, housing, hunger, institutional care, juvenile justice, missing children, natural disaster, parental kidnapping, paedophilia, political repression, political violence, population control, pornography, poverty, prostitution, public violence, refugees, sex tourism, torture, trafficking, war.

The abuse or neglect of children's rights is an immense and complex problem in which socio-economic, political, cultural and other factors are intertwined. It is impossible, in a report of this nature, to deal with the topic in any comprehensive manner. A few aspects of the issue have been selected and highlighted.

### **Child labour**

In underdeveloped Commonwealth countries today millions of child labourers are working for long hours, with no adequate protective clothing, no unions to advance their rights, no severance or unemployment benefits and no health care. Work conditions may be either actually dangerous, as where hazardous chemicals are involved, or mentally or physically detrimental to the children's development. Children in carpet factories in India work squatting on planks for hours on end, frequently with resultant severe bone deformities. Working children often have no educational opportunities nor training opportunities to enable them to progress in later years to more skilled occupations. Childhood is the time when a child's future is set. With little or no access to welfare, health or educational facilities, and no effective protection by the legal system these young children, forced into the labour market and prematurely leading adult working lives in conditions of extreme hardship, are caught in a vicious cycle of poverty and oppression from which it is unlikely that they, or their children in turn, will ever escape. Distressingly, the numbers of children in Commonwealth countries who must work to survive are increasing.

The ILO estimates that one third of the world's child labourers are in India. Statistics here are necessarily unreliable. Often child labour is illegal, hence information is hidden. Records which do exist are frequently inaccurate but the numbers certainly run to many millions. (One estimate made in 1985 by a non-governmental body in Bangalore, on the basis of percentage calculations of the census, on sample surveys and on research, was that there are 100,000,000 working children in

India alone.)

The population of many of the developing Commonwealth countries is predominantly rural. Here child labourers (some as young as 6) work: on tea, coffee, rubber or palm oil plantations (for example in India, Kenya, Malaysia or Sri Lanka); in brick kiln works (in Pakistan, India and Bangladesh); in fanning and in the sale of farm produce in local markets, or in cottage industries. When working out of doors children often go unprotected against burning sun, driving rain or cold temperatures. Recently in Sri Lanka small boys between the ages of 8-14 (who had been kidnapped from their homes) were found labouring in the scorching sun for long hours each day, salting and drying fish.

With today's burgeoning populations there is increasing landlessness and, since the rapid rises in population have not been met by a corresponding rise in employment opportunities in rural areas, increasing hardship as well. The result has been a drift to the towns and cities, to the growing urban slums. (Between 1931 and 1981 the 5 major cities of Pakistan grew from a population of 1.1 million to 10.8 million.)

In the urban sector children work at all kinds of jobs: as domestic servants; in factories; as "apprentices" to various trades; in hotels, restaurants and street trades; in mines, heavy manufacturing industries, and on construction sites; in jewellery industries, and with automobile repairs and servicing - to name just some of their occupations. Others are "self employed", performing tasks such as shining shoes, and scavenging for re-usable waste. In Bangladesh children from one slum have become skilled at scavenging for, and then melting down, polythene bags to make sheets of polythene. The sheets are sold for a variety of purposes including the construction of shanty houses.

Children are also used for purposes which are clearly illegal. Their swiftness and nimbleness encourage adults to employ them to steal. Both boys and girls are employed in organised prostitution, pornography and drug trafficking. They are used also for begging. For this purpose they are sometimes deliberately and extensively maimed in order that their plight will arouse sympathy and their begging attempts be more successful.

For employers the advantages of child labour are many. Children are cheap and they are easily replaceable, enabling employers to retain flexibility. Their small size and agility make them particularly desirable for certain kinds of work - crawling under moving parts of machinery for example. They have little or no bargaining power. They are not organised. Where labour unions exist children generally are not members.

Abject poverty is a major cause of the exploitation of child labour, and of the failure to provide adequate educational facilities. But it is not the only factor. The problem is complex and admits of no easy solution. Contributing factors include: the uneven distribution of wealth, the acceptance of child labour as a necessity in developing countries, the failure to regard children as people with rights, the failure to recognise that the children of a nation are its future resources and that their protection and education is a necessary investment. Communities need to be convinced of the damaging effects of the neglect, abuse and exploitation of children, and of the need to provide children with opportunities for advancement. The complexities of the problem are such that solving it is often regarded as impossible. Lack of determination then results in half-hearted efforts. Governments typically have not put a high priority on the protection of children. Children do not have a vote.

## **Education**

Education is pronounced a right in several international instruments. Yet today many children have no opportunity for education. Provision for schooling is frequently not keeping pace with the growth in population. In 1986 it was estimated that about 48% of the rapidly expanding population of Bangladesh (currently over 100,000,000 and increasing at an annual rate of 2.8%) was under the age of 16. The literacy rate was reported to be 23%.

Even where children do attend school initially, frequently neither they nor their parents have any motivation to continue the attendance. For working children school hours are at the time when children work, and, unlike the work, schooling offers no visible immediate returns. In addition the school performance of working children tends to be poor since generally they are tired and inattentive. This leads to their further discouragement.

For both working children and non-working children alike there are other problems. Even if schooling is free parents may be required to purchase books, paper and pens which often they can ill afford. Frequently the education which is provided is not adapted to the needs of the children it serves. (There are exceptions however, for instance a variety of trade union projects are run in Bombay designed to provide young people in urban slum areas with occupational skills.)

## **Other forms of abuse**

Problems are not confined to the developing parts of the Commonwealth. In developed Commonwealth countries serious problems continue to face many children and young people. Consider for instance: the conditions in which many indigenous children live; the situations of deprivation and hardship suffered by homeless children; the children who, despite generally high standards of living, continue to work long hours for very poor pay. Large numbers of children are victims of drug and alcohol abuse. Many children from minority groups and many children with disabilities (physical, intellectual and linguistic disability) do not have adequate opportunities for education, many more live in appalling poverty. Reports are increasing of children subjected to both physical and sexual abuse in their own homes. In 1984 the Canadian government produced a report entitled *Sexual Offences Against Children* in which it was stated, "Child sex abuse is a largely hidden yet pervasive tragedy that has damaged the lives of tens of thousands of Canadian children and youths.... For many of them their needs remain unexpressed and unmet." A LaTrobe University survey in the mid-1980s estimated that 28% of girls and 9% of boys in Australia have been sexually abused by the age of 16. In 74% of the cases the offender was known to the victim and more than 1 girl in 3 was sexually abused by a relative.

## **Progress in child protection**

In some areas considerable improvements have been wrought. Many governmental, intergovernmental and non-governmental agencies, both national and international, have been instrumental in bringing about these improvements and their efforts deserve recognition.

Tremendous strides have been made towards the goal of universal childhood immunisation. In Botswana for example 80%-90% of the infants are fully vaccinated against polio. In 1980 approximately 4,000,000 children died each year from dehydration caused by diarrhoea. At the end of the decade UNICEF estimated that deaths had been reduced by 1,000,000 each year. Over 100 developing countries had programmes to promote the use of oral rehydration therapy. Equally significant has been the great increase in awareness about the spacing of births.

The Kuala Lumpur Commonwealth Heads of Government Meeting Communique welcomed

progress of this kind, and called on member countries to support the concept of “Adjustment with a Human Face” to protect investment in social sectors such as health and education.

A successful programme to improve the health and nutrition of the nation’s children was introduced in the Iringa region of Tanzania in 1983. Five years later, in the 168 villages involved in the programme from the outset, severe malnutrition had been reduced by 60% and the deaths of young children by about 30%. The programme utilised all available communications media films, radio, a newsletter and child growth charts. The community training programmes involved the village people. Village health committees were formed or strengthened, village activities organised and government employees took responsibility for the programme as part of their duties.

In Kenya the Undugu Society, founded in 1973 by Father Arnold Grol, a missionary, has done a tremendous amount for street children. In doing so it has used local resources and involved local community leaders. One priority has been the upgrading of slum dwellings. It has provided supportive, preventive and developmental programmes for street children, devised alternative approaches to primary education, helped single mothers improve their incomes, and encouraged children to acquire useful skills and assisted them to earn a living through self-employment.

Problems of the protection of children, the promotion of their well being, and the need to ensure their opportunity for development into healthy and well adjusted adults with fair access to education and other facilities, have been tackled over many years both at national and at international levels. Domestic protective legislation concerning the conditions of working children goes back to the last century in the United Kingdom and protective legislation exists in many of the countries which today are home to the children who are forced to labour in appalling conditions to survive. In India and Bangladesh there is comprehensive legal protection but social and economic realities militate against enforcement. Insufficient importance is given to implementation mechanisms. Penalties for offending employers tend to be light. Prosecutions for offences are rare. Further, protective legislation which does exist generally leaves work in the informal sectors - domestic service, self-employment, begging, family businesses etc - completely unregulated.

At the international level the rights of children have been addressed by more than 90 international conventions and declarations dating back to the beginning of the century.

The League of Nations adopted conventions prohibiting traffic in women and children (1921) and slavery and the slave trade (1926). Simultaneously the ILO (established in 1919) was emphasising social justice and welfare, and took a series of actions aimed to eliminate the exploitation of working children. Among United Nations human rights instruments which provide protection for children are: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956; the Convention against Discrimination in Education of 1960; the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples of 1965; the Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) of 1985; and the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally of 1986. In addition there are the instruments developed by the Red Cross regulating the conduct of governments and members of their armed services towards children in times of war. Other conventions govern under-age marriage and guarantee the child’s right to a name and nationality.

### **The Convention on the Rights of the Child**

Today the major instrument protecting the rights of children is the Convention on the Rights of the Child adopted by the UN General Assembly in November 1989. This Convention draws together human rights provisions concerning children hitherto scattered over a wide range of instruments. In addition it breaks new ground - for instance with its provisions concerning adoption and drug abuse. Its main underlying principle is that the best interests of the child shall always be the major consideration.

The new Convention regards the civil, political, economic, social and cultural rights of children as a mutually reinforcing set of provisions, acknowledging that adequate nourishment, living standards and access to medical services alone will not ensure the right of a child to develop fully. Provision is necessary also for matters such as education, protection from exploitation and cruelty, from arbitrary separation from family, from abuses in the criminal justice system, and for access to information, play and leisure, and cultural activities. Other issues addressed by the Convention include the problems of refugee children, sexual and other forms of child exploitation, drug abuse, inter-country adoptions, the needs of the disabled, and of the children of minority or indigenous groups.

As at 21 January 1991, the Convention had received 130 signatures, 65 of which had been followed by ratification, 4 states have acceded to the Convention, bringing the total of states parties to 69, (for Commonwealth states see appendix V).

During the February 1991 elections for members of the new Committee on the Rights of the Child, 7 of the 35 candidates were from the Commonwealth and one Commonwealth member, the candidate from Zimbabwe was elected.

Despite the recent establishment of this U.N. Committee, the numbers of national and international protective instruments, and the exhortations to states to care for their children, for many children in the Commonwealth all this remains an aspiration only, untranslated into reality. The numbers of undernourished, exploited, abandoned and disadvantaged children continue to increase and the conditions in which many children exist remain appalling.

### **RECOMMENDATIONS**

1. At the Kuala Lumpur CHOGM Heads of Government called on the UN General Assembly in its 44th session to adopt a UN Convention on the Rights of the Child and for its early entry into force. Now that this Convention has been achieved (after years of negotiation and debate) it is vital that the Commonwealth actively encourage member states to ratify it. At the next CHOGM the Heads of Government should call on all member countries to ratify the Convention and to take all due measures to secure its early implementation.
2. The Commonwealth should set up mechanisms, in co-operation with the UN Centre for Human Rights and other appropriate UN bodies, to provide technical advice and other assistance at the request of member governments seeking to carry out their obligations under the Convention, to enable Commonwealth governments to prepare regular informative reports to the Committee on the Rights of the Child and to promote awareness of the provisions of the Convention.

3. The Commonwealth should move to make children a high priority on its human rights agenda. They are, after all, our most valuable resource. The Commonwealth Secretariat should take action utilising the Convention (which now provides an acceptable standard against which progress concerning the protection and promotion of the rights of children can be measured) as a rallying point to mobilise efforts by Commonwealth governments, parliamentarians, educators, religious leaders, the media and non-governmental groups, to ensure that the highest priority is given to efforts to realize the rights of children.
4. The Commonwealth should compile information (from UNICEF and other reports) of the state of the children in the Commonwealth today. These reports should then be utilised to establish priorities for action to promote, on an informed basis, co-operation between different groups and seek to generate practicable solutions designed from a variety of perspectives.
5. There is a vital need for increased awareness, both domestically and internationally, of the needs of children, of their situation, the types of protection they require, their right to be recognised as individuals and their right to develop as full citizens of the modern world. At the next CHOGM discussions should be held with member governments and non-governmental bodies to work out appropriate methods to increase this awareness. Co-operation should be sought also from UNICEF and other appropriate UN bodies.

## **WORKERS AND TRADE UNIONS**

### **UNIVERSAL DECLARATION OF HUMAN RIGHT**

#### *Article 4*

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

#### *Article 20*

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

### **ICCPR**

#### *Article 8*

3. (a) No one shall be required to perform forced or compulsory labour;

#### *Article 22*

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right.

### **AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS**

#### *Article 15*

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

### **ILO CONVENTION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE**

#### *Article 2*

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

### **CONSTITUTION OF INDIA**

#### *Article 42*

The State shall make provision for securing just and human conditions of work and for maternity relief.

#### *Article 43A*

The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

### **CONSTITUTION OF NAMIBIA**

#### *Article 21*

- (1) All persons shall have the right to:
  - (b) withhold their labour without being exposed to criminal penalties.

In 1980, the International Labour Organisation (ILO) estimated that the economically active population in the developing world was approximately 1,245 million, over two-thirds of whom were living in Asia. Workers in developing countries (and only four Commonwealth countries are not in this category) have suffered, most from the vicious cycle of debt, low commodity prices, structural adjustment and frustrated development which characterised the past decade. In addition, workers in many Commonwealth countries have faced problems arising from government labour policies which severely undermine their rights. This section focuses on some of the more pressing human rights issues confronting workers. But it is not in the developing countries of the Commonwealth alone that workers face problems; the Commonwealth Trade Union Council has information about trade union rights under attack in industrialised countries as well.

- In Bangladesh and Pakistan under 10 per cent of workers are unionised.
- In export zones in Sri Lanka workers have been harassed for joining unions or protesting about working conditions.
- Recent research has suggested that there is a particularly high rate of injuries among construction workers in Hong Kong.
- Recently three of the 10 members of the Commonwealth Trade Union Council's executive body were either detained or prevented from leaving their countries.
- Although bonded labour is outlawed in India both by the Constitution and by statute, there are still many instances of workers in effect in such a situation.

Despite the wide range of labour relations systems in the Commonwealth there are some characteristics common to most member states. Labour relations systems usually cover only urban industrial workers who constitute only a small proportion of the labour force and not all of whom are covered by collective agreements. For most Commonwealth workers employment does not mean a full-time job under regulated conditions of work and pay.

A majority of workers in the Commonwealth are unorganised: in Botswana, Kenya, Nigeria and Zambia, for example, less than 20 per cent of the economically active population is unionised. Most workers are casual wage labourers, self-employed (such as peasants), family workers and independent workers in the formal sector and are often amongst the poorest sections of the population. So legislation covering workers' rights usually protects only a minority of workers.

The strict controls or prohibitions on union activity during the British colonial period have not disappeared. In the contemporary Commonwealth trade unions are subjected to a wide range of controls including compulsory registration, restrictions on their right to organise and bargain collectively, the abolition or attenuation of the right to strike, compulsory membership in state-sponsored federations, co-optation of their leadership through inducements of finance or office, and, when all else fails, repression. In most of Commonwealth Africa, for example, trade unions generally operate under unfavourable conditions and most are weak. Thus workers in many parts of the Commonwealth are unable to assert their basic human rights effectively against interventionist states which regularly advance the pretext that free collective bargaining may adversely affect economic development.

Some Commonwealth governments have counterposed democracy to development, arguing that it

is necessary to impose restrictive labour laws and practices which limit workers' basic rights in order to achieve economic growth and industrial development. The Malaysian Labour Minister argued on behalf of all Asian Labour Ministers in 1982 that the "concept of freedom and rights held by developed countries, especially European countries, is different from the one held by developing countries... [Some ILO] Conventions...invite resentment and resistance from developing countries...because they are not practical to their political systems and the security of their countries... [I]mproving the wage earning population through implementing international standards would only increase the disparities between the "haves" and the "have nots" in these economies and thus create social and political instability".

This contradicts the ILO view that "trade union rights, constituting an integral part of human rights, are a combination of all the rights and freedoms which are essential for the existence, and the efficient functioning, of democratic trade unions capable of defending and furthering the interests of workers". It is therefore of particular concern that numerous states in the Commonwealth are reluctant to conform to the minimum standards in the International Labour Code which have been constructed so as to enable even the least developed countries to ratify and implement them.

In various countries of the Commonwealth governments are reluctant to permit truly free trade unions. Unions may be banned in certain industries, unions may be required to have a close association with government, or unions may be deregistered if they show independence of mind.

In 1970 the International Labour Conference adopted a resolution that lists the civil liberties which are essential for the normal exercise of trade union rights. These are the right to freedom and security of person and freedom from arbitrary arrest and detention; freedom of opinion and expression; freedom of assembly; the right to a fair trial by an independent and impartial tribunal; and the right to protection of the property of trade unions.

## **The Rights**

The fundamental right to withhold labour by striking is associated with the basic human rights contained in the International Labour Code, namely, freedom of association, freedom from forced labour, and equality of opportunity and treatment.

## **Freedom of Association**

Freedom of association underpins all worker's rights because their ability to assert their rights is based upon their capacity to combine, so that the assertion of any other right is almost impossible in the absence of the right to freely form and join trade unions. In addition, it provides the best mechanism for enabling labour to participate in the framing and implementation of social and economic policies. With a few honourable exceptions, the record of Commonwealth states in promoting and protecting freedom of association is not good. But the denial of freedom of association is only part of the problem. Rhoda Howard argues that:

[E]ven more important than the undermining of workers' substantive rights through the denial or attenuation of their freedom of association, is the long-term undermining of their right to have rights; that is, of those civil and political rights which are both preconditions for, and consequences of, successful long-term trade union struggle... The allegedly developmentalist model of trade unionism denies trade unionists the right to establish a principle which in the long run will benefit all

those who are powerless; the right to demand rights.

In a survey of African labour law, Isik Urla Zeytinoglu found that “although African countries have adopted the ILO Conventions [on freedom of association] as the basis of their laws, and have officially accepted the Conventions as part of their national legislation, they still enact laws which conflict with basic ILO policies... Beginning in the 1970s, however, there has been a decline in the ratification of the ILO Conventions and a dramatic increase in the failure to implement the ratified freedom of association standards. Since 1980 there have been major violations of freedom of association and collective bargaining rights in almost all African countries.”

Although most states in the Commonwealth are now members of the ILO (all except Brunei, Kiribati, Nauru, St. Kitts, St. Vincent, Tonga, Tuvalu, Vanuatu and Western Samoa), by the end of 1990, just over one half of the thirty-six Commonwealth countries listed in the ILO's Chart of Ratification of International Labour Conventions, had ratified Convention No. 87 on Freedom of Association and Protection of the Right to Organise and eight had not ratified Convention No. 98 on the Right to Organise and Collective Bargaining (see Appendix V). This is disturbing as these are two of the most important standards adopted by the ILO.

Trade unions have so far tended to limit their concern to labour working under the same roof for an employer, by-passing large segments of workers, men, women and children, who are self-employed and function in the informal sector throughout the third world. These workers are among the most vulnerable to the police and other authorities who may extort bribes in return for not enforcing the law against street workers and vendors, for example, who often technically infringe it in pursuing their livelihood. There are a few organisations for such workers, such as the Self-Employed Women's Association in Ahmedabad in India which has organised over 100,000 rag-pickers, push-cart operators and others, and negotiates terms and conditions of work with the authorities. It has encouraged saving, started a cooperative bank, provides legal aid and runs creches.

### **Collective Bargaining**

Freedom of association is the basis for collective bargaining which, more positively, has increased during the past decade, particularly in developing countries where the scope has been greatest. In Kenya, Nigeria, India and Sri Lanka far greater numbers of workers now fall under collective bargaining agreements, although in Canada the figure is still only 40 per cent, in comparison with 75 per cent in the UK. There has also been an encouraging trend for collective bargaining to be extended to an increasingly wide range of issues. These now cover almost every problem relating directly or indirectly to labour.

Nonetheless, collective bargaining is still severely restricted in many Commonwealth countries and has been suspended entirely in others - political upheavals often providing a convenient pretext. Problems persist even in the most developed member states: the British government has persistently refused to unambiguously reinstate teachers' collective bargaining rights. Where it does take place it is usually confined to medium to large-size industrial and commercial enterprises and is often completely absent in the agricultural sector (more than 60 per cent of workers in developing countries are rural workers). Agricultural, casual and domestic workers and apprentices are amongst those most vulnerable due to their lack of organisation and the limited scope of protective labour legislation and are thus most likely to be subjected to lengthened working days, increased intensity of work, the removal or non-application of safety standards, etc.

Employers, particularly states, are generally resistant to collective bargaining and exert strong influence over the process where it is permitted. Such external control undermines the basis of what is essentially a voluntary process. Experience shows that the legal prohibition of disputes is often ineffective and counterproductive. The ILO believes that “a development policy has little chance of success if it is not based on the general agreement of all who are to apply it. In these circumstances, collective bargaining can play a central part in the development policy, since its very purpose is to make compromise possible”.

### **Bonded labour**

Slavery may have been officially abolished, but there are workers in many parts of the world who are unable to choose their employment, and some of whom are in effect tied for life to one employer. In the United Kingdom, Hong Kong and Singapore, foreign domestic workers are severely restricted in the possibility of changing employers. But there are more serious instances of working circumstances which fall little short of slavery, of which the best documented examples are in India. Despite the outlawing in the Indian Constitution, Article 23, of all forms of bonded labour, and the passage of the Bonded Labour Abolition Act in 1976, it is clear that a variety of forms of bonded labour persist, often on the basis of debt obligations. Successive generations may be bound to employers to pay off debts which never seem to grow less, rather increase due to the low rates of pay, high rates of interest, and dishonesty and manipulation on the part of the employers. Or it may be that the labour is not that of the man who borrowed the money but of his wife, for the expense of whose marriage the money was borrowed in the first place, and whose labour takes the form of prostitution. The Supreme Court has also held to be bonded labour a situation in which the worker, although not technically bonded, works for a pittance in circumstances in which he has no effective choice open to him.

### **Women**

Domestic workers are, of course, predominantly female, and this is but one area in which women workers are seriously disadvantaged. The most recent ILO estimates show that women constituted more than one-third of the 1800 million workers worldwide in 1980. The great majority of women workers live in developing countries and about two-thirds of them are in the agricultural sector.

In 1958 the International Labour Conference, recognising the need for comprehensive instruments to protect workers against inequalities based on race, colour, sex, religion, political opinion, national extraction or social origin, adopted the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111). Only 19 of the 36 Commonwealth states listed in the ILO's Chart of Ratifications have incorporated this Convention into their domestic law. The Convention covers all forms of discrimination, exclusion or preference that have ‘the effect of nullifying or impairing equality of opportunity and treatment’, whether they are the result of legislation or of existing policies or practices.

The magnitude of the problems facing women workers is indicated by the fact that despite their overwhelming responsibility for household work and the reproduction of the labour force they are not even classified as part of the economically active population in many Commonwealth countries, because they do not directly provide economic goods or services. Domestic work is largely unpaid and is not generally regarded as an economic activity. Thus the ILO is led to remark that the “the day is still far off when working women will everywhere be equal partners with men in the efforts to achieve economic and social progress”. Women generally have unequal access to

employment, education and training, are concentrated in certain occupations and receive lower pay. They are rarely represented in planning and policy institutions or in international, national and local bodies where decisions about life and work are made.

Surveys indicate that many rural women work up to 16 hours per day with serious threats to their health. Women constitute a substantial part - and in some Commonwealth countries a majority - of the agricultural labour force, so that they are often performing two jobs. Despite this, their access to or control over land is minimal, especially in sub-Saharan Africa.

As a result, landlessness and poverty have forced increasing numbers of women into casual labour. In the industrial sector they are seriously discriminated against in attaining employment and receive inferior pay and conditions when they do so. Many women are forced into the informal sector in urban areas, and often into prostitution as a last resort. Industrialisation is often a double-edged sword for women, since they lose traditional sources of income without getting new jobs - this has been the case in Nigeria, for example.

The fact that women are concentrated in traditionally “female industries” and in low-skilled jobs keeps their wages low, hinders their upward mobility and makes them prone to long periods of unemployment in times of economic decline and restructuring. In no country in the world are women's wages equal to those of men on average, even where there is equal pay for equal work.

In many countries child labour, too, is the rule rather than the exception - but this is discussed in the section on children.

### **Export-processing Zones**

Amongst the greatest violations of workers' rights, and particularly those of women, take place in the various export-processing zones which have characterised the global accumulation during the 1980s. Forced to compete against each other for foreign investment, developing countries have fallen over themselves to offer “attractive” conditions to multinational corporations. These have included complete prohibitions on trade unions, low wage levels and appalling working conditions, and the “super-exploitation” of predominantly female work forces. In the Commonwealth the countries of south and southeast Asia, such as Malaysia and Sri Lanka, show unfortunate examples of this tendency.

Women are supposed to have greater dexterity, speed and endurance in certain assembly-line jobs in old industries such as clothing or in new industries such as electronics. They are considered to be more disciplined, more docile and less inclined to industrial action, and more willing to accept low wages than male workers. Young women are dismissed when they reach the legal age at which they would be entitled to adult wages or when the rigours of the job lead to ill-health. They have virtually no rights and no protection under law.

### **Safety**

It is not only in export zones that workers face conditions that are dangerous to their health or even to their lives. Evidence about the hazards of working with radioactive materials, or with asbestos, has come to light only gradually, and often years after affected workers have contracted grave illness, or actually died. Women who made clocks with luminous dials in England, quarry workers with lung disease in Nigeria and India are examples of those who have suffered from diseases

which develop over a long period. It is not always possible to anticipate these problems, but all too often innovations in production are introduced without adequate research on the safety implications. Again the role of trade unions is crucial; where they do not exist they cannot press for prior research, for safety precautions while work is carried out, or for adequate compensation if illness or injury actually occur.

## **RECOMMENDATIONS**

1. Many of the problems which workers face in the developing countries of the Commonwealth are directly attributable to inequalities and disadvantages from which these countries suffer in the global political economy. Commonwealth nations should co-operate to assert the necessity and the right for a reconstructed global economy in which they can compete more equally.
2. All policies and decisions which directly or indirectly affect workers should be conceived and implemented with the full participation of workers and their representatives. Economic development should, where possible, combine labour and capital investment in ways which facilitate employment. Human rights should not be conceived of as inimical to development, but as one of its foundation stones.
3. Commonwealth member states should ratify ILO conventions and honour the obligations contained in those instruments, not least through the provision of regular reports to the ILO.
4. In particular, Commonwealth members should ratify the conventions and recommendations on freedom of association, as the right to form and join unions of their choice is the basis for the protection of all other workers' rights.
5. The right to strike should be provided for in legislation and should be available in all circumstances in which the security of the state and public order are not threatened. State security and public order should be narrowly defined.
6. Commonwealth states should permit the establishment of independent trades unions.
7. Forced labour in all forms must be abolished.
8. Women should be granted equal labour rights to those of men. Women's work should be perceived of as an essential part of the development process, and women should participate in all social and developmental policy making. Special measures should be taken to ratify and implement under national legislation ILO and United Nations standards, especially on equal employment opportunities, equal pay for equal work, working conditions, job security and maternity protection. National policies should be formulated to accelerate the creation of productive and equal employment opportunities for women so as to enable them to participate more fully in economic growth and social progress.
9. Measures must be taken to halt the "super-exploitation" of women in export-processing zones. Workers in export-processing zones are entitled to the same human rights as all other workers.

10. Commonwealth member states should consider the adoption of a charter regulating the activities of multinational companies in order .to eliminate forms of competition which undermine workers' human rights.
11. Workers' rights should be extended to all sections of the population, and in particular to rural workers.

## **ENVIRONMENT**

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

#### *Article 3*

Everyone has the right to life

### **AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

#### *Article 24*

All peoples shall have the right to a general satisfactory environment favourable to their development

### **DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, STOCKHOLM 16 JUNE 1971**

#### *Principle 1*

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being...

### **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

#### *Article 12*

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

The steps to be taken by the States Parties ...to achieve the full realization of this right shall include those necessary for:....(b) The improvement of all aspects of environmental and industrial hygiene.

### **UN GENERAL ASSEMBLY RESOLUTION ON THE WORLD CHARTER FOR NATURE**

28 October 1982

#### *General Principle 1.*

Nature shall be respected and its essential processes shall not be impaired

### **Treaty of Rome**

#### *Article 130r*

Action by the Community relating to the environment shall have the following objectives: - to preserve, protect and improve the quality of the environment.....

### **CONSTITUTION OF INDIA**

#### *Article 48A*

The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

### **CONSTITUTION OF NAMIBIA**

#### *Article 95*

The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: (1) the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future...

## **CONSTITUTION OF PAPUA NEW GUINEA**

### *National Goals and Directive Principles 4*

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for collective benefit of us all, and be replenished for the benefit of future generations. We accordingly call for - (1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations;...

This is the age of environmental consciousness. Unlike the other issues discussed in this report, environmental protection has become big business; a recent newsletter says "A new directory shows companies how to tap into the billions of dollars available from the US government, foreign governments, and multilateral lending institutions to support environmentally sound trade and investment". There are also astonishing numbers of international instruments with environmental protection their aim; a recent report listed 150 between 1906 and 1985, and there have been more since. But this does not mean that the environmental problems of the world are solved.

- There is very wide acceptance that some degree of "global warming" is now inevitable; the consequent rise in sea-level may flood very considerable areas of Bangladesh, and low lying countries such as Maldives and Tuvalu could cease to exist. (1990 was the warmest year since records began).
- It is estimated that in Uganda 1981 it was necessary to travel over four times as far to find firewood as it had been in 1966.
- It has been estimated that the ultimate death toll from a leak at a UK nuclear reactor in 1957 could be 1000.
- The Narmada dam scheme in India will displace more than one million people, destroy over 50,000 hectares of forest, probably wipe out some species of fauna and flora and encourage the spread of waterborne diseases.
- About 2 in 3 Australians who live up to 70 suffer from skin cancer once in their lives and figures for malignant skin cancer are rising; the depletion of the ozone layer which has already occurred is expected to increase skin cancer among Australians by 12 to 20%.
- In 1989, despite a general improvement, Hong Kong experienced its worst "red tide", caused by the impact of pollution on marine life; the sale of shellfish in the affected area was banned for 2 weeks because of the risk of poisoning.

Environmental damage is peculiarly unlimited by boundaries of space or even time. Noise pollution perhaps has little extra-territorial impact, but water and air pollution, deforestation and desertification will often affect several countries. And over-use of resources, pollution, all the things involved in non-sustainable development, have implications for those with no voice at all: future generations. This is something which traditional law recognised and which modern law has tended to lose sight of; in the words of the famous observation of the Chiefs of Ife in Nigeria: "I conceive that the land belongs to a vast family of whom many are dead, some are living and countless numbers are yet unborn".

The issues which have attracted the most widespread interest and concern in recent years have included firstly the depletion of the ozone layer, and the actual hole over the Antarctic, caused by CFCs and other chemicals, which, as well as increasing the incidence of skin cancer, may have climatic implications. Those chemicals are also “greenhouse gases” and have been playing their part with the gases produced by the burning of fossil fuels, and with methane in producing a state of affairs which many, if not all, scientists predict will lead to a raising of the earth’s temperature and of the levels of the oceans. The former could cause such changes in grain production in grain growing areas that possibly obliterating some small low-lying states will cause serious flooding problems in Australia, Canada and the United Kingdom. Recent research in Canada suggests that warming may already be having an effect: in northern Ontario it was found that forest fires had increased, rain and snow reduced, and fish had taken to swimming at a greater depth to avoid the warm surface water of lakes.

Acid rain, much discussed in Europe and North America, has also been detected in India. Acid rain is caused by the emission of oxides of nitrogen and sulphur dioxide into the atmosphere from, for example, smelting, and causes damage to trees, to buildings and to river and lake waters and the fish they contain.

The destruction of the tropical rain forests has been the focus of much media attention (mainly because most of the temperate forests have been destroyed by man long ago). Most attention has been on the impact this has on the greenhouse effect (because this will affect the affluent countries of the world almost as much as the poor). But the permanent loss of many species of life, including those which might be of potential value to man, and the destruction of the way of life (often, indeed, the destruction of the life itself) of forest residents are also matters of major concern. Destruction of forests and vegetation generally has been going on for as long as man has had tools; it causes the loss of topsoil and therefore of fertility; the soil itself may be deposited elsewhere, such as the Bay of Bengal, where it causes flooding, or into reservoirs reducing their capacity. It also means the loss of fuelwood and the need to travel further to find fuel.

Water is life; but man is both using water at a rate which cannot in many places be sustained, and polluting the supplies we have. We have been realising that the sea does not have a limitless capacity to absorb and neutralise the waste products of man. Pollution was suspected of having contributed to deaths of seals around the British Isles, as it has killed off fish, and destroyed the fishing industry in Malaysian rivers. Even our solutions are so often our problems: in Hong Kong the flow from streams into one harbour has been reduced over the last few years by 70%, to provide drinking water; the result is increased pollution in the bay. And the extraction of water for irrigation has in many countries led to the inflow of salt water, the destruction of mangrove swamps (and the fish which breed there) and the ruin of once fertile land, while irrigation schemes themselves may make land infertile through waterlogging.

The air we breathe may be our death. Bhopal may be the word which should be written on the hearts of the executives of Union Carbide (and the death toll from that disaster now stands at over 4000) but there are smaller Bhopals every day. And if we shift from power stations which burn fossil fuels, we may turn to nuclear solutions, with their own risks of future Chernobyls and Three Mile Islands.

## **A Right to Environment?**

Despite the recognition of the importance of the issue, it cannot be said that either international or municipal law has recognised a clear “right to environmental quality”. Nor is it clear what type of right, if any, we are working our way towards. Is it some thing which can realistically be thought of as inhering in the individual, or is it a basic human need, or one of the “third generation rights”, of peoples rather than of individuals? A recent book has suggested that what is required is a new concept: the “planetary right”, which belongs to generations, including those yet to come as much as to those extant (Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* 1990).

There are some states which in their existing constitutions do include some recognition of environmental issues. Most of the socialist countries include statements of environmental protection either as aspiration or purporting to represent what the state does. Several Latin American countries use the language of rights (even, ironically, Brazil). On the whole constitutional statements in this field are at the highest level of generality, and few Commonwealth countries have anything at all. Where they do it is probably in non-justiciable principles of state policy (India, Namibia, Sri Lanka), or the constitution imposes duties upon, rather than granting rights to, citizens (India, Vanuatu).

In those circumstances it may seem to be inappropriate to head the items in the box above with the Right to Life of the Universal Declaration. But the grim fact is that for many people in the world today it is indeed life that is at issue. And the courts of India, at least, have been able to erect on the foundation of a right to life a protection against, among other things, environmental degradation: “The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Art. 21 of the Constitution” said one High Court in India and recently the Indian Supreme Court held that the right to life includes “the right to enjoyment of pollution-free water and air”.

Environmental rights mesh with other sorts of rights in various ways. They are often perceived as conflicting with developmental needs, and the emphasis on “development” has led in many countries, both “developed” and “developing”, capitalist and socialist, to environmental considerations being neglected because they were assumed to conflict with development. Perceptions are changing, as witness the Namibian constitution’s emphasis on sustainable development.

There is a connection, if by no means a rigid one, between inequality and environmental degradation; ethnic minorities, the old and the very young, women and the poorest sections of society often suffer disproportionately. While the cities, often the most affluent sectors of developing nations, suffer from air and noise pollution and water shortages, it is in the rural areas that the greatest effects are felt, as indigenous peoples are deprived of their forest homes in Malaysia, tribal peoples lose their land to reservoirs in India, villages in Bangladesh are flooded, women have to walk further for water in times of drought and for firewood as forests are destroyed. Even in the cities the otherwise disadvantaged have the worst environment. The strengthening of other human rights may be helpful, even essential, to the improvement of the environment.

The role of NGOs is crucial in many countries, even the most educated, and rights of speech and association, freedom of information and education will all make these more effective. In the United Kingdom, for example, a long tradition of voluntary organisations exists, and these have

been supplemented in recent years by many more, which have played a major part in arousing and channelling public awareness and action. The secretive tradition of British government (exported to many other Commonwealth countries) has prevented their being as effective as they might, although it is notable that the government is beginning to make a virtue of providing environmental information (none too soon, it might be said) and of the role of organisations and the public. Powerful forces are often ranged against environmental protection, and a major task is for the public to combine its own forces, to challenge government and industry where necessary, and to cooperate (without being coopted) where appropriate. A free press is also a crucial factor in drawing attention to environmental, as to other, issues.

A now very large literature addresses questions of how to restore the balance, whether it is couched in terms of sustainable development, conservation or of rights of the living or of future generations. The expert group in environmental law of the World Commission on Environment and Development (the Brundtland Commission) recommended a new Convention setting out rights and responsibilities for environmental protection and sustainable development, and a UN Commission rather on the lines of the Human Rights Commission to oversee the implementation of the Convention. They also proposed a UN High Commissioner for Environmental Protection and Sustainable Development to receive reports from organisations and individuals, represent the interests of future generations, prepare special reports on environmental issues (a sort of ombudsman or trustee). They also urged states to ratify and enforce existing international instruments and to strengthen facilities for settling disputes. They wanted to see new initiatives by non-governmental organisations, cooperating globally to encourage state action and to monitor developments; they also wanted standing for NGOs before international bodies. They hoped to see acceptance by transnational enterprises of the environmental elements of the OECD Guiding Principles for Multinational Enterprises. They proposed increased use of the criminal law in environmental protection, as well as general education and professional training. They also recommended new monitoring systems, standards and information networks on the risks of new technologies, as well as basic safety and information procedures for hazardous, especially nuclear plants. Their proposed Convention would include a right to environmental protection phrased in individual terms: "All human beings have the fundamental right to an environment adequate for their health and well-being".

The main emphases of recent literature have been the need for more international cooperation, the provision of and access to information both between and within nations, the role of NGOs, the need for popular participation, for standards, guidelines and monitoring; the notion of an "ombudsman for future generations" has also been proposed elsewhere. Proposals have also stressed the necessity to take a global view in the sense that environmental issues must be considered in relation to other questions, and vice versa: "Environmental protection and sustainable development must be an integral part of the mandates of all agencies of government, of international organizations, and of major private-sector institutions.... They must be given a mandate to pursue their traditional goals in such a way that those goals are reinforced by a steady enhancement of the environmental resource base of their own national community and of the small planet we share" (Brundtland Report).

It is possible to change; the speed with which Australia cut down its consumption of CFCs once it realised the risk from skin cancer demonstrates this. Maybe the world will be able to take the hard decisions necessary to slow and ultimately stop global warming - though not all commentators are by any means convinced of this. But even if there is some hope that the rich countries of the world are afraid enough to act, we can have even less confidence that the same will can be brought to bear

on the problems which are more exclusively those of the poor countries.

Change will require laws, but in many countries laws are already numerous. Kenya, for example, has 50 enactments relevant to environmental protection but “very little of it is applied”. And an Indian journalist recently wrote, “India has among the finest bodies of environmental legislation in the world.... most provisions of those laws have either remained only on paper or have been mauled completely out of shape during their implementation” . Hong Kong also has had a substantial body of legislation which has only recently begun to be seriously enforced, and in 1990 the government observed that the Water Control Ordinance had been effectively an obstacle to pollution control. Some countries lack the law while some lack the resources and that elusive quality “political will” to enforce what they have.

The inter-dependence of the world which is so central to the environmental question does not, unfortunately, mean that the world is pulling together and in the same direction. Pressure brought by Country A on Country B to give its own citizens the benefit of more traditional human rights may, it is true, sometimes be dictated by selfish considerations (as when one country wants another to give its workers fair treatment to eliminate what it sees as unfair competition). But very often the concern about what happens in Country B is more disinterested. However, we are seeing an increasing tendency for Country A to say to Country B “We want you to behave in a responsible fashion for the sake of our environment”. Britain was not best pleased to be told this by the Germans and the Swedes, nor the USA by Canada, but even more acrimonious, and ultimately counterproductive, disagreements may lie ahead. A recent report by UNEP, UNDP and the World Resources Institute suggested that the developing world is responsible for 48% of the carbon dioxide and 56% of the methane in the world, and placed India, with China and Brazil, among the top five greenhouse gas emitting countries, a report immediately (and not surprisingly) rejected, especially in India as “environmental colonialism”. This brings us to the Commonwealth.

### **The role of the Commonwealth**

The environment has been prominent on the Commonwealth agenda in the last few years. The Presidents of Bangladesh and the Maldives raised the problem of global warming at the Vancouver CHOGM in 1987. The upshot of this was the setting up of a Commonwealth Group of Experts, which submitted a report - *Climate Change: Meeting the Challenge* - in 1989. This reviewed the scientific evidence on the question of climate change over the next fifty years or so, and proposed a course of action for the Commonwealth itself, as well as for individual member countries. This involves a programme of data collection, and preservation, scientific and technical research, technical assistance, public education, and practical action, directed towards refining knowledge of the phenomenon, slowing down the global warming process, and dealing with its consequences.

The same 1987 CHOGM was followed by the establishment, within the Secretariat, of a programme of action to promote conservation for sustainable development in Africa, building on a Secretariat Study on *Conservation for Development*.

In 1989 the Commonwealth Heads of Government adopted the Declaration of Langkawi, expressing their deep concern at the serious deterioration of the environment, and urging sustainable development, technology transfer, mutual support and international action of various sorts. And at their 1990 the Commonwealth Law Ministers discussed the legal implications of, especially, atmospheric protection.

In common with environmental organisations throughout the world, Commonwealth bodies are preparing for the 1992 United Nations Conference on Environment and Development. In 1991 the Secretariat constituted a Group of Experts on the environment, one of the first functions of which will be to assist member governments in their preparation for the 1992 Conference.

## RECOMMENDATIONS

1. The usually non-confrontational style of Commonwealth deliberations make it a suitable forum to confront the tough issues which still exist. Not all countries by any means are convinced that they need to give serious thought to environmental considerations in the light of pressing economic ones. And there is some danger, as we have seen, that disputes as to the facts will cause the objectives to be lost sight of.
2. The substantially common legal traditions do mean that Commonwealth countries tend to talk the same legal language. The Commonwealth can thus be a forum for the exchange of experience and expertise on possible institutions and techniques for environmental protection: the possible uses of the ombudsman idea (not, of course, a common law creation), how to strengthen an Environmental Protection Department, to what extent the criminal law or taxation can be of value in environmental protection, whether there is any mileage in India's idea of environment courts, and on the development of standards and guidelines, whether legally binding or not, to take just a few examples.
3. Outside the legal field there is scope for the exchange of expertise; so often developing countries especially lack the skills to evaluate projects, to carry out environmental assessment, to deal with multinational corporations. Nor are the developing countries happy to leave the scientific research, its interpretation and dissemination, to the "developed" countries whose interests are not always allied with theirs.
4. The exchange of information, especially so long as other international bodies are not fulfilling this role, can also be something to which the Commonwealth can contribute.
5. Commonwealth bodies such as Technical Assistance Group, as well as NGOs should also heed the Brundtland Commission's observations about the necessity for all organisations to build environmental issues into their activities. Perhaps those which have cooperated in this Human Rights Initiative could place the environment on their agendas.
6. The Commonwealth has begun to link together NGOs; they can be much more effective, as has been suggested elsewhere, if they can pool their knowledge and experience.
7. All recent reports on environmental issues tend to stress the vital importance of education. The Commonwealth Education Ministers could perhaps address this question: how best to educate the ordinary citizenry about environmental issues. And the Commonwealth of Learning can actually educate.

## **CHAPTER IV**

### **THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS**

Since the end of the Second World War and most especially since the end of the 1970s, there has been an explosive emergence of local, national, and international voluntary organisations working for the promotion and protection of human rights on every continent and in almost every country in the world. Hundreds of such organisations now exist in the Commonwealth. These non-governmental organisations (NGOs) vary enormously in their membership, leadership, and purposes, in the scope of their activities and programmes, and in the influence or impact they have in domestic, regional or international arenas. This should not be not surprising in that NGOs have emerged in response to specific conditions and crises and are the product of social action, history and culture. In recent years, as the human rights movement has developed, there has also been a high degree of specialization and professionalization between and among the organisations.

Nonetheless, these NGOs, in all their diversity, comprise a human rights movement that has taken us from a world order in which governments were free to treat their citizens as brutally, callously or arbitrarily as they pleased to one in which political authorities are now accountable to internationally-defined standards of human rights. Non-governmental organisations (NGOs) have been the dynamo that has driven the struggle for self-determination, the struggle for democratic pluralism, and the struggle for a more just economic order.

It was NGOs which ensured that human rights were inscribed into the United Nations Charter. NGOs have contributed in a major way to the elaboration of the international Bill of Human Rights, and they were in the forefront of the push to move the United Nations system beyond human rights promotion to protection or implementation. NGOs continue to provide inter-governmental organisations with the information essential for action in enforcing these standards. They can also provide governments with information essential to judicious policy-formulation and can assist in implementing these human rights policies. Most importantly, these NGOs provide a countervailing and humanizing force to the centralizing tendencies of the modern state.

Sadly, there is still a tendency on the part of many governments to regard human rights NGOs with suspicion; to equate their criticism with treason or subversion; to ban them or deny them permission to register legally; and to imprison, muzzle or execute their leaders. Thus, human rights defenders in the forefront of the struggle are very much at risk in many areas of the world. Such defenders include not only the officials of human rights NGOs, but lawyers who defend political prisoners or publicly challenge repressive legislation; journalists and writers who use their pens to expose violations; religious leaders who speak up for landless peasants; and trade unionists who expose inhuman or unsafe working conditions and demand a living wage for workers. All these become "legitimate" targets for death squads or candidates for arrest under draconian security laws.

Freedom of association - which legitimizes the formation and functioning of voluntary associations, including human rights NGOs - is recognized in the Universal Declaration of Human

Rights (Article 20), in the International Covenant on Civil and Political Rights (Article 22), in the International Covenant on Economic Social and Cultural Rights (Article 8), and in the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5) as well as in many regional and specialized instruments. The United Nations Commission on Human Rights has established a Working Group on Defenders which is presently drafting a declaration for the better protection of human right organisations and advocates. And, at the last session of the Commission on Human Rights, a resolution was adopted (Res. 76/1990) to legitimate the work of human rights defenders and open up some additional avenues of protection for them. This report will suggest some ways in which the Commonwealth can contribute to these positive steps. First, however, we must look more closely at the nature and functions of NGOs and the problems confronting NGOs in the human rights arena.

## **I. The Nature and Characteristics of the NGOs Engaged in the Human Rights Struggle**

From the outset, it is essential to recognize that the human rights movement is comprised of two broad categories of NGOs.

The first is the “ideal” or “exclusive” human rights NGO whose *raison d’etre* derives from the fight for human rights. This includes international NGOs like Amnesty International, regional bodies such as Caribbean Human Rights, national bodies like the People’s Union for Civil Liberties in India or the Uganda Human Rights Activists, and local organisations such as the Alberta Human Rights and Civil Liberties Association in Canada.

The “ideal” human rights NGO is a voluntary organisation which is independent of both government and all groups which seek direct political power, and which does not itself seek such power. Typically, too, the human rights NGO monitors government behaviour and tries to hold the government accountable to human rights standards of human rights embodied in either international instruments or national legislation.

This is not to deny that the human rights struggle is, in essence, a highly political struggle. It would be naive to assume that one can hold governments accountable to human rights norms with purely moral argument, especially in situations of intense conflict. Total autonomy and independence may be an ideal which is aspired to - as with Amnesty International - though achieved more or less imperfectly by most human rights NGOs, since an organisation’s membership base, funding, and ideology inevitably influence political posture.

However, the foundation stone of human rights monitoring is political nonpartisanship. The legitimacy and credibility of a human rights organisation rests in large part on the objectivity of its fact-finding and the integrity with which it applies international human rights standards. A group which allies itself with government or opposition, seeks political power and office for itself, or subordinates human rights concerns to other political objectives, no matter how noble, has moved beyond the compass of human rights work.

Far more numerous than these exclusive human rights NGOs are NGOs which have broader or different primary goals but which devote substantial resources to the human rights struggle. This category includes churches; trade unions; peasant organisations; women’s organisations, professional associations (of lawyers, journalists, doctors, educators, scientists); ethnically-based associations; indigenous peoples’ organisations; groups concerned with children, refugees, the elderly, handicapped persons, the poor, or consumers; NGOs focused on development or the environment; and that broad class of organisations referred to as peoples’ organisations. In some instances, such NGOs have established special human rights committees to spearhead their human rights activities; others have simply written human rights planks into larger platforms or programmes. Often, such organisations did not begin with a specific human rights agenda but came rapidly to activities involving the promotion and protection of human rights. In other instances, individuals determined to engage in human rights action, but blocked by governmental regulations from registering as a human rights NGO, carry out human rights work under the guise of a social or cultural association, a consumer group, or a development organisation.

Anyone of these groups may be an important actor in the human rights arena and all contribute in a fundamental way to the political pluralism that is the basis of the democratic political process. Any of these groups may become a significant ally for a human rights organisation in a particular battle. What distinguishes a human rights NGO from other political actors is that the latter, typically, seek to protect the rights of their members or constituents only; a human rights group seeks to secure the rights for all members of the society. A political group seeks to advance its own particular interests or programmes; a human rights group seeks to keep the political process open to all legitimate societal forces.

## **II. The Functions of NGOs in the Human Rights Arena**

NGOs in the human rights arena perform a wide variety of functions. These will vary with the differing political, social, economic and cultural situations in which NGOs find themselves. The issues that absorb human rights NGOs in the developed Western democracies, and the strategies and tactics they will employ, will be very different from the issues of NGOs in situations of intense political repression, or of NGOs in Third World countries facing such multiple crises as famine, ecological degradation, foreign debt, ethnic violence, lawlessness and corruption.

### **(1) Information Gathering, Evaluation and Dissemination**

The first, and one of the most important, functions performed by NGOs engaged in human rights work is that of monitoring the behaviour of the state and of other power elites - of gathering, evaluating and disseminating information and, in the process, exposing human rights violations.

This is a vital function because, unless their behaviour is monitored, governments will not be held accountable. The importance of information emerges in part from the paradox that is central to the human rights struggle: that the main protector of human rights - the authority one must in the end rely on to enforce human rights standards - is also the main violator. While information is not, in and of itself, sufficient to halt human rights abuses, it is a precondition for stopping abuses and a prerequisite for effective action in the human rights field.

Not only do NGOs provide information to their own constituencies, their governments and the mass media, they also provide information to intergovernmental organisations charged with human rights responsibilities. Without this information - conveyed to such bodies as the UN Commission on Human Rights and its Sub-Commission and the various treaty-supervisory committees, in the form of petitions, written and oral interventions, and analyses - these inter-governmental bodies would be largely impotent, for few have real fact-finding capabilities.

In recent years, the information or fact-finding function of NGOs has come under serious scrutiny, especially from governments charged with committing violations and from their supporters. As a consequence, many in the human rights community have been sensitized to the need for their data to pass tests of validity (particularly as to source of the information - e.g., how credible are the witnesses) and reliability (quantity and quality).

NGOs have also had to face the charge of “balance”, particularly when reporting on violations in situations of internal conflict or civil war. Traditionally, NGOs have monitored the behaviour only of governments, not insurgents, guerrillas, movements of armed opposition or terrorists. While

human rights advocates have recognized that other societal bodies or forces - including criminal gangs, terrorist organisations, corporations, ethnic or religious communities - could also be repressive and badly abuse human beings, the prevailing assumption was that such abuses would, or should, be regulated by governments. Furthermore, since it was governments which signed and undertook obligations to respect international human rights law, it was governmental accountability that was the focus of concern. In the light of charges that NGOs reports were not balanced in focusing only on government violations, when the abuses of guerrillas or insurgents are left unreported, NGOs - particularly international NGOs - have been forced to reassess this position, and many have begun reporting on both sides to a conflict and in terms not only of international human rights law but also of humanitarian law.

Finally, with respect to information, it is important to recognize that NGOs are often in a better position than government agencies both to collect and to assess information with respect to the observance of economic, social and cultural rights at the grassroots. They frequently have access to, and the trust of, those at the base of society, whether in the urban or rural sectors, and especially among the marginalized. While fact-finding with respect to economic, social and cultural rights is an area that has been largely neglected by international human rights NGOs, it is an area of prime concern to local and national NGOs, especially in- the Third World. It is also an area that has finally begun to attract attention at the international level as the UN Committee on Economic, Social and Cultural Rights has started elaborating standards for measuring human rights performance with respect to these rights.

While fact-finding and analysis are critical preconditions for effective action in the area of human rights, to have a policy impact, that information needs to be disseminated. Writing a report is only part of the task. Seeing that the report gets into the hands of policy-makers, opinion-leaders, and community organizers is the next vital step.

## **(2) Advocacy to Stop Abuses and Secure Redress**

“Advocacy”, as a legal term, means pleading on behalf of someone else. The counterpart to advocacy in religious terminology is “witnessing”. Whether used in the legal or religious sense, advocacy is initially dependent on information processing yet goes beyond that function. It means actively taking up the case of those whose rights are violated.

For a human rights organisation, advocacy may mean speaking out for the voiceless and, in this fashion, it entails expanding and making more visible what may be only a latent conflict. Frequently, too, advocacy involves challenging orthodox interpretations; and, at times, advocacy involves breaking completely new ground, focusing public attention on an issue that has been totally ignored and outside the public consciousness (as for example with the harmful effects of female circumcision or with discriminating against persons with AIDS or HIV -positive).

Advocacy, therefore, involves first gathering and presenting enough evidence in a world in which multiple crises and innumerable just causes are fiercely competing for attention legitimacy and urgency. If and when a human rights NGO succeeds in its pleading, when the issue gains enough political salience to become “an issue”, then the task becomes one of sustaining concern; i.e. keeping it on the political agenda. The latter task may be particularly difficult for chronic situations for the public attention span is short and chronic repression is displaced in the headlines by a new calamity.

### **(3) Legal Aid, Scientific Expertise and Humanitarian Assistance**

Legal aid refers to a range of law-related activities - engagement of legal defence, provision of co-counsel, filing writs of *habeas corpus*, filing *amicus curiae* briefs, sending legally-trained foreign-national observers to public trials, up to and including publicization of “political show trials” so carefully staged by repressive regimes - on behalf of individuals or organisations accused of such vague political crimes as “conspiracy”, “subversion” and “slander of the State”. Legal aid also frequently means training villagers to know and act on their rights, training paralegals who can work with victims at the grassroots, and developing advice centres to which people with no access to legal resources can come when in need.

Such legal assistance is an important aspect of the struggle to humanize a repressive regime. For example, where a political elite seeks to invoke vague categories of political crime to silence domestic critics, yet a proper defence can be presented, then that right of defence must be fully assured: this forces the national judicial establishment to face the dilemma of choosing between relative independence and total political subservience to the government of the day. In the process, political prisoners may be freed; but even if not, the biased, arbitrary and thoroughly politicized nature of the “criminal justice system” is publicly documented. More generally, using the right of defence and providing legal assistance keeps alive the spark of hope in the existence or reemergence of the rule of law.

In recent years, another type of related expert assistance has been provided to victims by NGOs: that is expertise which derives from the scientific community. Thus, forensic scientists have helped in identifying bodies buried in mass graves or in performing autopsies on people who have died in police custody or under suspicious circumstances, and lawyers and forensic scientists have collaborated to develop standards for conducting such autopsies. Geneticists have helped in matching “disappeared” Argentine children with their grandparents and have established a gene bank for this purpose. More generally, physicians and other health workers have provided treatment to torture victims; they have investigated the medical consequences of the use of tear gas and plastic bullets; and they have conducted research into the health impact of disasters such as Bhopal and Chernobyl.

Organisations concerned with human rights have also been engaged in a broad range of activities that can be grouped under the heading of humanitarian assistance. This may involve sending food, clothes or reading material to political prisoners; extending material aid to the families of such prisoners; providing emergency relief to refugees and internally displaced persons; providing shelter for the homeless, for street children, or for battered women.

### **(4) Lobbying National and International Authorities**

Lobbying generally means the informed communication from private individuals and groups to public decision-makers, generally in support of or in opposition to some pending policy decision. Lobbying is the essence of the democratic process - the process through which interests are articulated and aggregated. It is, of course, closely associated with advocacy which may, but need not always, be designed to evoke specific policy responses. More loosely used, lobbying may also be directed at co-interest groups to mobilize their support; and it may involve the pressuring of corporations, banks, international financial institutions and inter-governmental organisations.

Since few governments or institutions are monolithic, an NGO lobbying strategy may involve

getting members of the executive or legislative branches of government to lobby within government - to “log-roll” other legislators, to bargain within the bureaucracy, or to stimulate a “public groundswell”. Within the international organisational context, NGOs will lobby expert members of key human rights bodies, or governments, or officials of the organisation in order to get the votes necessary to pass a resolution, have an item inscribed into the agenda, establish a rapporteur, or commit the organisation to a pro-human rights course of action.

Frequently, governments look with suspicion on NGOs lobbying in the political arena. They will argue that such groups have become “politicized” and “partisan” and use this argument in an attempt to undermine the credibility of the organisation. Yet the human rights struggle is clearly a political struggle and there is nothing inherently wrong with a human rights NGO supporting or opposing specific policies on human rights grounds. (This is, of course, different from a human rights NGO supporting a specific party or political group, or seeking power for itself.) Governments should welcome, not fear, lobbying by human rights NGOs. That is, they should recognize that, if NGOs are denied access to the democratic political processes to effect change, they will be presented with a situation in which the only perceived alternative is the utilization of tactics of mass mobilization (e.g. demonstrations or general strikes), and enormous pressures are generated for a violent solution to the crisis.

Predisposed to utilize democratic tactics and strategies, many national NGOs concerned with human rights have become as professional as other private interest groups in lobbying within their own country. Some have also learned how to take their case to international arenas and forums when domestic remedies are exhausted: e.g., to the UN Human Rights Committee, the UN Commission on Human Rights, its Sub-Commission, or the Sub-Commission’s Working Groups on Indigenous Populations or on slavery. Individuals and organisations have also learned how to petition within regional arenas: before the European Commission or Court of Human Rights, the Inter-American Human Rights Commission or Court, or the African Commission on Human and Peoples’ Rights.

Yet, for many national NGOs, these inter-governmental bodies are distant both geographically and psychologically: NGOs have neither the money to get to a Sub-Commission session in Geneva, nor the expertise to utilize international procedures effectively; and, if they do get there, they do not have the necessary Consultative Status (reserved for international NGOs) to take their case to the floor of the UN. While there are a number of international NGOs which have specialized in assisting local groups to use international petition procedures, and while knowledge and expertise about these procedures is growing in the Third World, local and national NGOs have only begun to explore the potential offered by these arenas.

## **(5) Legislation to Incorporate or Develop Human Rights Standards**

For most national or local NGOs concerned with human rights protection and promotion, the national arena remains the most important in that that is where the human rights battles are won and lost; that is the frontline for the struggle; that is where rights are protected or violated. While these NGOs recognize that law on the books is not law in fact - that law must be implemented, not merely drafted - nonetheless, substantial efforts have been devoted to bringing national legislation into conformity with international human rights standards. Thus, NGOs are often engaged in drafting legislative proposals, preparing position papers on pending legislation, and testifying before parliamentary or other government committees. This has been particularly true in periods of transition from authoritarian or military regimes to democratic ones.

At the international and regional level, the burden of legislative drafting has fallen to international human rights NGOs which have been playing an increasingly important role in this area. Indeed, we have come a long way from the model of the international system still dominant in the 1950s and 1960s when states were considered the only significant actors on the international stage. Today, NGO working groups closely follow the drafting of new international human rights legislation - treaties, declarations and guidelines - and make major inputs into the process. They play an equally important role in identifying defining new issues and areas requiring legislation.

## **(6) Education, Conscientization or Empowerment**

NGOs have come to realize that people cannot defend their rights unless they know their rights. Moreover, as one advocate has phrased it, "it is increasingly felt that human rights can play a significant role in the empowerment of the impoverished. The oppressed can become more self-reliant through an understanding of their rights. Indeed, the right to organize and the right of association are vital to impoverished groups seeking to mobilize and organise themselves and thus develop countervailing power." Only through education and conscientization can NGOs combat the status quo in which large groups at the base of society are effectively excluded from political participation in decisions so fundamentally affecting their lives, including resource allocation, the choice of technology, and the development model.

The educational efforts that engage NGOs in the human rights area tend to be at the non-formal level, rather than the formal school setting, and involve consultations, workshops and seminars, and training courses for women, trade unionists, peasants, the indigenous or church people. New methodologies have been developed, especially for reaching the illiterate, including street theatre, comic books, poster competitions, folk music, films, videos and games. The educational efforts have also been heavily directed towards developing self-reliance, as with participatory research, skills development and leadership training.

In periods of intense repression, the energies of most human rights organisations are concentrated heavily on defence: keeping people alive or out of prison. However, as repression eases and it is possible to consider long-range objectives, education, conscientization and empowerment move to a priority position in the human rights agenda as the best hope for the future.

## **(7) Building Solidarity**

NGOs and peoples' organisations on the front line in human rights struggles are often both highly vulnerable and highly isolated. Even though human rights struggles are fought and won largely in national arenas - by organizing and mobilizing in the slums and the *barrios*, by conscientizing people about their rights and how to fight for them - the role of international support cannot be underestimated.

In like manner, building solidarity across different sectors of society - between workers and peasants, women's organisations, organisations of indigenous peoples - and across ethnic and religious groups, is a task taken on by many organisations working in the human rights arena. Particularly in large or heterogenous societies, many NGOs recognize that change will come only by a radical restructuring of the social order; and for such a restructuring, lines of solidarity must be built across communities that have been fragmented, isolated and marginalized, and often mobilized communally against each other. Hence, efforts are directed towards information sharing

and networking as a first step toward such creating such solidarity and overcoming an “apartheid” mentality. Such efforts are also felt to be the only realistic means for countering the elite strategy of divide and rule which has led to so much communal violence and bloodshed.

## **(8) Delivery of Services**

This function is rather different from the others. It involves less protection from state power and more helping, often in collaboration with the state, to realize economic, social and cultural rights, and sometimes civil and political ones.

The function originates in the fact that, in the last two decades, many governments - especially, but not exclusively in the Third World - have come to realize that NGOs are better able to deliver services than government authorities. This may pertain to such things as reaching victims in disaster relief, assistance to refugee populations, providing skills training for underprivileged groups, offering courses in human rights education to military and police, offering legal aid to those who cannot afford it. In these cases, governments have tried to coopt NGOs into becoming instruments for delivering services they should be providing, but are unable to provide.

One of the dilemmas facing these NGO's is whether or not they want to be coopted, or can legitimately fulfil their roles as monitors and critics of government policies in their new role as service-giver for that government. This dilemma is particularly sharp in periods when countries are moving from repression towards democracy. The Philippines, Haiti, Poland and Argentina are examples: when democratic processes were reinstated, the governments asked human rights monitors to join the government or to simply join hands with state agencies and become service organisations.

For some, the temptation to take on this function has been considerable for it has generally meant access to public funding and other resources generally unavailable to NGOs, the prestige of being part of the “power elite”, and a sense of political efficacy that those in the opposition rarely experience. Others have, however, resisted these temptations on the grounds that even the most democracy-professing government requires constant monitoring to keep it democratic. And generally, the downfall of a military or authoritarian regime is only the very beginning of the long and hard process of returning to, or building a new, a civil and democratic policy.

## **(9) Keeping Open the Political System**

The ninth and final function is that of keeping open the political process for other actors. On the whole, human rights NGOs are not mass based organisations. They work with, but are generally different from, “people's organizations”. They are very much involved in political struggle in as much as the struggle for human rights is a struggle about power and its control, but as noted earlier - they are not political in the sense of a political party (which seeks power itself) or a peoples' organisation (which seeks to attain specific rights or privileges for its own members).

The human rights organisation is different because its purpose is largely to keep the political process open and to keep the government accountable so that power is not inordinately centralized or abused. It is for this reason that killing human rights monitors or preventing human rights groups from operating, is particularly devastating because, by those acts, one directly undermines all other independent societal forces.

### **III. The Problems faced by NGOs in the Human Rights Arena**

Despite the enormous diversity among NGOs working for the promotion and on of human rights in the Commonwealth, and the despite the radically It situations they confront - modern industrial society versus Third poverty, stable democracy versus military rule, peace versus civil strife nonetheless possible to generalize to some extent about the problems they face. These problems can be clustered under three major headings, relevance and legitimacy, and efficacy.

#### **(1) Survival**

“Survival” for human rights NGOs is a multi-dimensional problem.

##### **(a) Freedom of association**

The first dimension turns on freedom of association: whether governmental and/or practice permit such organisations to exist.

Freedom of association is not, of course, an absolute right and Article 4 of the International Covenant on Civil and Political Rights recognizes the rights of governments “in time of public emergency which threatens the life of the nation” to derogate, with certain exceptions, from their obligations under the Covenant, “to the extent strictly required by the exigencies of the situation”. States frequently use the national security argument to restrict the right of association of their citizens. However, as the International Commission of Jurists points out in its study of states of emergency, “there is a tendency for some governments to regard any challenge to their authority as a threat ‘to the life of the nation’. This is particularly true of regimes which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order”.

Other governments are prepared to restrict freedom of association even outside a state of emergency, frequently by the use of anti-subversive or anti-terrorism laws or decrees, or by other internal security legislation. Since human rights NGOs, by their very nature, are likely to be critical of government policy, governments are tempted to deal summarily with a potential critic by labelling an NGO as subversive and banning it. In states where there is a blanket ban on political organisation, human rights NGOs need merely be labelled “political” to be declared illegal.

In still other cases, more sophisticated techniques are adopted by government to restrict freedom of association. One is the use of a “Societies Act”, ostensibly a neutral instrument intended to regulate associational activity for the smooth functioning of a democratic order but, in fact, often used to deny potential critics the legal right to exist and function freely. Such Societies Acts may also impose a barrage of reporting requirements, or require cash bonds to be forfeited for bad behaviour, points to which we shall return to below. In a number of countries of the Commonwealth, few if any human rights groups can operate openly as human rights groups because no (or few) human rights NGOs have been given permission to register.

##### **(b) Physical risks**

A second dimension of survival concerns the physical survival of the leadership and membership of the human rights NGOs. Human Rights Watch publishes an annual survey on The Persecutio n

of Human Rights Defenders; in 1989, the Lawyers Committee for Human Right published the first compilation of attacks on lawyers and judges and in 1990, the Centre for the Independence of Lawyers and Judges its report on *The Harassment and Persecution of Judges and Lawyers*; the Committee to Protect Journalists issues an annual report on attacks on the press; and the International Confederation of Free Trade Unions does an annual survey on the violations of the rights of trade unionists. What these reports underscore is what S. Amos Wako has identified as “a particularly alarming trend, which is rapidly spreading, namely, the practice of ‘death threats’ deliberately directed, in particular, against persons who play key roles in defending human rights and achieving social and criminal justice in a society” .

The practices of “disappearances” and “extra-legal executions” are particularly disturbing because the state denies all knowledge of and involvement in the acts, laying the blame on vigilantes, para-military groups, or others beyond its control. The plausibility of these denials is heightened in situations of intense civil conflict or war, which is the context in which such assassinations most frequently occur. However, repressive regimes utilize a whole range of other equally reprehensible methods to rid themselves of particularly troublesome critics: thus human rights defenders have “committed suicide” in police custody, been shot in “encounters” allegedly trying to escape from the police, had unfortunate car accidents, or died from food poisoning. More conventionally, they are deprived of their liberty by arrest, harassment or imprisonment, often under preventive or administration detention without trial. Human rights defenders are, in such circumstances, forced into hiding or exile, or if they refuse these options, forced to live an existence in which both their lives and those of their families and friends are in constant peril.

In 1984, the UN Commission on Human Rights established a Working Group on Defenders, which goes under the cumbersome name of the “working group to draft a declaration of the rights and responsibilities of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.” Its charge is not to come up with new rights, but simply to draw together those rights which are already accepted and are relevant or have a bearing on providing protection to defenders.

The Working Group, which has been meeting annually for a week (extended to two weeks in 1990 and 1991) just prior to the Commission’s annual meeting, has been making slow progress, hampered in its first years by East-West tensions. In more recent years, while the Soviet Union has become supportive of the draft declaration, certain Third World countries have been obstructionist. There have, however, been real efforts on the part of most governments participating in the open-ended Working Group to come up with acceptable compromises, and greater participation by international NGOs in the parallel informal drafting group, and it is likely that a draft Declaration will be completed over the next two to three years.

One should also note that, at the last session of the Commission on Human Rights, a resolution was adopted, entitled “Co-operation with Representatives of United Nations Human Rights Bodies” (Res. 76/1990), which affirmed that representatives of the UN’s human rights bodies engaged in studying human rights situations or certain aspects of human rights violations must take an even-handed approach in the gathering of information and, to this end, they require unhampered access to private individuals and groups; therefore, anyone wishing to impart pertinent information to the United Nations should not feel inhibited from doing so by fear of intimidation or reprisal. It also noted that private individuals and groups should feel free to avail themselves, without fear of intimidation or reprisals, of various UN procedures, and expressed concern about: (a) those who have been subjected to harassment, ill-treatment and detention or imprisonment for so doing; (b)

family members of defenders who have been subjected to similar treatment; and (c) reports that relatives of disappeared persons, when seeking to clarify the fate or whereabouts of the victims through appropriate channels, have frequently been subjected to reprisals as have the organisations to which they belong.

The resolution then affirmed that the UN should take steps to prevent harm to those who turn to the Organization for help on human rights concerns, recalled a resolution (1988/34) in which it urged Governments to take steps to protect the families of disappeared persons against any intimidation or ill-treatment, and called on Governments: (1) to allow unhampered contacts between private individuals and representatives of UN bodies, and to remove all legal and practical obstacles which would unduly prevent or discourage such contacts from taking place; (2) to condemn all acts of intimidation or reprisal, in whatever form, against private individuals or groups who seek to co-operate with the United Nations and representatives of its human rights bodies...; (3) requests all representatives of UN human rights bodies reporting on violations to (a) take urgent steps, in conformity with their mandate, to help prevent the occurrence of intimidation or reprisal; and (b) to devote special attention to the question in their respective report to the Commission or the Sub-Commission; and (4) requests the Secretary-General to submit to the Commission at its 47th session any available information, from all appropriate sources, on reprisals against witnesses or victims of human rights violations.

### **(c) The context**

It is not enough that states respect the right to life and liberty of human rights defenders, or that they respect the right of NGOs to legal existence. There must be an atmosphere that, at the very least, permits NGOs to carry out their work, and more preferably, that encourages and facilitates the work of NGOs engaged in promotion and protection human rights. Such an atmosphere requires that the cluster of rights related to freedom of association - freedom of express and of the press, freedom of information, the right to peaceful assembly, freedom of conscience and opinion, due process of law - are also respected.

Unfortunately, this is frequently not the case. Instead, what NGOs often confront is a hostile environment in which innumerable obstacles make it difficult for them to function and to get the resources (both human and material) they need to operate. A few of these difficulties can be highlighted.

#### **(i) Funding**

For Third World NGOs, funding by Western foundations, development agencies, churches and other donors is often critical. Governments have used legislation or other regulations to make it illegal for NGOs to accept foreign funds (on the grounds that this involves foreign interference in the domestic affairs of the state), or to make it so difficult (by complicated procedures) or so undesirable (by reporting requirements that NGOs perceive as a governmental attempt to penetrate their organisation and undermine its autonomy and independence) that the survival of the organisation is threatened. Obstacles may also be placed on the raising of funds internally.

#### **(ii) Freedom of Expression and the Press**

For most NGOs in the human rights arena, the ability to speak out and to publish is as much a precondition for organisational survival as funding. This is a key way in which the organisation reaches the public and their membership or constituency. Consequently, obstacles to freedom of expression and the press - many of them documented in the annual report of the London-based

NGO, ARTICLE 19, are effective threats to organizational survival.

These may include, *inter alia*, denying an NGO permission to register and publish a newspaper, newsletter, magazine or journal, or making registration dependent on so high a “bond” price that the effect is the same; denying an NGO newsprint or paper locally and/or the foreign currency needed to buy paper abroad; subjecting the NGO publications to censorship; or intimidating NGOs with libel suits for what they have published.

(iii) The Right to Peaceful Assembly

In like manner, NGOs may be denied the right to peaceful assembly: they may be denied permits to hold rallies, marches or demonstrations; their meetings may be broken up by police, paramilitary, or criminal “gangs” or “thugs” hired for this purpose; or they may be denied access to facilities necessary for meeting.

## **(2) Relevance and Legitimacy**

Human rights NGOs face a number of problems that can be grouped under the heading of relevance and legitimacy, the following among them.

### **(a) Attempts to discredit the work of human rights organisations**

In our discussion of the information function of NGOs, we discussed the extent to which the fact-finding reports of NGOs have come under scrutiny, and the attempts by governments to cast doubt on the validity and reliability of those reports. In some instances, governments have been so concerned about the tarnishing of their image, especially where economic or military assistance might be at risk if they were shown to be human rights violators, that they have hired high-powered public relations firms to refurbish their image (without necessarily halting their abuses). In other cases, governments have created human rights commissions, or supported the creation of competing human rights bodies - GONGOS (government-organized non-governmental organisations) - to produce reports that are intended to discredit those of the bona fide human rights NGO. Such counter-reports, if they do nothing else, create confusion and are attempts to delegitimize the work of human rights NGOs.

Since the legitimacy of human rights NGOs - and their moral authority - is so much rooted in the credibility of their information, NGOs, both international and local, have been forced to professionalize their fact-finding, check and double-check their information. It has meant that considerable efforts have been devoted to standardizing fact-finding procedures and developing methodologies appropriate for information gathering in new or especially difficult situations.

It has also created some unfortunate tensions between local third world NGOs and international human rights NGOs: the latter feel uneasy about relying and acting upon information provided by groups on the frontlines, unless it is independently verified by their own team. Yet, international NGOs, in the final analysis, could not conduct fact-finding without the cooperation and assistance of those same local organisations.

### **(b) Confronting the Structural Causes of Violations**

NGOs, particularly - but not exclusively - in Third World countries, face a different challenge to their legitimacy and especially their relevance. By and large, Western-based human rights NGOs,

including most international NGOs, have addressed violations of human rights - especially such egregious violations as torture, political imprisonment, disappearances, or extra-legal executions, and a wide range of violations of civil and political rights including the subversion of the rule of law. Yet they have, by and large, not delved into the structural causes of such violations, and they have, by and large, not devoted the same degree of attention to economic and social rights. They have called on governments to desist from doing certain things. And they have acted out of a belief that, through publicity and the mass media, through the use of the courts, through lobbying to have unjust legislation amended and new legislation written, and, in the last resort, through demonstrations, protests or civil disobedience, the status quo could be reformed or moved in a more pro-human rights direction. What they have not done has been to call for the radical restructuring of societies.

The problem confronted by many NGOs in Third World countries is that such conventional democratic strategies appear to produce no real change. The causes of many of the violations - and therefore the solutions - are judged to be structural. Legislation on the books bears little relationship to legislation in fact, so that even where laws are rewritten, little happens to change the lives of people; even where a case is won in court, little is done to enforce that verdict. As a consequence, there is rising frustration that the work of human rights NGOs is marginal to the real issue of political, social and economic change.

#### **(c) Confronting the Process of Democratization**

A somewhat related problem of relevance and legitimacy faces NGOs working in societies which are emerging from dictatorial or authoritarian rule and moving towards democratic rule. The government may no longer be the same enemy it was before. The tactics and strategies that were applied against governments engaged in massive violations of security rights are no longer relevant to governments that may appear to be striving for a more humane system, but where numerous obstacles remain.

In such circumstances, human rights NGOs which continue to monitor state performance, or which call for the punishment of those who engaged in gross violations under the previous regime, may find their legitimacy challenged on different grounds. They may be told that it is inappropriate to do anything to undermine the stability of a new fledgling democracy, especially when the military remains in the wings ready once again to step in; they may be told that it is inappropriate to press for the repeal of impunity laws (giving amnesty to and/or protecting gross violators from prosecution) because what the nation needs is healing, not retribution or even justice; and they may be told that they ought to be working with, not against, the new government, even if - or especially because - the government has been unable to gather enough strength for a fundamental social restructuring.

In such circumstances, human rights NGOs may be isolated and marginalized, both in their own societies and by the international human rights NGO community which has now moved on to deal with other "more pressing" emergencies.

#### **(d) Confronting Violence and Internal Conflict**

The final problem of relevance and legitimacy to be addressed here concerns NGOs in countries experiencing internal war, civil strife or large scale violence: specifically, their attitude towards that violence.

Amnesty International's position on violence has been clearly stated: it will speak out to protect anyone, including persons who have engaged in violence, from torture, extra-legal execution, or disappearance and AI is opposed to the death penalty regardless of the crimes a person may have committed, but it will not adopt a person as a prisoner-of-conscience if that individual has advocated or engaged in violence, no matter how just the cause. Thus it adopted Winnie Mandela as a POC but never Nelson Mandela. For other NGOs the issue has not been so clear. For example, some international NGOs have provided humanitarian support to liberation movements in southern Africa.

For national or local NGOs, the issue may be even more morally and strategically complex. First is the question of what precisely, do we mean by violence. As Sumanta Banerjee posed it: "The industrialist whose factory effluent pollute a river, the village landlord who keeps a landless labourer in eternal bond age, the contractor who recruits the rural poor for construction projects in Delhi and pays them starvation wages, the municipal authorities in a city who fail to provide slum-dwellers with water - chosen at random, all these people can be held responsible for the same end which results from a "violent action" - namely dead and maimed victims. Where should we draw the line between direct, physical violence, and other forms - often indirect - of power or coercion through which injury and death can be caused?"

Further, when a system is totally repressive and corrupt, when structural violence is endemic, when victims have no recourse to the courts because there is no independent judiciary, and no hope of effecting change through peaceful political processes, what should the position of local and national human rights NGOs be if the victims are driven to violence? To stand on the sidelines and condemn equally both oppressor and oppressed is to risk the loss of both relevance and legitimacy - and more - in the eyes of the victims on whose side they ostensibly stand.

In most cases of civil conflict and violence, the line may not be so clearly drawn, but the dilemma remains the same. Is the role of the human rights NGO merely to investigate, report and denounce violations as they occur in the manner of an objective, albeit passionate, scientist? Or should the human rights NGO attempt to play a mediating role in the conflict? Mediation not only requires skills that are different from fact-finding ones, but the two activities may not be readily undertaken by the same person or organisation. UN Rapporteurs have been known to water down criticism of a government, to obfuscate the facts, because they conceived of themselves as mediators or conciliators and wanted to retain their access to those governments.

### **(3) Efficacy**

The final set of problems relate to efficacy: the effectiveness of the strategies and tactics employed by NGOs in their attempt to promote and protect human rights. Perhaps the problems of efficacy can be best addressed in terms of the needs of NGOs at the operational level.

#### **(a) Sharing of Information and Solidarity Building**

NGOs need to be able to share information with others, locally, regionally and internationally, and to build networks of solidarity. They need to be able to meet, talk, and develop strategies with others. Such sharing must take place not only between North and South, but also between South and South.

In the past, there has been a tendency, even within the human rights movement, for most of the

lines of communication to run from North to South. To the extent that opportunities for sharing existed between countries of the Third World, this was generally on a regional basis. Now that there are significant numbers of human rights NGOs in all areas of the Third World - albeit more in some regions than others - there should be more dialogue and more sharing of experiences South-South across the regions of the Third World.

There is a need for mechanisms to facilitate such sharing. Considerable work has been done by HURIDOCS (the Human Rights Information and Documentation Center in Utrecht) in the area of standardizing the recording of information to facilitate exchange. The publications of Human Rights Internet, particularly the human rights directories and the *HRI Reporter* have facilitated networking among NGOs. The International Human Rights Internship Programme, which has not only placed interns from the North in the South and vice versa, but is increasingly directed towards staff exchanges, especially South-South, has been a useful technique for human resource development. However, much more needs to be done to facilitate both information sharing and person-to-person exchanges. The Commonwealth framework might contribute significantly to these processes.

#### **(h) Training and Professionalization**

There is a need for those NGOs which have developed skills and competence - in fact-finding, in information-handling, in communications (both print and electronic), in lobbying, and in human rights education - to assist others in developing similar competence. Unless this is done, there is a risk that a few largely Western NGOs will continue to set the human rights agenda and monopolize available resources, prestige and arenas.

There are now a number of annual training sessions, some oriented towards academic studies and others to activists. The oldest programme, and perhaps the most academic, is the one offered each summer in Strasbourg by the International Institute for Human Rights (largely for law and university students). Similar, but shorter, programmes are also offered annually at Columbia University in New York City, and in Prince Edward Island, by the Canadian Human Rights Foundation. Programmes which are more activist in their orientation have been developed in Costa Rica by the Inter-American Institute of Human Rights and in Ottawa by the Human Rights Centre of the University of Ottawa.

Each year for the past several years, there have been a considerable number of specialized courses and training sessions, some organized under the Technical Services branch of the United Nations, others by NGOs. HURIDOCS, for example, has organized various courses to train Third World documentalists in the use of the standard formats for information handling. The African Centre for Democracy and Human Rights Studies in Banjul has offered several courses and is now developing a longer term programme for Africa. The Central American Human Rights Commission runs regular training sessions for its member organisations: the Human Rights Program of the Adult Education Council of Latin America has organized courses for special sectors including leaders of peasant, worker and women's organisations in Latin America; Interights has concentrated on training judges and lawyers in international human rights procedures.

Resources for organizing and holding such sessions are, however, hard to mobilize and much remains to be done. Moreover, it is particularly important that organisations in the Third World and on the frontlines of the human rights struggle be permitted to define what their needs are in the

area of training, and for those doing the training to come increasing from the South as against the North. Otherwise, there is the danger that paternalism will dominate the human rights movement as much as it dominates the world.

**(c) Access to the International Human Rights System**

In this latter regard, there is a need to assist national human rights NGOs in gaining access to regional and international human rights arenas which have by and large been dominated by Western-based international NGOs. While many national and local NGOs will continue to regard international petition procedures and arenas as secondary to their struggle at home, there are nonetheless a significant number of Third World NGOs which would utilize these procedures and arenas if they knew how to, and had the resources to, reach them. Efforts must, therefore, be made to make the fora and mechanisms of the international system more transparent and more accessible to such NGOs.

**(d) Support for Research and Reflection on Strategies and Tactics**

There is a need for research into and reflection on strategies and tactics, especially those for confronting new challenges to the human right movement, some of these have been documented above: how to deal with the structural causes of violations, the process of democratization, or situations of war and internal violence. There are other issues, both conceptual and practical, that one could point to: how most effectively to combat the rise in fundamentalism and communalism that is posing so serious a challenge to human rights norms? how to utilize modern communications technology (the fax, the computer, the electronic bulletin board) most effectively? How to build effective coalitions with co-interest groups (such as NGOs focused on the environment or peace)? Human rights activists often function under enormous pressure and rarely allow themselves the “luxury” of reflection, self-criticism and appraisal. Yet clearly, this “luxury” is more accurately a “necessity” for efficacious action.

**(e) Protection for Human Rights Defenders**

Finally, there is a need to support all efforts directed at providing protection for human rights defenders whose lives and liberty are at risk, and for human rights NGOs under threat or harassment. Not only must on-going efforts be supported, but thought must be given to devising new ways of extending such protection.

## **RECOMMENDATIONS**

1. The Commonwealth Heads of Government should give explicit recognition to the importance of NGOs in the protection of human rights. They should urge governments not to view NGOs as elements hostile to government, but as potential allies in the search for human rights to which governments have committed themselves.
2. If the Commonwealth sets up any formal body for the monitoring or enforcement of human rights, in the near or more distant future, standing for NGOs should be built into its procedures.
3. Regional and national human rights commissions or committees should also give

recognition to the role of NGOs (see the Rules of Procedure of the African Commission).

4. The various meetings of Commonwealth Ministers, for example, of Ministers concerned with Women's Affairs, Law Ministers, Education Ministers, should recognise the way in which NGOs may bring governmental endeavours to fruition at the grassroots level.
5. The Commonwealth of Learning should consider the possibility of providing courses for NGOs personnel.
6. Governments should endeavour to recognise the role of NGOs, to resist the temptation to treat them as enemies, and, equally, the temptation to try to co-opt them.
7. Governments should recognise that foreign funding may be the only option for some NGOs; and funding agencies must be sensitive to the quite understandable concerns of governments about foreign-funded bodies.
8. Individual governments, and inter-governmental bodies should be prepared to fund the activities of NGOs, and, where appropriate, work in collaboration with them.
9. Without duplicating existing efforts it would seem that there is a role for Commonwealth NGOs (like our sponsoring bodies) and for the machinery of the Commonwealth to assist in the exchange of experience, expertise and personnel between NGOs in individual Commonwealth countries.
10. Courts, and if necessary, rule-making bodies, should be prepared to allow genuine NGOs to bring, or intervene in, human rights litigation (see Appendix III).
11. Research is needed into the roles of NGOs, and into the obstacles which they face, including the uses and abuses of legislation such as Societies Acts.
12. Activists themselves need to have time to reflect on their experiences, in order to develop themselves, and to be able to share their experiences most fruitfully with others.

## CHAPTER V

### SUMMARY OF RECOMMENDATIONS

In each of Chapters I, III and IV there are recommendations concerning action on specific issues, or by specific bodies. The purpose of this Chapter is to enable the reader to see quickly what we have proposed. It hardly needs to be said that what amounts to little more than a list should not be considered in isolation from the background information, the arguments and the greater detail presented earlier.

#### I. A Commonwealth Human Rights Policy

1. In 1971 the Commonwealth Heads of Government spelt out a set of Principles, in which they said, *inter alia*,  
We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live.

We suggest that, unexceptionable as this statement is, it is inadequate even as a statement of aspiration, and that, regrettably, the performance of virtually all, if not all, of the members of the Commonwealth, has fallen short even of that statement.

We urge upon the Heads of Government to renew their faith in and commitment to human rights, and, at this time when they are considering the future of the Commonwealth, to embrace the concept of human rights explicitly and in its fullest sense.

A belief in human rights is a prerequisite for the genuine practice of human rights, and a statement of beliefs has its value. But we urge that the time has come for action, and not simply statements of belief.

2. However, this report is not directed only at Heads of Government or even at Governments more generally. The Commonwealth would be meaningless if it were just a Governmental Club; it is the Commonwealth of Nations, and this means ultimately the Commonwealth of People. Therefore, in this report we call upon the people of the Commonwealth, as individuals, as organised into communities, as organised into NGOs, upon the Commonwealth NGOs, such as those which sponsored the report, upon the individual Ministers of Commonwealth Governments, and those Governments as entities, upon the machinery of the Commonwealth in the form of the Secretariat, as well as upon the Heads of those Governments, to make human rights more than a slogan, much more than a battle-ground, but a reality.
3. We have tried to pinpoint some of the areas which seem to us to require special attention in the current context: notably the right to physical liberty so often infringed by administrative detention, and by mistreatment of those detained; freedom of speech, expression and the media and the necessary corollary of freedom of information; the rights of 50% of the citizens of the Commonwealth, the women; the rights of children, the future of the Commonwealth and of mankind; the rights of two types of outcast of modern

society: refugees and indigenous and tribal peoples; the rights of workers, the rights of all of us; and the environment which again is crucial to the future.

In the report specific suggestions for action are directed towards different sections of the Commonwealth community.

## **II. Commonwealth Governments Acting Together**

### **(1) A Declaration**

Since the policies and activities of what we may call the official Commonwealth are determined by the governments of its member states, an essential first step in the Commonwealth Human Rights Policy is a declaration by the heads of government. We are aware that there exist several international statements and declarations on the subject and we do not consider that the purpose of a Commonwealth Declaration is to add to the substance of these other statements. But we believe that a Declaration, drawing upon well accepted principles of human rights and relating them to the specific problems of the Commonwealth, will establish the aspirations of the Commonwealth, its governments and people, provide a focus for Commonwealth human rights activities and provide standards by which to educate people and judge governments.

- (a) We recommend that at its next meeting in Harare in October 1991, the CHOGM should adopt a Declaration of Principles on Human Rights.
- (b) The Declaration should contain a commitment to the principal international instruments on human rights.
- (c) It would require the member states to take steps to implement the provisions of these as well as national provisions on human rights.
- (d) It would establish an agenda for Commonwealth human right activities, including education.
- (e) It would set out the responsibilities of the Commonwealth Secretariat and other Commonwealth institutions to promote human rights, monitor the record on human rights and investigate allegations of abuses of human rights within the Commonwealth.
- (f) It would recognise the valuable role of NGOs in the promotion and implementation of human rights.

### **(2) Role in ethnic conflict**

Since, as we have argued, a major cause of the violation of human rights, as well of tensions between member states, is ethnic violence, we recommend:

- (a) that the CHOGM should commission a study of causes of ethnic conflict and the ways, including constitutional reforms, that can be undertaken at the national and Commonwealth levels to prevent or ameliorate such conflict. The commission should consist of non-government members. One or more major research institutes should be commissioned to produce the study, which would be discussed at the following CHOGM.
- (b) The Commonwealth should also institute machinery for its good offices in mediation and conciliation when there is a threat to peace due to ethnic conflict.
- (c) CHOGM should emphasise the importance of adherence to the principles and rules of humanitarian law in armed domestic conflicts.

### **(3) A fund**

The CHOGM should establish a Commonwealth fund for human right activities. Contributions should be made through a combination of mandatory and voluntary payments by member states. Money should also be raised from other sources. A substantial part of the Fund must be used to assist NGOs in their human rights work.

### **(4) No assistance for violations**

A part of the Commonwealth human rights policy must be that no member state would arm or in other ways aid another in furtherance of the violation of the rights of its people. Expediency must yield to human rights.

## **III. Individual Governments**

### **(1) National commitment to human rights**

- (a) The counterpart of a programme for the institutions of the Commonwealth is a commitment by individual governments to devise and implement a national policy on human rights.
- (b) As a first step, all Commonwealth states should ratify the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its Optional Protocol.
- (c) Each government should commit itself to ratify progressively all human rights instruments.
- (d) Governments must undertake to fulfil the requirements of ratification, for example the preparation, comprehensively and promptly, of periodic reports to international bodies. Where such treaties provide for a right of individual petition these should also be ratified.

### **(2) Ensuring that the law and practice comply with the standards**

- (a) Governments must establish procedures to ensure that their national constitutions or laws protect human rights and that the legislation is implemented.
- (b) It should be a special responsibility of law officers, particularly the Attorney-General, to ensure that legislation as well as government policies and acts are compatible with human rights provisions.
- (c) It is important also to scrutinise existing legislation, especially that enacted before independence in the case of former colonies. Much old repressive legislation is still used, although it is incompatible with constitutional provisions on human rights.
- (d) The office of the Attorney-General should have at least one expert on human rights.

### **(3) Educating officials**

Governments should institute or strengthen education in human rights for their officials so that they become aware of the kinds of action that are unlawful as constituting violations of human rights. Courses in human rights law would be of particular value to the police and prison staff. Courses should also be provided for legal draftsmen to minimise the enactment of legislation incompatible with human rights provisions.

#### **(4) Strengthening the legal system**

- (a) It is essential to the effectiveness of the legal system that judges and lawyers should be well qualified, courageous and independent.
- (b) Governments need to discard the notion that a human rights oriented judge or lawyer is *ipso facto* subversive.
- (c) The courts must give a liberal and broad interpretation to human rights provisions.
- (d) It is necessary that all individuals or groups should have easy access to courts for the protection of their rights. The procedures for bringing suits should be simplified, and the rules as to who may bring actions relaxed.
- (e) Relevant NGOs should be permitted to bring actions on behalf of individuals or in the public interest.
- (f) Legal aid should be provided where an individual or group cannot afford legal costs.
- (g) Human rights instruments and legislation and case law should be readily available.

#### **(5) Non-judicial institutions**

Governments should consider the establishment of special institutions with responsibility for the monitoring and enforcement of human rights, where these do not already exist.

#### **(6) Public education**

- (a) We recommend that education in human rights should begin in primary schools.
- (b) The curricula at various levels should be scrutinised to eliminate prejudice and bias against particular communities and religions, and to encourage tolerance and respect for human rights.

#### **(7) The role of NGOs**

- (a) Governments should recognise the role of NGOs in the promotion of human rights.
- (b) Governments should undertake that they will neither sponsor nor countenance attacks on human rights organisations and individuals.
- (c) Human rights groups should be free to come into existence, and to operate within the law, without harassment. National laws must ensure that no unnecessary legal impediments are placed in the way of the formation and functioning of NGOs. The laws and administrative practice must ensure their autonomy.
- (d) Governments must recognise the legitimacy of the NGOs to speak on behalf of their constituencies, and their responsibilities for the defence and enforcement of human rights. Governments should make clear commitments to freedom of association and to an atmosphere which at least permits, and preferably encourages, the work of NGOs engaged in the protection and promotion of human rights.
- (e) Domestic NGOs should have a special standing on human right questions with their governments.
- (f) NGOs should be free to gather information for reports to local and international bodies set up to monitor the implementation of human rights.

#### **(8) The press**

- (a) Government should recognise that major role which a free press can play in the furtherance of human rights.
- (b) Governments should recognise that it is unlikely that the press will be able to play a full role in society if it is wholly owned by government.

## **(9) Detention**

- (a) Commonwealth states should review their legislation on detention to ensure compliance with standards to be set out in a paper prepared by the Secretariat.
- (b) Administrative detention should be a remedy of last resort.
- (c) There is an urgent need to strengthen safeguards against arbitrary administrative detention.
  - (i) The power to detain should be available only on the proclamation of a state of emergency. An emergency can validly be proclaimed only when there is a serious and demonstrable threat to national security.
  - (ii) The proclamation as well as the continuation of an emergency should be subject to the control of the legislature as well as the courts.
  - (iii) The grounds for which a detention may be ordered should be clearly and narrowly specified so that it is valid only if the person detained has engaged in unlawful acts which are a clear threat to national security and which cannot be dealt with in any other way.
  - (iv) The courts should have full powers of review of decisions to ensure that there is no abuse of the power. If necessary, part of the evidence can be presented in camera, as is provided in the laws of all the states.
  - (v) There should be adequate publicity of all detentions. All detentions should be announced in the gazette or in some other public way.
  - (vi) The detainee should be provided in clear language of the charges and allegations against him or her in sufficient detail that it is possible to attempt to rebut them, and an early opportunity should be given to the detainee to answer the charges and allegations.
  - (vii) The detainee should be given full opportunities to promptly consult with a lawyer of his or her choice, and to have the right to be represented by that lawyer, if need be at public expense.
  - (viii) The rights of a detainee to fair and humane treatment during detention, and in particular to protection against torture, must be fully secured.
  - (ix) A detainee any of whose rights have been violated or who has been unlawfully detained should be entitled to high damages from the state and officials who have abused his or her rights.

## **(10) Indigenous Peoples**

Development projects must be carefully assessed to determine their impact on the land rights and economies of indigenous and tribal peoples. It must be recognized that the economic, social and cultural impacts of projects in indigenous and tribal peoples can outweigh the benefits to other sectors of the national and international economy.

## **(11) Women**

- (a) Governments should incorporate women into decision-making processes, being prepared to take affirmative action where necessary.
- (b) Cultural bias against women should be recognised where it exists. Economic measurements should include estimates of the value of women's labour and, where they fail to do so (for example in conventional recording of gross national product) this should be acknowledged.
- (c) Governments and other agencies should analyse and spotlight where sexual discrimination may affect economic development; employment, immigration, refugee policy, health care and a diversity of other issues.

- (d) Governments should exchange views with religious and nongovernmental bodies on religious and cultural obstacles to the realisation of human rights for women; should encourage open debate on such issues, and the sharing of ideas within a Commonwealth framework.
- (e) The significance of family planning in enhancing the human rights of women should be stressed.

**(12) Workers**

- (a) All policies and decisions which directly or indirectly affect workers should be conceived and implemented with the full participation of workers and their representatives. Economic development should, where possible, combine labour and capital investment in ways which facilitate employment.
- (b) The right to strike should be provided for in legislation and should be available in all circumstances in which the security of the state and public order are not threatened. State security and public order should be narrowly defined.
- (c) Commonwealth states should permit the establishment of independent trades unions to be formed.
- (d) Forced labour in all forms must be abolished.
- (e) Women should be granted equal labour rights to those of men. Women's work should be perceived of as an essential part of the development process, and women should participate in all social and developmental policy making.
- (f) Measures must be taken to halt the "super-exploitation" of women in export-processing zones. Workers in export-processing zones are entitled to the same human rights as all other workers.
- (g) Workers' rights should be extended to all sections of the population, and in particular to rural workers.

## **IV. Implementation at the Commonwealth Level**

### **(1) Standing Commission on Human Rights**

- (a) A Standing Commission, consisting of 10 or so independent experts of distinction, should be appointed by Heads of Government to advise them on general issues affecting human rights within the Commonwealth.
- (b) Its functions would be advisory, consultative and monitoring.
- (c) It would publish a report prior to each Heads of Government meeting on the record of human rights in the member states and make recommendations to them on how to improve the situation.
- (d) Among the issues of which it would take account would be the freedom of action of and support for NGOs in member states.
- (e) It would advise the heads of governments and the Secretariat (including the Human Rights Unit).
- (f) It would also address, independently, human rights issues across the Commonwealth and would take account of the contributions of national governments and of NGOs, as well as of official Commonwealth bodies.
- (g) It would be empowered to receive reports from Governments, NGOs and Commonwealth citizens direct and, where appropriate, could ask governments or the Secretariat to comment on particular matters.

### **(2) Machinery for investigation and adjudication**

- (a) We support the proposal for a Commonwealth machinery for investigation and adjudication, and urge the next CHOGM to set up a committee to make recommendations on its establishment.
- (b) If the Commonwealth sets up any formal body for the monitoring or enforcement of human rights, in the near or more distant future, standing for NGOs should be built into its procedures.

### **(3) Secretary-General and Secretariat**

- (a) Following acceptance of a Human Rights Policy by the Heads of Government the Secretary-General, as the Chief Executive of the official Commonwealth, should undertake the primary role in implementing a human rights policy throughout the official Commonwealth agencies.
- (b) The Secretary -General should develop a consistent practice of addressing issues of human rights within the Commonwealth.
- (c) The Secretary-General should develop links to relevant regional and international institutions concerned with the promotion and protection of human rights.
- (d) We envisage the Secretary-General playing a major role in implementing the Commonwealth role in mediation in conflicts within or between member states which threaten human rights.
- (e) The Secretary-General might appoint a special representative or rapporteur to assist him in offering advice and help to governments on matters related to human rights.

### **(4) Commonwealth Secretariat Human Rights Unit**

- (a) The resources of the Human Rights Unit will have to be increased significantly.
- (b) In conjunction with the Legal Division, it should facilitate the exchange of information on human rights developments within the Commonwealth, in particular the

- dissemination of judicial decisions touching human rights.
- (c) Working closely with the Standing Commission on Human Rights we have proposed and with NGOs, it would have a special responsibility for education in human rights.
- (d) Support should be given for the networking of resource centres.
- (e) The Unit should also encourage liaison between official and statutory bodies in the Commonwealth, such as human rights commissions, and comparative work on the experience of national legislation, and of Commonwealth experience of different types of international machinery.
- (f) Specifically in support of NGOs it could support the development of a Directory of Commonwealth human rights NGOs.

## **(5) The Commonwealth Fund for Technical Assistance and the Commonwealth Foundation**

Pending the establishment of a substantial fund, we recommend that the CFTC and the Foundation should devote a significant part of their resources to human rights work, and that their support should extend to the NGOs.

## **(6) Commonwealth of Learning**

- (a) We recommend that the Commonwealth of Learning should give priority to human rights education, in all the fields we have identified as matters urgency.
- (b) It should collaborate with the Commonwealth Legal Education Association to develop suitable courses.
- (c) The Commonwealth of Learning should facilitate programme exchange between broadcasting media throughout the Commonwealth.
- (d) It should consider the possibility of providing course for NGOs personnel.

## **(7) Specific suggestions for action**

### **(a) Detentions**

The Human Rights Division of the Commonwealth Secretariat in conjunction with a body like Interights, should prepare a paper on the international, regional, and best Commonwealth standards on administrative detentions, including the grounds and the procedure for detentions.

### **(b) Expression and information**

- (i) The Commonwealth should provide technical advice and other assistance to member governments concerning incorporation in their constitutions and other laws of provisions protective of freedom of expression and information, and ways to implement such provisions.
- (ii) The Commonwealth should continue to conduct training courses for journalists and editors in order to promote high professional standards and to discuss common problems in collecting and publishing information about matters of legitimate public interest.
- (iii) The Commonwealth Media Development Fund should be enlarged.
- (iv) The Commonwealth should undertake a study of internal security, prevention of terrorism, official secrets and similar acts in order to develop guidelines for identifying when considerations of national security and public order may and may not supply justifications for restrictions on the freedom of expression and information.
- (v) The Commonwealth should undertake a study of various methods by which governments regulate the print and broadcasting media with a view to developing

guidelines on appropriate methods by which to ensure editorial independence and diversity consistent with legitimate government interests.

- (vi) The Commonwealth should undertake a study of the ownership of media throughout the Commonwealth and mechanisms by which member countries have sought to regulate foreign ownership and oligopolistic domination of markets in order to analyze the advantages and disadvantages of media concentration and to propose methods by which governments may regulate media ownership without discouraging needed infusions of capital and technology.
- (vii) The Commonwealth should undertake a study of the availability of newsprint throughout the Commonwealth in order to consider ways in which the Commonwealth might promote ways to ensure availability of adequate amounts and equitable distribution of newsprint in countries that do not have convertible currencies or which impose import restrictions.
- (viii) The Commonwealth should commission a study on licensing and registration for journalists and newspapers.
- (ix) The Commonwealth should undertake a study on permissible measures under international law by which governments may regulate foreign broadcasts receivable in their territories when necessary to protect the cultural identity of their people.

(c) **Refugees**

- (i) The Secretariat should prepare a comprehensive report on the situation of refugees in Commonwealth countries to be made available to the next Commonwealth Heads of Government meeting. The initial study should be factual and indicate the numbers and situation of refugees in the different Commonwealth countries, the roles played by international agencies, by governments and by non-governmental organisations.
- (ii) The Commonwealth Secretariat should identify and give publicity to effective measures and initiatives already introduced.
- (iii) This factual report should be used for follow up studies – for example to explore how different approaches could increase the protection accorded to refugees in the Commonwealth.
- (iv) The Commonwealth should help in the development of a plan by which refugee women can be integrated into camp leadership and decision-making.
- (v) The Commonwealth should take positive steps to create awareness about, and to encourage the ratification of, the 1951 Convention and its 1967 Protocol.
- (vi) Official agencies should be used to provide technical assistance (using the Commonwealth Fund for Technical Cooperation where possible) to assist the processes both of ratification and accession, and to assist governments with subsequent obligations of implementing, reporting and co-operating with UNHCR in the provision of assistance to refugees.
- (vii) Commonwealth programmes and reports should, as a matter of routine, be required to assess the impact of their activities and recommendations upon refugees.

(d) **Indigenous peoples**

- (i) The Commonwealth should prepare a report on the various approaches to indigenous and tribal peoples issues among its member states, especially with regard to land rights and cultural autonomy. Such a report would facilitate exchanges between indigenous and tribal peoples, between government officials and between academics. It could also serve as a Commonwealth contribution to the ongoing work of the United Nations Working Group on Indigenous Populations.

- (ii) The Commonwealth and its member states should facilitate political participation of indigenous and tribal peoples within states and in Commonwealth bodies and initiatives.
- (iii) The Commonwealth should encourage visits and exchanges, in particular, scholarships for indigenous and tribal peoples to visit their counterparts abroad or to study in other Commonwealth countries.
- (iv) The Commonwealth should respond to the United Nations Year of Indigenous Peoples with a conference devoted to the on-going issues of relations between indigenous and tribal peoples and the state governments in the Commonwealth.

**(e) Women**

- (i) The Commonwealth Secretariat should make a follow-up report to *Engendering Adjustment*, to be made available to Ministers Responsible for Women's Affairs no later than 1995. This should indicate how far international agencies, governments and other bodies have changed their practices following the first report, and how the changing economic situation affects the rights of Commonwealth women then.
- (ii) There should be close cooperation between the Women in Development and Human Rights units within the Commonwealth Secretariat on projects and matters of mutual interest.
- (iii) The Commonwealth Secretariat and official agencies of the Commonwealth should set an example in incorporating women into decision-making.
- (iv) Commonwealth programmes and reports should, as a matter of routine, be required to assess the impact of their activities and recommendations upon women.
- (v) Ministers Responsible for Women's Affairs and Law Ministers should exchange views with NGOs on the problems of domestic violence. Good Commonwealth practice should be circulated to interested parties, causes analysed, and justice for injured women upheld.
- (vi) Ministers Responsible for Women's Affairs should be given more support, by official and unofficial bodies in the Commonwealth, recognising that the rights they promote will require time and education for achievement. Jointly with Commonwealth Ministers of Education they should commission a study on the impact of formal education systems on human rights for women.

**(f) Children**

- (i) The Commonwealth should set up mechanisms, in co-operation with the UN Centre for Human Rights and other appropriate UN bodies, to provide technical advice and other assistance at the request of member governments seeking to carry out their obligations under the Convention, to enable Commonwealth governments to prepare regular informative reports to the Committee on the Rights of the Child and to promote awareness of the provisions of the Convention.
- (ii) The Commonwealth should compile information (from UNICEF and other reports) of the state of the children in the Commonwealth today. These reports should then be utilised to establish priorities for action to promote, on an informed basis, co-operation between different groups and seek to generate practicable solutions designed from a variety of perspectives.

**(g) Workers**

Commonwealth member states should consider the adoption of a charter regulating the activities

of multinational companies in order to eliminate forms of competition which undermine workers' human rights.

**(h) Environment**

- (i) The Commonwealth machinery can serve to exchange information and experiences, legal and non-legal in the field of environmental protection.
- (ii) The Commonwealth Education Ministers could perhaps address the question of how best to educate the ordinary citizenry about environmental issues.
- (iii) Commonwealth bodies such as Technical Assistance Group, as well as NGOs should also heed the Brundtland Commission's observations about the necessity for all organisations to build environmental issues into their activities. Perhaps those which have cooperated in this Human Rights Initiative could place the environment on their agendas.

**v. Non-governmental Organisations**

**(1) The role of NGOs**

We believe that NGOs have an indispensable role to play in the protection and advancement of human rights.

**(2) NGOs and education**

- (a) We recommend that NGOs should give special attention to education about human rights.
- (b) We recommend that one of our sponsoring organisations, the Commonwealth Legal Education Association, should take primary responsibility, in conjunction with the Human Rights Unit and other appropriate bodies, for a survey of what is currently going on in this field and to prepare teaching materials, at different levels.

**(3) NGOs in support of the legal system**

- (a) In every state there should be at least one legal resources centre which would provide legal aid to other NGOs and individuals who are involved in human rights litigation. It would establish an expertise in human rights law and would be the source of documentation, comparative case law, etc.
- (b) It would also undertake education in the legal rights of specialised groups, like workers, women and journalists. It would also remind the government about the deadlines for the submission of reports to international monitoring bodies and help to co-ordinate the submissions of the NGOs to these bodies.
- (c) The work of the national legal resource centres would be made more effective if they could link with centres in other member states.
- (d) There is a need for a Commonwealth NGO to provide back up support for national centres and to facilitate the exchange of information, case law, etc. Among its other responsibilities might be the publication of Commonwealth human rights decisions and a newsletter on litigation strategies.
- (e) We recommend that a committee consisting of a number of national centres be appointed (perhaps by our sponsoring organisations) to consider the feasibility of a Commonwealth legal resources centre and advise on modalities.
- (f) Without duplicating existing efforts it would seem that there is a role for

Commonwealth NGOs (like our sponsoring bodies) and for the machinery of the Commonwealth to assist in the exchange of experience, expertise and personnel between NGOs in individual Commonwealth countries.

**(4) Professional codes of conduct**

- (a) We recommend that Commonwealth professional NGOs should adopt and, where relevant, review their codes and ensure that they conform to international standards.
- (b) The Commonwealth codes should be used to educate the professions in their responsibilities.
- (c) They could also be used to fight against the manipulation or abuse of their skills or knowledge by the government or private groups to commit violations of human rights.

**(5) NGO networks**

We therefore urge that our sponsoring organisations and other suitable NGOs should help to promote networks among similar NGOs.

**(6) Commonwealth human rights conferences**

We recommend that human rights oriented NGOs should organise a Commonwealth conference on human rights every two years, in advance of the meeting of the heads of governments. The conference would be held in the same place as the meeting of heads of governments. It would review the record of governments on human rights and focus on whatever the organizers considered to be human right priorities at the time. Its recommendations would be forwarded to the heads of governments who we hope would take them into account when they considered official reports on human rights and decided on policies and strategies.

**(7) Research**

- (a) Research is needed into the roles of NGOs, and into the obstacles which they face, including the uses and abuses of legislation such as Societies Acts.
- (b) Activists themselves need to have time to reflect on their experiences, in order to develop themselves, and to be able to share their experiences most fruitfully with others.

**(8) Specific areas**

- (a) Commonwealth NGOs should collect information on attacks on journalists and restrictions on newspapers, and bring the information to the attention of governments.
- (b) Non-governmental organisations should be encouraged and assisted to help with the provision of information for these reports on refugees and to publicise and monitor the operation of the 1951 Convention on Refugees.
- (c) NGOs should incorporate women into decision-making processes.

**VI. The Future of CHRI**

We propose that the sponsoring organisations of this initiative should consider how best they might continue their support for human rights in the future, in collaboration with other, more grassroots, NGOs.

## APPENDICES

### I. THE OMBUDSMAN IN THE COMMONWEALTH

#### Introduction

The office of the ombudsman has become firmly established in the Commonwealth since it was first introduced in New Zealand in 1962 and currently operates in some twenty-eight Commonwealth countries (and dependent territories). It has proved to be extremely adaptable and operates in both developed and developing nations, in multi-party and one-party states and in states under military rule.

The aim of the office is the pursuit of administrative justice in a manner which is confidential, informal and flexible. Thus any person who claims to have suffered injustice at the hands of a government official may complain to the ombudsman and ask for an investigation into the matter. If the case is accepted, an investigation is undertaken in private and (almost invariably) free of charge. As a permanent independent statutory (and often constitutionally established) institution, the office is potentially a most effective investigatory body operating within, although not being a part of, government. This is because wide-ranging investigative powers give an ombudsman unique access to government documents and officials and allow for the development of personal contacts with high-ranking government officials which can often swiftly resolve a complaint. In addition, government officials are often cooperative once it is realised that the office is also an important protection for them against unfounded, malicious or unfair attacks.

The organisation of the ombudsman within Commonwealth countries varies. Australia, Canada, New Zealand and the United Kingdom have established several bodies. For example, in Canada there are ombudsman offices at both the federal and provincial level, and in India only at state level (known as the *Lokayukta*) whilst in Australia separate offices handle matters such as equal opportunities and privacy. Similarly, in the United Kingdom the work of the Parliamentary Commissioner for Administration is complemented by separate ombudsman offices which deal with, amongst other things, pensions, the health service and local government, and by private sector institutions such as the banking ombudsman. In other countries a single office is the norm.

In view of constraints of space, this paper will now concentrate on the operation of the office in developing countries. A detailed study of the office of the ombudsman in the Commonwealth is currently being undertaken by the present author on behalf of the Commonwealth Secretariat.

#### Organisation

##### Appointment

The original concept of the institution was that the ombudsman would be linked to the legislature and indeed in Scandinavian countries the ombudsman is elected by Parliament itself. During the parliamentary debate leading to the Parliamentary Commission (Ombudsman) Act 1962 in New Zealand, it was repeatedly stressed that the ombudsman was to be an officer of Parliament and that he or she must enjoy its confidence. Accordingly, although actually appointed by the governor-general, such appointment is made on the recommendation of the legislative body. Similarly, in the United Kingdom, the Parliamentary Commissioner for Administration is

appointed upon the recommendation of Parliament. In contrast, the majority of other Commonwealth jurisdictions have opted to make the appointment an executive matter. In some countries, such as Pakistan, Tanzania and Zimbabwe, the matter is the sole responsibility of the President. In others, such as Zambia, the President is required to consult with the Judicial Service Commission. Papua New Guinea appears unique in that the head of State must act in accordance with the advice of the Ombudsman Appointments Committee which is made up of members of the judiciary, public service and Parliament (including the leader of the opposition.)

### **Term of office**

In most cases the ombudsman has a fixed term appointment ranging from three to six years which is renewable for a similar period. Several countries, such as Tanzania and Zambia operate a multi-member institution. In Zambia, for example, the Commission for Investigations is made up of the Investigator General and three commissioners, one of whom retires annually. Arguably, this constant change of office-holders potentially undermines the effectiveness of the office by ensuring that incumbents never become too “effective” or popular. Thus there is much to be said for the creation of a more permanent career structure to enable the development of a more meaningful and effective institution. Indeed, this is the approach in the newest office in the Commonwealth, Namibia, where the incumbent is appointed up to the age of 65 years.

### **Qualifications for appointment**

Some states lay down specific qualifications for the post of ombudsman, the most common being legal qualifications. In others, experienced public servants are required. For example, in Uganda, a person is qualified for appointment as Inspector-General of Government when he or she has served in a field of discipline relevant to the work of office for not less than seven years. However, the majority of states require no formal qualifications for appointment. Here emphasis is placed on the calibre of appointee. For example, in Hong Kong the qualities considered necessary for appointment as the Commissioner for Administrative Complaints (COMAC) include that he/she “should be an independent person of significant stature (preferably a serving judge or other legally qualified person with administrative skills), of high standing in the community and knowledgeable of the civil service and how it works”. Similarly, in Nigeria a key criterion is “a high standard of integrity and probity exhibited in previous offices held”. Some jurisdictions include some negative factors which generally relate to a prohibition on the holding of other posts incompatible with that of the ombudsman. For example, in India, the *Lokayukta* cannot hold any other official position, be connected with any political party or practise any trade or profession.

It is clear that the emphasis is rightly placed upon the appointment of an independent and “high-powered” individual. A useful illustration of the problems that might otherwise arise comes from Swaziland. Here the ombudsman was also Secretary to the Liqoqo (Supreme Council of State), a position which was clearly incompatible with his position as ombudsman and one which seriously tarnished the image of the office in the eyes of the public. The failure to establish a clearly independent office contributed greatly to the eventual failure of the ombudsman there.

### **Removal from office**

In most jurisdictions the grounds for removal are similar to those pertaining to members of the judiciary i.e. inability to perform the duties of office by reason of physical or mental incapacity or misconduct/misbehaviour. Although rarely having a role to play in the appointment process, the legislature is frequently involved over the removal of incumbents. In some places, such as Hong Kong, removal of the ombudsman requires the approval of the legislature. In other jurisdictions all branches of government are involved in the process. Thus in Zambia, following the passing of a

resolution by the National Assembly to investigate the possible removal of the Investigator-General, the Chief Justice must appoint a tribunal of enquiry. If such tribunal so advises, the President must remove the Inspector-General from office. In some Indian states, the removal of the *Lokayukta* requires the consent of both a judicial tribunal and of each house of the State Legislature. In other countries, such as Zimbabwe, the President must act on the advice of an independent tribunal. One unusual variant on this procedure occurs in Pakistan where the President may unilaterally remove the *Mohtasib* from office on specified grounds. In response, the *Mohtasib* may “if he sees fit and appropriate to refute any charges” request an open public evidentiary hearing before the Supreme Judicial Council. If this does not take place within a specified period, the *Mohtasib* is “absolved of any and all stigma whatever”.

Perhaps as a sign of the calibre of appointees, it appears that on only one occasion has an ombudsman actually been removed from office. This was in 1988 when the Oyo State Commissioner in Nigeria was removed following a report by the Chief Commissioner to the Armed Forces Ruling Council.

### **Funding and Staffing**

The provision of an independent budget is an important requirement for the successful running of the office. The point is highlighted in the case of Zimbabwe where the funding for the office (except the salary of the ombudsman) comes from the Ministry of Justice. This is a source of great concern to the ombudsman because it potentially tarnishes the image of the office as an independent body and can cause problems when investigations into complaints against the Ministry of Justice are undertaken. In addition, it prevents the ombudsman having control over the running and development of the office. In practice, only a bare majority of ombudsmen in Commonwealth countries control their own budgets and this is widely viewed by them as unsatisfactory.

As regards staffing, the size of offices varies considerably. For example, in Pakistan there are 37 investigating officers who are assisted by 415 supporting staff appointed by the *Mohtasib* (who has an independent budget). Similarly, in Nigeria there are a total of 199 investigative officers. Other offices, such as those in Guyana and Mauritius, are staffed by a single ombudsman plus a few supporting staff. Several ombudsman offices are facing serious operational difficulties due to paucity of funding and staff and frequently these practical points greatly reduce the effectiveness of the institution.

### **Operations**

The original ombudsman model required complaints to be made via members of the legislature. This is still the case in the United Kingdom and the system was favoured when the Commissioner for Administrative Complaints was established in Hong Kong in 1989. However virtually all other Commonwealth countries provide for direct access to the ombudsman. It is this procedure which makes the whole process so attractive. Thus any person has the right to make a complaint directly to the ombudsman and to ask for an investigation at no personal cost. Indeed, one of the features of the office is the fact that there are few, if any, restrictions as to who can lodge a complaint. Of course, this does not preclude individual members of parliament from investigating complaints from their constituents and thus in this respect, the ombudsman’s functions are complementary rather than exclusionary. In most jurisdictions there is a time limit for receipt of complaints which ranges from three months to two years from the date when the aggrieved party first had notice of

the matter. However, in practice, out of time complaints are investigated at the discretion of the ombudsman.

Another noteworthy aspect is speed of investigations. Most offices report that complainants are interviewed immediately and, if accepted, investigations into their complaints are commenced right away. Obviously the length of time taken to complete a case varies but most cases are completed within six months to one year. Indeed many are resolved within a matter of weeks. It is also striking that people from all backgrounds and abilities “from university professors to illiterates” bring their cases to the ombudsman. Indeed, some offices report that a good proportion of complainants have little or no education and live in rural areas or high density urban areas.

In many jurisdictions the ombudsman is empowered to undertake investigations on his/her own initiative. For example, in India, the *Lokayukta* can take cognizance even of an anonymous complaint or newspaper report or information gathered from any other source if he is *prima facie* satisfied that there is some substance in the allegation and that an investigation is in the public interest. Such a jurisdiction is especially important in cases where urgent action is required for it is clearly unacceptable to predicate action solely upon the receiving of a complaint, particularly when transportation and communication problems often make it impossible for an individual to contact the office in order to lodge an urgent complaint.

### **Jurisdiction**

Invariably, the office of ombudsman investigates cases of alleged “maladministration” by government officials. There is no precise, universal meaning given to this term. In Pakistan it includes:

- (i) a decision, process, recommendation, act of omission or commission which:
  - (a) is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is bona fide and for valid reasons; or
  - (b) is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; or
  - (c) is based on irrelevant grounds; or
  - (d) involves the exercise of powers or the failure or refusal to do so for corrupt or improper motives, such as bribery, jobbery, favouritism, nepotism, and administrative excesses;

In Zambia a former Investigator-General has noted that:

the abuse of authority or maladministration.....may take various forms. For example, corruption, favouritism, bribes, tribalism, harshness, misleading a member of the public as to his rights, failing to give reasons when under a duty to do so, using powers for the wrong purposes, failing to reply to correspondence or causing unreasonable delay in doing desired public acts

On the face of it, the scope of any investigation is enormous. Coupled with this is the availability of wide-ranging investigative powers. The ombudsman may require any government official to furnish information or to produce documents relevant to the investigation and, if necessary, officials may be interviewed. In most jurisdictions the ombudsman also has the power to summon and examine witnesses at a formal inquiry and to have any witness committed for contempt. Any failure on the part of any official to comply with an order of the ombudsman without reasonable cause constitutes a criminal offence.

However, in practice important constraints operate to reduce the effectiveness of the office. Thus certain key officers and authorities are frequently not subject to investigation. These invariably include the head of state and/or government and members of the Judiciary and Cabinet. In addition, the head of government normally has the power to prevent any investigation on grounds of security. Investigations into the activities of the security forces are also frequently banned. In addition, investigations into cases of alleged corruption, mistreatment of prisoners, unlawful detention or torture are also frequently banned. Whatever the justification for these exclusions, the effect is that many complaints are inevitably excluded from investigation due to lack of jurisdiction, although, even here, the office can play a useful role in advising complainants as to possible alternative courses of action.

In this respect, one notable feature of the recently established offices in Uganda (1986) and Namibia (1990) is the wide jurisdiction enjoyed by the incumbents. In Uganda, the Inspector-General of Government may conduct and inquire or order an investigation into any allegation of a violation of human rights, and this includes the power to investigate cases of detention or torture. Similarly in Namibia the ombudsman has the duty to investigate complaints concerning violations of fundamental rights by government officials, both national and local. (The only "officials" specifically excluded are judges and judicial officers. Does this mean the ombudsman can investigate a complaint against the President or Prime Minister?) It is significant that both offices may investigate the very evils and abuses which have plagued the countries for so long. Assuming this is not a mere "window-dressing" exercise, the appointment may result in genuine accountability of the security forces.

The lack of access to justice for the many indigent people in developing countries is well-known. The complexity of the legal process, delays, the absence of effective legal aid schemes and/or the non-availability of lawyers invariably prevents the majority of citizens enforcing their legal rights. This is particularly serious as regards constitutional rights and protection for these are only of any real value if they are enforceable in practice. It is recognised in both Namibia and Uganda that the ombudsman has a key role to play here. In the former, the ombudsman may provide legal assistance or advice to those seeking to enforce or protect a fundamental right through the courts. In the latter, it is considered that because legal procedures are frequently lengthy, complex and expensive, the law courts are not always a suitable venue for many complainants to bring their cases. Accordingly the Inspector-General of Government may investigate complaints despite the availability of a judicial remedy. To give the ombudsman a responsibility in this field is both imaginative and appealing. A legal assistance and advice function is certainly not a substitute for a more formal legal aid scheme. However it does represent a practical interim solution for dealing with the problems of access to justice and illustrates the kind of flexible and rapid response to a problem which the ombudsman offers.

Many countries are experiencing environmental problems caused by the dumping of hazardous waste, over-exploitation of land, de-forestation and the like. In Namibia, there was particular concern over the over-exploitation of natural resources during the colonial period. In an attempt to prevent this recurring, the ombudsman has the duty to investigate complaints concerning environmental issues, including "the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the destruction of ecosystems and the failure to protect the beauty and character of Namibia" (Article 91(d) Namibian Constitution). Investigations are not apparently limited to government activities and this gives the ombudsman wide-ranging investigative powers into an area of growing international importance. This represents an significant extension of the work of the office and is worthy of consideration in other jurisdictions.

## Post-Investigation Powers

The ombudsman does not exercise any judicial or quasi-judicial function for the incumbent has no enforcement powers and can only make recommendations to rectify an injustice. In practice such recommendations are complied with in the majority of cases. However, if this does not occur the matter must normally be reported to the head of state who then determines the appropriate action. Significantly, in recent years several offices have developed additional powers to rectify instances of maladministration. For example, in Namibia, the ombudsman can take direct action by bringing proceedings for an interdict or other suitable remedy “to secure the termination of the offending action or conduct or the abandonment or alteration of the offending procedures” (Article 91(e) (dd) Namibian Constitution). This provides citizens with a direct, speedy and effective protection from abuses of power by intransigent government officials. This is especially useful in cases requiring urgent action and complements the independent investigatory power. In addition the ombudsman may challenge the validity of any statutory provision if the offending action or conduct “is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise ultra vires” (Article 91 (e) (ee) Namibian Constitution). This power represents another major advance as it means that subordinate legislation becomes subject to critical review. The wide-ranging investigations of the ombudsman may also uncover criminal conduct on the part of some government officials. In such circumstances the Namibian Ombudsman may refer the matter to the Prosecutor-General with a view to prosecuting the offender(s). The *Mohtasib* in Pakistan also has two interesting powers. Firstly, he may award reasonable costs and compensation to an aggrieved party for any loss or damage suffered on account of maladministration. This is recoverable from the erring public servant or Agency. Secondly, he has the power to undertake research with a view to eradicating the root causes of maladministration, and in particular corrupt practices.

## Overview

The office of the ombudsman can make an important contribution to the protection of human rights in the Commonwealth. Being freely accessible and unencumbered with any rigid formalism or procedural constraints, it can provide people from every strata of society with a remedy against government officials which would otherwise would not be available. In addition, the independent investigative power permits the taking of immediate action in defence of human rights.

The fundamental question is whether in practice the office of the ombudsman actually does fulfil its objective. This is difficult to assess. On the positive side, annual reports of national offices indicate that many complainants do receive a speedy and satisfactory determination of their cases. Indeed, having the right to complain and to receive an explanation for a decision is in itself important. In addition, the very presence of the institution may act as an incentive for government officials to perform their duties conscientiously. On the negative side, the number of complaints received by offices in most Commonwealth countries remains relatively small and the number of cases actually investigated even smaller. Much of this is undoubtedly due to limitations on jurisdiction, paucity of resources, lack of publicity and the like.

Overall, there is no doubt that the success of the institution depends, to a very large extent, upon the support it receives from government. Only when this is forthcoming together with the provision of sufficient resources will a clearly independent office emerge which will gain public confidence. The evidence at present indicates that this is something which is lacking in some Commonwealth jurisdictions. However, with increased international interest in the development

of government accountability, the office of the ombudsman may yet play a key role in the protection of human rights.

## **II. HUMAN RIGHTS COMMISSIONS**

International as well as national experience shows that considerable progress in securing human rights can be made through the establishment of specialised bodies vested with general or specific responsibilities for enforcing them. The American Human Rights Commission has helped to educate the public in the importance of human rights and exposed systematic violations of them in a number of countries. New Zealand has achieved great success in promoting better racial understanding and relations through the office of the race relations conciliator. India has a commission to watch over the progress in the amelioration of the conditions of members of economically disadvantaged communities. In the UK commissions on racial and sexual equality have played important roles in education, research and enforcement of legislation in these areas.

In our report we have cautioned against an over-reliance on the courts as a means of enforcement of human rights. We have emphasised the importance of facilitating access of the disadvantaged to legal and administrative bodies, and the value of informal and inexpensive means of redress. We have stressed the need for popular as well as more specialised education in human rights. We have pointed to the desirability of mechanisms to ensure that laws which offend against recognised human rights and freedoms do not enter or stay on the statute book. All or more of these functions can be performed by a body like the Human Rights Commission active in some parts of the Commonwealth, and which we have urged states which do not have them to establish them.

A Human Rights Commission was first established in Saskatchewan in 1947. Since then similar commissions have been established in all the other Canadian provinces as well as at the federal level. New Zealand and Australia have also set up human right commissions. This note briefly examines the organisation, objectives and functions of such commissions.

The basic objective of a commission is to promote respect for and observance of human rights in the administration of the province or the state. This objective may relate either to particular instruments, domestic or international, or to human rights more generally. There are about five principal methods by which the commission discharges this objective. These are educational, standard setting, review of legislation and administrative practices for compatibility with human rights provisions, dispute settlement, and litigation.

The educational programme has been one of the most important tasks of existing commissions. Materials for education in human rights have been prepared for and used in schools, trade unions, women's groups, etc. They cover both the content of the rights and the procedures for complaints and enforcement. Different media have been used, including pamphlets, radio, and video. A commission may also conduct and publish research on human rights, in particular the problems in their realisation, which may require special legislation, as for example in the case of privacy or racial or employment discrimination. Such research has frequently formed the basis of policy measures.

A commission may be required to report to the government any legislation which it comes across in its work and which it considers is incompatible with the provisions for human rights. It may make suggestions for its repeal or reform. A commission may also be asked by the government to

review a proposed legislation for this purpose. More common is examination of administrative practices which are likely to come before it during the course of investigations of particular complaints. In this way a commission can make a valuable contribution towards the reform of administrative practices and decision-making.

By far the greatest amount of the time of a commission is taken up by its consideration of complaints made to it by individuals, associations or NGOs of violations of human rights. Such a commission provides a more accessible, informal and cheaper alternative to litigation in a court. It may proceed by trying to promote a settlement between the parties, consistent with the observance of human right provisions. Experience in some instances has been that these efforts are generally successful, but if not, the law may provide for the commission to issue binding directions. If this is the case, the law will also provide for a party dissatisfied with a direction to have it reviewed by the courts.

Sometimes a commission may be able to proceed to litigation, in support of a party. It would usually do so, to assist a party without adequate resources of its own, if the issue raised a question of great importance which had a general application. In this way the commission can help in the clarification as well as the enforcement of the law.

A commission may also help in the clarification and enforcement of human rights law by establishing codes of conduct to guide various parties (e.g., employers, professionals, trade unions). The commission's knowledge and experience are placed in this way at the disposal of private parties to enable them to conform to human rights law.

It could be given a general responsibility to oversee the implementation of the provisions of a bill of rights and other specialised human rights type of legislation. It might discharge that responsibility in part by submitting an annual report to the legislature on the state of human rights, with its own recommendations for more effective implementation.

If the commission is to do its task effectively and to secure the confidence of the public, it is essential that it be and be seen to be independent. Its finances should be provided directly by parliament. It should also be able to report directly to parliament and any administrative ministry or agency it thinks appropriate.

### **III. PUBLIC INTEREST LAW IN INDIA**

Soon after the Emergency (1975-77), Indian courts became the situs of a new kind of litigation. It arose out of a letter complaining about prison conditions sent by an inmate to a Supreme Court judge who promptly listed it as a fundamental rights petition. This seemingly stray exercise in processual equity was soon to be consolidated as what has come to be known as the "epistolary" jurisdiction of the Court. The significance of this innovation was not that the judges made short shrift of cumbersome legal procedure to enable easier access to themselves. Of crucial significance was the new liberty to raise any public interest issue related to the infringement of guaranteed human rights or the exercise or non-exercise of public power or authority. It was not necessary to show that the petitioners were personally affected by the infringement or lapse they complained about.

The effect of this was far-reaching. Lawyers and law professors brought cases about the length of

criminal trials and the conditions of incarceration in prison and elsewhere. Environmentalists used the court to question the wisdom of mining authorization in the Himalayas. The disadvantaged - such as the pavement dwellers of Bombay- asserted that the government could not extern the urban poor from town centres. Activists used judicial fora to obtain relief from government in the form of schemes for eliminating bonded labour, examining the working conditions of women and children, and securing the entitlements of the rural poor. In legal terms, this new expansive pursuit of the public interest entailed a relaxation of what lawyers call the rules of standing, enabling citizens - if in good faith - to interrogate power and correct injustice through the courts without having to show the infringement of a private right or interest.

But the new liberal rules of standing were not enough. New challenges encounter fresh problems which engender new solutions. To begin with, public interest cases are by their very nature complex - even more so when they were initiated by a letter and professionally processed by a *pro bono* section of the bar without any legal aid and other back up and resources. And, if judges were going to decide on environmental, social welfare and such issues, they would need facts, data, technological information and expert advice. The judges resolved the problem by appointing fact finding and expert commissions of inquiry into child labour, working conditions of tanneries, ecology, land entitlement and a host of other issues. The Supreme Court rightly felt that such inquiry into the public interest is best done by new investigative methods rather than by the adversarial procedure of the common law in which each side seeks to win by questioning the credibility of the other's version of the story.

The next stage of public interest litigation was fraught with a great deal of constitutional tension. The vulnerability of the judiciary might be encapsulated in the challenge; "The judges have made orders; now let them enforce those orders". The common law is limited in its reliefs. It enables the award of damages or the issuance of injunctions. But, so many public interest issues cannot be resolved by passing simple orders that something should or should not be done or by awarding sums of money as compensation. Money is not a substitute for upholding the public interest. So, the judges ordered schematic relief. In a case concerning the cruel occupation of rickshaw pullers, the State was asked to devise and carry out a scheme for the rehabilitation of rickshaw pullers in more honourable and dignified jobs. In a remarkable land entitlements case, from the State of Uttar Pradesh, the Supreme Court ordered not just a phased land entitlement scheme but created a monitoring body to ensure that what the court ordered was done. Such remedial boldness inspires both respect and apprehension - respect because the entitlements of people (especially the disadvantaged and disempowered) need the dignity of considered solutions; but apprehension because the judiciary cannot run the government, assume constitutional authority over financial expenditure not voted by parliament and presume total administrative cooperation. Lest they be accused of usurpation, the judges insist that their enterprise is grounded in legitimate constitutional claims and functions of the executive. This may seem just a disarming ploy, but the quest for consensus solutions conceals pragmatic wisdom and constitutional tact. It has not wholly persuaded the critics of public interest litigation or allayed the fears of the administration. But, it sets a constructive tone for a future which is not mortgaged to an uncompromising confrontation between the executive and the judiciary.

What public interest litigation in India has done is to entrench a new concept of trusteeship of the public interest. Hitherto, the common law reposed the protection of the public interest in the Attorney-General who alone could represent public causes in court. Restrictive rules of standing restrained ordinary citizens from voicing their public concerns and challenging the abuse of power and authority through the courts. No doubt, groups of citizens could get together as a class and

pursue their collective rights. But, the new public interest litigation procedure converts every citizen in India into a “private attorney-general”. It links democracy to justice and seeks to make power subject to accountability.

There are many problems that remain. The public interest law movement was judge-led even though it excited the attention of social activists and committed radical lawyers. At one level there are pressures from government to check the tide of extended court scrutiny of administrative action. Even some judges themselves are not wholly convinced and question whether the new permissive procedures will not release a flood of litigation by busy bodies out to embarrass the courts into a head on collision with the government. Lawyers, too, are uneasy that such causes will further clog an already overloaded system to divert time and resources from mainstream litigation. At another level, constructive efforts have to be made to consolidate the gains of the new litigation so that all the complexities of such a demanding enterprise are properly backed by legal aid schemes, advice centres, professional part-time personnel, documentation and expert support.

India’s “judicial” experiment with democracy has much to commend it. It invites access to the courts as interrogators of power and dispensers of substantive social and economic justice. It creates new ways of eliciting information and provides the possibilities of comprehensive remedies. Like all social experiments, it needs the discipline of integrity, due process and courage. The end result may not be cataclysmic in civil and political society or, by itself, effect distributive justice. But it will create a responsive administration and mitigate harshness, arbitrariness and pain. Courts of justice are not - in the words of an insightful Indian Supreme Court judge - for powerful people with quibbling minds and long purses. It is an invitation for the disadvantaged and disempowered to redeem their faith in constitutional democracy, necessary if the Constitution is to be ascribed a meaning consistent with justice.

#### **IV. INTERNATIONAL PROCEDURES FOR COMPLAINTS OF HUMAN RIGHTS VIOLATIONS**

##### **General**

There is a wide variety of procedures at the international level which may be used for pursuing complaints of violations of human rights. The available procedures within the United Nations system can broadly be classified into two categories:

- (a) complaint-recourse; and
- (b) complaint-information procedures, which may be either (i) general or (ii) “situation” mechanisms.

The purpose of a complaint-recourse procedure is the redress of individual grievances. The body receiving the communication is obliged to take action on an individual communication and the author of the communication is entitled to participate in the consideration of the communication procedure to some extent. Examples of such procedures are the individual communications procedures outlined in section A below.

A complaint-information procedure, by contrast, does not provide an avenue for the redress of individual grievances, but is intended to identify general trends of human rights violations or human rights problems in particular countries in, order to formulate appropriate remedial

strategies. The author of the communication does not generally participate formally in the consideration of the communication after it has been submitted and does not have the right to be informed of the outcome of the consideration of the communication. Although not intended to address individual cases, these procedures may nonetheless be of assistance in that context. Examples of such procedures are outlined in section C below.

This broad classification does not reflect the full diversity of existing human rights procedures. For example, even a complaint-information system may go some way towards providing a remedy for an individual as an, incidental result of the fact that the matter is considered at the international level. Furthermore, the work of the various thematic Special Rapporteurs of the United Nations Commission on Human Rights has a recourse function, as well as addressing country situations and more general issues within the Rapporteurs' mandates (see section B below).

## **Which procedure?**

In deciding whether to lodge a complaint under an international procedure, at least three factors need to be considered:

1. Does the alleged violation fall within the substantive scope of the procedure concerned, whether under the terms of the treaty or other nonnative instrument applicable to the procedure?
2. Has the State which is alleged to be responsible for the violation accepted the competence of the body concerned to receive and consider complaints or is it otherwise subject to the procedure (for example, by the fact of membership of a particular organisation)?
3. Have the preconditions for consideration of the complaint on the merits (admissibility criteria) been satisfied?

There will frequently be one or more procedures under which a complaint can be pursued. In some instances, it may be possible to submit a complaint under more than one procedure simultaneously or consecutively. A number of procedures may provide opportunities for oral hearings, although in many of them the complainant's input is confined to written submissions. It is important to recall that redress under international procedures, if it comes at all, often comes only after a considerable lapse of time.

Since the forms of redress available under the different procedures vary and the preconditions for accepting a complaint (admissibility criteria) may differ from procedure to procedure, it is important to seek advice from those with experience in advising on the use of international procedures before deciding whether or not to utilise a particular procedure.

## **A. Individual complaints procedures**

### **United Nations treaty bodies**

A number of the human rights treaties adopted under the auspices of the United Nations establish procedures which permit individuals to lodge complaints (known as "communications" in UN parlance) against States Parties to those treaties alleging that the rights guaranteed to them by one of those treaties have been violated by a State Party to that treaty. Communications submitted under each of these procedures are examined by the body of independent experts established by the relevant treaty. After consideration of the communications, the committee expresses its views or

opinion as to whether there has been a violation of the relevant rights. These determinations are not, however, formally binding judicial determinations, although in most cases the State Party concerned will abide by them.

All the individual complaints procedures under the UN human rights treaties are optional, so that a State may become a party to the treaties without accepting the competence of the supervisory committee to consider complaints against it.

In order for a communication to be considered on the merits, it must satisfy the admissibility criteria laid down in the individual treaties and the rules of procedure adopted by each committee. Although they differ in some respects, they are similar in important respects. Among the important conditions which must be satisfied is the requirement that local remedies must have been exhausted. The exhaustion of local remedies rule obliges a person to seek to remedy an alleged violation within the national system before bringing it to an international forum. Local remedies do not have to be exhausted if resort to them would be futile or if it would involve unreasonable delay.

Furthermore, if a communication is already being examined under another international procedure (and, in some instances, if it has already been examined), it will not generally be admissible. Other common admissibility criteria are that communications not be anonymous, that they not be an abuse of the right of submission of communications, and that they not be incompatible with the provisions of the relevant treaty. If one is considering submitting a communication under a particular procedure, it is obviously important to examine the specific criteria which apply to that procedure and the practice of the body concerned.

In each case the procedure is a written one, and both the individual complainant (“the author of the communication”) and the State Party are given the opportunity to make their submissions and to respond to the submissions made by the other party. Both the individual and the State Party concerned are informed of the determination of the committee, which is subsequently published.

Individual communications procedures have been established under the International Convention on the Elimination of All Forms of Racial Discrimination 1966, the First Optional Protocol to the International Covenant on Civil and Political Rights 1966, the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984, and the International Convention on the Rights of All Migrant Workers and Their Families 1990 (not yet in force). There is presently no individual communication procedure provided for under the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Elimination of All Forms of Discrimination Against Women 1979, or the Convention on the Rights of the Child 1989.

### **Convention on the Elimination of All Forms of Racial Discrimination**

Article 14 of the Racial Discrimination Convention provides that a State Party may recognize the competence of the Committee on the Elimination of Racial Discrimination (CERD) “to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention”. The Convention provides a wide range of guarantees against discrimination on the grounds of race, colour, descent, or national or ethnic origin and obliges States Parties to take steps to prevent and punish discrimination by public authorities, as well as by private individuals in any field of public life.

As of 1 January 1991, only 14 of the 128 States Parties to the Convention had recognized the competence of CERD to receive communications. As of April 1991, CERD had only adopted opinions in two cases under Article 14.

### **First Optional Protocol to the International Covenant on Civil and Political Rights**

Article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights provides that a State Party to the Covenant that becomes a party to the Optional Protocol recognizes the competence of the Human Rights Committee “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”. The Covenant guarantees the enjoyment of a wide range of civil and political rights.

As of mid-1991, 54 of the 95 States Parties to the ICCPR had accepted the competence of the Human Rights Committee to consider individual communications. The Committee has considered several hundred cases submitted under this procedure.

### **Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment**

Article 22 of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment provides that a State Party to the Convention may recognize the competence of the Committee Against Torture “to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

The Convention imposes an obligation on a State Party to take appropriate legal, administrative and educational steps to prevent and punish torture and to prevent cruel, inhuman and degrading treatment or punishment in any territory under its jurisdiction. Article 1 of the Convention provides that torture means:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

As of 1 January 1991, 25 of the 55 States parties to the Convention had made declarations accepting the competence of the Committee to examine individual complaints. As of April 1991, the Committee had considered 5 cases under article 22, all of which it had dismissed on inadmissibility grounds.

### **Where to send communications**

Communications alleging a violation of the rights guaranteed by one of the above treaties should be sent to:

Centre for Human Rights,  
United Nations Office at Geneva,  
8-14 Avenue de la paix,  
CH-1211 GENEVA 10  
SWITZERLAND

Depending on whether the State concerned is a party to a particular treaty and has accepted the competence of the relevant committee to consider individual communications, it may be appropriate to ask that the communication be directed to a specified committee for consideration, rather than leaving it to the Centre for Human Rights to direct the communication to the procedure which it considers to be most appropriate. For example, the substantive coverage of the ICCPR overlaps with that of both the Racial Discrimination Convention and the Torture Convention. If the State Party concerned has submitted to more than one of the procedures, then choice of the right procedure may determine the outcome of the complaint.

## **Regional systems of human rights protection**

### **Council of Europe**

The European Convention on Human Rights also establishes procedures for the consideration of complaints by individuals that States Parties to the Convention have violated the rights guaranteed by the Convention (or its Protocols). The European Convention is only open to ratification by members of the Council of Europe.

Under article 25 of the Convention, a State Party to the Convention may recognize the competence of the European Commission of Human Rights to receive petitions “from any person, non-governmental organization or group of individuals claiming to be the victim of a violation. . . of the rights set forth in this Convention” by it. Individual complaints can also be lodged against such a State where the complainant alleges that the applicant is a victim of a violation of the rights guaranteed by a Protocol to the Convention to which the State concerned is party.

The Commission can only consider the merits of a complaint (known as a “petition” or “application”) if it satisfies the admissibility criteria conditions laid down by the Convention. These criteria are similar to those applicable to the United Nations treaty committees. They include the requirement that local remedies must have been exhausted and that the petition is substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement, as well as a number of other criteria.

If the Commission decides that a communication is admissible, it proceeds to an examination of the petition together with the representatives of the parties and places itself at their disposal “with a view to securing a friendly settlement of the matter”. If a solution is not reached, the Commission draws up a report on the facts and states its (non-binding) opinion on whether there has been a breach of the Convention. That report is forwarded to the Committee of Ministers of the Council of Europe.

Within three months either the Commission or the State Party concerned (or other States Parties under certain circumstances) may refer the case to the European Court of Human Rights, provided that the State(s) concerned have accepted the compulsory jurisdiction of the Court or agree to the reference. The applicant cannot refer the matter to the Court, although the applicant may

participate in the proceedings before the Court. (Protocol No.9 to the Convention, which is not yet in force, will permit the applicant to refer the case to the Court.)

The judgment of the Court is binding on the parties to the case and execution of the judgment is supervised by the Committee of Ministers. If a case is not referred to the Court, the Committee of Ministers decides whether there has been a breach of the Convention, a decision which is binding on member States.

Of the 23 States Parties to the Convention as of 1 January 1991, all had accepted both the right of individual petition under article 25 of the Convention and the jurisdiction of the European Court of Human Rights under article 46 of the Convention.

### **Where to send communications**

Communications alleging a violation of the rights guaranteed by the European Convention on Human Rights by a State Party to the Convention should be sent to:

European Commission of Human Rights,  
Council of Europe,  
BP 431 R6 67006 STRASBOURG CEDEX  
FRANCE

### **Inter-American system**

Complaints by individuals that they are the victims of violations of their human rights by member States of the Organisation of American States (OAS) may be brought before the Inter-American Commission of Human Rights by one of two routes.

Complaints against States Parties to the American Convention on Human Rights 1969 may be lodged with the Inter-American Commission by any person or group of persons or any non-governmental entity recognized in a State of the OAS. In contrast to the other procedures mentioned above, by ratifying the Convention States Parties accept *ipso facto* the jurisdiction of the Commission to receive complaints.

The procedure before the Commission is similar to that of the European Commission of Human Rights. A decision on admissibility is followed by an attempt to secure a friendly settlement; if that cannot be achieved, the Commission draws up a report stating the facts and its conclusions. That report is sent to the States concerned.

The case may then be referred to the Inter-American Court of Human Rights by the Commission (if the State concerned has accepted the compulsory jurisdiction of the Court) or by the State concerned. The judgments of the Court are final and binding on parties to the case before the Court.

Under article 20 (b) of the Statute of the Inter-American Commission on Human Rights the Commission is given the competence to examine communications submitted to it concerning alleged violations of States which are not parties to the Convention. The normative instrument applied under this procedure is the American Declaration of the Rights and Duties of Man 1948. The admissibility requirements for consideration of such communications and the procedures

followed in examination of the complaint are similar to those applicable to communications lodged pursuant to the Convention. However, such a case cannot be referred to the Court.

As of the end of May 1991 there were 23 States Parties to the American Convention, against all of which individual complaints can be lodged with the Commission. Of these, 14 had accepted the compulsory jurisdiction of the Inter-American Court.

### **Where to send communications**

Communications alleging a violation of the rights guaranteed by the American Convention on Human Rights by a State Party to the Convention or of the American Declaration of the Rights and Duties of Man may be sent to:

Chairman,  
Inter-American Commission on Human Rights,  
Organization of American States,  
WASHINGTON, D.C 20006 U.S.A.

### **United Nations Educational, Scientific and Cultural Organisation**

Individuals may lodge complaints against member States of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) alleging violations “of human rights falling within UNESCO’s competence in the fields of education, science, culture and information”, if these violations are “individual and specific”. Under the procedure, established in 1978 by the Executive Board of UNESCO in its decision 104 EX/Decision 3.3, the UNESCO Committee on Conventions and Recommendations is assigned the responsibility of considering communications received by UNESCO.

The Committee on Conventions and Recommendations is a committee of the Executive Board of UNESCO which meets twice a year. It is composed of 18 members of the Executive Board, who are elected to serve as individuals representing their Governments. The aim of the communications procedure is to achieve an amicable solution wherever possible and the proceedings of the Committee are confidential during and after the consideration of communications. However, the author of a communication is given the opportunity to respond to the information supplied by the State concerned. If the matter cannot be resolved amicably, the Committee takes a decision on the case. Both the Executive Board and the Government concerned are informed of the Committee’s proceedings and decision and are provided with a copy of them. The author of the communication is informed of the substance of the proceedings and of any decision taken by the Committee, but is not provided with a copy of them.

For communications to be considered under this procedure they must satisfy detailed admissibility criteria, one of which is that “the communication must concern violations of human rights falling within Unesco’s competence in the fields of education, science, culture and information”.

The following rights have been identified by UNESCO as falling within its field of competence for this purpose:

- the right to education (article 26 of the Universal Declaration of Human Rights);
- the right to share in scientific advancement (article 27);
- the right to participate freely in cultural life (article 27);
- the right to information, including freedom of opinion and expression (article 19).

In addition these rights may imply the exercise of others, including:

- the right to freedom of thought, conscience and religion (article 18);
- the right to seek, receive and impart information and ideas through any media and regardless of frontiers (article 19);
- the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production (article 27); and
- the right to freedom of assembly and association (article 20) for the purposes of activities connected with education, science, culture and information.

### **Where to send communications**

Communications alleging a violation of the rights which fall competence of UNESCO may be sent to:

UNESCO,  
7, place Fontenoy,  
75700 PARIS  
FRANCE

### **Procedures of the International Labour Organisation**

The International Labour Organisation has a number of procedures for dealing with communications alleging violations of human rights within the areas of work of the ILO. Although potentially applicable to individual cases, on the whole they have tended to be utilised in cases in which there is an alleged widespread violation of relevant rights.

The complaint procedures of the ILO can only be initiated by a Member State of the ILO, an employers' or a workers' organisation or the Governing Body of the ILO. Thus, individuals do not have direct access to the procedures of the ILO but must persuade one of the entities with standing to submit a communication to do so on her or his behalf.

Article 24 of the ILO Constitution provides that an industrial association of employers or workers may make a representation to the International Labour Office that a Member of the ILO "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". There are a number of ILO Conventions which guarantee basic human rights including freedom of association and non-discrimination in employment. The matter is brought before the Governing Body of the ILO, which is composed of Government, employer and worker representatives. If the Governing Body considers that the representation is receivable, it is required to appoint a Committee of the Governing Body, composed of equal numbers of Government, employer and worker representatives, to examine the complaint. The Committee reports to the Governing Body, which may then publish the representation and response of the Government in accordance with article 25 of the Constitution.

Articles 26 to 34 of the ILO Constitution provide another means for dealing with complaints that a Member is not securing the effective observance of a Convention which the member has ratified. This procedure may be initiated by a Member of the ILO which has also ratified the Convention in question, the Governing Body on its own initiative or on the receipt of a complaint from a delegate to the International Labour Conference. This procedure may, if the Governing Body considers this appropriate, lead to the appointment by the Governing Body of a Commission of Inquiry to

consider the complaint and to report thereon.

The ILO has also established special procedures for dealing with alleged violations of trade union rights which can be invoked against any Member of the ILO, regardless of whether that Member has ratified any of the Conventions dealing with trade union rights. Such complaints are referred in the first instance by the Governing Body to its Committee on Freedom of Association (a tripartite body, with members serving in their personal capacity). That Committee reports to the Governing Body its view as to whether the matter requires further consideration, in which case it will be referred to either the Committee of Experts on the Application of Conventions and Recommendations (in the case of ratified conventions) or, with the consent of the Member concerned, to a Fact-Finding and Conciliation Commission for examination (in the case of unratified conventions).

### **Where to send communications**

Communications alleging a violation of the rights which are covered by the ILO procedures must be submitted by one of the bodies with standing to make complaints. Further information may be obtained from:

Director-General,  
International Labour Office,  
4, route des Morillons,  
CH-1211 GENEVA 22  
SWITZERLAND

## **B. hybrid procedures**

There are a number of other procedures under which individuals may submit allegations of human rights violations. While some of these may have an indirect impact on individual cases, they are not individual complaint procedures like those mentioned above, under which the body receiving the complaint must take action on the complaint and reach some determination.

### **The thematic Special Rapporteurs of the Commission on Human Rights**

One of the most important mechanisms developed in the last ten years by the Commission on Human Rights is that of the thematic rapporteur. The Commission has appointed a number of independent experts to act as rapporteurs on particular themes. There are now four thematic rapporteurs with mandates covering summary and arbitrary executions, torture, religious intolerance and trafficking in children.

The functions of the individual rapporteurs vary according to the different mandates granted to them by the Commission. They include the collection of information about the observance or violation of specific rights, the receipt and forwarding to governments of communications received from individuals or organizations alleging violation of the rights which fall within the relevant mandate (in some cases as a matter of urgent action), reporting on the extent and practice of the violations of the relevant rights, formulating policy recommendations and, in some cases, visiting individual countries at the invitation of those countries.

The report of each rapporteur to the Commission is a public document which contains summaries of communications and government replies, as well as more general material. The rapporteurs do not adjudicate on the accuracy of the allegations contained in material which they receive from individuals and organizations or from Governments in reply.

Allegations of violations of rights which fall within the mandate of a Special Rapporteur may be submitted against any State which is a member of the United Nations. Thus, if a State has not accepted the competence of a treaty committee or regional body to consider individual complaints, this may be one of the few available procedures. Furthermore, it is not necessary to exhaust local remedies before the allegation can be received and acted on by the Rapporteur. It does not appear that submission of a complaint to a Special rapporteur prevents an individual from submitting the complaint under one of the individual complaint procedures.

### **Where to send communications**

Further information about the mandates of the Special Rapporteurs can be obtained from and communications alleging a violation of the rights covered by the Rapporteurs' mandates may be sent to:

Centre for Human Rights,  
United Nations Office at Geneva,  
8-14 Avenue de la paix,  
CH-1211 GENEVA 10  
SWITZERLAND

### **Working Groups of the United Nations Commission on Human Rights**

Another type of mechanism established by the United Nations under which individual cases can be examined is that of the thematic working group. The UN Commission on Human Rights has established two thematic working groups, the Working Group on Enforced or Involuntary Disappearances (established in 1979) and newly established Working Group on Arbitrary Detention (established in 1991).

The mandate of the Disappearances Working Group is "to examine questions of enforced and involuntary disappearances", and it is composed of five members of the Commission on Human Rights who serve as experts in their personal capacity.

In contrast to the resolution 1503 procedure (see below), the Working Group holds public sessions, receives material from non-governmental organisations and permits them to comment on Government replies (and vice versa). It has also visited countries on a number of occasions at the invitation of the countries concerned. Its work includes consideration of individual cases, particular country situations and the phenomenon of "disappearances" more generally.

The main focus of its work has involved individual cases, in which it tries to assist persons to ascertain the whereabouts and fate of their relatives by opening channels of communication between individuals and Governments. The Working Group has stressed its humanitarian function and "does not engage in the attribution of responsibility of individual officers or agents of the State for individual cases of disappearances".

The Working Group on Arbitrary Detention is modelled on the Working Group on Disappearances. It has the competence to receive and examine allegations relating to arbitrary detention from victims, family members, nongovernmental organisations and other sources.

### **Where to send communications**

Further information about the procedures of the two Working Groups can be obtained from and communications concerning enforced or involuntary disappearances or arbitrary detention may be sent to:

Centre for Human Rights,  
United Nations Office at Geneva,  
8-14 Avenue de la paix,  
CH-1211 GENEVA 10  
SWITZERLAND

### **Article 20 of the Convention Against Torture**

Article 20 of the Torture Convention provides an additional procedure for responding to situations in States where there is a widespread pattern of torture. While it is not as such an individual complaint procedure, individual complaints can provide the information which is sufficient to trigger the procedure.

The procedure is triggered by the receipt by the Committee of “reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party”. It does not appear that local remedies must be exhausted before the procedure can be invoked. What follows is a four-stage procedure involving the participation of the State concerned, the details of which remain confidential until it is concluded, at which stage the Committee may decide to publish a summary of its findings.

States Parties to the Convention are bound by the procedure unless they opt out of it at the time of ratification. As of 1 January 1991, 47 of the 55 States Parties to the Convention had accepted the procedure.

### **Regional conventions against torture**

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 and the Inter-American Convention to Prevent and Punish Torture 1986 establishes a procedure which, while not an individual complaint procedure, may nonetheless assist in redressing individual grievances. The Convention establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The functions of the Committee (whose members are independent experts) are to carry out regular and ad hoc visits to States Parties to the Convention in order to contribute to the prevention of torture and other ill treatment of persons deprived of their liberty.

The Committee has no adjudicative powers, but may carry out fact-finding visits and make recommendations for the strengthening of protections for persons deprived of their liberty from torture or other ill treatment.

While the Committee does not have the function of investigating individual complaints, it may take those into account in deciding whether to visit a State Party and in the recommendations it makes.

## **C. Petition information procedures**

### **United Nations procedures**

#### **United Nations Commission on Human Rights: The procedure established by Economic and Social Council resolution 1503 (XL VIII)**

In addition to the thematic mechanisms referred to above, Resolution 1503 (XL VIII) establishes a procedure for the receipt and examination of allegations human rights violations made against a member State of the United Nations. The procedure is designed to identify particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and to devise appropriate responses to them. The primary normative instrument applied in the procedure is the Universal Declaration of Human Rights.

The procedure does not provide redress for individual grievances. The procedure treats admissible communications as a source of information in regard to a particular situation which reveals a consistent pattern of gross violations of human rights. Thus, the Secretary-General ceases practically to have any contact with the author of a communication from the time it sends an acknowledgement of receipt to the person concerned.

Resolution 1503 lays down a three stage procedure involving consideration of complaints by three bodies: a special working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities; the Sub-Commission itself; and the Commission on Human Rights.

A working group of the Sub-Commission those communications which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, in order to bring them to the attention of the Sub-Commission. In deciding whether to consider communications, the working group applies the admissibility criteria similar to those which apply to individual communications under the various United Nations human rights treaties.

The full Sub-Commission then determines if particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights should be referred to the Commission on Human Rights.

The Commission must then decide whether a situation which has been referred to it by the Sub-Commission requires a thorough study by the Commission and followed by a report to ECOSOC or whether should be the subject of an investigation by an ad hoc committee. The procedure is confidential until the Commission reports to ECOSOC.

#### **Where to send communications**

Communications alleging a violation of human rights which are submitted for consideration under the Resolution 1503 procedure may be sent to:

Centre for Human Rights,  
United Nations Office at Geneva,  
8-14 Avenue de la paix,  
CH-1211 GENEVA 10  
SWITZERLAND

### **Commission on the Status of Women**

The United Nations Commission on the Status of Women also has a limited mandate to receive communications on the status of women. However, the procedure provides the Commission with little authority to respond effectively to such communications. Governments are requested to respond to communications concerning them. The communications are first considered by a sessional Working Group of the Commission, which reports to the Commission on the categories of communications most commonly received and identifies trends and patterns. The Commission may then make recommendations to the Economic and Social Council as to appropriate action the Council may wish to adopt. The Commission has no power to take any other action in regard to communications concerning the status of women.

### **Where to send communications**

Communications on the status of women for consideration under the communications procedure of the Commission on the Status of Women may be sent to:

Division for the Advancement of Women,  
United Nations Office at Vienna,  
P.O. Box 500,  
A-1400 VIENNA  
AUSTRIA

## **Regional procedures**

### **Inter-American Commission**

The Inter-American Commission on Human Rights also has the jurisdiction to investigate on its own initiative situations in which there are widespread patterns of violations of human rights in a particular country. It has exercised this competence on many occasions, often combined with on-site investigations in the country concerned, and regularly publishes reports on the human rights situations in individual countries.

### **African Charter**

The African Charter on Human and Peoples' Rights 1981 ("the Banjul Charter") establishes the African Commission on Human and Peoples' Rights. Articles 55-59 provide for consideration by the Commission of communications relating to human and peoples' rights subject to the satisfaction of fairly standard admissibility criteria.

Under article 58 of the Charter the Commission may take further steps in relation to "one or more communications [which] relate to special cases [and] which reveal the existence of a series of serious or massive violations of human and peoples' rights". The Commission may draw the case

to the attention of the Assembly of Heads of State and Government of the Organisation of African Unity, which may request the Commission to make an in-depth study and to prepare a factual report and recommendations to the Assembly.

### **Where to send communications**

Communications alleging a violation of human rights which are submitted for consideration under the procedure established under the African Charter procedure may be sent to:

African Commission on Human and Peoples' Rights,  
P.O. Box 673  
Banjul,  
The Gambia.

## **V. ACCEPTANCE AND PERFORMANCE OF OBLIGATIONS UNDER HUMAN RIGHTS INSTRUMENTS**

### **A. MAJOR INTERNATIONAL AND REGIONAL INSTRUMENTS**

- \*1. International Covenant on Economic Social and Cultural Rights  
(1966) GA Res. 2200 A(XXI) 21 UN GAOR, Supp. 16 and 49 UN Doc. A/6316. Entered into force on 3 January 1976.
- \*2. International Covenant on Civil and Political Rights  
(1966) GA Res. 2200 A(XXI) 21 UN GAOR, Supp. 16 and 49 UN Doc. A/6316. Entered into force on 23 March 1976,  
AND Optional Protocol to the International Covenant on Civil and Political Rights.  
(1966) GA Res. 2200 A(XXI) 21 UN GAOR, Supp. 16 and 49 UN Doc. A/6316. Entered into force on 23 March 1976.
- \*3. International Convention on the Elimination of All Forms of Racial Discrimination  
(1965) United Nations, Treaty Series, Vol.660, p. 195. Entered into force on 4 January 1969.
- \*4. International Convention on the Suppression and Punishment of the Crime of Apartheid  
(1973) United Nations, Treaty Series, Vol. 1015. Entered into force on 18 July 1976.
- \*5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment  
(1984) United Nations, Treaty Series, 1985. Entered into force on 26 June 1987.
- \*6. Convention relating to the Status of Refugees  
(1951) United Nations, Treaty Series, Vol. 189, p. 137. Entered into force on 22 April 1954.
- \*7. Convention on the Elimination of All Forms of Discrimination against Women  
(1979), GA Res. 34/180. Entered into force on 3 September 1981

- \*8. Convention on the Prevention and Punishment of the Crime of Genocide  
(1948) United Nations Treaty Series Vol. 78 p. 277. Entered into force 12 Jan. 1951
- \*9. Convention on the Rights of the Child  
Adopted by the General Assembly of the UN 20 November 1989.
- \*10. ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise.
- \*11. ILO Convention No. 98 concerning the Application of the Right to Organise and to Bargain Collectively.

#### Slavery Convention

(1926) (Amended 1953) United Nations Treaty Series Vol. 212 p. 17. Entered into force 7 July 1955

ILO Convention (No. 105) Concerning the Abolition of Forced Labour

(1957) United Nations Treaty Series Vol. 320 p. 291. Entered into force 17 Jan. 1959

Convention relating to the Status of Stateless Persons

(1954) United Nations Treaty Series Vol. 360 p. 117. Entered into force 6 June 1960

Convention on the Reduction of Statelessness

(1961) UN Doc. A/CONF. 9/15 Entered into force 13 Dec. 1975

Convention on the Nationality of Married Women

(1957) United Nations Treaty Series Vol. 309 p. 65. Entered into force 11 Aug. 1958.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

(1949) United Nations Treaty Series Vol. 75 p. 31. Entered into force 21 Oct. 1950.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

(1949) United Nations Treaty Series Vol. 75 p. 85. Entered into force 21 Oct. 1950.

Geneva Convention relative to the Treatment of Prisoners of War

(1949) United Nations Treaty Series Vol. 75 p. 135. Entered into force 21 Oct. 1950.

Geneva Convention relative to the Protection of Civilian Persons in Time of War

(1949) United Nations Treaty Series Vol. 75 p. 287. Entered into force 21 Oct. 1950.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of International Armed Conflicts

(1977) Entered into force 7 Dec. 1978.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts

(1977) Entered into force 7 Dec. 1978.

#### **Regional instruments:**

European Convention on Human Rights - Convention for the Protection of Human Rights and Fundamental Freedoms

Council of Europe European Treaty Series, No.5, entered into force 3 Sept. 1953.

European Social Charter

(1961) Council of Europe European Treaty Series, No. 35, entered into force 26 Feb. 1965.

American Convention on Human Rights

(1969) Organization of American States Treaty Series No. 36, entered into force 18 July 1978.

African Charter on Human and Peoples' Rights  
(1981) Organization of African Unity, entered into force 21 Oct. 1986.

\* For signatures/ratification of the first 10 listed instruments see the Table below.

**B. RATIFICATIONS OR SIGNATURES OF INTERNATIONAL INSTRUMENTS**  
(As at 31 January 1991)

	1 ICESCR	2 ICCPR (+OP)	3 CERD	4 APARTHEID	5 TORTURE	6 REFUGEEES	7 WOMEN	8 GENOCIDE	9 CHILDREN	10 ILO87	11 ILO98
TOTAL 50	21	19	34	22	9	26	27	19	17	21	28
Antigua & Barbuda			X	X			X	X		X	X
Australia (B)	X	X	X		X	X	X	X	X	X	X
Bahamas			X	X				X	S		X
Bangladesh			X	X			X		X	X	X
Barbados (A)(B)	X	X+OP	X	X		X	X	X		X	X
Belize*					X	X	X		X	X	X
Botswana			X			X					
Brunei											
Darussalam											
Canada	X	X+OP	X		X	X	X	X	S	X	
Cyprus	X	X	X		S	X	X	X	S	X	X
Dominica						X	X		S	X	X
The Gambia (B)	X	X+OP	X	X	S	X	S	X	X		
Ghana			X	X		X	X	X	X	X	X
Grenada			X		X		X		X		X
Guyana (B)	X	X	X	X	X		X		S	X	X
India (A)(B)	X	X	X	X			S				
Jamaica	X	X+OP	X	X		X	X	X	S	X	X
Kenya (A)	X	X		S		X	X		X		X
Kiribati											
Lesotho			X	X		X	S	X	S		X
Malawi						X	X				X
Malaysia								X			
Maldives			X	X				X	S		
Malta (A)	X	X+OP	X		X	X			X	X	X

	ICESCR	ICCPR	CERD	APARTHEID	TORTURE	REFUGEES	WOMEN	GENOCIDE	CHILDREN	ILO87	ILO98
Mauritius	X	X+OP	X				X		X		X
Namibia			X	X					X		
Nauru											
New Zealand(A)(B)	X	X+OP	X		X	X	X	X	S		
Nigeria			X	X	S	X	X		S	X	X
Pakistan			X	X				X	X	X	X
Papua New Guinea	X			X		X	S		X		
St. Kitts & Nevis							X		X		
Saint Lucia			X				X	S		X	X
St Vincent & the Grenadines	X	X+OP	X	X			X	X			
Seychelles			X	X		X			X	X	
Sierra Leone			X		S	X	X		X	X	X
Singapore											X
Solomon Islands	X	X									
Sri Lanka	X	X	X	X			X	X	S		X
Swaziland			X						S	X	X
Tonga			X					X			
Trinidad & Tobago (A)(B)	X	X+OP	X	X			X		S	X	X
Tuvalu						X					
Uganda	X		X	X	X	X	X		X	X	X
United Kingdom (A)(B)	X	X	X		X	X	X	X	S	X	X
United Republic of Tanzania	X	X	X	X		X	X	X	S		X
Vanuatu									S		
W. Samoa						X			S		
Zambia	X	X+OP	X	X		X	X		S		
Zimbabwe						X			X		

## LEGEND

- (A) Declaration/Reservation regarding the International Covenant on Economic, Social and Cultural Rights.
- (B) Declaration/Reservation regarding the International Covenant on Civil and Political Rights.
- \* At Independence Belize agreed in an exchange of letters with the UN Secretary - General to be bound by all covenants signed by the colonial power.
- X Ratified S Signed but not yet ratified.

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**C. Status of Reporting for Commonwealth Countries under the International Covenant of Civil and Political Rights and International Covenant on Economic social and cultural rights**

<b>State Party</b>	<b>Reports overdue under ICCPR at 9/11/90</b>	<b>Reports overdue under ICESCR at 14/12/90</b>
Australia		1 due 1989
Barbados		3 due 1983, 1986, 1989
Canada		2 due 1986, 1989
Cyprus	2 due 1984, 1989	1 due 1989
The Gambia	1 due 1985	5 due 1983, 1985, 1987, 1986, 1989
Guyana	1 due 1987	5 due 1977, 1979, 1983, 1986, 1989
India		2 due 1986, 1989
Jamaica	1 due 1986	2 due 1986, 1989
Kenya	1 due 1986	6 due between 1977 and 1989
New Zealand-	1 due 1990	
	1 due 1985 (re Cook Islands)	2 due 1986, 1989
St. vincent		4 due 1883(2), 1985, 1987
Solomon Islands		4 due 1883(2), 1985, 1987
Sri Lanka		4 due 1983, 1985, 1987, 1989
Tanzania	1 due 1986	5 due 1977, 1987, 1983, 1986, 1989
Trinidad & Tobago	1 due 1990	2 due 1986, 1989
United Kingdom		1 due 1989
Zambia		2 due 1983, 1987

## Further Reading

Below are a few suggestions on further reading on topics covered in this report. It is in no way a complete bibliography, but it seemed worth including something. On the whole the items are not technically legal, and they relate to more than one country, or to general issues.

### General

Blackburn & Taylor, *Human Rights for the 1990s: Legal, Political and Ethical issues* (Mansell, 1991)

Davies, ed., *Human Rights* (Routledge, 1988)

Robertson & Merrills, *Human Rights in the World: An introduction to the Study of the international Protection of Human Rights* (3rd. ed., 1989, Manchester University Press)

Sieghart, *The Lawful Rights of Mankind* (OUP, 1985)

Thornberry *Minorities and Human Rights Law* (3rd. ed. 1991, Minority Rights Group)

Each of the above (except Sieghart) has chapters on different topics.

### More Specific Works

Africa Watch *Academic Freedom and Human Rights Abuses in Africa* (1991)

Article 19, *information, Freedom and Censorship* (1988)

Barendt, *Freedom of Speech* (OUP, 1985)

Commonwealth Secretariat, *Engendering Development* (1989)

Commonwealth Secretariat, *Human Rights Training Manual for Public Officials* (1989)

Crawford, *The Rights of Peoples* (Clarendon Press, 1988)

Ennew & Milne, *The Next Generation: Lives of Third World Children* (Zed Books 1989)

Fyfe, *Child Labour* (Polity Press, 1989)

Hocking, ed., *International Law and Aboriginal Human Rights* (Law Book Co. 1988)

Independent Commission on International Humanitarian Issues, *Refugees, Dynamics of Displacement* (Zed Books, 1986)

Momson, *Women and Development in the Third World* (Routledge, 1991)

Rogers, *A Decade of Women and the Law in the Commonwealth* (Commonwealth Secretariat and Hubert Humphrey Inst. of Public Affairs, 1985)

Rogge, *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987)

Snyder & Slinn, *International Law of Development: Comparative Perspectives* (Professional Books, 1987)

Steiner, *Diverse Partners: Non-Governmental Organization in the Human Right Movement* (Harvard) Law School Human Rights Programme and Human Rights Internet 1991)

UNICEF, *The State of the World's Children 1991* (UNICEF/OUP)

UNICEF *Children and Development in the 1990s* (1990)

UNICEF & UNEP *Children and the Environment* (1990)

UN *The World's Women 1970-90: Trends and Statistics* (1991)