

January 1976

From Ghandi to Ghandi - International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms of India

Ved P. Nanda

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Ved P. Nanda, From Ghandi to Ghandi - International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms of India, 6 Denv. J. Int'l L. & Pol'y 19 (1976).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

From Ghandi to Ghandi - International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms of India

Keywords

Human Rights Law

ARTICLES

From Gandhi to Gandhi*—INTERNATIONAL Legal Responses to the Destruction of Human Rights and Fundamental Freedoms in India

VED P. NANDA**

I. INTRODUCTION

Emerging norms of international law require the protection of individuals from the dehumanizing acts of their own

*



'My name is Gandhi, but I am not
related to that woman'

Copyright © 1975 Chicago Sun-Times. Reproduced by courtesy of Wil-Jo Associates, Inc. and Bill Mauldin.

** Professor of Law and Director, International Legal Studies Program, University of Denver College of Law; Co-Chairman, World Committee for Human Rights in India.

governments.¹ Consequently, when gross violations of human rights occur, the international community is obligated to invoke pressures against the offending government.²

In December 1975, the United Nations General Assembly adopted a Declaration against "torture and other cruel, inhuman or degrading treatment or punishment" of persons in de-

I wish to acknowledge with deep gratitude my personal debt to so many students, colleagues and personal friends, and to individuals and groups concerned with promotion and protection of human rights both in the United States and abroad, who have been the source of inspiration, encouragement and assistance in the continuing effort since June 26, 1975, for the restoration of human rights and fundamental freedoms in India. I am especially grateful to: my students—Ian Bird, Edward Buckingham, Mark Caldwell, Constance Cox, Katharine Kunz, David Pansius, Steven Peden, Myra Rainey, Douglas Scrivner, James Walczak, and Jeffrey Wilson; Luis Kutner, Esq., Co-Chairman, and Members of the Consultative Council, the World Committee for Human Rights in India; several officers and members of the Denver International Law Society, Indians for Democracy, Indians for Freedom International, and the International League for Human Rights; my friends and colleagues—in Denver, Britt Anderson, Bill Barker, William Beaney, Robert Burns, John Carver, Jonathan Cox, Phil Gauthier, Tom Gavin, Ed Goodin, Leon Drozd, Genevieve Fiore, William Hornby, Michael Howard, William Key, Tony Larsen, Neil Littlefield, Thompson Marsh, Maurice Mitchell, Wilbert Moore, Christopher Munch, Lee Olson, Stanton Peckham, George Salem, Harley Shaver, William White, Robert Yegge and Mrs. Ronald Yegge; in Chicago, Cherif Bassiouni and Robert Friedlander; in Iowa City, David Baldus, Dale Bentz, Willard Boyd, Helen Buckley, Helen Clark, Paul Neuhauser and Allan Vestal; in New York, Blair Clark, Thomas Franck, John Hazard, Egon Schwelb, Douglas Wachholz and Burns Weston; in Washington, D.C., Edward Derwinski, Donald Fraser, Gary Hart, Floyd Haskell, Nicholas Kittrie, Bert Lockwood, Dayton Olson, Joseph Page, William Ris, Jr., John Salzberg, Pat Schroeder, Michael Walter; Edward Gordon at Albany; Frank Newman at Berkeley; Houston Lay at California Western; Irvin Ritter at Cincinnati; Ralph Lake at Dayton; Richard Baxter at Harvard; John Murphy at Kansas; James Nafziger at Oregon; Covey Oliver at Pennsylvania; Albert Blaustein and Roger Clark at Rutgers; Kenneth Penegar at Tennessee; Thomas Buergenthal at Texas; Harold Maier at Vanderbilt; Richard Lillich, John Norton Moore and Mason Willrich at Virginia; Myres McDougal, Michael Reisman and Eugene Rostow at Yale; S. Swamy in London; A. Bhide in Nairobi, Kenya; and . . . in India.

1. Pertinent documents and the existing literature are too voluminous to list. See, e.g., The Convention on the Prevention and Punishment of Genocide, G.A. Res. 260A, U.N. Doc. A/810, at 174 (1948), adopted Dec. 9, 1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277 (1951); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich, ed., 1973); Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828 (1975); Humphrey, *The Revolution in the International Law of Human Rights*, 4 HUMAN RIGHTS 205 (1975); McDougal, Lasswell & Chen, *Protection and Respect for Human Rights: Freedom of Choice and World Public Order*, 24 AM. U. L. REV. 919 (1975); Newman, *Interpreting the Human Rights Clause of the UN Charter*, 5 HUMAN RIGHTS J. 283 (1972), Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337 (1972).

2. See, e.g., Nanda, *A Critique of United Nations Inaction in the Bangladesh Crisis*, 49 DENVER L. J. 53, 66-67 (1972).

tention and imprisonment.³ The General Assembly also adopted a resolution expressing "its profound distress at the constant, flagrant violations of human rights, including . . . torture, cruel, inhuman or degrading treatment or punishment, arbitrary arrest, detention and exile . . . which have taken place and, according to existing evidence, continue to take place in Chile,"⁴ and calling upon the government of Chile to take all necessary measures to restore basic human rights and fundamental freedoms in that country.⁵

But ironically, and unfortunately, at the same time that the Government of India was supporting these human rights resolutions, its own conduct mocked the very standards it had ratified.⁶ I was visiting India at the time and had the opportunity to verify some of the reported incidents of arbitrary arrest and detention, and inhuman, degrading treatment, and torture of those held in detention or imprisonment on political grounds.⁷ My personal observation and investigation coupled with the evidence gathered by others,⁸ have led me to conclude that gross and massive violations of human rights and fundamental freedoms have occurred and continue to occur in India.

These violations will be discussed in this comment in light of appropriate provisions of the U.N. Charter and of the applicable human rights instruments—covenants, declarations, and resolutions.⁹ This discussion will be followed by a section on appraisal and recommendations.¹⁰ Specifically, a few alternatives will be explored which might be helpful in seeking restoration and protection of human rights and fundamental freedoms

3. G. A. Res. 3452, 30 GAOR Supp. ____ at ____, U.N. Doc. A/ ____ (1975). The resolution is also printed in 12 U.N. MONTHLY CHRONICLE, Jan. 1976, at 91.

4. Art. 1, G.A. Res. 3448, 30 GAOR Supp. ____ at ____, U.N. Doc. A/ ____ (1975). The resolution is also printed in 12 U.N. MONTHLY CHRONICLE, Jan. 1976, at 90.

5. *Id.* art. 2.

6. See § II *infra*, at text accompanying notes 16-100.

7. See Nanda, *Passage Through India—Whip of the New Raj*, NATION, Feb. 21, 1976, at 203-204.

8. The evidence I have relied upon was gathered primarily by the *Lok Sangharsh Samiti* (People's Struggle Committee in India, hereinafter cited as the *Samiti*) and already has been used by two groups—Indians for Freedom and the International League for Human Rights—in their respective communications to the United Nations. The copies of the *Samiti* reports and the official bulletins and copies of these communications are on file at DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY.

9. *Supra* note 6.

10. See § III *infra*, at text accompanying notes 101-142.

in India. The purpose is to suggest selected measures which states as well as intergovernmental organizations and nongovernmental groups might take to seek the implementation by India of the applicable human rights prescriptions for the one-sixth of the human race living in that country.

II. PATTERN OF CONSISTENT AND GROSS VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BY THE GOVERNMENT OF INDIA

A systematic and steady erosion of the fundamental freedoms guaranteed by the Constitution of India¹¹ began with the imposition of a state of Emergency by the Government of India on June 25, 1975.¹² Since then, repressive legislative and executive measures have cut deeply into the enjoyment of human rights by the people of India. These measures directly contravene the obligation of states under the U.N. Charter. For example, article 55 requires member-states to promote universal respect for, and observance of, human rights and fundamental freedoms; and article 56 demands that they take joint and separate action, in cooperation with the United Nations, toward that end.

Clearly, the Government of India is pursuing a policy of harassment, arrests, detention and imprisonment of political opponents, and of treating inhumanly those detained and imprisoned on political grounds. The Government of India justifies its acts, its extraordinary "disciplinary" sanctions, on grounds of national security. In Indira Gandhi's words, the purported reason for imposing the Emergency and for undertaking these extraordinary measures was to protect India from threats to national unity, to discharge the Government's "paramount duty to safeguard unity and stability. The nation's integrity demands firm action."¹³ The continuation of these measures is rationalized by invoking the need to instill discipline and to improve the country's economy.¹⁴ As the following

11. CONST. OF INDIA arts. 12-35 (1950). For an incisive commentary see G. AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION*, 50-115 (1966).

12. N.Y. Times, June 27, 1975, at 1, col. 8.

13. MINISTRY OF EXTERNAL AFFAIRS, PRIME MINISTER INDIRA GANDHI ON EMERGENCY IN INDIA, 1, 10 (1975) [hereinafter cited as *INDIRA GANDHI ON EMERGENCY*]. See also N.Y. Times, June 27, 1975, at 12, col. 3; SATURDAY REV., Aug. 9, 1975, at 10, col. 2.

14. See, e.g., *INDIRA GANDHI ON EMERGENCY*, supra note 13, at 23-25; Kaul, *In Which Reasons for the State of Emergency Are Explained and Defended*, N.Y. Times,

discussion will demonstrate, the Government's contentions are neither supported by facts,¹⁵ nor can they be justified on legal grounds.

A. *Torture and Mistreatment of Detainees and Prisoners*

Torture and other practices of cruel, inhuman or degrading treatment or punishment of detainees and prisoners are categorically prohibited under international law. Specific international prescriptions on the subject include article 5 of the Universal Declaration of Human Rights¹⁶ and article 7 of the International Covenant on Civil and Political Rights¹⁷ (which came into force in March 1976)¹⁸ both of which proscribe such measures against any person under any circumstances. The Covenant further stipulates that a person's right not to be subjected to torture or to cruel, degrading or inhuman treatment or punishment is so fundamental that it cannot be derogated even in time of public emergency.¹⁹ The Covenant mandates that all persons deprived of their liberty are to be treated "with humanity and with respect for the inherent dignity of the human person;"²⁰ the necessary guidelines as to lawful sanctions are contained in the U.N. Standard Minimum Rules for the Treatment of Prisoners.²¹

July 28, 1975, at 21, col. 1; GOVERNMENT OF INDIA, *TIMELY STEPS* (1975). Criticizing Indira Gandhi's recent statement that "the gains of the emergency were economic and not political," Jaya Prakash Narain, the ailing opposition leader said on July 14, 1976, "The relevant question, however, is whether the imprisonment of tens of thousands of persons and their detention without trial, the suppression of civil liberties and of the freedom of the press and establishment of a virtual police Raj [state], were necessary to achieve the paltry economic gains." *Satya Samachar* 1 (n.d., official bulletin published by the *Samiti*), on file at DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY.

15. See, e.g., *Christian Science Monitor*, July 30, 1976, at 10, col. 1 [hereinafter cited as *C. S. Monitor*]; Nanda, *If Mrs. Gandhi has her way, India Will Have a Dynasty*, *Rocky Mountain News*, Apr. 18, 1976, at 1, col. 1.

16. Art. 5 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217 A, U.N. Doc. A/810, at 72 (1948), reproduced in *Human Rights: A Compilation of International Instruments of the United Nations*, U.N. Doc. ST/HR/1, at 1 (1973) [hereinafter cited as *U.N. Human Rights Instruments*].

17. *U.N. Human Rights Instruments*, at 9.

18. The covenant came into force on March 23, 1976. See *After 30 years, an International Bill of Human Rights*, 12 U.N. MONTHLY CHRONICLE, Apr. 1976, at 50.

19. Art. 4(2), *U.N. Human Rights Instruments*, at 8.

20. Art. 80(1), *id.* at 9.

21. The U.N. Economic and Social Council approved the Standard Rules in August 1957. ECOSOC Res. 663(c), 24 U.N. ECOSOC Supp. 1, at 11, U.N. Doc. E/3048 (1957). For the General Assembly action recommending implementation and adoption

More recently, the U.N. General Assembly, at its Thirtieth Session, adopted a Declaration²² which condemns such inhuman practices as a denial of the purposes of the U.N. Charter and violative of the Universal Declaration of Human Rights.²³ The Declaration defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons."²⁴ States are not to permit or tolerate such practices,²⁵ and are obligated: (1) to take effective measures to prevent these practices;²⁶ (2) to conduct impartial investigation of charges against such practices;²⁷ and (3) to take appropriate action against the offender²⁸ and to afford redress and compensation to the victim.²⁹ These prohibited practices cannot be excused or justified even under exceptional circumstances such as a state of war or a threat of war, internal political instability, or any public emergency.³⁰

These guidelines are to be further studied by the Sub-Commission on Prevention of Discrimination and Protection of Minorities [hereinafter to be referred to as the Sub-Commission], which is a subsidiary organ of the U.N. Commission on Human Rights [hereinafter to be referred to as the Commission]. The study will be undertaken pursuant to the Commission's request that the Sub-Commission draft a body of principles for the protection of all persons under any form of detention and imprisonment.³¹ Subsequently, at the April-May 1976 session of the Economic and Social Council [hereinafter to be referred to as ECOSOC], the Council called

of the Rules see G.A. Res. 2858, 26 U.N. GAOR Supp. 29, at 94, U.N. Doc. A/8588 (1971), and G.A. Res. 3144, 28 U.N. GAOR Supp. 30, at 85, U.N. Doc. A/9425 (1973).

22. *Supra* note 3.

23. *Id.* art. 2 of the Declaration.

24. *Id.* art. 1.

25. *Id.* art. 3.

26. *Id.* arts. 4, 6.

27. *Id.* arts. 8, 9.

28. *Id.* art. 10.

29. *Id.* art. 11.

30. *Id.* art. 3.

31. 12 U.N. MONTHLY CHRONICLE, Mar. 1976, at 38.

upon all Governments fully to observe and to implement the Declaration.³²

Reports from India suggest that the Government has systematically and consistently violated these substantive rights. The *Loka Sangharsh Samiti* (People's Struggle Committee in India), has made serious allegations against the Government of India regarding mistreatment of detainees and prisoners and of torture in police stations and jails.³³ Many observers of the Indian scene have made similar charges.³⁴ The methods of torture often used by the police to induce or extract a confession to or implicate others in a nonexistent plot against the Government of India, to seek information concerning the activities of the underground, or to punish a victim for his or her activities in the underground are as varied as they are inhuman and revolting. After personally verifying the alleged accounts of police brutality I reported after my visit to India last December:

The victims who talked with me related incidents where they or other political prisoners were hung upside down; were stripped naked and severely beaten with shoes, steel rods and gun butts; had burning candles applied to their bare soles, which were then punctured with nails; had chili powder smeared into their noses and other parts of their bodies; were kept awake while icy water was thrown on them on cold winter nights; were starved and even denied water; had rods tied to their necks, creating an intolerable strain on the spinal cord.

The doctor I met was not personally tortured. However, while he was in jail as a political prisoner, illegally detained on trumped-up charges, he had treated more than twenty prisoners who, he said, must have been "mercilessly beaten." The sole fault of the lawyer, arrested on the charge of being a "hooligan," was, he said, that he had appeared in court on behalf of a political prisoner. A member of the Indian Supreme Court Bar Association showed me a resolution adopted by that organization which condemned police atrocities and harassment of attorneys defending opposition members. The Bar Association noted that even the families and relatives of such attorneys were not spared police wrath.³⁵

32. *Id.* June 1976, at 26.

33. Copy on file at DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY.

34. See, e.g., statement by George Fernandes, Chairman, Socialist Party of India, of Nov. 8, 1975, at 19 (copy on file at DENVER J. INT'L LAW & POLICY); Swamy, *The bed of nails that Mrs. Gandhi made*, Manchester Guardian Weekly, June 13, 1976, at 9; Anderson & Whitten, *Torture of Political Prisoners Continues*, Washington Post, March 27, 1976, at E14, cols. 2-3; Nanda, *supra* note 7, at 204.

35. Nanda, *supra* note 7, at 204.

The massive arrests since the imposition of the Emergency have resulted in overcrowding in Indian jails. Political prisoners are kept in conditions violative of the Standard Minimum Rules for the Treatment of Prisoners.³⁶ Even before the promulgation of the Emergency, thousands of "Naxalites" were kept in Indian jails without trial, and many of them were physically abused.³⁷

One cannot argue that these continuing violations of international norms could occur without some knowledge, toleration or direction by the Government of India. Furthermore, the Government has ignored repeated requests for the appointment of a commission of inquiry to conduct an impartial investigation of these charges, and has not responded to or even acknowledged communications on the subject from opposition Members of Parliament.³⁸

B. Suspension of the Rights to Life, Liberty and Security of Person and to Due Process of Law

The Universal Declaration of Human Rights protects the rights of all persons to life, liberty and security of person,³⁹ and to due process of law, including "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights" guaranteed a person by the constitution or by law,⁴⁰ protection from arbitrary arrest, detention or exile,⁴¹ the right to a fair and public hearing by an independent and impartial tribunal,⁴² and the presumption of innocence.⁴³

These rights were subsequently codified in articles 9, 14 and 15 of the International Covenant on Civil and Political Rights.⁴⁴ More recently, the Commission has shown special concern for "the question of human rights of all persons subjected to any form of detention or imprisonment."⁴⁵ At its

36. Appendices 5, 6 and 8 of the communication submitted to the U.N. Secretary-General by Indians for Democracy [hereinafter cited as *Indians for Democracy Communication*].

37. *Id.* appendices 3 and 4.

38. *Id.* appendices 7, 9, 10, 11a-11d, 12-14.

39. Art. 3, *U.N. Human Rights Instruments*, at 8.

40. *Id.* at art. 8.

41. *Id.* at art. 9.

42. *Id.* at art. 10.

43. *Id.* at art. 11(1), and 2.

44. *Id.* at 9-10.

45. 12 U.N. MONTHLY CHRONICLE, Mar. 1976, at 38.

February-March 1976 session, the Commission asked the Sub-Commission "to draft a body of principles for the protection of all persons under any form of detention and imprisonment."⁴⁶ It also drew the attention of all states "to studies and principles relating in particular to freedom from arbitrary arrest and detention."⁴⁷ The Commission's contribution to the promotion of respect for human rights and fundamental freedoms at its 1976 session was endorsed by ECOSOC.⁴⁸ It is significant to note that earlier, in 1974, the Sub-Commission had already decided by its resolution 7 "to review annually developments in the field of human rights of persons subjected to any form of detention or imprisonment."⁴⁹ The resolution also called for attested information on the subject from governments, intergovernmental organizations, and non-governmental groups.

Since the beginning of the Emergency, the Government of India has consistently and flagrantly violated these fundamental rights. To briefly recapitulate, the fundamental rights guaranteed under the Constitution of India were suspended by Presidential orders⁵⁰ issued under article 359 of the Constitution.⁵¹

The rights suspended include: the rights to life and personal liberty;⁵² equality before the law;⁵³ protection against arrest and detention without being informed of the grounds for arrest, and the duty to produce an arrested person before a magistrate within 24 hours.⁵⁴ The Emergency destroyed these

46. *Id.*

47. *Id.*

48. *Id.*, June 1976, at 26.

49. U.N. Doc. E/CN.4/1160, E/CN.4/Sub. 2/354, at 52-53 (1974). For a thorough and incisive analysis of the Sub-Commission's role see Burke, *New United Nations Procedure to Protect Prisoners and other Detainees*, 64 CALIF. L. REV. 201 (1976).

50. See, e.g., N.Y. Times, June 28, 1975, at 1, col. 6; *id.* June 30, 1975, at 1, col. 1; *id.* July 23, 1975, at 1, col. 3; *id.* July 25, 1975, at 3, col. 1; *id.* Aug. 8, 1975, at 3, col. 7; *id.* Oct. 19, 1975, at 18, col. 5.

51. Art. 359 authorizes the Government to take measures suspending some or all of the fundamental rights guaranteed under the Constitution once the President has proclaimed an emergency under art. 352, that is, when the President is "satisfied" that there is a threat or imminent threat to India's security. See Nanda, *The Constitutional Framework and the Current Political Crisis in India*, 2 HASTINGS CONST. L.Q. 859 (1975).

52. CONST. OF INDIA art. 21 (1950).

53. *Id.* art. 14.

54. *Id.* art. 22. The President of India issued an ordinance soon after the proclamation of the Emergency stating that it was no longer necessary to communicate to

protections. Tens of thousands of political opponents have been arrested since the declaration of the Emergency,⁵⁵ and sweeping police powers have been exercised under repressive measures such as the Maintenance of Internal Security Act (MISA) and the Defense of India Rules.⁵⁶

The citizen's right to move judicial tribunals for writs of habeas corpus, guaranteed by the Constitution of India, was challenged by the Government in the Supreme Court of India. In its four-to-one ruling of April 28, 1976, the Supreme Court upheld the Government's suspension of the right of habeas corpus during the Emergency.⁵⁷ It accepted the Government's contention that "the President's power to take any action during the emergency under Article 359 was absolute and by such action, if a citizen was deprived of his liberty and life, he could not complain that the action was without the procedure established by law."⁵⁸ Thus, there "is no personal rights law for the time being."⁵⁹ Consequently, no detainee or prisoner during the Emergency could seek judicial intervention, "even if an action taken by the executive was unlawful."⁶⁰

The Court also upheld a law enacted in January 1976,

detained persons reasons for their detention. N.Y. Times, June 30, 1975, at 1, col. 1.

55. The number of political prisoners in Indian jails has been estimated at nearly 200,000 by the opposition. *Satya Samachar*, *supra* note 14, at 6. "It's a small number of people, very small, relative to India's whole population" is how Indira Gandhi responded to a question in April 1976. *Borders, New Delhi Balks on Prisoner Data*, N.Y. Times, April 27, 1976, at 11, col. 1. The number was put, "by conservative estimates," at more than 100,000 in a special report to the Washington Post from London. Lifschultz, *India Still Holding 100,000 in Jails*, Washington Post, Mar. 5, 1976, at A1, col. 1. A staff writer of the Los Angeles Times reported from New Delhi on June 25, 1976: estimates of political prisoners run to the tens of thousands. Most foreign diplomats have stopped playing the guessing game." Rosenhouse, *A New India: Democracy in the Past Tense*, L.A. Times, June 25, 1976, at 1, col. 1. In January 1976, a Washington Star staff writer reported the number of arrested political prisoners to be 95,000. Bradsher, *Mrs. Gandhi Obliterating Nehru's Consensus Rule*, Washington Star, Jan. 23, 1976, at A7, col. 1. See also N.Y. Times, May 2, 1976, § IV, at 14, col. 5.

56. For recent amendments to MISA see an Associated Press report in Rocky Mountain News, June 17, 1976, at 26, col. 1. See also *Borders*, *supra* note 55.

57. N.Y. Times, Apr. 29, 1976, at 1, col. 5.

58. The Government's contention was made by the Attorney-General of India, Niren De, in his arguments before the Supreme Court. Indian Express, Dec. 18, 1975, at 1, col. 5. I confirmed the accuracy of Mr. De's statement in a conversation with Mr. De in Denver in April 1976.

59. *Supra* note 57, at 8, col. 1 (Mr. De's contention before the Supreme Court).

60. Hindustan Times, Dec. 16, 1975, at 1, col. 1. (Mr. De's contention before the Supreme Court).

under which the grounds for detention were made confidential "matters of state, [which are] against the public interest to disclose."⁶¹ Writing for the majority, Chief Justice A.N. Ray said:

Material and information on which orders of preventive detention are passed necessarily belong to a class of documents whose disclosure would impair the proper functioning of public service and administration. The file relating to a detention order must contain intelligence reports whose confidentiality is beyond reasonable question.⁶²

Pursuant to executive decrees and ordinances and legislative measures, government actions have deprived political detainees of their fundamental rights. These actions include:⁶³ (1) failure to bring detainees before a magistrate promptly, or to identify the grounds for detention—it is now sufficient that the authorities are satisfied that detention is necessary to safeguard the security of India; (2) failure to bring detainees to trial within a reasonable time—a political prisoner may be held in detention for up to one year without bail, notification of charges, or arraignment or trial; (3) denial of visitors and/or counsel; (4) unjustified solitary confinement; and (5) rearrest and detention of released prisoners under the same circumstances.

Since there is no time limit on the duration of the Emergency,⁶⁴ a person detained or arrested has no legal or judicial recourse to safeguard his or her right to personal liberty during the period of the Emergency, even if such a person is totally innocent and illegally detained on false information or on immaterial or nonexistent grounds.⁶⁵

61. *Supra* note 57, at 8, col. 1.

62. *Id.*

63. *Id.*; *supra* notes 50-55 and the accompanying text; MATCHBOX (Amnesty Int'l newsletter), Summer 1976, at 1-2; N.Y. Times, Jan. 23, 1976, at 10, col. 1; Denver Post, Aug. 16, 1976, at 4, col. 1. See, e.g., the communications to the United Nations Secretary-General by the International League for Human Rights and Indians for Democracy, and various official bulletins and reports by the *Samiti* on file at the DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY.

64. On July 23, 1975, the Lok Sabha—lower house of the Indian Parliament—ratified the Government's declaration of state of emergency, which empowered the Government to keep the Emergency in effect indefinitely. Lok Sabha also ratified a constitutional amendment precluding judicial review of the President's proclamation of emergency. N.Y. Times, July 24, 1975, at 1, col. 7; *id.* July 25, 1975, at 3, col. 1; *id.* July 30, 1975, at 2, col. 1.

65. For Additional Solicitor-General of India's contention on the subject in the

The repressive governmental measures which have deprived a citizen of recourse to the law and the judiciary include the following: (1) suspension of the fundamental rights guaranteed by the Constitution of India;⁶⁶ (2) various amendments to MISA, further curtailing the rights of the detainees;⁶⁷ and (3) amendments to the Constitution of India, depriving the courts of jurisdiction to review any claim that the Emergency powers have been misused.⁶⁸

The Government of India has used these repressive measures primarily against its political opponents. Among those arbitrarily arrested and detained are former cabinet ministers, Members of Parliament, leaders of opposition parties and even dissenters from within the ruling Congress Party, journalists, university professors, and students.⁶⁹ As the later discussion will demonstrate, no legal justification exists for taking these extraordinary measures.

C. *Denials of Freedom of Expression, Assembly and Association, and Freedom of the Press*

Article 19 of the Universal Declaration of Human Rights guarantees the right to freedom of opinion and expression.⁷⁰ Article 20 of the Declaration protects the right to freedom of peaceful assembly and association.⁷¹ These rights are codified in the Covenant on Civil and Political Rights—Article 18 recognizes the right to freedom of thought and conscience,⁷² article

Supreme Court, see *Times of India*, Jan. 19, 1976, cited in the *Indians for Democracy Communication*. MISA was removed from judicial scrutiny as early as August 1975. *N.Y. Times*, Aug. 8, 1975, at 3, col. 7. In October 1975 MISA was further amended by a Presidential ordinance, according to which the Government was no longer required to disclose reasons for arrests made under MISA. The ordinance was made retroactive to June 29 to keep prisoners already in jails from challenging their arrests. *Id.* Oct. 19, 1975, at 18, col. 5. See also, *id.* Nov. 18, at 8, col. 6; *Rocky Mountain News*, June 17, 1976, at 26, col. 1; *Denver Post*, Aug. 16, 1976, at 4, col. 1.

66. *Supra* notes 52-54 and note 78 *infra* and the accompanying text.

67. *Supra* note 65.

68. *Supra* note 64.

69. See, e.g., *Lukas, India is as Indira Does*, *N.Y. Times*, Apr. 4, 1976, § 6, at 19, 89, col. 1; *id.* June 27, 1975, at 1, cols. 6, 8; *id.* at 12, col. 5; *id.* July 8, 1975, at 7, col. 1; *id.* July 27, 1975, at 1, col. 7; *id.* Aug. 5, 1975, at 10, cols. 3, 5; *id.* Dec. 20, 1975, at 6, col. 4; *id.* Feb. 2, 1976, at 9, col. 2; *id.* Feb. 5, 1976, at 5, col. 1; *id.* March 9, 1976, at 3, col. 3; *id.* Apr. 27, 1976, at 11, col. 1; *id.* May 2, 1976, § IV, at 14, col. 5; *id.* May 19, 1976, at 10, col. 4; *id.* May 26, 1976, at 1, col. 1.

70. *U.N. Human Rights Instruments*, at 2.

71. *Id.*

72. *Id.* at 10.

19 states the right to freedom of opinion and expression;⁷³ article 21 protects the right to peaceful assembly;⁷⁴ and article 22 guarantees the right to freedom of association.⁷⁵

The President of India has suspended the seven basic freedoms guaranteed under the Constitution of India—freedom of speech, of assembly, to form associations and unions, to move throughout the country, to live in any part of the country, to own property, and to follow any profession, trade or business.⁷⁶ The mass arrests of political opponents, designed to silence opposition to the Government, clearly violate the right to freedom of expression. In addition, the Government has outlawed 26 organizations⁷⁷ and has stifled the once lively Indian press by placing it under severe censorship.⁷⁸ In December 1975 it promulgated the Prevention of Publication of Objectionable Matter Ordinance,⁷⁹ under which any words, signs or visible representations considered defamatory of the executive authorities including the President, Prime Minister or any other member of her Council of Ministers, the Speaker of the Lok Sabha—lower house of the Indian Parliament—or Governor of a State, constitutes a punishable offense.⁸⁰

Under the Ordinance, the definition of the objectionable matter includes any words, signs or visible representations which are likely to “[b]ring into hatred or contempt or excite disaffection towards the Government established by law in India or in any State thereof and thereby cause or tend to cause public disorder.”⁸¹ The executive is authorized to take action

73. *Id.* at art. 19(2), at 11.

74. *Id.*

75. *Id.* at art. 22(1).

76. CONST. OF INDIA art. 19 (1950). The suspension came on Jan. 7, 1976. *See also Indians for Democracy Communication.*

77. N.Y. Times, July 5, 1975, at 1, col. 4. *See also* statements by Ved Nanda and Jagjit Singh Chohan at Congressional Hearings, *Hearings on Human Rights in India Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Session, at ____ (June 28, 1976) [hereinafter cited as *House Hearings*].

78. *See, e.g.*, N.Y. Times, July 26, 1976, at 3, col. 1; *id.* May 29, 1976, at 22, col. 2; *id.* Feb. 15, 1976, § 1, at 4, col. 1; ECONOMIST, May 29, 1976, at 47; notes 79-89 *infra* and the accompanying text.

79. Hindustan Times, Dec. 10, 1975, at 1, col. 1; Int'l Herald Tribune, Dec. 9, 1975, at 1, col. 1; N.Y. Times, Dec. 9, 1975, at 8, col. 3.

80. § 3(B)(I), Hindustan Times, Dec. 10, 1975, at 5, col. 1.

81. *Id.* at § 3(I).

to prevent or combat "any activity prejudicial to the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality."⁸² The penalties for disobedience are severe⁸³ and the executive has wide discretion in implementing the ordinance.⁸⁴ In January 1976 the Parliament of India gave the measure its stamp of approval,⁸⁵ thereby allowing strict press censorship to survive even should the Emergency end.

Earlier, in July 1975, the Government promulgated censorship guidelines⁸⁶ which prohibit the publication, without prior approval, of opposition speeches in Parliament, details of court proceedings, names of detainees and their places of detention, demonstrations against the government and matters critical of the government. Thus, the publication of anything the Government finds objectionable is forbidden—even to the extent of prohibiting quotations from Gandhi, Nehru and certain statements made by Indira Gandhi herself before the imposition of the Emergency.⁸⁷

In January 1976, the Government further stifled the right of free expression by repealing the immunity of the press in reporting parliamentary proceedings.⁸⁸ It also abolished the Press Council of India, which was an independent agency established to protect freedom of the press.⁸⁹ Censorship has reportedly been extended to censoring mail, confiscating foreign literature including newspapers and periodicals containing articles critical of the Government, and telephone bugging and wiretapping of political opponents and dissidents.⁹⁰

The Emergency decree and the suspension of article 19 of the Constitution have severely curtailed the right to peaceful assembly, which is essential to the Gandhian concept of resistance and disobedience. Thus protest marches, demonstrations,

82. *Id.* at § 5(1)(A), at 5, col. 2.

83. *Id.* at §§ 8-15, at 5, cols. 2-3; at 7, col. 6.

84. *See, e.g., id.* at § 4, at 5, cols. 1-2; *id.* at § 17, at 7, col. 6; *id.* at §§ 20, 22, 23, at 7, col. 7.

85. N.Y. Times, Jan. 30, 1976, at 3, col. 5.

86. *Id.* July 22, 1975, at 6, col. 5; at 1, col. 2; at 7, col. 1.

87. Nanda, *supra* note 15.

88. N.Y. Times, Jan. 29, 1976, at 3, col. 1.

89. *Id.*

90. *Id.* Jan. 18, 1976, at 12, col. 1; Appendices 17-20, *Indians for Democracy Communication*.

and political rallies are illegal. When in defiance of the Government's prohibition of assemblages of more than five persons, countrywide *Satyagrahas* (peaceful resistance) took place from November 1975 to January 1976,⁹¹ brutal police tactics were often used to disperse the demonstrators.⁹² Also, under the censorship laws, the press could not report these *Satyagrahas*.⁹³

Fear of arrest for expression of dissident views has severely curtailed public debate in Parliament, in educational institutions, and in various public forums known for lively discussion on political, economic and social matters before the Emergency. This blanket of silence imposed on the Indian press and people denies not only the freedom of expression but the concomitant right to impart and receive information, a right basic to democratic society.

D. *The Right of Self-Government*

Article 21 of the Universal Declaration of Human Rights recognizes the right of a person to take part in the Government of his or her country, to have access to public service, and states that the will of the people, expressed through periodic elections, shall be the basis of governmental authority.⁹⁴ These rights were subsequently codified in article 25 of the Covenant on Civil and Political Rights, which stipulates that all citizens shall have the right and the opportunity to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections held by secret ballot.⁹⁵

The Government of India has postponed the national elections for a year (and perhaps much longer).⁹⁶ It has dismissed the only existing opposition governments—in the States of Gujarat⁹⁷ and Tamil Nadu⁹⁸—and has imposed direct presidential rule there from New Delhi. The term of the state government in Kerala where the ruling Congress Party and its allies are in

91. Nanda, *supra* note 7, at 204; Nanda, *Little Hope for Rights in India*, Rocky Mountain News, June 27, 1976, § Trend, at 2, col. 1.

92. *Id.*

93. *Id.*; Lukas, *supra* note 69, at 89; Lifschultz, *supra* note 55, at A14, col. 3.

94. *U.N. Human Rights Instruments*, at 2.

95. *Id.* at 11.

96. N.Y. Times, Feb. 5, 1976, at 5, col. 1. *See also id.* Dec. 30, 1975, at 1, col. 5; *id.* Jan. 4, 1976, § 1, at 3, col. 4; § IV, at 2, col. 2.

97. *Id.* Mar. 13, 1976, at 1, col. 1.

98. *Id.* Feb. 1, 1976, § 1, at 2, col. 3.

power has been extended.⁹⁹ It has detained and silenced political opposition leaders,¹⁰⁰ and has transformed the Parliament into a mere rubber-stamp body.¹⁰¹ Thus, through the Emergency proclamation and its subsequent actions, Indira Gandhi's regime has effectively destroyed the right and opportunity of the citizenry to take part in the Government of India.^{101.1} The end result is that the once vital Indian political system has been rendered listless and impotent.

III. APPRAISAL AND RECOMMENDATION

Since the standards used in this comment to judge the actions of the Government of India have been primarily those contained in the U.N. Charter and various U.N. instruments—the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the resolutions adopted by the U.N. General Assembly and the ECO-SOC—do not India's actions constitute a challenge to the legal status of these instruments, or at least imply a claim that she is not bound to comply with their pertinent provisions outlined in the preceding discussion?

While the debate is likely to continue on the nature and scope of the legally binding obligations, if any, created by General Assembly resolutions, recommendations and declarations,¹⁰² and even though India has not ratified the Covenant on Civil and Political Rights, it is submitted that India is nevertheless legally bound to comply with the U.N. Charter and the provisions of the U.N. instruments discussed above.¹⁰³ The reasons are as follows:

99. *Id.* July 21, 1975, at 9, col. 1.

100. *Supra* note 69.

101. For a letter by the Opposition members in India's Parliament to President Ahmed announcing their boycott of Parliament's opening session in January 1976, see *N.Y. Times*, Jan. 5, 1976, at 3, col. 5. A member called it "a captive Parliament." S.A. Shamin's remarks, cited in Lifschultz, *supra* note 55, at A14, col. 3. Rosenhouse, *supra* note 55, Pt. I, at 24, col. 5, reports: "Once a lively body, Parliament is now considered a rubber stamp." Since the speeches by opposition members could not be reported under strict press censorship and opposition members were frequently absent for fear of arrest, there was little opposition to the adoption of legislative measures introduced by the ruling Congress Party at Parliament's January and March sessions.

101.1. *N.Y. Times*, Aug. 31, 1976, at 3, col. 1; *id.* Sept. 3, 1976, at A3, cols. 5, 7.

102. See, e.g., O. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 *AM. J. INT'L L.* 782 (1966).

103. The parties to the covenant are listed in *After 30 Years, an International Bill of Human Rights*, 12 *U.N. MONTHLY CHRONICLE* Apr. 1976, at 50, 52. The general rule

(1) The Universal Declaration, adopted by the General Assembly in December 1948, without dissent, has been constantly reaffirmed by the United Nations. As Chief Justice Earl Warren said in his address at the World Peace Through Law Conference in 1973: "In the legislative work of the United Nations, the declaration has become an arbiter and a standard of reference against which every new text on human rights is measured."¹⁰⁴ The Declaration has been referred to in the constitutions of many new states,¹⁰⁵ and in the decisions of various national tribunals.¹⁰⁶ In its Preamble, the Declaration is proclaimed as "a common standard of achievement for all peoples and all nations."¹⁰⁷ To this end "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."¹⁰⁸ On the occasion of the twentieth anniversary of the Declaration, Professor Sohn concluded, after a study of its legal status, that it had already "become a part of the constitutional law of the world community . . ."¹⁰⁹ He noted that "the constant and consistent practice of the United Nations . . . has imbued the Declaration with a status almost equal to that of the Charter itself."¹¹⁰ Further, the Declaration gives "a more precise meaning to the general phrases of the Charter,"¹¹¹ and provides an authoritative interpretation of the human rights provisions of the U.N. Charter.¹¹²

is stated in art. 18 (a) of the Harvard Research Draft Convention on Treaties: "A treaty may not impose obligations upon a State which is not a party thereto." 29 AM. J. INT'L L. Supp. 653, 661 (1935). The rule is codified in art. 34 of the Vienna Convention. See A. McNAIR, *THE LAW OF TREATIES* 309-21 (1961); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 521-23 (1970). On interpretation of treaties see M. McDUGAL, H. LASSWELL & J. MILLER, *INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

104. Warren, *It's Time to Implement the Declaration of Human Rights*, 59 A.B.A.J. 1257 (1973).

105. *Id.*

106. *Id.*; McDougal & Bebr, *Human Rights in the UN*, 58 AM. J. INT'L L. 603, 639-40 (1964).

107. *United Nations Human Rights Instruments*, at 1.

108. *Id.*

109. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMM. JURIST. 17, 26 (No. 2, Dec. 1967).

110. *Id.* at 25.

111. *Id.* at 26.

112. *Id.* at 17-23.

It is submitted that, as an authoritative expression of world community standards on human rights, the Declaration was imbued from its inception with a great moral and political force. In the last 28 years it has played a most significant role in creating community expectations, thus developing the customary international law of human rights.¹¹³ Many of its provisions, notably the ones mentioned here, have thereby attained the status of general principles of customary international law. As Professor John Humphrey, a former director of the U.N. Division of Human Rights, has recently noted, "the Declaration has [now] become, next to the Charter itself, the most authoritative of all contemporary international instruments. It may be more important even than the Charter; for it will retain its authority long after the United Nations has been replaced by a more effective world organization."¹¹⁴

(2) The Covenant on Civil and Political Rights, as an authoritative codification of the principles enunciated in the Declaration, is similarly an expression of the prevailing community standards in matters relating to civil and political rights. Thus it can be argued that even states which have not ratified the covenant are no longer absolved of their obligation to comply with its terms; they can no longer rely on the traditional norm of international law that only a state party to a treaty is bound by it.¹¹⁵ A similar argument can be made that the U.N. resolutions and the Declaration on Torture mentioned earlier also are binding on India, because in the international arena, resolutions, declarations and recommendations "perform similar functions to those rules and principles we call 'law' without hesitation."¹¹⁶

(3) Furthermore, India is estopped from contending that it is not bound by the Charter provisions and other pertinent provisions of international instruments enumerated above. These provisions contain international law standards and reflect the

113. For a short but incisive commentary on the application of the Declaration in the practice of the United Nations, see *id.* at 23-26.

114. Humphrey, *Human Rights and Authority*, 20 U. TORONTO L.J. 412, 414 (1970).

115. See, e.g., *Barcelona Traction Power & Light Co.*, [1970] I.C.J. Rep. 32; Newman, *supra* note 1, at 290 notes 7, 8, 11.

116. Clark & Nevas, *The First Twenty-Five Years of the Universal Declaration of Human Rights—And the Next*, 48 CONN. BAR J. 111, 113 (1974).

expectations of the world community—standards India has held for herself in the past and to which she has held others accountable,¹¹⁷ standards she now defies when applied to her own actions. Thus India's own traditional stance dictates the criteria by which her present acts may be judged.

(4) Finally, it is submitted that no adequate legal justification exists for the far-reaching and pervasive measures undertaken by the Government of India. Admittedly, the exigencies of emergency situations have been recognized by the international community as allowing some derogation of human rights. For example, the International Covenant on Civil and Political Rights, in article 4, provides that states may depart from their obligations when an emergency "threatens the life of the nation,"¹¹⁸ but only "to the extent strictly required by the exigencies of the situation."¹¹⁹ While war with Pakistan or China—the situations when India previously declared emergencies—may be said to threaten the life of the nation, the constitutional repudiation of a Prime Minister or a political party in power most certainly does not comprise such a threat. The Government has made allegations and charges of a purported conspiracy to threaten national security¹²⁰ but has failed to substantiate the charges. However, even if such a grave situation existed, the extraordinarily repressive measures taken by Mrs. Indira Gandhi's government far exceed those required by the exigencies of the situation. In addition, article 4 specifically stipulates that torture, inhuman treatment, and retroactive application of criminal laws are prohibited and that freedom of thought and conscience is to be protected, even in times of emergency.¹²¹

117. For instance, India played a significant role in the General Assembly's application of the Declaration principles to the question of the treatment of people of Indian and Pakistani origin in South Africa. See, e.g., various Assembly resolutions beginning with G. A. Res. 265, U.N. Doc. A/900 at 6 (1949). The last resolution on the subject was adopted at the Sixteenth session of the General Assembly, G.A. Res. 1662, 16 U.N. GAOR Supp. 17, at 10, U.N. Doc. A/5100 (1961). Following 1961, the General Assembly began considering the question in the context of the broader question of apartheid.

118. *U.N. Instruments on Human Rights*, at 8.

119. *Id.*

120. Mrs. Gandhi said in an interview that the "threat of disruption was clear and imminent." *SATURDAY REV.*, Aug. 9, 1975, at 10, col. 2. See, e.g., *INDIRA GANDHI ON EMERGENCY*, *supra* note 13, at 1-9.

121. Art. 4(2), *U.N. Instruments on Human Rights*, at 8.

The conclusion is inescapable that the Government of India has flagrantly and brutally violated the commonly accepted standards of respect for human rights. The Government cannot justify its repressive measures by invoking either national security or the alleged need to bring about economic and social reforms.¹²² Nor can the Government's actions be excused on the pretext that it is not alone in violating human rights,¹²³ that others such as Uganda and Chile are even worse offenders, and that current State practices do not provide much hope for early, worldwide compliance with evolving norms on human rights.

What role can states, intergovernmental organizations and non-governmental groups play in persuading India to restore human rights and fundamental freedoms? It is submitted that world public opinion, admittedly fragile, should not be ignored as an effective tool in the protection of human rights. In recent history, the pressure of external public opinion has been a significant factor in changing the policies of many states, including the Soviet Union, Chile and Indonesia, on specific human rights questions.¹²⁴ Specifically, concerned states should hold India accountable in the United Nations and in international conferences. While the situation in India may not call for a Security Council resolution censuring India, it certainly warrants discussion in the General Assembly, where it might be offered as an agenda item by a member state. Similarly, at international conferences, the subject can be discussed at the initiation of a concerned state, as has been frequently done with South Africa and Chile.

Concerned states can also use various political strategies to seek a change in India's policies and conduct on human rights and freedoms in India. For example, the United States House of Representatives recently held hearings to discuss the Indian situation.¹²⁵ While the role the United States can play

122. See, e.g., Nanda, *supra* note 15.

123. India's own conduct as the champion of human rights in other countries would preclude its reliance on this argument.

124. Some recent examples are: the permission by the Soviet Union to allow emigration of its citizens, including some of its staunchest critics, and the release of political prisoners both by Chile and Indonesia.

125. The hearings were held on June 23, 28 and 29. *House Hearings*, *supra* note 77. Witnesses who testified that the Government of India had violated human rights included Jagjit Singh Chohan, Homer Jack, Ram Jethmalani and Ved Nanda.

in the restoration of human rights and fundamental freedoms on the sub-continent is certainly limited, the value of the hearings in raising public awareness is indisputable. Without widespread concern, no changes will be forthcoming.

Prior discussion has also demonstrated that no adequate domestic remedies are presently available for protection of human rights in India. The current situation in India meets the criterion of the admissibility of communications before the Sub-Commission, which has adopted a procedure that "communications shall be inadmissible if domestic remedies have not been met."¹²⁶ Once this criterion is met, non-governmental groups (NGOs) are entitled to use various procedural devices to bring the issue before the Commission.¹²⁷ To illustrate, ECOSOC resolutions 728F (XXVIII) of July 30, 1959,¹²⁸ 1235 (XLII) of June 6, 1967,¹²⁹ 1296 (XLIV) of May 23, 1968,¹³⁰ and 1503 (XLVIII) of May 27, 1970¹³¹ lay down the procedures to be followed by such groups to present complaints of violations of human rights. While resolution 1235 authorized both the Commission and the Sub-Commission, "to examine information relevant to gross violations of human rights and fundamental freedoms" contained in the communications concerning human rights which the Secretary-General is to compile pursuant to resolution 728F, and resolution 1296 authorizes NGOs to submit written statements, resolution 1503 provides detailed procedures and new machinery to assist the Commission and the Sub-Commission in the discharge of their func-

126. Sub-Commission Res. 1, para. 4(b), 24 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary Report, U.N. Doc. E/CN.4/1070 (1971). For a commentary analyzing the procedure see Cassese, *The Admissibility of Communications to the United Nations on Human Rights Violations*, 5 HUMAN RIGHTS J. 375 (1972); Comment, *The Exhaustion of Domestic Remedies in the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 24 BUFFALO L. REV. 643 (1975).

127. See, e.g., Prasad, *The Role of Non-Governmental Organizations in the United Nations Procedures for Human Rights Complaints*, 5 DENVER J. INT'L L. & POL. 441 (1975).

128. ECOSOC Res. 728F, 28 U.N. ECOSOC, Supp. 1, at 19, U.N. Doc. E/3290 (1959).

129. ECOSOC Res. 1235, 42 U.N. ECOSOC, Supp. 1, at 17, U.N. Doc. E/4393 (1967).

130. ECOSOC Res. 1296, 44 U.N. ECOSOC, Supp. 1, at 21, U.N. Doc. E/4548 (1968).

131. ECOSOC Res. 1503, 48 U.N. ECOSOC, Supp. 1A, at 8, U.N. Doc. E/4832/Add. 1 (1970).

tions pertaining to violations of human rights and fundamental freedoms.¹³² Resolution 1503 authorizes the Sub-Commission to appoint a working group which would meet annually to consider all communications received by the Secretary-General under resolution 728F "with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission."¹³³ The Sub-Commission, in turn, is to consider the communications referred to it by the working group to determine whether "to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission."¹³⁴ The Commission is then to determine whether a situation deserves further study or investigation by the Commission, and a report and recommendation thereon to ECOSOC.¹³⁵

Human rights of detainees and prisoners were the subject of a resolution adopted by the Sub-Commission in 1974.¹³⁶ Under the resolution, in operative paragraph 1, the Sub-Commission decided "to review annually developments in the field."¹³⁷ In reviewing these developments,

the Sub-Commission will take into account any reliably attested information from governments, the specialized agencies, the regional intergovernmental organizations and the non-governmental organizations in consultative status with the Economic and Social Council concerned, provided that such non-

132. For a summary of the functions of the Commission and the Sub-Commission, see *United Nations Action in the Field of Human Rights*, U.N. Doc. ST/HR/2, at 137-44 (1974). For comments on their functions, see Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968); Murphy, *The U.N. and Human Rights: The Human Rights Commission in 1973-74*, 4 ISRAELI Y.B. HUMAN RIGHTS 48 (1974); Comment, *U.N. Sub-Commission on Minorities and Discrimination*, 13 INT'L COMM'N JURISTS REV. 29, (Dec. 1974).

133. ECOSOC Res. 1503, *supra* note 131, at para. 1.

134. *Id.* para. 5.

135. Pursuant to ECOSOC Res. 1235, *supra* note 129.

136. The Question of the Human Rights on Persons Subjected to Any Form of Detention or Imprisonment, Sub-Commission On Prevention of Discrimination and Protection of Minorities, Res. 7, U.N. Doc. E/CN.4/1160, E/CN.4/Sub.2/354, at 52-53 (1974).

137. *Id.*

governmental organizations act in good faith and that their information is not politically motivated, contrary to the principles of the Charter of the United Nations.¹³⁸

In operative paragraph 2, the Sub-Commission requested "the Secretary-General to transmit to the Sub-Commission information referred to in paragraph 1."¹³⁹ Since the resolution refers to "persons subjected to any form of detention or imprisonment," and the Sub-Commission has taken further steps in 1975 to put the new procedure to constructive and effective use,¹⁴⁰ it is submitted that NGOs should utilize this procedure to bring the situation in India before the Sub-Commission which could refer the situation to the Commission and eventually it could be discussed in ECOSOC. The World Committee on Human Rights in India is already preparing a well-documented study, to be presented to the Sub-Commission, through an NGO in consultative status with ECOSOC.¹⁴¹ A specific request would be to seek an impartial, on-site investigation by a Sub-Commission member of the charges contained in the communication. Another significant effort would be to invoke a World Habeas Corpus proceeding, a procedure initiated, refined and used by a distinguished advocate of human rights, Luis Kutner.¹⁴²

A possible study and investigation of the situation in India by the Sub-Commission and the Commission to be followed perhaps by censure of the Government of India by ECOSOC should not preclude a discussion of the subject directly by the U.N. General Assembly.¹⁴³ Unfortunately there will be reluctance in the Assembly to question India's practices, for many governments are apprehensive lest similar charges be brought

138. *Id.*

139. *Id.*

140. U.N. Doc. E/CN.4/Sub.2/L. 635 (1975).

141. The study will be presented in September 1976.

142. See, e.g., L. KUTNER, *WORLD HABEAS CORPUS* (1962); *THE HUMAN RIGHT TO INDIVIDUAL FREEDOM: A SYMPOSIUM ON WORLD HABEAS CORPUS* (L. Kutner, ed. 1970); and Kutner, *World Habeas Corpus: The Legal Ultimate for the Unity of Mankind*, 40 *NOTRE DAME LAW.* 570 (1965). For a commentary on Kutner's work, see Katin, *The Advocate as Lawmaker: Luis Kutner and the Struggle for Due Process*, 23 *U. MIAMI L. REV.* 397 (1969), especially at 401 n.8 which lists several law review articles on the subject written by Luis Kutner and associates. Mr. Kutner also drafted a proposed treaty on the subject.

143. The World Committee for Human Rights in India is seeking the assistance of concerned states to raise the issue at the next session of the General Assembly.

against them. However, the tragic situation in India poses a challenge to all concerned with the implementation of the U.N. human rights program and global protection of human rights.

Silence on the part of those who care for individual freedom and human dignity is often considered a license by the oppressor. Thus, the need is timely and urgent, and calls for international pressure—by individuals, NGOs, states and international organizations—on Indira Gandhi's government to relent, to halt and even reverse the current use of repressive policies.