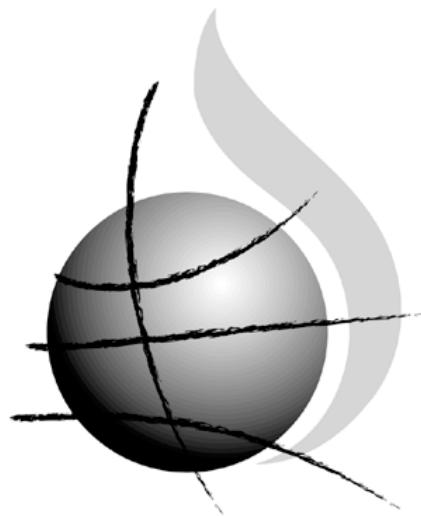


Criminal Justice Reform in India: ICJ Position Paper

**Review of the Recommendations made by the Justice
Malimath Committee from an international human rights
perspective**



Position Paper of the ICJ submitted on the occasion of the

**National Conference
Jointly Organized by**

**Human Rights Law Network (HRLN), New Delhi
and**

International Commission of Jurists (ICJ), Geneva

**on
9th & 10th August 2003, New Delhi**

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EXECUTIVE SUMMARY

The following review has been prepared by the International Secretariat of the International Commission of Justice (ICJ) on the occasion of a two-day national conference jointly organized by the ICJ and the Human Rights Law Network. It seeks to create a public and political debate on the recommendations made by the Justice Malimath Committee on Criminal Reforms in light of international human rights standards and the international legal obligations of India.

The Committee on Reform of the Criminal Justice System headed by Justice V. S. Malimath has proposed important changes to various aspects of administration of justice with a particular focus on the principles of evidence and conduct of criminal trials. The Malimath Committee was constituted on 24 November 2000 by the Union Government. The Report was submitted to the Union home ministry in April 2003 for further consideration and action. It is the first time in 150 years of Indian legal history that such wide-ranging reforms are being proposed.

The Committee sought to expedite the criminal process as it considers that “the criminal justice system is virtually collapsing under its own weight as it is slow, inefficient and ineffective” and that “people are losing confidence in the system.” The recommendations, however, have far reaching consequences for the rule of law in India.

The changes proposed by the Committee represent a turn from a system that had been rooted in jurisprudence prevalent in India for more than a century. If the suggested changes are implemented by the Government, there will be serious consequences for the protection of human rights of individuals, and particularly members of the weaker sections of society. The recommendations may also interfere with international human rights norms and with safeguards established by the Supreme Court of India and various State High Courts.

The Committee proposes a lesser proof criterion for the finding of guilt than has been followed until now, namely a standard of “court’s conviction that it is true” rather than proof beyond reasonable doubt. Another important recommendation concerns the right to silence of the accused during trial. This right is a corollary of the right against self-incrimination, a basic postulate of well-settled international jurisprudence.

Last but not the least, the Committee proposes that courts be permitted to accept as evidence the statements or confession made by the accused to a police officer, overturning a provision in the Indian Evidence Act to the contrary.

Human rights groups and legal organizations have already expressed their concern with regard to the major recommendations, and there is a discussion within the legal community. However, by and large, the recommendations have not given rise to the public debate they warrant.

The ICJ would like to intervene in the legal debate to draw attention to the international standards concerning the right to a fair trial. The ICJ, in partnership with the legal community and human rights NGO's, wishes to address the debate from the perspective of international human rights, and raise public and political debate about the implications of such proposals on the rule of law. Therefore, this joint National Conference at the initiative of the Human Rights Law Network (HRLN) will be the first national event focussing on the Justice Malimath Committee Report from a human rights angle. The Conference will create a forum for judges, human rights and criminal lawyers, representative of human rights organizations and other legal professionals.

The OBJECTIVES of the review are the following:

- Give a preliminary response to the Justice Malimath Committee Report on criminal justice reforms in India from the international human rights perspective;
- highlight the problems and lacunas with regard to the major recommendations of the Justice Malimath Committee and make proposals in light of India's obligations under international law, in particular the ICCPR and customary international law;
- raise the debate within the legal community on a constructive dialogue with public authorities with a view to achieving a criminal justice reform based on dignity and human rights.

CRIMINAL JUSTICE REFORM IN INDIA

Review of the Recommendations made by the Justice Malimath Committee from an international human rights perspective

TERMS OF REFERENCE	6
I. PRELIMINARY REMARKS: ADVERSARIAL AND INQUISITORIAL CRIMINAL JUSTICE SYSTEMS AND UNDERLYING ASSUMPTIONS OF THE JUSTICE MALIMATH COMMITTEE....	9
1. The role of magistrates in the inquisitorial system	9
2. Systemic shortcomings of the criminal justice system in India.....	11
II. REFORMS CONCERNING THE POLICE AND POLICE INVESTIGATION METHODS.....	13
1. Police custody	14
2. Admissibility of evidence – in particular confessions - collected by the police in criminal trial.....	14
3. Intelligence, surveillance, data collection.....	17
III. REFORMS CONCERNING THE CRIMINAL TRIAL PROCEDURE	20
1. Presumption of innocence and burden of proof	20
2. Right to silence and drawing of adverse inferences	22
3. New procedure following the “Prosecution statement”	24
4. Summary procedures	26
5. Terrorism and organized crime	27
IV. REFORMS CONCERNING VICTIMS OF CRIME AND WITNESS PROTECTION	30
1. The rights of victims of crime and human rights violations	30
2. Offences against women.....	34
3. Witness protection.....	36
4. Rights of the accused.....	37
SUMMARY OF THE RECOMMENDATIONS.....	38
<u>As to the approach towards a reform of the criminal justice system</u>	<u>38</u>
<u>As to reforms concerning the police</u>	<u>38</u>
<u>As to reforms concerning the criminal trial procedure</u>	<u>39</u>
<u>As to reforms regarding victims of crime and witness protection.....</u>	<u>40</u>

TERMS OF REFERENCE

Proposals on the reform of the criminal justice system. In March 2003, the Committee on Reforms of the Criminal Justice System (Justice Malimath Committee) submitted a comprehensive report with recommendations to improve the Indian criminal justice system. The Justice Malimath Committee was constituted by the Government of India, Ministry of Home Affairs by its order dated 24 November 2000 and was to examine the fundamental principles of criminal law, particularly with a view to shortening the excessively long delays of criminal trials and to restoring confidence in the Indian criminal justice system. This included the possibility to review the main statutes governing the criminal justice system in India, namely the Constitution of India of 26 November 1949, the Indian Penal Code,¹ the Code of Criminal Procedure,² and the Indian Evidence Act.³ The Committee proceeded to examine several national systems of criminal procedure, and especially comparing the adversarial and inquisitorial systems. It considered in particular the criminal justice systems of continental Europe. It also consulted with many actors involved, seeking the opinions of members of the civil society through an in-depth questionnaire, and with all actors involved in the criminal justice system, such as courts, bar councils, police departments, state governments, forensic scientists, and legal academics.

The 158 recommendations resulting from the study of the Justice Malimath Committee are aimed at addressing all aspects of the system. They are divided into the following areas: fundamental principles; investigation; prosecution; judiciary; crime & punishment. The essence of the Justice Malimath Committee proposal is a shift from an adversarial criminal justice system to an inquisitorial criminal justice system, based on the continental European systems. It seeks a shift towards a system in which the main objective of the criminal justice system is the “quest for truth”. The second key proposal by the Committee is a substantive strengthening of the police force, as it emphasizes that police investigations are at the beginning of every criminal justice system. A third important area of propositions concerns the introduction of legislation on federal crimes, organized crime and terrorism. Lastly, the Justice Malimath Committee makes recommendations for an improvement of the status of victims of crime and witnesses.

Many of the recommendations seek to provide adequate resources for the authorities involved in the criminal process and an improved training for their members. These recommendations are welcome and, if implemented, will help to improve the Indian criminal justice system. Some of the recommendations, however, raise concern as to their compatibility with international human rights standards. The International Commission of Jurists wishes to submit some remarks and recommendations from the perspective of the international rule of law.

¹ Act No 45 of Year 1860.

² Act No 2 of 1074.

³ Act 1 of 1872.

Principal issues of concern. The purpose of the following review is confined to analysing some specific recommendations which, in the view of the ICJ, constitute issues of concern. Many of them are recommendations the consequences of which cannot yet be fully assessed, either because they are kept in rather general terms, or because their effect cannot yet be seen. In those cases, caution is nevertheless expressed where there seems to be reason for prudence. The main areas of concern are related to the proposed shift from an adversarial to an inquisitorial system. The ICJ is concerned that the proposal does not fully adopt the inquisitorial system, but wants to introduce some elements of it into the Indian system, without regard to the overall compatibility with the system. There is, in particular, a grave concern with regard to the proposals concerning the presumption of innocence and the right to silence. Secondly, a strong emphasis on strengthening the police force can be made out throughout the Justice Malimath Committee's proposals. Emphasis is laid on so called "efficiency" of the system, which the Justice Malimath Committee seems to assess through the criterion of a high conviction rate. The rationale of a criminal justice system to respect and protect human rights is not discussed. Not much importance seems to be given to the concept of efficiency through professional and proper investigation in full respect of human rights. The ICJ wishes to recall some fundamental principles of human rights that have to guide the investigations. Lastly, the issue of victim and witness protection, in particular the protection of women, appears to be one of the fundamental aspects of criminal justice. The ICJ would like, in this regard, to address the propositions made by the Justice Malimath Committee in the light of the international legal obligations of the state in this area of law.

The analysis is limited to the compliance of the proposed recommendations to international legal standards on human rights. It does not address in detail the many social factors that adversely affect the current criminal justice system. However, when analysing the proposals, it must be kept in mind that many of the shortcomings that the Justice Malimath Committee seeks to remedy result from structural factors, such as the high level of discrimination, the problem of corruption, the shortage of resources, and the prevailing violence to which many state officials resort to.

The ICJ also would like to stress that the following analysis is not intended as a comprehensive review and does not address all issues raised by the 158 recommendations. Only the most pressing concerns will be highlighted and discussed.

International Human Rights Conventions and customary law. India is a party to many international human rights conventions. It has ratified the International Covenant on Civil and Political Rights (in the following ICCPR);⁴ the International Covenant on Economic, Social and Cultural Rights,⁵ the Convention on the Elimination of All Forms

⁴ 999 U.N.T.S. 171. India has made reservations to articles 1, 9, 13 and declarations on arts. 12, 19(3), 21, 22.

⁵ 993 U.N.T.S. 3.

of Racial Discrimination,⁶ the Convention on the Elimination of All Forms of Discrimination Against Women,⁷ and the Convention on the Rights of the Child.⁸ Furthermore, customary international law, formulated to a large extent in the Universal Declaration on Human Rights,⁹ is legally binding upon India. For this study, the customary rules on the right to a fair trial and the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which is also a peremptory norm of international law,¹⁰ are of particular relevance.

Declaratory human rights instruments. There are also international standards of a non-binding nature which illustrate human rights in the administration of justice, and in particular criminal justice. These are declaratory in nature and influence international standards on the right to fair trial as interpreted by national and international human rights bodies and tribunals. On a universal level, there are, in particular: the Basic Principles on the Role of Lawyers,¹¹ the Guidelines on the Role of Prosecutors,¹² the Basic Principles on the Independence of the Judiciary,¹³ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹⁴ the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁵ the Resolution of the Human Rights Commission on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms,¹⁶ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.¹⁷

Fair trial standards in comparative perspective. Finally, insofar as the Justice Malimath Committee refers to the inquisitorial system of continental Europe – particularly France and Germany - the rights of the accused in those systems and the rights guaranteed by the European Convention on Human Rights¹⁸ as interpreted by the

⁶ 660 U.N.T.S. 195.

⁷ 249 U.N.T.S. 13.

⁸ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

⁹ G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹⁰ The prohibition of torture has been identified not only as a norm of customary international law, but also as an inderrogable norm of peremptory international law [Human Rights Committee, *General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 8, 10]. India has signed, but not ratified the UN Convention against Torture (78 U.N.T.S. 277).

¹¹ Adopted in Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).

¹² Adopted in Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

¹³ Adopted in Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

¹⁴ Adopted by General Assembly resolution 40/34 of 29 November 1985, U.N. Doc. A/40/53 (1985).

¹⁵ Adopted by General Assembly resolution 55/89 Annex, 4 December 2000.

¹⁶ Commission on Human Rights Resolution 2003/34.

¹⁷ *Final report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (*op cit* note 17).

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 213 U.N.T.S. 222.

European Court of Human Rights must, to the extent possible and relevant, be taken into account. Indeed, all countries of Europe are bound by the European Convention on Human Rights, which has a consolidated jurisprudence on the right to fair trial in particular. Also, where possible, the national codes of criminal procedure should be taken into account, so as to illustrate how the rights of the accused, and also the rights of victims, are protected in those systems.

Outline. The analysis first addresses some assumptions on which the Justice Malimath Committee bases its proposals, and which concern the functioning of the two main currents of criminal justice, namely the adversarial/common law and the inquisitorial/continental criminal justice system (I.). It then proceeds to a critical study of the propositions concerning first the investigation stage (II.) and then the trial stage (III.) of the criminal justice system. Lastly, it addresses the question of victim and witness protection, and in particular the propositions of the Justice Malimath Committee with regard to women in criminal justice (IV).

I. PRELIMINARY REMARKS: ADVERSARIAL AND INQUISITORIAL CRIMINAL JUSTICE SYSTEMS AND UNDERLYING ASSUMPTIONS OF THE JUSTICE MALIMATH COMMITTEE

The Justice Malimath Committee, to counter the lack of efficiency, proposes a shift from the adversarial to the inquisitorial criminal justice system (Recommendation 1-7). The “quest for truth” should be at the centre of the criminal justice system, as an instrument to assign wide investigation powers to the magistrate. The rationale underlying the recommendations seems to be that a system which gives investigation powers to courts leads to “more effectiveness”, in other words a higher rate of conviction. Thus Recommendation No 1 proposes a new preamble for the Code of Criminal Procedure, which reads “(...) it is expedient to constitute a criminal justice system for punishing the guilty and protecting the innocent” without mentioning the protection of the accused. The Justice Malimath Committee’s assumption that a shift from the adversarial to the inquisitorial systems will lead to an improvement of the situation of the criminal justice system in India must, however, be critically assessed in the light of public international law.

1. The role of magistrates in the inquisitorial system

Safeguards for the accused in the inquisitorial criminal justice system. The first assumption is that the adversarial system is at the root of the malfunctioning and distrust. However, not only is it very doubtful whether the conviction rate is in any way linked to

the inquisitorial system, but above all, it is not the rationale of the inquisitorial system to convict the greatest possible number of accused. Rather, the role of the magistrate in this system is not to be above all “effective”, but mainly to conduct a fair trial, to examine all evidence for and against the accused,¹⁹ and to protect the accused from arbitrariness. Therefore, the statement by the Justice Malimath Committee, according to which “[t]he inquisitorial system is certainly efficient in the sense that the investigation is supervised by the judicial magistrate which results in a high rate of conviction”²⁰ is mistaken in that it overlooks the safeguards against abuses in the investigation process. Whereas it is self-evident that the main objective of a criminal law process is the search for truth, it is certainly not the only duty of the magistrate.

Also, the shift to an inquisitorial system carries with it an increase in the competences and powers of the court, which has the duty to order further investigations on its own motion if it is not satisfied with the result of the investigations. The Indian law-maker must be aware of the implications of such a shift towards a court-controlled system, and build into a new system the safeguards necessary to such a system. For example, the duty of the magistrate to search for truth means a high commitment of the magistrate to find the truth *proprio motu*. In this respect, the fourth paragraph of recommendation No 1 contains an unclear proposal, stating that it shall be the duty of “(...) everyone associated with it in the administration of justice, to actively pursue the quest for truth”. Does this also comprise the defence counsel?²¹ Whereas the defence lawyer must be seen as part of the legal profession and thereby as having a duty to respect the rule of law, his main role is the defence of his client within the limits of the law, and he cannot be compelled to present evidence to the detriment of the accused. It is incumbent on the magistrate to shed light on all facts pertinent for the conviction.

A human rights- based criminal justice system. All systems, be they adversarial or inquisitorial, must comply with international human rights law. International human rights law is, in principle, indifferent to the internal criminal law system, as long as its features are compatible with international human rights. A country seeking a change in its criminal procedure system has to be aware that most systems have had to adapt gradually to international human rights standards. Indeed – and this is of particular relevance as the Justice Malimath Committee repeatedly refers to the European systems – the European Convention on Human Rights is a good example for this, as the European Court of Human Rights made clear that each country, while free to adopt its own system of criminal justice, evidence, proceedings, etc., is nevertheless bound by the fair trial standard laid out in the Convention.²² Thus, although there are a lot of differences between the adversarial and the inquisitorial system, “in the final analysis, they come very close together. The issue is more one of different instruments and safeguards rather

¹⁹ See, in particular article 81 of the French Code of Criminal Procedure: “Le juge d’instruction procède, conformément à la loi, à tous actes d’informations qu’il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge”.

²⁰ Explanation before Recommendation No 1.

²¹ This seems to be the implicit meaning by the Committee in its Report at p 57, para 3.54 and p 250, para 21.5.

²² See, in this sense ECtHR, *Salabiaku v France*, Judgment of 7 October 1988, Series A No 141-A, para 27

than of basic goals and principles. Both systems strive for the same end: to convict the guilty and to discharge the non-guilty by seeking the truth by fair means.”²³

It is of utmost importance that any criminal justice system, be it adversarial or inquisitorial, be it based on a system of free proof or legal proof, or a combination of these systems, comply with international human rights standards. In particular, the rights of the accused must be at the centre of all proceedings, and the rights of the victim must be protected at all stages. Human rights must be the benchmark for any criminal justice system.

2. Systemic shortcomings of the criminal justice system in India

The assumption that the shift from an adversarial to an inquisitorial system will render criminal justice more efficient also fails to address the deeper-rooted causes of the shortcomings of the criminal justice system in India. As has been reported by numerous human rights organizations, the Indian criminal justice systems suffers from discrimination of certain sections of society, old-fashioned and inefficient institutions, lack of human and technical resources, lack of investigation expertise, a confession-oriented approach to interrogation, lack of punitive action against abusers of human rights, and a level of corruption.²⁴

Lack of resources: the Indian criminal justice system suffers from serious under-funding and understaffing, and continues to be extremely slow. The population-judge ratio is extremely low. There is a need for training of all judicial personnel and court administrators.²⁵

Torture: Torture is endemic in India and this is a fact acknowledged by the authorities and widely documented.²⁶ Police forces are poorly trained on investigation methods and on the absolute prohibition of torture and cruel, inhuman or degrading treatment. Most cases of torture by state officials occur in police custody, and it is widely acknowledged by governmental and non-governmental studies that the police operate in a system facilitating the use of torture and ill-treatment. Torture is systematically used in the criminal justice system as a method of investigation: the increasingly dysfunctional criminal justice system and torture in custody constitute a vicious circle of deficient interrogation, falsified investigation results and distrust of the criminal justice system. It appears that there exists a certain perception in India that torture is acceptable under extreme circumstances, and for “hardened criminals” and “terrorists”.²⁷ The overload

²³ A. Eser, Collection and Evaluation of Evidence in Comparative Perspective, in: 31 Israel Law Review (1997), 429.

²⁴ Amnesty International (*op cit* note 24), p 3.

²⁵ National Human Rights Commission of India, Annual Report 2000-2001, paras 3.62 *et seq* (available at <http://nhrc.nic.in/>); *Concluding observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, para 27; Amnesty International, Annual Report 2002 (India) and Annual Report 2003 (India).

²⁶ See the accounts in the Annual Reports of the National Human Rights Commission of India.

²⁷ Amnesty International (*op cit* note 24) p 5.

within the criminal justice system also contributes to public tolerance towards violence as a means of justice. The consequence of this is a lack of investigation into allegations of torture, let alone of “mere beatings”, and impunity for the perpetrators. Corruption within the police equally provides a ground for the practice of extortion and threats. It is reported that members of the medical profession refuse to examine torture victims or document injuries, often because of fear and threats.²⁸ As a result, the number of custodial deaths is alarmingly high. The Supreme Court and High Courts of India as well as the National Human Rights Commission have handed down many recommendations to achieve a better prevention against torture and to provide for redress measures for victims, but it has not lead to an eradication of torture.

Discrimination: The other background to be taken into account is the persisting discrimination on state and society level in India.²⁹ Discrimination constitutes one of the very seeds for the systematisation of torture and an impediment to the fairness and functioning of the criminal justice system. Discrimination on the basis of gender, religion, caste, ethnicity, social, political and economic background is widespread throughout India and lays the foundations for endemic torture.³⁰ All torture involves the dehumanisation of the victim, the severing of the bonds of human sympathy between the torturer and the tortured. This process of dehumanisation is made easier if the victim is from what is considered a despised social, political, ethnic or religious group.³¹ Although discrimination is outlawed in the Indian Constitution and progressive legislation and jurisprudence exists to prevent and sanction discrimination, and although India is a party to the major Conventions against discrimination of particular groups, the reality in India does not reflect these legal commitments, partly because they have not been accompanied by an adequate increase in resources.³² The criminal justice system reproduces the discrimination existing in society against women, dalits and adivasis, and members of the scheduled castes and scheduled tribes.

²⁸ See the reports by *Amnesty International: India: Break the Cycle of Impunity in Punjab*, AI INDEX: ASA 20/002/2003, 20 January 2003, p 35, *India: Time to Stop Torture and Impunity in West Bengal*, AI INDEX: ASA 20/033/2001, 10 August 2001, p 20, and *India: The Battle against Fear and Discrimination: The Impact of Violence against Women in Uttar Pradesh and Rajasthan*, AI INDEX: ASA 20/016/2001, 8 May 2001, p 28; see, on the role of the medical profession the *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*, adopted by General Assembly resolution 37/194 of 18 December 1982.

²⁹ National Human Rights Commission of India, Annual Report 2000-2001, p 135 (reports of violence against dalits, minorities, disabled and others); *P.J. Alexander*, Some recommendations from the Law Commission of India on arrest and detention, p 1 (available at <http://www.article2.org/mainfile.php/0102/27>); *Amnesty International* (*op cit* note 24) p 3; *Amnesty International* Annual Report 2002 (India) and Annual Report 2003 (India); *Human Rights Watch*, World Report 2003 (India).

³⁰ See *Law Commission of India*, 152nd Report on Custodial Crime (1994), para 1.5; *Concluding observations of the Committee on the Elimination of Discrimination against Women: India*, 1 February 2000, A/55/38, para 68, 71.

³¹ See *Human Rights Watch*, Broken People - Caste Violence Against India’s “Untouchables”, March 1999; *Amnesty International* (*op cit* note 24) p 5; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: India*, 17 September 1996, CERD/C/304/Add.13; *Concluding Observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, paras 5, 15

³² *Amnesty International* (*op cit* note 24) p 7.

Corruption. Lastly, there exist many accounts of corruption throughout the criminal justice system, and this contributes to a spreading of torture practices, to more discrimination, and to miscarriages of justice.³³

Recommendations

- Any reform of the Indian criminal justice system must be based on respect for human rights, in particular the rights of the accused and the rights of victims.
- Whichever criminal justice system is adopted, it has to be in conformity with the international human rights obligations of India.
- Any reform of the criminal justice system must take into account and seek to eradicate the root causes of its malfunctioning, i.e. discrimination, lack of resources, corruption and the practice of torture.

II. REFORMS CONCERNING THE POLICE AND POLICE INVESTIGATION METHODS

Throughout its proposals, the Justice Malimath Committee seeks to strengthen the police force. Indeed, the police in India is overburdened, often operates in high risk situations, lack adequate remuneration and appropriate training. Proposals and reports on police reform have not borne fruit until now.³⁴ The proposals to strengthen the material and human resources in the police, to have a more sustained training policy must therefore be welcome as a real improvement for the police system in India. Equally, the creation of an investigation and a law and order wing could lead to more efficiency within the criminal justice system, through the higher specialisation and qualification of investigation officers.

However, there is a lack of balance between the strong attacks by the Justice Malimath Committee on judges, prosecutors and witnesses and the very strong support for increased police power. The report raises a concern that a somewhat disproportionate weight is given to the strengthening and supporting the interests of the police. It should be the concern for the welfare and human rights of all persons under Indian jurisdiction that constitute the main concern for a reform of the police. Among the powers that the Justice Malimath proposes to confer to the police, the most far reaching are the extension

³³ *Ibid*, p 3; Responses by *Basil Fernando* to the questionnaire formulated by the Committee on Reforms of the Criminal Justice System (on Part B: Institutions); see also *Justice K.N. Singh*, The Obstacles to the Independence of the Judiciary, in: *International Commission of Jurists*, The Independence of the Judiciary in India (1990), p 23 *et seq.*.

³⁴ For a background on the many attempts to reform the police see *National Human Rights Commission of India*, Annual Report 2000-20001, paras 3.50; *Amnesty International* (*op cit* note 24), pp 11 *et seq.*

of police power to detain persons in police custody, the admissibility of confessions made to the police as evidence in criminal trial, the extensive powers of surveillance granted to the police, and the appointment of a police officer to the prosecution office. It must be noted that most of these police powers have already been conferred to the police in the Prevention of Terrorism Act, 2002. It is disturbing that powers meant for the exceptional situation of fight against terrorism is now to be mainstreamed into the everyday criminal justice system; the most problematic aspect of this trend is the curtailing of judicial supervision of law enforcement officials.

Recommendation:

- **The protection of human rights should be the driving motor of any reforms of the police.**

1. Police custody

Length of police custody. Recommendations 28 to 30 seek to extend the length of police custody from 15 to 30 days. The suggestion is problematic as a prolongation of police custody in reality amounts to a substantial increase in the risk of violence against the suspect, particularly as the police is and will remain the authority carrying out criminal investigations. This is contrary to what has been recommended by the Special Rapporteur on torture and the Committee against Torture, who, as a protection from torture in police custody, have asked that detention and interrogation facilities should be separate, so that those who have an interest in the outcome of the investigation are not the same as those who decide on and are in charge of detention.³⁵

Recommendations on detention:

- **The authority conducting the investigation should be separate and independent from the detention authority.**
- **The length of police custody should not be extended.**

2. Admissibility of evidence – in particular confessions - collected by the police in criminal trial

Recommendations No 21 *et seq* contain a number of suggestions for better technological equipment, in particular for tape recording, videography, photography. The use of modern technology may indeed lead to an improvement of criminal justice, as it may

³⁵ *Concluding observations of the Committee against Torture: Colombia*, 9 July 1996, A/51/44 para 78; *Concluding observations of the Committee against Torture: Jordan*, A/52/44, para. 176; *Consolidated recommendations of the Special Rapporteur on torture* (*op cit* note 35), para. 39 (f).

sometimes provide objective evidence for certain facts. It also helps to broaden the investigation tools.

Recording of confessions. As far as the recording of confessions is recommended, it is true that many organizations approve and encourage the use of recording devices in police stations as a safeguard against torture and ill-treatment.³⁶ However, it must be borne in mind that audio or video recording can never of itself be a sufficient disincentive from torture or ill-treatment. Also, regard must be had to the particular circumstances of each case, and it must be taken into account that recordings may merely serve to formally legitimise illegal interrogation methods.³⁷ Altogether, this method will only serve as an efficient safeguard against illicit interrogation methods, if it is supervised by an independent authority, and not left to the hands of the interrogating officers. Recording under the supervision of a higher-ranking police officer, as proposed by the Justice Malimath Committee, is an insufficient safeguard, as it guarantees no independent supervision.

Proposition to use confession to the police as evidence. Recommendation 37 highlights the possible implication of the provisions on audio and video recording and exposes the risk of misuse in criminal proceedings. Indeed, this Recommendation suggests that “Section 25 of the Evidence Act may be suitably amended on the lines of Section 32 of POTA 2002 that a confession recorded by the Superintendent of Police or Officer above him and simultaneously audio or video recorded is admissible in evidence subject to the condition that the accused was informed of his right to consult a lawyer.”³⁸ Against the background of the systematic resort to torture by the police in India, such a suggestion carries with it the risk that confessions extracted under duress will be used as evidence against the accused, in clear violation of international law.³⁹

Confession to the police as evidence should be rejected. The possibility to allow confessions made to the police as direct evidence must be rejected as a matter of principle, at least where it is not made in the presence of a lawyer. Most international

³⁶ *Consolidated recommendations of the Special Rapporteur on torture (op cit note 35)*, para. 39 (d): “Serious consideration should be given to introducing video- and audio-taping of proceedings in interrogation rooms” and para 39 (f): “All interrogation sessions should be recorded and preferably video-recorded”; *Amnesty International, Combatting Torture – A Manual for Action* (2003), p. 105.

³⁷ For instance, according to *Basil Fernando*, Director of the Asian Human Rights Commission, it is to be feared that given the level of corruption and closeness of the police system, the presence of a higher ranking officer serves as a legitimisation rather than a deterrent of abuse [Responses to the questionnaire formulated by the Committee on Reforms of the Criminal Justice System, question 7.17].

³⁸ Section 32 POTA is a derogation from Section 25 of the Indian Evidence Act, 1872, which reads: “No confession made to a police officer shall be proved as against a person accused of any offence”.

³⁹ According to the Human Rights Committee, “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” [*General Comment 20, Article 7 (op cit note 39)*, para 12]; It has also made clear that the use of evidence extracted through torture violates the right not to confess guilt and stated that national laws “should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable” [*General Comment 13, Article 14*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 14]. The UN Convention against Torture expressly prohibits the use of evidence extracted through torture in article 15. A similar prohibition can be found in Principle 16 of the UN Guidelines on the role of prosecutors.

bodies have guarded against confessions as evidence, since it can easily lead to evidence obtained through torture or cruel, inhuman and degrading treatment being admitted as evidence. The Special Rapporteur on torture has stated that “[n]o statement of confession made by a person deprived of liberty, other than one made in [the] presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained confession by unlawful means.”⁴⁰ An investigation and criminal justice system based on confessions and coupled with public pressure on police to fight crime results in a systematic resort to torture in order to coerce confession.⁴¹ There is a good reason why the Indian Evidence Act does not allow confessions as evidence,⁴² and as long as torture is not completely eradicated in India, it should remain this way.⁴³ Also, the admissibility of confessions does not fit into the framework of the Indian Evidence Act as it now stands, as there are no safeguards enshrined in the system of proof in order to prevent miscarriages of justice. Even in systems of free proof where all evidence is in principle admitted in trial, safeguards exist. In France, for instance, any record of proceedings only has probative value if it fulfils all formal conditions, and any record of interrogation must contain all questions that have been answered.⁴⁴ Even then, any confession, like any other piece of evidence, is subject to the free appreciation of the judges.⁴⁵ In Germany, no confession made to the police is admissible as evidence;⁴⁶ only declarations made to the magistrate may be read in the hearing in order to take evidence of a confession.⁴⁷

Right to the presence of a lawyer during police interrogation as a minimum guarantee. The suggestion by the Justice Malimath Committee is all the more worrying since the right to a lawyer during police interrogation is not, as yet, enshrined in the statutes of India, although it has been affirmed by the Supreme Court.⁴⁸ In reality, lawyers and relatives are reportedly denied access to detainees.⁴⁹ Indeed, the Justice Malimath Committee, in Recommendation No 37 only makes the use of confessions to the police as evidence subject to the *information* about the right to be interrogated in the presence of a lawyer, not subject to the actual presence of a lawyer. Most people are interrogated without the presence of a lawyer, so that these confessions should not be considered as evidence. The Indian law-maker should make the presence of a lawyer compulsory for interrogations by the police. This has been recommended by international human rights bodies,⁵⁰ and is stated as a right in the Rome Statute for the

⁴⁰ *Consolidated recommendations of the Special Rapporteur on torture* (*op cit* note 35), para. 39 (d).

⁴¹ *Amnesty International* (*op cit* note 24), p 22; Opinion of the Commission on the Prevention of Terrorism Bill, 2000, Annex 2 to the Annual Report of the Human Rights Commission of India 2000-2001.

⁴² This recommendation is based on the provision of section 32 POTA.

⁴³ Historically, there is a clear link between the change in the law of evidence and the official abolition of torture.

⁴⁴ Article 429 of the French Criminal Procedure Code.

⁴⁵ Article 428 of the French Criminal Procedure Code.

⁴⁶ See §§ 250 et seq. of the German Criminal Procedure Code.

⁴⁷ § 254 of the German Criminal Procedure Code.

⁴⁸ *Satpathy v P.L. Dani*, AIR 1978 SC 1025.

⁴⁹ *Amnesty International* (*op cit* note 24), p 23.

⁵⁰ *Concluding Comment of the Committee against Torture: Democratic Republic of Korea*, 11 November 1996, A/52/44, para. 68; *Concluding Comments of the Committee against Torture: United Kingdom*, 9 July 1996, A/51/44, para. 65 (e).

International Criminal Court.⁵¹ Equally, the Basic Principles of the Role of Lawyers establish a right to legal assistance at all stages of criminal proceedings, including during interrogation and the right to be informed of this right.⁵²

Duty to investigate allegations of torture. Lastly magistrates, like any other state authority, have a duty to investigate allegations of torture and ill-treatment.⁵³ This duty of investigation is an obligation for the magistrate to conduct the investigation *proprio motu* and *ex officio*. This is important, as many detainees or accused brought before a court will not complain about having been tortured, as they will often be subject to intimidation by the police. Magistrates should always automatically verify if evidence has not been obtained through torture or cruel, inhuman or degrading treatment. This international standard has also been adopted by the Indian Supreme Court, which has held that section 54 of the CrPC required that the magistrate before whom the arrested person is brought shall enquire if the person has a complaint of torture or ill-treatment and inform the person of his or her right to a medical examination.⁵⁴

Recommendations on police investigations

- All evidence in criminal cases must be obtained through professional methods of investigation and in full respect of human rights.
- Confessions extracted through torture or other cruel, inhuman and degrading treatment are unlawful and cannot be admitted as evidence under any circumstances.
- Confessions made to the police should not be admissible in criminal trials. Only confessions made to a magistrate should be used as evidence.
- All interrogations should be carried out in the presence of a lawyer throughout the interrogation; interrogated persons should be informed of their right to legal assistance; they should be given the opportunity to have recourse to a lawyer through legal aid.
- Any magistrate must conduct an investigation *proprio motu* into allegations of torture.

3. Intelligence, surveillance, data collection

⁵¹ Article 55 (2) (d) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, entered into force 1 July 2002; The Supreme Court of India, in the case of *D.K. Basu v West Bengal*, 18 December 1996, [1997] 2 LRC 1, para 36 (10) has recommended the right to presence of a lawyer during, but not throughout the interrogation: though it is a progressive approach, it still falls short of the international standard.

⁵² Principles 1 and 17 of the Basic Principles on the Role of Lawyers.

⁵³ On the details of this international legal obligation see below under point IV 1.

⁵⁴ *Sheela Barse v State of Maharashtra*, AIR 1983 SC 378.

Another example of the extension of powers for the police is Recommendation No 26, which reads: “An apex Criminal Intelligence Bureau should be set up at the National level for collection, collation and dissemination of criminal intelligence. A similar mechanism may be devised at the State, District and police station level.” The Justice Malimath Committee proposals for these intelligence bureaus is that they should all have their own computerised databases and that all these databases should be linked to one another.⁵⁵ The exact charter for the national intelligence bureau is to be determined by Central Government.⁵⁶ Recommendation No 26 is complemented by Recommendation No. 39, in which the Justice Malimath Committee suggests that “a suitable provision be made on the lines of section 36 to 48 of POTA 2002 for interception of wire, electric or oral communication for prevention or detection of crime.” The breadth of this provision is highly disturbing, as it does not provide for the usual guarantees such as the protection of privacy, the exclusion of certain data, etc.

International standards on the protection of the right to privacy. Interception of telecommunications has a strong impact on the right of citizens to the protection of their privacy. The right to privacy is protected in article 17 ICCPR: any interference with this right must be clearly provided for in law and must be proportionate to the aim sought by the interference.⁵⁷ The Human Rights Committee has stated that in principle, “telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited”;⁵⁸ it has required clear legislation setting out the conditions for interference with privacy and providing for safeguards against unlawful interferences.⁵⁹ Communications between the accused and his lawyer should be exempt from interception, in accordance with Principle 22 of the Basic Principles on the Role of Lawyers, which states that “governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”⁶⁰ In the same vein, the Supreme Court of India, in the judgment of *People’s Union for Civil Liberties v the Union of India and another* has specifically ordered procedural safeguards to be observed for telephone

⁵⁵ Committee on Reforms of the Criminal Justice System, p 116, para 7.27.

⁵⁶ *Ibid*, p 117, para 7.27.3.

⁵⁷ *Toonen v Australia*, 4 April 1994, CCPR/C/50/D/488/1992, para 8.3.

In a comparative legal perspective: In France, interception of telephone conversation is only permitted for crimes for which punishment is two years or more , for the specific purposes of obtaining information concerning national security, for the protection of essential elements of scientific and economic capacities of France, for the prevention of terrorism or organized crime and for the prevention of some unlawful paramilitary groups, and for a maximum duration of four months [Articles 100-100-7 of the French Code of Criminal Procedure and Loi n° 91-646 du 10 juillet 1991 relative au correspondances émises par la voie des telecommunications]. In Germany, interception of communications is only admissible for some specifically designated crimes and only if specific facts justify the suspicion that this crime has been committed [§§ 100a et seq. German Code of Criminal Procedure].

⁵⁸ *General Comment 16, Article 17*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 8.

⁵⁹ *Concluding observations of the Human Rights Committee: Russian Federation*, 26 July 1995, CCPR/C/79/Add.83, para 19.

⁶⁰ See also § 148 of the German Code of Criminal Procedure, which guarantees the confidentiality of communications between the accused and his or her lawyer, with some very limited exception in cases of terrorism suspects; see, on these proposed safeguards *Amnesty International*, Briefing in the Prevention of Terrorism Ordinance, 15 November 2001, ASA 20/049/2001, p 10.

tapping.⁶¹ The Indian legislator, if it were to adopt the Justice Malimath Committee's recommendations with regard to the interception of telecommunication, should take the international standards and the principles of the Indian Supreme Court into account. It may also have recourse to the extensive European legislation and human rights case law on the matter. Indeed, the European Court of Human Rights has held very early that any interference by state authorities with the private life of the individual must be justified by legislation which clearly sets out the conditions for such interference in a precise manner foreseeable to the individual,⁶² and respects the principle of proportionality.⁶³ The same safeguards must be guaranteed for data collection and storing, as they also constitute an interference with private life.⁶⁴ The collection of data revealing racial or ethnic origin, political opinions, religious or other beliefs, trade union membership, and data concerning health or sexual life is equally prohibited.⁶⁵

Use as evidence in trial. Clear condition should also be set out on when and how the information collected through surveillance may be used as evidence. If it is used as evidence, some safeguards must be observed. For instance, the evidence should only be admissible if the accused is furnished with a copy of the order of the competent authority; the accused and his or her lawyer should be given the opportunity to review the content of the evidence and challenge it during trial.

Recommendations on interceptions of telecommunications

- The conditions for the interception of telecommunications should be clearly regulated in law.**

⁶¹ *People's Union for Civil Liberties v the Union of India and another*, Case of Coram Kuldip Singh and S Saghir Amhmad, JJ, Judgment of 18 December 1996 in W.P. (C) No. 246 of 1991, para 35.

⁶² ECtHR, *Malone v the United Kingdom*, Judgment of 2 August 1984, Series A No 82, para. 67; *Kopp v Switzerland*, Judgment of 25 March 1998, Reports 1998-II, para 55; *Amman v Switzerland*, Judgment of 16 February 2000, Reports 2000-II, para. 50; *Rotaru v Romania*, Judgment of 4 May 2000, Reports 2000-V, para 52.

⁶³ The European Court of Human Rights has considered incompatible with the right to privacy a law which does not lay down the limits of the surveillance and storing of data, does not define the kind of information that may be recorded, the categories of people against whom surveillance measures may be taken, the circumstances in which such measures may be taken or the procedure to be followed, the limits on the age of information held and the length of time for which it may be kept, the persons authorized to consult the files and the procedure to be followed; there must be effective procedural safeguards surveillance should, in principle, subject to judicial control [*Rotaru v Romania*, Judgment of 4 May 2000, Reports 2000-V, para 57, 59; *Craxi v Italy (No 2)*, Judgment of 17 July 2003, paras 78 *et seq*] It is not sufficient to simply hold national security as a ground for interfering with private life, if such ground is not defined with more precision [*Ibid*, para 58].

Similar safeguards are demanded by the *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* [ETS 181; see, in particular, articles 5 to 8] and the *EC Directive on data protection* [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995, p 0031-0050].

⁶⁴ ECtHR, *Leander v Sweden*, Judgment of 26 March 1987, Series A No 116, para. 48 *et seq*; *Rotaru v Romania*, Judgment of 4 May 2000, Reports 2000-V, para 43.

⁶⁵ Articles 8 and 6 respectively; see also *Z v Finland*, Judgment of 25 February 1997, Reports 1997-I..

- The legal provisions on interception of telecommunications should comply with the minimum safeguards set out in international law and jurisprudence; in particular, there should be a judicial supervision of interceptions.
- Personal data as well as communication with LEGAL counsel should be exempt from interception.
- The rights of the accused must be protected if intercepted data is used as evidence in trial, in particular the right to challenge the evidence in the hearing.

4. Police officer as Director of Prosecution

Recommendation No 52, according to which the post of Director of Prosecution should be filled from among suitable high ranking police officers, carries the risk of a criminal justice system which will ultimately lie in the hands and control of the police. It may put into question the very basis of separation and balance of powers by giving the institution who has the *initiative* and the charge of *conducting* the investigation the power to decide on whether the results of the investigation are sufficient to file a charge. An institution with more distance to the investigation process should be in charge of assessing the result of the investigation.

This recommendation may also lead to lack of an institution conducting an independent investigation and bringing charges against the police itself, particularly in cases of allegations of human rights violations. In such cases, as has been mentioned, an independent investigation must be conducted into the alleged facts. If the Director of Prosecution leading the investigation is a police officer, the rights of the individual will be violated. Police and prosecution should therefore be distinct, including personal independence.

Recommendation:

- No police officer should be nominated as director of prosecution.

III. REFORMS CONCERNING THE CRIMINAL TRIAL PROCEDURE

1. Presumption of innocence and burden of proof

The Justice Malimath Committee has reconsidered the standard of proof beyond reasonable doubt prevailing in Indian criminal procedure. It suggests a new standard of proof lying below “proof beyond reasonable doubt” and above “preponderance of

probabilities”. It therefore proposes a standard of “courts [sic] conviction that it is true”. This recommendation carries the risk of unhinging the whole criminal justice system of India, but also one of the fundamental universal values of criminal justice, in a national, international and comparative perspective.

The presumption of innocence in international law. The lowering of the standard of proof in criminal justice below “proof beyond reasonable doubt” would constitute a violation of the presumption of innocence, one of the cornerstones of national and international human rights law and criminal justice (see article 14 (2) ICCPR). The presumption of innocence prohibits the sentencing of a person, unless the state authority has proven his or her guilt. If a doubt remains, the accused cannot be convicted (*in dubio pro reo*). The Human Rights Committee has clearly stated that “[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt”.⁶⁶ Therefore, article 14 (2) does not leave the determination of the standard of proof to the states⁶⁷ and any conviction on evidence which does not fulfil the standard of proof beyond reasonable doubt constitutes a violation of India’s obligations under the ICCPR.

The presumption of innocence from a comparative legal perspective. The same holds true from a comparative perspective. The Justice Malimath Committee, referring to continental European systems such as the French, the German and the Italian, states that “[t]he standard of proof required is that of the inner satisfaction or conviction of the Judge and not proof beyond reasonable doubt as in the Adversarial System”.⁶⁸ In this respect, it must be recalled that all countries of Europe are parties to the ICCPR and thereby bound by Article 14 (2) ICCPR. Moreover, they are all parties to the European Convention on Human Rights and bound by the presumption of innocence laid out in Article 6 (2) ECHR. As far as the Justice Malimath Committee refers to systems in which a “clear and convincing conviction”, no confusion must be made between the difference in systems of proof – free proof (intime conviction, freie Beweiswürdigung) or legal proof (*probatio legalis*) – and the standard of proof for the finding of guilt.

For instance, the Justice Malimath Committee asserts that in France, the standard of proof “is ‘intime conviction’ or inner conviction, the same as ‘proof on preponderance of probabilities’”.⁶⁹ The French Code of Criminal Procedure indeed establishes that the judge decides according to its inner conviction.⁷⁰ This reflects the system of proof in France, which admits all proofs, but requires an assessment of all proofs by the judge. It

⁶⁶ General Comment 13, Article 14 (op cit note 39), para. 14, para. 7, emphasis added; similarly, the Inter-American Court of Human Rights has stated that the principle of presumption of innocence “demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted” [I/A Court HR, *Cantoral Benavides Case*, Judgment of August 18, 2000, Series C No. 69, para. 120].

⁶⁷ This is affirmed by the Committee on Reforms of the Criminal Justice System, p 70, 71, para. 5.22.

⁶⁸ *Ibid*, p 25.

⁶⁹ *Ibid*, p 70, para. 5.22.

⁷⁰ Article 427 of the French Criminal Procedure Code (“[...] et le juge décide d’après son intime conviction”).

is contrary to the system of evidence used in many common law countries, where the admission of evidence is ruled by exclusionary rules, but once evidence is presented legally imposes itself to the judge as a matter of law. In the French system of free proof, on the contrary, the judge is not bound by any evidence, but has to assess the legality, admissibility, and persuasive force of each piece of evidence, including confessions,⁷¹ according to the principles of human dignity and reason.⁷² However, the finding of guilt presupposes that - based on the inner conviction - the judge is convinced beyond reasonable doubt that the accused is guilty. Similarly, the German Criminal Procedure Code - although limiting the admissible pieces of evidence - enshrines the free assessment of proof by the court.⁷³ For conviction, it demands a persuasion of the court - based on its free conviction - which leaves no reasonable doubt.⁷⁴ Where the slightest doubt remains, the accused must be acquitted: the principle *in dubio pro reo* applies, which demands that any doubt must go to the benefit of the accused. Thus, both the adversarial and the inquisitorial systems require the same standard of proof, namely proof beyond a reasonable doubt".⁷⁵

Recommendation:

- **If a system of administration of proof is adopted which is based on the inner conviction of the judge, the whole system of evidence based on the Evidence Act would have to be revised; however, it may not lead to a lowering of the standard of proof for conviction: international law requires proof beyond a reasonable doubt.**

2. Right to silence and drawing of adverse inferences

The proposed change in the *standard* of proof is accompanied by suggestions to also change the *burden* of proof. Indeed, in Recommendation 8, the Justice Malimath Committee proposes to amend Section 313 of the Code of Criminal Procedure, 1973, by adding a clause according to which "if the accused remains silent [faced with a question by the court], or refuses to answer any question put to him by the court which he is not compelled by law to answer, the court may draw such appropriate inferences including adverse inference as it considers proper in the circumstances". The proposal of the Justice Malimath Committee also suggests that once the prosecution and the defence statement are submitted to the court, "[a]llegations which are admitted or are not denied need not be proven and the court shall make a record of the same". These propositions amount to laying the burden of proof with the defence.

⁷¹ Article 428 of the French Criminal Procedure Code.

⁷² T. Garé and C. Ginestet, *Droit pénal, procédure pénale*, Paris, Dalloz 2002, p 214.

⁷³ § 261 of the Criminal Procedure Code: "Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung".

⁷⁴ Kleinknecht/Meyer-Gossner, *StPO*, 42nd ed., Beck 1995, § 261, para 26.

⁷⁵ A. Eser (*op cit* note 23), at 430.

Right to silence as a fundamental rule of criminal justice. The Justice Malimath Committee writes about the origin of the right to silence that “[i]t was essentially the right to refuse to answer and incriminate oneself in the absence of a proper charge. Not initially, the right to refuse to reply to a proper charge.”⁷⁶ The Justice Malimath Committee’s assumption is that the right to silence is only needed in tyrannical societies, where anyone can be arbitrarily charged. It assumes that whenever a charge is “proper”, there is no need for protection of the accused. It fails to see that if the presumption of innocence is taken seriously, the concepts of a proper and an improper charge loses its meaning with regard to the presumption of innocence: all charges must be corroborated by evidence produced in the courtroom. To accept the concept of improper charges is to get rid of the presumption of innocence by assuming that some charges are in themselves proof of the guilt of the accused. The Law Commission of India has similarly warned against a curtailing of the right to silence as contrary to Article 20 (3) of the Constitution of India.⁷⁷ The right to silence also comprises the right not to comment on allegations of the prosecution, and not thereby concede to them. The standard proposed by the Justice Malimath Committee is essentially the one of civil litigation, where facts not denied are considered proven by the court.

The underlying rationale of the Justice Malimath Committee seems to be that the protection of the accused can be lowered as long as this is accompanied by a guarantee that the accused should have counsel to assist him or her⁷⁸ and that state officials act in respect of due process of law.⁷⁹ Laudable as the urge that state officials uphold the rule of law is, it would not be sufficient to guarantee the rights of the accused; those rights are also a safeguard against the whole state apparatus: there is an inherent imbalance of power between the prosecution and the accused; the accused is an individual, whereas the prosecution acts with the weight of the state. In any state, this inequality must be counter-balanced by safeguards for the accused, as it is from the outset impossible for him to match the power of state, even if the state authorities respect the rule of law.

Adverse inferences as violation of article 14 ICCPR. If adverse inferences were drawn as suggested by the Justice Malimath Committee, they would be in violation of article 14 ICCPR. Indeed, the Human Rights Committee considers the drawing of adverse inferences to be in violation of Article 14 (3) (g). It has urged countries where such presumptions exist to “reconsider, with a view to repealing it, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under article 14 of the Covenant”.⁸⁰ As India is legally bound by article 14 ICCPR, it should take this jurisprudence into account.

⁷⁶ Committee on Reforms of the Criminal Justice System, p 48, para 3.3.1

⁷⁷ *Law Commission of India*, 180th Report on Article 20 (3) of the Constitution of India and the Right to Silence, May 2002.

⁷⁸ Committee on Reforms of the Criminal Justice System, p 57, Rn. 3.54.

⁷⁹ *Ibid*, pp 58-62.

⁸⁰ *Concluding Observations of the Human Rights Committee: United Kingdom*, 6 December 2001, CCPR/CO/73/UKOT, para. 17.

Adverse inferences and article 6 ECHR. As far as the Justice Malimath Committee states that such inferences are used in continental European systems, the jurisprudence of the European Court of Human Rights should be recalled. Indeed, the European Court of Human Rights has set strict conditions for the compliance of inferences of guilt with the right to remain silent and the privilege against self-incrimination protected under Article 6 ECHR. It has stated that “it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself.” In the opinion of the Court, inference to the detriment of the accused may only be drawn “in situations which clearly call for an explanation from him” and only to assess the “persuasiveness of evidence adduced by the prosecution”.⁸¹ According to the Court, “[t]he question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent”.⁸² Also, the Court considers that the drawing of such inferences can only be compatible with the principle of fair trial if the accused is granted access to a lawyer already at the stage of the police interrogation.⁸³ Where the accused is tried by jury, the judge must give the jury proper direction on these conditions.⁸⁴ In sum, the European Court of Human Rights, while having to accept that each member state is free to adopt the system of criminal justice that it chose to, has set strict limits to the possibility of drawing adverse inference; it may never be the only evidence.⁸⁵

Recommendations:

- **Where the accused does not explicitly deny an allegation made by the prosecution, this should not be understood as a concession that the allegation is true.**
- **The drawing of adverse inferences should be explicitly prohibited in the Evidence Act.**

3. New procedure following the “Prosecution statement”

In Recommendations No 9 and 10, the Justice Malimath Committee suggests a new process to be followed for the charge, which may jeopardize the right to silence and the presumption of innocence. It proposes that once the “Prosecution Statement” is served upon the accused, the accused must file a “defence statement” within two weeks, in

⁸¹ ECtHR, *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I, para. 47.

⁸² *Ibid*, para. 51.

⁸³ *Ibid*, para. 66.

⁸⁴ ECtHR, *Condron v. the United Kingdom*, Judgment of 2 May 2000, Reports 2000-V, para. 66.

⁸⁵ In a similar vein, the Public Union for Civil Liberties (PUCL) has stated that for rebuttable presumptions not to become a general prescription for arbitrariness, they “should be confined to cases where (i) no independent evidence is possible; (ii) any other explanation is *prima facie* unrealistic; and (iii) the complainant/witness/prosecution has no reason for cooking up false evidence against the accused. (If not all three, then at least two of the three), PUCL response to questionnaire by the Committee on Reforms of the Criminal Justice System, PUCL Bulletin, November 2002, para. 2.2.

which he “shall give specific reply to every material allegation.” Where the accused fails to reply, or replies too vaguely in the opinion of the court, the allegations of the Prosecution Statement shall be considered as proven⁸⁶ and allegations which are not denied need not be proven⁸⁷.

Discriminatory proposal. The presumption of innocence, however, implies that the burden of proof must remain with the prosecution, and it is the accused’s right not to comment on it. Also, the two week time-frame for the defence statement is inherently discriminatory, as it is evident that only persons with good advice from counsel will realize the risk they are running if they do not respond, and be able to respond to the satisfaction of the court. It makes it impossible from the outset for anyone of the disadvantaged and vulnerable sections of society to seek justice.

Contradictory approach. The evidence and proof system proposed by the Justice Malimath Committee is in fact the one used in contradictorial civil litigation, where the party relying on an alleged fact has to prove it. Not only does this contravene the presumption of innocence in criminal cases, but the proposals of the Justice Malimath Committee also appear self-contradicting: it seeks to introduce an inquisitorial system, where the court is charged with finding truth, while at the same time introducing a burden of proof which belongs to the contradictorial civil process. It becomes clear, here again, that the introduction of an entirely new criminal justice system must be very well thought out, lest the outcome should be a patchwork of contradictory propositions to the detriment and in violation of the human rights of the accused. A similar contradiction lies in the upholding of the principle that the accused must plead any exceptions and shall be precluded from pleading exceptions if he has not done so in the defence statement: this is not the case in inquisitorial systems, where the burden lies on the prosecution and court to prove that no exception is fulfilled and where the court must seek on its own motion whether any exception is fulfilled to the benefit of the accused.

No proper criminal investigation by the prosecution. The process proposed by the Justice Malimath Committee also suggests that “in the light of the plea taken by the accused, it becomes necessary for the prosecution to investigate the case further, such investigation may be made with the leave of the court” (Recommendation No 9 (i)). This implicitly means that were the accused pleads guilty, the investigation must not be taken further. This, again, contradicts the inquisitorial principle: it amounts to putting the burden on the accused to contest every allegation against him, failing which no investigation will be carried out; the “quest for truth” becomes remarkably easy in such conditions. The Recommendations also overlook the fact that the right to silence also ensures proper and thorough investigation. While the Justice Malimath Committee asks for conviction based on “clear conviction”, such conviction is not actually possible in the framework of the procedure proposed by it. Indeed, where the system operates with mandatory presumptions of fact (as it states that all facts not denied, or not denied to the satisfaction of the court *shall* be deemed proven) and mandatory preclusions (where the accused does not contradict the facts or where the accused does not claim the benefit of

⁸⁶ Recommendation No 9 (f).

⁸⁷ Recommendation 10 c).

exceptions) the court cannot come to a conviction or any conclusion arising out of the evidence, as it is already bound by the statutory conclusions.

Recommendations:

- **There should be no obligation to file a defence statement to the prosecution statement.**
- **There should be no presumption that allegations of the prosecution not explicitly denied by the defence are proven.**
- **There should be no preclusion rule to exception-pleas.**

4. Summary procedures

Summary procedures with sentence up to three years. In Recommendations 72 *et seq.* the Justice Malimath Committee suggests that offences for which a punishment is three years and below should be tried in summary procedures under Sections 262 to 264 of the Criminal Procedure Code, so as to quicken the pace of justice. Parallel to this, the Justice Malimath Committee proposes an extension of the procedures for petty offences. In current legislation summary procedures exist for offences for which punishment is imprisonment for a term not exceeding two years and no sentence of imprisonment for a term exceeding three month can be passed. Through the Justice Malimath Committee's proposal, summary procedures will allow for sentence of imprisonment for a term of up to three years. Also, the Committee suggests that instead of giving magistrates the discretion to try the case summarily, the summary procedure shall be automatic in the mentioned cases.⁸⁸ While it is indisputable that trials in India exceed the admissible length of time, and that measures must be taken to counter procedural shortcomings, the propositions of the Malimath Committee may be an issue of concern.

Summary procedure must respect international fair trial standards. If summary procedures are extended, they have to comply with fair trial standards as provided in Article 14 (3) ICCPR. Although the principle of fair trial does not apply without any restrictions, any limitation must be confined to the necessary, and must be proportionate to the aim pursued. In principle, international law, and particularly article 14 ICCPR allows for fast procedures, and the Human Rights Committee has even suggested special courts to deal with petty offences where a state system suffers from a great backlog of cases.⁸⁹. Nevertheless, the summary procedure in India, as it has been used in practice until now, may be too quick to ensure full compliance with fair trial standards. Indeed, with very few exceptions, summary procedures in India have been conducted up to now in cases where the offence is very minor (such as trafficking offences) and the accused has pleaded guilty. Although the summary procedure can be followed where the accused

⁸⁸ Recommendation 72.

⁸⁹ *Concluding Observations of the Human Rights Committee: Brazil*, 24 July 1996, CCPR/C/79/Add.66, para. 24.

does not plead guilty, leading to a summary record of only the “substance of the evidence”, and only “a brief statement of the reasons for the finding”,⁹⁰ it is not followed in practice. In cases which can lead to a conviction of up to three years, it is almost certain that the accused will not plead guilty in many of those cases, and the case will warrant a contradictory procedure guaranteeing equality of arms. In those cases, the rights of the accused to adequate time and facilities for the preparation of his defence and to communicate with counsel (guaranteed in article 14 (3) (b) ICCPR), and to examine, or have examined the witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (guaranteed in article 14 (3) (e) ICCPR) must be respected.

Recommendation:

- All procedures, including summary procedures, must respect the rights of the accused guaranteed in article 14 ICCPR.

5. Terrorism and organized crime

Proposed expansion of the jurisdiction of Special Courts. Recommendation No 137 suggests that “[c]rime units comprising dedicated investigators and prosecutors and Special Courts by way of Federal Courts be set up to expeditiously deal with the challenges of ‘terrorist and organized’ crimes. The main concern with this Recommendation is the expansion of powers of the so called Special Courts,⁹¹ which already exist under the Prevention of Terrorism Act, 2002 (POTA).⁹²

No independent courts. Special Courts do not comply with the right to be tried by a tribunal previously established by law (the “juge naturel”). The judges of these Courts are appointed by Central or State Government, with the concurrence of the Chief Justice of the High Court. Such appointment bears the risk of political and partial appointments. Moreover, where a question on the jurisdiction of the Special Court arises, it is not decided by the court itself, but referred to Central Government which takes a binding decision.⁹³ This is contrary to Principle 14 of the UN Basic Principles on the Independence of the Judiciary, according to which the assignment of cases to judges within the court is an internal matter of judicial administration.

Anonymous witnesses. The Special Court may also keep the identity of witnesses secret where it is satisfied that the life of a witness is in danger. Although it is, in principle, possible that witness protection may require the secrecy of the identity of the witness as a

⁹⁰ Section 264 Criminal Procedure Code.

⁹¹ The Human Rights Committee has held that Special Courts may only exceptionally try civilians and in full respect of the rights of fair trial, *General Comment 13, Article 14 (op cit note 39)*, para 4.

⁹² Act No. 15 of 2002.

⁹³ Section 23 (3) POTA.

restriction of the right of the accused to have the evidence against him disclosed and to examine witnesses against him, such restrictions of the rights of the accused may seriously obstruct the defence,⁹⁴ and must be balanced against the rights of the accused.⁹⁵ They must be counter-balanced by safeguards to preserve equality of arms at the trial,⁹⁶ and be reasoned by the court. The provision of the POTA goes very far in that measures to protect witnesses may include “the holding of proceedings at a place to be decided by the Special Court”,⁹⁷ or a decision that “all or any of the proceedings pending before such a Court shall not be published in any manner”.⁹⁸ The latter measure constitutes a violation of article 14 (1) ICCPR, which stipulates that any judgment shall be made public save for the narrow exceptions mentioned in the paragraph, and which are not fulfilled in the case of terrorism trials.⁹⁹

Confessions made to the police. According to POTA, the Special Courts may also admit confessions made to the police as evidence, which, as mentioned above,¹⁰⁰ is conducive to admitting confessions extracted under duress as evidence, and should be rejected. Equally, POTA already provides for the possibility of adverse inferences as they are now being suggested by the Justice Malimath Committee,¹⁰¹ which is contrary to the right to silence and the presumption of innocence.¹⁰²

Proposed mainstreaming of the definition of terrorism from POTA. Recommendation No 138 suggests a comprehensive and inclusive definition of terrorists’ acts, disruptive activities and organized crimes in the Indian Penal Code. The recommendation bears the risk that very different categories of crimes, in particular terrorist and organized crimes, may be amalgamated. Terrorist crimes and organized crime are too distinct categories. It is true that organized crime may serve to finance terrorist groups and activities, and that there may be, as the Justice Malimath Committee states, a “close nexus between drug trafficking, organized crime and terrorism”.¹⁰³ On the other hand, it may also lack any relationship whatsoever to terrorism. The Justice Malimath Committee’s proposition blurs categories of crimes. Such an approach is dangerous regarding criminal law, which should be as clearly defined as possible. The

⁹⁴ Cf. Human Rights Committee, *Pearl and Pearl v Jamaica*, 19 July 1994, CCPR/C/57/1, para 11.5; *Concluding Observations of the Committee against Torture: Colombia*, 9 July 1996, A/51/44 para 78.

⁹⁵ See the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*: “the views and concerns of victims should be presented and considered at appropriate stages of the proceedings (...) without prejudice to the accused.”

⁹⁶ See, inter alia, ECtHR, *Dooson v the Netherlands*, Judgment of 26 March 1996, Reports 1996-II, para. 54.

⁹⁷ Section 30 (3) (a).

⁹⁸ Section 30 (3) (d) POTA.

⁹⁹ “(...) except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”, the Human Rights Committee has recalled the obligation to publish the judgements save in those “strictly defined exceptions”, *General Comment 13, Article 14 (op cit note 39)*, para 6.

¹⁰⁰ See above under chapter III 2.

¹⁰¹ Section 53 POTA.

¹⁰² See above under chapter II 2.

¹⁰³ Committee on Reforms of the Criminal Justice System, p 229.

consequence of such amalgamation would be an extension of the jurisdiction of the Special Courts, which by themselves lack fair trials standards, to common criminality.¹⁰⁴

Definition of terrorism in POTA in violation of international law. Most disturbingly, the Recommendation could lead to the drafting of a criminal provision with a definition of terrorism based on the definition of Section 3 POTA.¹⁰⁵ The terrorism definition of Article 3 POTA contravenes the principle of *nullum crimen, nulla poena sine lege*,¹⁰⁶ which is a fundamental and inderrogable¹⁰⁷ right under international law. It not only prohibits retroactivity of laws, but also prescribes that criminal offences must be clearly defined, free from ambiguities, and not extensively construed to an accused's detriment. The individual must be able to know from the wording of the relevant provision, what acts and omission will make him or her criminally liable.¹⁰⁸ In particular in respect of the crime of terrorism and the special legal regime it is submitted to, the definition must avoid imprecision and ambiguity.¹⁰⁹ This requirement is not fulfilled by section 3 (1) POTA.¹¹⁰ The provision is complemented by section 4, according to which anyone in

¹⁰⁴ Such concern was already expressed with regard to the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) by Human Rights Committee Member Klein, who urged India to “review all the laws that left room for abuse of authority and not to try to replace the TADA by a penal-law amendment bill. It was essential to limit the powers of the police and the armed forces by means of clear texts (...)", Summary record (partial) of the 1606th meeting: India, 21 November 1997, CCPR/C/SR.1606, para 47. In the ambit of the European Union, the Working Party established under Directive 95/46/EC has underlined the importance of “refusing the amalgam between fight against real terrorism and the fight against criminality in general” (Article 29 – Data Protection Working Party, Opinion 10/2001 on the need for a balanced approach in the fight against terrorism adopted on 14 December 2001, 0901/02/EN/Final WP 53).

¹⁰⁵ Misuse of POTA during the last year has been documented by *Human Rights Watch* in: In the Name of Counter-Terrorism: Human Rights Abuses Worldwide – A Human Rights Watch Briefing Paper on the 59th Session of the United Nations Commission on Human Rights, March 25, 2003 (India).

¹⁰⁶ Article 15 (1) ICCPR; Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 7; see also Article 22 (2) of the Rome Statute for the International Criminal Court, which reads “The definition of a crime shall be strictly construed and shall not be extended by analogy”.

¹⁰⁷ See Article 4 (2) ICCPR.

¹⁰⁸ See, *inter alia*, *Concluding Observations of the Human Rights Committee: Algeria*, UN Doc CCPR/C/79/Add.95, 18 August 1998, para. 11; *Concluding Observations of the Human Rights Committee: Portugal (Macao)*, CCPR/C/79/Add.115, 4 November 1999, para. 12; ECtHR, *Veeber v Estonia (NO2)*, Judgment of 21 January 2003, para 30.

¹⁰⁹ The Human Rights Committee has criticized the definition of terrorism in Egyptian law as “so broad that it encompasses a wide range of acts of different gravity”, *Observations and recommendations of the Human Rights Committee: Egypt*, UN Doc CCPR/C/79/Add.23, 9 August 1993, para 129; see also the *Recommendation of the Inter-American Commission of Human Rights* according to which States must “ensure that crimes relating to terrorism are classified and described in precise and unambiguous language that narrowly defines the punishable offense, by providing a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable by other penalties” (*Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, Recommendation NO 10 (a).)

¹¹⁰ This provision contains a number of terms that are so vague that they fail to meet the exigency of clarity required for a criminal offence, and that, moreover, they criminalize activities which are the exercise of human rights. Under the terms of “any means whatsoever” and “likely to cause disruption of services essential to the life of the community” the exercise of the right to demonstrate or to strike could be considered a terrorist crime. The definition also incriminates in section 3 (5) membership in a terrorist organization, without the person having been involved in any illegal act such as a killing, which might

possession of certain weapons within a notified area shall be held guilty of terrorist act, without any other further act such as a killing. Such a wide and imprecise definition of terrorism is incompatible with the principle of *nullum crimen, nulla poena sine lege*. If the Justice Malimath Committee's suggestion to draft a comprehensive definition on organized crime, terrorism and disruptive activities were followed, it would only serve to blur the boundaries of criminal definitions.

Recommendations:

- **The jurisdiction of Special Courts should not be expanded, as they do not comply with the requirement of independent and impartial tribunals respecting the rule of law and the right to a fair trial.**
- **Terrorism, disruptive activities and organized crime should not be amalgamated in a common definition in the Indian Criminal Code.**
- **Any definition adopted in the Criminal Code should not use the definition of Section 3 POTA, as it is in contravention of international law.**

IV. REFORMS CONCERNING VICTIMS OF CRIME AND WITNESS PROTECTION

1. The rights of victims of crime and human rights violations

The Justice Malimath Committee has made some progressive and welcome recommendations on the protection for victims of crime. The rights to participation of the victim in the criminal trials will ensure their access to justice, particularly the right to produce evidence, to ask questions to the witnesses, to know the status of investigations and to move the court for further investigation, to advance arguments, to participate in negotiations, and the right to appeal under certain circumstances.¹¹¹ Equally, the proposal for a Victim Compensation Law enshrining the State's obligation to compensate victims even when the offender is not apprehended is a step towards a real protection of victims of crime and of human rights violations. Indeed, any criminal legislation should be based on respect of the rights of the accused and the victim.

Impediments to the protection of victims of crime in India. Nevertheless, the legislative background adverse to victims of crime must be recalled. Most notably, shortcomings still exist with regard to crimes committed by public officials, in particular

entail a violation of freedom of association under article 22 ICCPR and the principle of individual responsibility in criminal law.

¹¹¹ Recommendation 14.

police forces and armed forces - crimes by state authorities towards citizens amount to human rights violations. In practice, investigations and prosecutions are not conducted in a consistent and systematic manner. This is often due to immunities granted to many state officials, particularly members of the armed forces.¹¹² The investigations carried out have often lacked the thoroughness and effectiveness warranted by the gravity of the alleged violation. The vast majority of complaints about torture or ill-treatment do not result in conviction or in very minor sanctions.¹¹³ In many cases, victims do not even complain, because they are unaware of their rights, because of the stigma attached to the complaint, especially in rape cases, or because they have been threatened by the perpetrators.¹¹⁴ Medical doctors have sometimes failed to emit truthful reports, often because of pressure from the perpetrators.¹¹⁵ In areas of armed conflict, officials even appear to have been rewarded in some cases for their misconduct and violence.¹¹⁶ Despite progressive jurisprudence of the Supreme Court of India on the matter,¹¹⁷ there is, as yet, no government reparation scheme or law.

¹¹² The law protects public officials from prosecution with far reaching immunity clauses. Section 197 of the Criminal Procedure Code provides that no magistrate, public servant or member of the Armed Force not removable from his office may be prosecuted for any act done in the discharge of his duties, except with the previous sanction of the government. Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and Section 7 of the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 and Section 57 of the Prevention of Terrorism Act, 2002 contain similar clauses.

The National Human Rights Commission, while having been active in the fight against torture, is limited in its mandate by the Protection of Human Rights, 1993, which prevents it from investigating allegations of human rights violations committed by members of the army or paramilitary forces and incidents which took place more than a year before the complaint was made [Sections 19 and 36 (2) Protection of Human Rights Act, 1993].

The UN Human Rights Committee has demanded that the requirement of consent by government to prosecute officials from security forces should be removed from all legislation, as it creates a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2 (3) ICCPR [*Concluding Observations of the Human Rights Committee: India, 4 August 1997, CCPR/C/79/Add.81, para 21*].

¹¹³ On statistics see *National Human Rights Commission of India, Annual Report 2000-2001, Annexures, Charts and Graphs; REDRESS, Responses to Human Rights Violations - Reparation for Torture in India, Nepal and Sri Lanka, February 2003*, p. 20.

¹¹⁴ REDRESS (*op cit* note 113), p. 21.

¹¹⁵ See the reports by *Amnesty International: India: Break the Cycle of Impunity in Punjab* (*op cit* note 28) p 35, *India: Time to Stop Torture and Impunity in West Bengal* (*op cit* note 28), p 20 and *India: The Battle against Fear and Discrimination: The Impact of Violence against Women in Uttar Pradesh and Rajasthan* (*op cit* note 28), p 28; see, on the role of the medical profession the *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*, adopted by General Assembly resolution 37/194 of 18 December 1982.

¹¹⁶ *Amnesty International, India: Time to Stop Torture and Impunity in West Bengal* (*op cit* note 28), p 20.

¹¹⁷ *D.K. Basu v West Bengal*, 18 December 1996, [1997] 2 LRC 1, para 56: "Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometime perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is victoriously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be fell to the criminal courts in

International standards protecting victims of crime. It is important that the legislator should adopt a rights based approach for victims of crime. There is an important body of rights and principles to protect victims of crime and particularly victims of crimes committed by state authorities. Of these, the main universal instruments are the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹¹⁸ the Resolution of the United Nations Human Rights Commission on the rights to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms¹¹⁹ as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.¹²⁰

The main needs of victims of crime that must be taken into account are the right to access to mechanisms of justice, including the right to be informed at every stage about those rights, participation of the victim throughout the proceedings, respect for their dignity and privacy, and the right to obtain redress. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the views and concerns of victims of crime should be presented and considered at appropriate stages in the proceedings, that victims should be provided proper assistance throughout the process, that they should suffer only minimal inconvenience, in particular with regard to their privacy, and that unnecessary delays should be avoided in the proceedings.¹²¹ It also states that victims of crime should obtain prompt redress through expeditious, fair, inexpensive and accessible procedures.¹²² Offenders should make fair restitution to victims, their families or dependants and governments should consider restitution as an available sentencing option.¹²³ When compensation is not fully available from the offender or other sources, the state should provide financial compensation.¹²⁴

The duty to investigate, to punish and to investigate grave human rights violations. Of the victims of crime, specific attention should be paid to victims of grave human

which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damage which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait, jacket formula can be evolved in that behalf. The relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit”[sic].

¹¹⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/40/53 (1985).

¹¹⁹ Commission on Human Rights Resolution 2003/04.

¹²⁰ Final Report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (op cit note 17).

¹²¹ Principle 6; see also Principle 10 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.

¹²² Principle 5.

¹²³ Principles 8 *et seq.*

¹²⁴ Principles 12, 13.

rights violations. Also, very specific international human rights standards and jurisprudence govern the rights of victims and their next-of-kin in all cases of grave human rights violations, such as death, torture, ill-treatment or disappearances. Such standards follow, amongst others, from the ICCPR and the jurisprudence of the Committee on Human Rights, which are binding on India. Any state authority, upon a credible allegation of torture or cruel, inhuman or degrading treatment, of a killing, or of the disappearance of a person, has an obligation *ex officio* to lead a prompt, effective, independent and impartial investigation into the incident.¹²⁵ Also, victims of human rights violations have a right to an efficient remedy (see article 2 (3) ICCPR) which implies that the victim of the violation should have access to a remedy which can lead to the punishment of those responsible.¹²⁶ Also, victims of human rights violations have a right to adequate compensation, proportionate to the gravity of the violation and the harm suffered.¹²⁷

Recommendations:

- **Any criminal justice system must be based on the rights of the accused and the rights of the victim.**
- **The criminal justice system of India should ensure that the rights of victims – such as the right to have access to and participate in the proceedings at all stages, the right to be informed of one's rights, the right to respect of one's dignity and privacy and the right to obtain redress - are duly guaranteed in law and practice.**
- **The criminal justice system should give particular attention to improving the investigation, prosecution and punishment of state officials who commit crimes and human rights violations.**
- **There must be prompt, effective, impartial and independent investigations into all allegations of ill-treatment, death or disappearance or other serious human right violations; the**

¹²⁵ Human Rights Committee, *General Comment 6, Article 6*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 4; *General Comment 20 on Article 7* (*op cit* note 39), para 14; ECtHR, the requirements for investigations of the jurisprudence of the European Court of Human Rights have been recently summarized in the case of *Finucane v the United Kingdom*, Judgment of 1 July 2003, paras 67-71. See also the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by General Assembly resolution 55/89 of 4 December 2000 (so called Istanbul Principles).

¹²⁶ Human Rights Committee, *General Comment 6, Article 6* (*op cit* note 39), para 3; *General Comment No 20, Article 7*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 13, 15; *Nydia Erika Bautista v Colombia*, CCPR/C/55/D/563/1993, 13 November 1995, para 8.6; *José Vicente y Amado Villafaña Chaparro, Luis Napoleón Torres Crespo, Ángel María Torres Arrozo y Antonio Hugues Chaparro Torres v Colombia*, CCPR/C/60/D/612/1995, 20 July 1997, para 8.8. *Concluding Observations of the Human Rights Committee – Brazil*, 24 July 1996, CCPR/C/79/add.66, para 8.]. Although personal immunity may be legitimate for some cases, and although immunity for magistrates should even be the norm as it is a safeguard to preserve their independence and impartiality [Principle 16 of the *Basic Principles on the Independence of the Judiciary*, UN Doc A/CONF.121/22/Rev.1 (1985)], it is not, in general compatible with the right of the victim to an effective remedy for grave human rights violations.

¹²⁷ *Concluding Observations of the Human Rights Committee: Brazil*, 24 July 1996, CCPR/C/79/add.66, paras 20; ECtHR, *Papamichalopoulos v Greece* (article 50), Series A No 330-B, para 34.

- investigating authority must, above all, be independent from the authority whose actions are being scrutinized.**
- In particular, victims and their next-of-kin must have access to legal aid where this is necessary to ensure their adequate participation in the proceedings.**
- The criminal justice system should guarantee the right of victims of crime and human rights violations to prompt and adequate redress. Compensation, however, does not absolve the state from its duty to prosecute and punish.**
- The immunity clauses for state officials should be revoked in all statutes.**

2. Offences against women

Women are particularly vulnerable when they become victims of crime, committed both by private or public actors, because of their already weak situation and protection in society, and because of the stigma that it attaches to many gender specific crimes, particularly to the crime of rape. The recommendations to protect women by strengthening the criminal provisions and procedures in cases of violence against women are welcome, particularly the recommendation on increasing gender sensitivity among the magistrates.

Marital rape. Recommendation 119 to redefine the offence of rape is welcome, as it will lead to a more accurate protection of women from violence. However, it is to be noted that the Justice Malimath Committee does not recommend the criminalization of marital rape, which has been identified as an issue of concern by the Human Rights Committee¹²⁸ and is included by the Special Rapporteur on Violence into the definition of acts of domestic violence.¹²⁹

Female judges. The proposition of Recommendation No. 67 to assign criminal cases relating to women to female judges is rather unclear, in particular as it only recommends the nomination of women judges in urban areas, thereby leaving rural areas without a policy of gender-sensitivity. It is, in principle, a progressive approach and should be encouraged, and would only need clarification. The Human Rights Committee has stressed that it is important to have a pluralistic judiciary, including members of minorities and women.¹³⁰ It is desirable that on account of the increased number of women becoming involved in the criminal justice system, the presence of women must be

¹²⁸ *Concluding Observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, para 16.

¹²⁹ *Special Rapporteur on violence against women*, Framework for model legislation on domestic violence, E/CN.4/1996/53/Add.2, 2 February 1996, para 11.

¹³⁰ *Concluding observations of the Human Rights Committee: Sudan*, 11 November 1997, CCPR/C/79/Add.85, para. 21.

mainstreamed in the judiciary. It is also desirable that judges who are adequately trained and gender sensitive be appointed.

Rights of the accused. Recommendation 116 may lead to a curtailing of the rights of the accused. It stipulates that in order to prove bigamy, if a man and a woman have lived together “for a reasonably long period”, it shall be deemed proven that they have married according to the customary rites. This assumption goes very far for a criminal offence, which should normally be clearly described in law.

Offence against women made bailable and compoundable. Recommendation 114, which proposes that Section 498A of the Indian Penal Code regarding cruelty by the husband or his relatives should be made bailable and compoundable, is equally an issue of concern. Indeed, if the offence is made bailable, women are at risk of being subjected to more violence and to threats with regard to the criminal process. If the offence becomes compoundable this will lead to procedures of mediation between the victim and the perpetrator. An in-depth study should be conducted with a view to determining the effect that such legislation may have on women.

Time limits for First Information Reports. As far as the Justice Malimath Committee suggests a certain time limit to file First Information Reports, i.e. a complaint to the police,¹³¹ it seems to come into contradiction with its own findings that women are often under trauma immediately after the event.¹³² The demand that there should be a restrictive delay specifically for this offence, which does not generally exist for complaints, appears to be discriminatory towards women.

Recommendations:

- **Marital rape should be made a crime in the Indian Criminal Code.**
- **The presumption of a “reasonable long period” of common life to prove bigamy should be reviewed.**
- **The proposition to make cruelty towards women bailable and compoundable should be subject to further study.**
- **There should be no time limits for first information reports concerning violence against women.**

¹³¹ Recommendation 123.

¹³² Committee on Reforms of the Criminal Justice System, p 194, para 16.7; the Committee fails to address the issue of concern mentioned by the UN Special Rapporteur on Violence against Women, according to whom women survivors of sexual violence in Gujarat were reportedly denied the rights to file FIRs [Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2003/75/Add.1, 27 February 2003, para 988].

3. Witness protection

The Justice Malimath Committee's recommendation towards an effort in treating witnesses with respect is an important step towards rebuilding a dignified court system for all participants. It will also serve the interests of justice as witnesses will be willing and able to follow court proceedings accurately and give correct testimony. Also, stricter laws on perjury may reduce the risk of innocent persons being sentenced on the basis of false testimony - although Recommendation 87 seems to express a distrust of witnesses somewhat disproportionate to the trust accorded to police officers. It must also be stressed that intimidation or compelling of witnesses leads to unreliability of their testimony, which affects the accused's right to fair trial.¹³³ From an international law perspective, the protection of witnesses raises two concerns, which may seem contradictory, but are a common feature to all criminal trials: on the one hand, the state has an obligation to protect witnesses, and the Justice Malimath Committee's proposals may fall short of an efficient protection; on the other hand, the right of the witness to protection must be balanced against the right of the accused to a fair trial.

Duty of the state to protect witnesses. The Justice Malimath Committee's recommendations on the status of witnesses give only vague indication on witness protection. Recommendation 81 merely states that “[a] law should be enacted for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries”. The recommendations are specific with regard to protecting witnesses in the courtroom. However, many threats to witnesses occur outside the courtroom.¹³⁴ It has been criticised in the press, that in the current Indian situation, witness protection is not a realistic proposition.¹³⁵ It should nevertheless be recalled that states have an obligation to protect persons against threats to their life or personal integrity and must take positive measures to ensure this protection.¹³⁶ It is clear that efficient witness protection will, in certain cases, require a mobilisation of state resources, such as police protection. When the life and limb of the witness are at stake, the obligation of the state will require the mobilisation of such resources.

Recommendation:

- The state should adopt the adequate legislation and make available adequate resources to protect witnesses not only at the trial but also outside the courtroom.**

¹³³ *John Campbell v Jamaica*, 24 March 1993, CCPR/C/47/D/307/1988, para 6.4.

¹³⁴ This has been acknowledged by the Committee in its Report at p 152, para 11.3.

¹³⁵ The Indian Express, 10 July 2003.

¹³⁶ Cf. *General Comment 6, Article 6 (op cit note 39)*, para 3; 4; *General Comment No 20, Article 7*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 13; ECtHR, *A v the United Kingdom*, Judgment of 23 September 1998, Reports 1998-VI, para 22.

4. Rights of the accused

From a different perspective, it must be recalled that witness protection, where it affects the defence, must be balanced against the rights of the accused to a fair trial and equality of arms.

Right to cross-examine witnesses. This is of particular importance with regard to anonymous witnesses, for, in principle, the accused has a right to cross-examine witnesses against him. Therefore, anonymous witnesses are, in principle, incompatible with article 14 (3) (e).¹³⁷

No adjournments. Recommendation No 82 may be prejudicial to the defence; it states that in order to avoid witnesses being required to appear several times in court, trials should proceed on a day to day basis and granting of adjournments should be avoided. The judge should be held accountable for any lapse on this behalf. This could lead to shortcomings with regard to the accused's right to have adequate time and facilities to prepare his defence (article 14 (3) (b) ICCPR). Also, it is not clear whom the judge will be accountable to. It is, in principle, for the judge to deal with the entire proceedings of the case without interference from a higher instance or interference from another branch of state; this is not only a matter of the independence of judges, but also a right of the accused to be tried by a tribunal previously established by law (juge naturel).

Rights of victims in bail proceedings. Recommendation No 14 provides that the victim should be heard in respect of the grant or cancellation of bail. While this is to be welcome in certain cases in order to protect the victim from threat or violence - such as, for instance, cases of domestic violence – a certain caution must be expressed as to the general rule. The international law on pre-trial detention seeks to make such detention the exception rather than the rule (article 9 (3)). The accused, and this also flows from the presumption of innocence, should not be held in detention where there is no risk of his absconding, of his influencing witnesses or the like. The protection of victims, in such cases, may have to be guaranteed by other - albeit more costly - means, such as protection orders, so as to preserve the fundamental right to liberty and the presumption of innocence of the suspect.

Recommendations:

- **The criminal justice system should find a fair balance between the rights of the accused and witness protection at all stages of the trial. Measures of witness protection must be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**

¹³⁷ *Concluding observations of the Human Rights Committee: Colombia*, CCPR/C/79/Add.75, para. 21.

SUMMARY OF THE RECOMMENDATIONS

In summary, the ICJ welcomes the steps of the Indian Government to initiate a process of reform of the criminal justice system. It wishes to recall India's obligations under international law concerning the criminal justice process, especially the rights of the accused and the rights of victims. It therefore submits the following recommendations:

As to the approach towards a reform of the criminal justice system

- Any reform of the Indian criminal justice system must be based on respect for human rights, in particular the rights of the accused and the rights of victims.
- Although every country is free, as a matter of international law, to choose the criminal justice system that it deems appropriate, the question whether a shift from the adversarial to the inquisitorial system would be beneficial to India's criminal justice system should be subject to further study and analysis.
- Any reform of the criminal justice system must take into account and seek to eradicate the root causes of its malfunctioning, i.e. discrimination, lack of resources, corruption and the widespread practice of torture.
- The eradication of torture must be the priority for the Indian authorities. India should ratify the UN Convention against Torture, which it has signed.

As to reforms concerning the police

- The length of police custody should not be extended.
- The authority conducting the investigation should be separate and independent from the detention authority.
- All evidence in criminal cases must be obtained through professional methods of investigation and in full respect of human rights.
- Confessions extracted through torture or other cruel, inhuman and degrading treatment are unlawful and cannot be admitted as evidence under any circumstances.
- Confessions made to the police should not be admissible in criminal trials. Only confessions made to a magistrate should be used as evidence.
- All interrogations should be carried out in the presence of a lawyer throughout the interrogation; interrogated persons should be informed of their right to legal assistance; they should be given the opportunity to have recourse to a lawyer through legal aid.

- Any magistrate must conduct an investigation *propriu motu* into allegations of torture.
- The conditions for the interception of telecommunications should be clearly regulated in law.
- The legal provisions on interception of telecommunications should comply with the minimum safeguards set out in international law and jurisprudence; in particular, there should be a judicial supervision of interceptions.
- Personal data as well as communication with counsel should be exempt from interception.
- The rights of the accused must be protected if intercepted data is used as evidence in trial, in particular the right to challenge the evidence in the hearing.
- No police officer should be nominated as director of prosecution .

As to reforms concerning the criminal trial procedure

- If a system of administration of proof is adopted which is based on the inner conviction of the judge, the whole system of evidence based on the Evidence Act would have to be revised; however, it may not lead to a lowering of the standard of proof for conviction: international law requires proof beyond a reasonable doubt.
- Where the accused does not explicitly deny an allegation made by the prosecution, this should not be understood as a concession that the allegation is true.
- The drawing of adverse inferences should be explicitly prohibited in the Evidence Act, on the basis of the wording of article 67 (1) (g) of the Rome Statute of the International Criminal Court.
- There should be no obligation to file a defence statement to the prosecution statement.
- There should be no presumption that allegations of the prosecution not explicitly denied by the defence are proven.
- There should be no preclusion rule to exception-pleas.
- All procedures, including summary procedures, must respect the rights of the accused guaranteed in article 14 ICCPR.
- The jurisdiction of Special Courts should not be expanded, as they do not comply with the requirement of independent and impartial tribunals respecting the rule of law and the right to a fair trial.
- There should be no common definition of terrorism, disruptive activities and organized crime in the Indian Criminal Code.
- Any definition adopted in the Criminal Code should not use the definition of Section 3 POTA, as it is in contravention of international law.

As to reforms regarding victims of crime and witness protection

- Any criminal justice system must be based on the rights of the accused and the rights of the victim.
- The criminal justice system of India should ensure that the rights of victims – such as the right to have access to and participate in the proceedings at all stages, the right to be informed of one's rights, the right to respect of one's dignity and privacy and the right to obtain redress - are duly guaranteed in law and practice.
- The criminal justice system should give particular attention to improving the investigation, prosecution and punishment of state officials who commit crimes and human rights violations.
- There must be prompt, effective, impartial and independent investigations into all allegations of ill-treatment, death or disappearance or other serious human right violations; the investigating authority must, above all, be independent from the authority whose actions are being scrutinized.
- In particular, victims and their next-of-kin must have access to legal aid where this is necessary to ensure their adequate participation in the proceedings.
- The criminal justice system should guarantee the right of victims of crime and human rights violations to prompt and adequate redress. Compensation, however, does not absolve the state from its duty to prosecute and punish.
- The immunity clauses for state officials should be revoked in all statutes.
- Marital rape should be made a crime in the Indian Criminal Code.
- The presumption of a “reasonable long period” of common life to prove bigamy should be reviewed.
- The proposition to make cruelty towards women bailable and compoundable should be subject to further study.
- There should be no time limits for first information reports concerning violence against women.
- The state should adopt the adequate legislation and make available adequate resources to protect witnesses not only at the trial but also outside the courtroom.
- The criminal justice system should find a fair balance between the rights of the accused and witness protection at all stages of the trial. Measures of witness protection must be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.