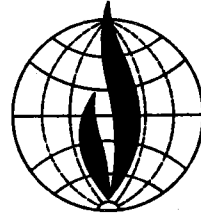


**For the Rule of Law****THE REVIEW****INTERNATIONAL COMMISSION OF JURISTS**

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No 28

June 1982

Editor: Niall MacDermot

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## *Editorial*

The contents of this issue were written before the Israeli invasion of the Lebanon and before the conclusion of the hostilities in the Falkland Islands.

### **Israel and the Lebanon**

The illegality of the Israeli annexation of the Golan now pales before the illegality of the offensive against Lebanon. As long as the rest of the world continues to do nothing but make disapproving statements, it seems that the present government of Israel will continue to act as a law unto itself under the pretext of 'legitimate self-defence'. In the case of the Lebanon, Israeli propaganda has now invented the myths that both the Syrian and Palestine forces had previously invaded the Lebanon, implying that the Israelis came as liberators. In truth, as was pointed out in *Le Monde* of 11 June 1982, both were invited by the Lebanon. The Syrian forces form part of the Arab Deterrent Force created by the Arab League at the express request of the Lebanese government, and the P.L.O. presence is the subject of formal agreements dating back to 1969. Whilst violations of their terms by the P.L.O. forces have given rise to disagreements, Lebanon has never demanded their withdrawal. So far from the Israeli invasion forces being welcomed as liberators, they have served to unite in opposition to Israel all the differing factions in the Lebanon with the exception of the Lebanese Phalangists.

### **The Falkland Islands**

Argentina has now paid heavily for its unlawful attempt to seize the Falkland Islands by force, and for its folly in not acting upon the unanimous U.N. Security Council resolution calling for the withdrawal of its forces. Had it done so, it would have enlisted widespread support for its claim, particularly in countries of the third world. As is shown in the commentary in this issue, which traces the history of the rival claims to the Falkland Islands, the Argentine claim is not as empty of merit as British statements imply. However, the result of this short but horrifyingly destructive war has been to silence those in the United Kingdom who were ready and anxious to reach a solution acceptable to all parties concerned. The world has not heard the last of the Falkland Islands question, but its resolution has now been indefinitely postponed.

## **ILO Convention on Rural Workers**

In this issue the text has been reproduced in full of ILO Convention No. 141 concerning Organisations of Rural Workers and their Role in Economic and Social Development, and of the ILO Recommendation 149 on the same subject. Although adopted by the Governing Body on 4 June 1975, only 22 countries have ratified the Convention.

In the view of the International Commission of Jurists these instruments are of primary importance for true development. The poverty, illiteracy and disease in the third world is overwhelmingly to be found in the rural areas. A precondition for the development of these areas is the recognition of the right of small farmers and rural workers to organise themselves in the ways prescribed in these instruments of the ILO. The 22 countries which have ratified Convention No. 141 are: Afghanistan, Austria, Cuba, Cyprus, Denmark, Ecuador, Finland, Federal Republic of Germany, India, Israel, Italy, Kenya, Mexico, Netherlands, Nicaragua, Norway, Philippines, Spain, Sweden, Switzerland, United Kingdom and Zambia.

These texts have been reproduced in the hope that lawyers in other countries will urge their governments to ratify and apply them.

## **Declaration on Religious Intolerance**

The text of the U.N. Declaration on the Elimination of Religious Intolerance is also included in the Basic Texts. Having been finally agreed after many years discussion in the Commission on Human Rights, it was approved by the General Assembly in 1981.

# *Human Rights in the World*

## **The Case of Captain Astiz**

An interesting issue has arisen as a result of the British re-possession of the Island of South Georgia on 25 April 1982. The Commander of the Argentine garrison, Captain Alfredo Astiz, was captured and became a prisoner of war.

He is a well-known figure for the role he played in the military repression in Argentina as an intelligence officer of the Navy.

The International Commission of Jurists has been in possession since mid-1981 of copies of no less than eight statements about him by survivors of one of the worst secret detention camps in Argentina, in the Naval School of Mechanics (Escuela de Mecánica de la Armada). These statements allege that Captain Astiz, who is 32 years of age, took part in the arrest, kidnapping, torture and illegal execution without trial of political opponents of the régime.

There is also evidence that he personally infiltrated the human rights movement created by relatives of disappeared persons in Argentina. Using a false name, and pretending to be the brother of a disappeared person, he collaborated with the 'Mothers of May Square'. It is alleged that it was as a result of his infiltration that two french nuns, Sisters Alice Domon and Renée Duquet, were seized and disappeared. Some of the witnesses saw Sister Alice subsequently in the Naval School of Mechanics. It is also alleged that he was responsible for the arrest and killing of a 17-year-old swed-

ish girl, Dagmar Hagelin.

In 1978 Captain Astiz was sent to Paris where he attempted to infiltrate the Committee of Solidarity with the Argentine People, again with a false identity. This manoeuvre failed, as a former political prisoner recognised him from the torture chambers in Argentina.

When pictures of him signing the surrender in South Georgia were transmitted to Europe, he was again recognised, and the French and Swedish governments asked to be allowed to have questions put to him about the disappearance of their citizens. He was transferred to a military prison in the United Kingdom. When the questions were put to him he declined to answer them, and, of course, there was no lawful way of compelling him if he did not wish to do so. Moreover, under the Geneva Conventions he is not required to answer any questions other than to give his name, rank and number.

As a prisoner of war he is entitled to the protection of the Geneva Conventions of 1949. The British would have been entitled to detain him until the end of the hostilities, but they have, in fact, repatriated him to Argentina like other prisoners of war. Since the offences alleged against him were not committed during the course of the hostilities with Britain, the British had no right to put him on trial in respect of them as war crimes.

The suggestion has been made<sup>1</sup> that the British could have prosecuted Captain Astiz for the crime of torture under international law. There is no doubt that torture is illegal under international law, and this has served as the basis for a civil action in the *Filartiga* case in the United States. It is, however, very doubtful whether the British courts would accept that torture is now recognised as a crime under international law or, even if it were, that they would have jurisdiction to try a person for that crime without Parliament having conferred such a jurisdiction upon them.

France and Sweden could not ask for Captain Astiz to be extradited to their countries as any offences he committed against their subjects were committed in Argentina, and not in territory under their jurisdiction.

The Mothers of May Square have filed a writ in Buenos Aires asking for a judicial investigation into Captain Astiz's role in the detention and subsequent disappearance of 12 people in 1977, including the two french nuns. It is unlikely, however, that the present régime in Argentina would put him on trial for offences alleged to have been committed when working for

the naval intelligence service.

It seems, therefore, that unless a democratic régime is established in Argentina, Captain Astiz will escape justice, and even the possibility of a prosecution under a new régime may be frustrated by Argentina passing an amnesty law to protect its torturers, as Chile has done.

The case does, however, illustrate the importance of an article of the Draft Convention against Torture which is still under discussion in the Working Group of the U.N. Commission on Human Rights. By this article the Swedish government has proposed that the States Parties to the Convention should establish universal jurisdiction, that is to say that they should assume jurisdiction to try for an offence of torture any person found upon their territory, wherever the offence was committed, if they do not extradite him to another country.

If a convention with such an article had been in force, and Britain were a State Party, it is possible that the British would have been able to refer the case to their own prosecuting authorities. It is perhaps significant that Argentina is one of the countries which is raising objections to this article.

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1) In a letter by Malcolm N. Shaw, Senior Lecturer, Department of Law, University of Essex, published on 8 June 1982 in *The Times* of London.

# Guatemala

Guatemala has this year witnessed the remarkable event of a supposedly democratic election being so blatantly fraudulent that a military coup was able peacefully to overthrow the 'elected' government, suspend the democratic constitution, dissolve the Congress, ban all political parties and arrogate to itself the right to rule by decree, and still be received almost with relief by a large part of the population. With protestations of its intention to clean up the administration and "achieve individual security and tranquillity based on absolute respect for human rights", the government is seeking to persuade international and above all US opinion, that such improvements have been effected and that US aid programmes can properly be renewed. First reports indicate that while there has been some improvement in the capital city, the situation in the rural areas, where the great mass of the population lives, is unchanged.

It is sometimes said, by way of apologia, that there is a tradition of violence in Guatemala. As Donald T. Fox showed in his brilliant report on *Human Rights in Guatemala*, published by the ICJ in 1979<sup>1</sup>, this violence is endemic in a socio-economic system that seeks to maintain a majority of the population in conditions of serfdom. The continuing source of the horrifying repression, he said, "is the narrowly perceived economic interests of the larger land-owners".

Over 50% of the 7 million population are indigenous indians, mostly in the western Altiplano. 77% of the population live in the rural areas, and 77% of the indians are illiterate. 50% of the active population have an average income of US\$60 per year and 34% are unemployed. 80% of the agri-

cultural land is held by 2% of the owners. The fertile plains on the Pacific Coast are held by wealthy owners producing export crops such as sugar and cotton, while the mass of the rural poor pursue subsistence farming on uneconomic plots with poor soil.

Donald Fox traces back the origin of the violent resistance to an unsuccessful military uprising in 1960 against the régime of president Ydigoras, with the intention of reforming the army and punishing corruption. The uprising failed but some of the military combined with remnants of the dissolved Communist Party to create some small guerrilla bands operating in the north-east and western plateau. This led to a major counter-insurgency campaign by the army, which from 1966 onwards continued with increasing brutality for over a decade, resulting in deaths and disappearances attributable to official and semi-official forces exceeding 20,000, mostly of peasants.

After General Lucas Garcia came to power following the elections in 1978, the repression resumed. Assassination and kidnappings in the first half of 1979 alone totalled over 800, the majority being the rural poor in areas where the guerrillas operated, but they included students, lawyers, university teachers, journalists and opposition politicians. Many others went into exile following 'death lists' published by right-wing para-military organisations linked with the government.

A statement made to the UN Commission on Human Rights in 1982 by the representative of the International Federation of Rural Adult Catholic Movements about the repression in 1978 and 1979 included

1) Available in Spanish only, the English edition now being out of print.

the following:

Mass executions without trial, torture, crucifixions, rapes and machine-gunning from helicopters. Houses and crops in rural areas were burnt under the so-called *tierra arrasada* (scorched earth) policy to prevent villagers supplying food to guerrillas. In December 1979 a number of peasants bearing physical marks of torture were brought to Chagul town hall by an army squad. The population were summoned to hear a speech and the prisoners were then burnt alive after petrol was poured over them. The outraged onlookers turned against the soldiers who had to call for reinforcements. After this a delegation of indians went on 31 January 1980 to the Spanish Embassy asking for an international commission to investigate the Chagul massacre. Learning of this, President Lucas Garcia personally ordered<sup>2</sup> an attack upon the embassy during which a fire was started and 39 people were killed. A peasant, Gregoria Yuja, who had been taken by the Red Cross to hospital, was seized by an army detachment. His body, bearing marks of torture, was later found near the university halls of residence. The army subsequently engaged in over 50 massacres in different villages. At Coya the villagers resisted and were bombed and machine-gunned from the air. Over 200 were killed and their bodies were then dismembered by soldiers with machetes. 17 priests in rural areas were murdered, two disappeared, and in one notorious case, after many months of detention a Father Pellecer appeared on television to denounce the guerrillas.

In two years, 70 trade union leaders disappeared, and 55 judges and lawyers were assassinated and five more disappeared.

Amnesty International, in a report of February 1981, stated that over 3,000 people were murdered after being arrested

or kidnapped in the first 10 months of 1980, and hundreds of others were missing. Bodies were found piled in ravines, at roadsides or in mass graves, often with scars of torture.

In the State Department's country report to the US Congress in February 1981, it is stated that "charges of human rights violations such as degrading treatment, arbitrary arrest and summary execution are made regularly, particularly in those rural areas where Marxist guerrillas have intensified violence against the Government, its allies, and business interests. Guatemalan security forces have increased efforts to eradicate the guerrillas. Innocent persons often are the victims of indiscriminate violence from both sides. It is frequently impossible to differentiate politically-inspired from privately-inspired violence. Article 55 of the Constitution and Article 10 of the criminal procedural code prohibit torture. There are reports that Government security personnel engage in torture and other arbitrary and unjust treatment. According to Guatemalan press reports, assassination victims often show signs of torture or mutilation. There is no indication that anyone involved in its practice has been disciplined."

The State Department report for the following year states that "the greater number of apparently politically-motivated killings are probably attributable to groups associated with the extreme right or with elements of the government forces, rather than to the extreme left." It reports some diminution in the scale compared with the previous year.

The law enforcement system is powerless to meet this situation. As the International Federation of Human Rights has said in a report to the United Nations, "The 1965 Constitution provides in article 79 for a form of *habeas corpus*, known as 're-

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2) This was subsequently confirmed by a member of his staff, Elias Barahone.



*curso de exhibition personal'* but this provision, like the 1973 Penal Code prohibiting arbitrary arrest and abduction, is not applied; the police never conduct a proper inquiry when corpses are discovered or people disappear. The judges say they are powerless because of the magnitude of the phenomenon. In 20 years, only one appeal has succeeded (in 1978) in producing the missing person."

The report of a Pax Christi International mission published in January 1982 shows that the toll of assassinations, disappearances, tortures and other gross violations of human rights continued and increased in 1981. The repression in the north has led to a flow of 40,000 refugees into neighbouring Mexico.

When the Presidential elections were held in March 1982, of the eight officially registered political parties only four, all right-wing parties, took part. The electorate also abstained massively, only 36.5% voting. It was announced that General Anibal Guevara, former Minister of Defence in General Lucas Garcia's government, had been successful. The usual protests of electoral fraud were made by the opposition. Two weeks later came the military coup, and the already discredited government was removed.

The new ruling Junta was composed of:

- General Rios Montt, a former Christian Democrat who was proclaimed winner of the 1974 elections but who was prohibited from taking office by the Army High Command. It is alleged that in 1973 he personally directed the massacre of more than 100 campesinos (peasants) of Sansirisay.
- General Horacio Maldonado Schaad, former Commander of the Army General Headquarters. He was in charge of the army intelligence organisation and, at the time of the coup, Commander of

the Honour Guard Brigade, which controlled one of the chief torture centres in the capital. He is also noted for his role in peasant massacres in the Alto-plano.

- Colonel Francisco Gordillo, commander of a military base in the western province of Quetzaltenango, described as 'a noted torturer and expert in anti-guerrilla warfare'.

It seems that the primary purpose of the Junta was to create a climate for the renewal of US aid, which was cut off by President Carter, and could not be resumed by President Reagan until at least a show of moderation made it politically possible. In April it was reported that the Reagan administration included a request for \$250,000 military assistance to Guatemala in an amended version of the Security Assistance Act, and some days later the US Ambassador to Guatemala, Frederick Chapin, announced that the administration had offered \$50 million in assistance to Guatemala to strengthen the government's plans in western Guatemala, one of the areas of major guerrilla activity.

On June 9, 1982, it was announced that the three-man Junta had been dissolved, and that General Rios Montt had been designated by the army as President of the Republic and Commander-in-Chief of the armed forces, with full legislative powers.

This concentration of powers in the hands of one man has caused concern in conservative political circles.

Although he has promised a return to democracy, no move has yet been made in this direction. He has threatened a major offensive against the guerrillas if they do not avail themselves of an amnesty by surrendering their arms before the end of June.

General Rios Montt has said that "there will be no more dead bodies along the side

of the roads". It remains to be seen whether this promise can be made good, not only in the capital, but in the rural areas where the population is continually under supervision by the armed forces, para-military groups, and 'civil defence patrols', i.e. civilians armed and instructed by the military.

The claims of the regime will prove more convincing when it agrees to allow on-site investigation by such inter-governmental bodies as the Inter-American Commission on Human Rights of the Organisation of American States, and to cooperate with the UN Working Group on Disappearances, and with the Special Rapporteur on Guatemala of the UN Commission on Human Rights. The immense task confronting the regime is shown by the following passage from the conclusions of the Report by the Inter-American Commission on Human

Rights to the OAS General Assembly in December 1981:

"These illegal executions and disappearances not only violate the right to life, they have created an endemic climate of total alarm, and even terror, which has subverted the rule of law, and in practice, has inhibited the observance of most of the rights set forth in the American Convention on Human Rights. The generalized violence in Guatemala has meant, that the rights to personal freedom and safety, a fair trial and due process, freedom of conscience and religion, freedom of thought and expression, and freedom of assembly and association, as well as political rights are seriously affected and restricted in fact, despite their formal recognition in the Guatemalan Constitution and laws."

## Israel

### Israel and the Golan Heights

On 14 December 1981, the Knesset approved, by 63 votes to 21, an act called "Application of Israeli legislation to the Golan Heights" (hereafter called "the Golan law"). This act provides that the territory is to be subject to the laws, jurisdiction and administration of Israel from now on. The law takes effect immediately and the Minister of the Interior is authorized to take any necessary measures to make the law effective.

On 16 December, at the request of Syria, the UN Security Council met in New York and on the next day adopted Resolution

497, declaring null and void the Israeli decision, reaffirming that the Geneva Convention of the 12th August, 1949 concerning the protection of the civilian population during war time remains integrally applicable to Syrian territory occupied by Israel in 1967, and calling upon Israel to give effect to Resolution 497 on or before the 5th January, 1982. On 5 February 1982, the UN General Assembly condemned Israel for not complying with Resolution 497 and declared that the application of the Golan law was equivalent to the effective annexation of the territory.

As no nation, not even its principal ally the USA, has recognized the Israeli annexation of the Golan Heights, this territory remains, according to international law, under Syria's sovereignty.

## **The Situation in the Golan Since 1967**

During the Six Day War in June 1967, Israel occupied more than two thirds of the Golan territory. This led to a flood of refugees, almost the entire population of about 150,000 persons, fleeing to Syria. They are still living in camps around Damascus. Only five villages remained inhabited, four of which were populated by Druzes, from whom the Israelis expected little resistance.

In October 1973, in face of the refusal of Israel to apply UN Resolution 242 concerning the evacuation of occupied Arab territories after the Six Day War, Egypt and Syria launched an offensive on both the Suez Canal area and the Golan. During the ensuing hostilities, Israeli forces occupied a further part of the Golan territory, but following the agreement negotiated by Henry Kissinger in May 1974, the Israeli armed forces returned to the 1967 cease-fire line. When they did so, the villages of Kuneitra and Rafid had been razed to the ground. The Israeli authorities claimed that the destruction of these villages was due to the hostilities, but an international group of experts who later examined the damage found that the destruction was recent and systematic and took place just before the withdrawal of the Israeli forces. This had a profound effect upon the inhabitants of the Golan territory who regarded Kuneitra as their principal centre.

Since 1967, the Israelis have installed 33 settlements, totalling about 10,000 inhabitants in the Golan occupied territories. At the present time, land confiscation continues, usually following the same procedure: fruit trees and grape vines are uprooted; mines are laid in plantations and pastures; areas destined for the army are marked off and it is forbidden to cultivate them. Later these lands are declared absentee's property and are distributed to Israeli settlers.

Many Druze teachers have been discharged and replaced by unqualified teachers. The educational programmes have been rewritten by the occupation authorities, falsifying Druze history and culture.<sup>1</sup>

The doctrine of "Eretz Israel"<sup>2</sup> became an official government doctrine when Mr. Begin's Herut party came to power, with Mr. Sharon as National Defence Minister. During this period, the Israeli government grew more intransigent (despite the Camp David agreements) as is evidenced by the annexation of the eastern part of Jerusalem, the bombardment of the Iraqi nuclear plant of Tamuz, the increased repression in the West Bank and Gaza, the installation of a 'civil administration' on November 1, 1981, and the setting up in several regions of village leagues (which were boycotted by the local population) with substantial and military means at their disposal.

## **The Golan Population's Reaction to the Annexation**

As has been noted above, after the occupation of the Golan by the Israeli armed forces in 1967, most of the Arab population was driven back or fled towards Da-

1) Memorandum addressed to the Israeli League for Human and Civic Rights by its secretary, Mr. Joseph Algazy.

2) i.e. 'Greater Israel'

mascus, except for five villages (four populated by Druzes and one by Alawites). At that time, the population was about 7,000; it is now 13,000, due to natural population increase and not to the return of the refugees.

The Israeli government had thought that there would be no difficulty in assimilating this population owing to the attitude of the Druzes in Israel, who have accepted integration and many of whom have agreed to serve in the Israeli forces. Consequently, the day after the Knesset adopted the Golan law, the Israeli authorities tried to force the Druzes of the Golan to accept Israeli identity cards. This resulted in a general strike which lasted three days. In fact the inhabitants of the Golan refused to negotiate on any point of the Golan law and demanded that it be simply revoked. The Israeli authorities tried by every means to apply the new law. In the memorandum of Mr. Algazy (see reference 1) it was revealed that the Israeli authorities:

- refused to register births and marriages,
  - refused necessary permits for building, planting fruit trees or driving,
  - forbade admissions to hospital, and
  - withheld social allocations
- to persons who did not possess an Israeli identity card.

They also arrested, on February 13, four Druze leaders: Sheik Suleiman Kanj, Sheik Mahmud Safati, Kama'al Kanj and Kanj Kanj. This provoked a second general strike. Ten days later, two more persons were imprisoned: Salma'an Fakr E-Deen and Jamal Muskin Back Hish. Mr. Algazy states that his request to visit the four imprisoned leaders was refused by the prison authorities. Since the beginning of this second strike and up to now, many inhabitants have been arrested and others were threatened and in some cases beaten.

The Association for Civil Rights in Israel (ACRI) recently sent to the Golan a five-person mission among whom were two lawyers:

"Their findings were presented in a two-page report that details allegations of beatings, brutality and collective punishment, which it says are clearly illegal and it describes the general situation in the Golan as 'totally unacceptable and without justification'. Members of the party reported witnessing an incident in which a woman from one of the Golan villages who had injured her eye in a household accident was not permitted to leave the Golan to receive medical treatment at the government hospital in Safad, in spite of her having a referral letter from her local sick-fund clinic, because she did not have an Israeli identity card.

Lawyers in the party told the policeman at the roadblock that it was illegal to deny the woman her freedom of movement. But he consulted with his superiors by radio and repeated to the party that these were the instructions he had to enforce.

The ACRI group detailed other allegations:

- A three-year-old boy who went out onto a balcony during a curfew was shouted at by soldiers, and in fright fell from the balcony, breaking his two front teeth and gashing his chin. His father asked for permission to take the child to hospital, but was told that he would only be allowed to leave the area if he had an Israeli identity card. He chose to treat the child at home and extracted the teeth himself.
- Soldiers appeared at the home of another family, took their original military identity cards and gave them Israeli civilian cards. The family refused to accept them, and the soldiers threw the new cards on the floor. When a three-

year-old child picked up one of the cards and threw it out of the house, one of the soldiers began to beat him with a club. When the child's mother attacked the soldier, another soldier approached her and shot her in the foot. When her brother tried to approach her, another soldier pressed his rifle to his forehead and fired a shot that grazed the man's head. The woman was treated at Rambam Hospital in Haifa."<sup>3</sup>

When releasing the ACRI report to the press, its President, Haim Cohn, a former deputy president of Israel's Supreme Court, commented: "This is not Israeli law or administration — this is the law of barbarians."

Many workmen were discharged from their employment for participating in the strike. Finally, the Israeli army blockaded the Druze villages for a period of 53 days. During this time, there was a shortage of food and medicine: "Grocery shops are open one hour in the evening, but there is not much to buy. Meals are reduced to one a day for most of the people. As there is no milk for children, mothers feed them sweetened water."<sup>4</sup>

The telephone was cut off, water and electricity were available only for a few hours a day. "Identity cards were forcibly distributed accompanied by blows and insults at times. But the day after the blockade was raised, a great majority of the population threw away their identity cards on the public squares of the villages and proclaimed their Syrian identity."<sup>5</sup>

The inhabitants of two villages have made it known through petitions that they

do not consider themselves obliged to submit to the authority of the mayors appointed by the Israelis. The Druze inhabitants of the Golan want their status as Syrian citizens, living under foreign occupation to be recognized.

The identity card issued by the Israelis to the Druzes states that the "nationality" of the holder is "Druze". However Druze is not a nationality but a term describing members of a particular religious sect. The term Druze is used by the Israelis in an attempt to deny their Syrian nationality to these inhabitants of the Golan. If they accept this identity card, the Druzes not only become second class Israeli citizens, but are denied access to Syria.

### Comments on the Principal Arguments Invoked by Israel to Justify the Annexation of the Golan Heights

The arguments which have been put forward by the Israeli authorities are as follows:

1. The Golan Heights are of strategic importance. "From there, Syria continually shelled Israeli villages and towns."<sup>6</sup>  
— However in November 1981, the official report of the Secretary General of the UN concerning the six months renewal of the UNDOF stated that the cease-fire had been respected during the last period. No complaint on this subject was registered by either of the parties in the UNDOF zone of operations.

3) David Richardson, *Jerusalem Post*, Friday, April 16, 1982.

4) *Le Progrès Egyptien*, March 13, 1982.

5) Amnon Kapeliouk: "Israël, une stratégie radicale", *Le Monde Diplomatique*, Mai 1982.

6) Declaration of Mr. Blum, UN representative of Israel, during the Security Council meeting of 16th December, 1981.

2. The Golan law is not contrary to Resolution 242 adopted by the Security Council on November 22, 1967, concerning boundary lines. The Israeli government does not consider the armistice demarcation line to be a "secure and recognized frontier" as defined in Resolution 242. "Thus Israel has only regularized the situation."<sup>7</sup>
  - This playing with words bears no relation to international law and can only serve to weaken its credibility and authority.
3. "In essence, Resolution 242 implies that negotiations be held to determine 'secure and recognized frontiers'. However, Syria has declared that it will not participate in such negotiations with us, because it does not want to recognize our existence. Thus the Resolution is drained of its substance."<sup>8</sup>
  - Resolution 338 was adopted by the Security Council on October 22, 1973. Two days later, Syria accepted the Resolution which in paragraph 2 requests interested parties to "immediately apply Resolution 242 (1967) in all its dispositions". Therefore, this acceptance implies that of future negotiations with Israel. In any event, the refusal of Syria to negotiate does not entitle Israel to annex its territory.
4. The Golan law is not contrary to the Fourth Geneva Convention of 1949. "Having entered the area in 1967, Israel was faced with a legal vacuum, due to the lack of judges and advocates expert in local law and local legal literature. Thus, as far back as 1969, the military authorities of the Golan Heights area issued an order establishing a Court system which would function in accordance with Israeli law... and this does not contravene the provisions of the 1907 Hague rules and the 1949 Geneva Convention which restricts the right of the occupant to alter local law, in view of the fact that such local law was not capable of being applied."<sup>9</sup>
  - After driving back towards Damascus 150,000 Arabs, among whom were of course judges and lawyers, it seems inevitable that the Israeli authorities were faced with a vacuum. But the lack of a Court system did not justify the application of the Israeli law to the Golan Heights. In accordance with the Fourth Geneva Convention, the Israeli government should apply Syrian law, with the assistance of expert witnesses in that system of law. The Israeli authorities, under cover of legal vacuum legislate in areas that go far beyond what is needed for the security of their army or the welfare of the population.
5. "The proposition that Israel's act is contrary to international law cannot be advanced without the patently absurd corollary that international law places on Israel an obligation to maintain an administration under the rules of armed conflict, against her will, and to the detriment of the local population's welfare."<sup>10</sup>

7) *Ibid.*

8) Mr. Begin's declaration made to the U.S. Ambassador in Israel, in answer to the threat of sanctions announced by Mr. Reagan.

9) "The Golan Heights Law, some legal aspects", document received from the Permanent Mission of Israel to the UN in Geneva.

10) *Ibid.*

- The extraordinary resistance of the Druzes proves that they do not believe that the Golan law contributes to their welfare. As long as Israel maintains its armed occupation it is bound by the terms of the Geneva Convention. It is not entitled to annex the territory under the specious argument that it is for the welfare of the population.

## Conclusion

The International Commission of Jurists

has asked the Permanent Mission of Israel to the UN in Geneva to state what Israel considers to be the present legal status of the Golan. Does Israel regard the Golan law as an act of annexation and does it consider the occupied territory of the Golan now to form part of the territory of the state of Israel? No clear answer has been received, but equally there has been no denial by Israel that it has purported to annex the territory. In any event, whatever its intended effect, the Golan law is plainly contrary to international law and of no effect in international law.

## Malawi

The International Commission of Jurists is concerned about the mysterious case of the detention and threatened prosecution in Malawi of Orton Chirwa, Q.C., together with his wife, Vera, and his son, Fumbani Chirwa.

Mr Orton Chirwa is a former Minister of Justice and Attorney-General of Malawi, who resigned shortly after independence in 1964 when the nature of the personal rule of Life-President Dr. Hastings Kamuzu Banda became apparent. Together with a number of other cabinet ministers he went into exile.

He has since lived in Tanzania, where he is a distinguished practicing barrister.

He is the Chairman of the Malawi Freedom Movement (Malfremo), which has the support of some Malawians in Tanzania. Late in 1981 its leaders met with leaders of other Malawi political organisations in exile in an attempt to form a common front against President Banda's government.

According to an announcement on the Malawi government radio, Mr Chirwa was detained on 24 December 1981 after secretly returning to Malawi via Zambia.

It is widely believed by Mr Chirwa's supporters that he and his wife and son were kidnapped in Zambia by Malawi security agents, after having been lured by them to a place near the frontier with Malawi.

To anyone who knows Mr Chirwa it seems inconceivable that he would have attempted to enter Malawi openly under the present régime, and in the unlikely event of his attempting to do so clandestinely, he would certainly not have been accompanied by his wife and son.

It is known that he went with them to Zambia in order to spend a Christmas holiday with his daughter who works in the Zambian capital, Lusaka. It is difficult to see why he would have made the long journey to the vicinity of the Malawi frontier unless it was to meet some sympathisers

from Malawi. The most likely explanation of his arrest, therefore, is that he went to the frontier expecting to meet friends from Malawi, and that he was then seized with the members of his family and taken across the frontier where they were all detained. The Zambian authorities understandably take the position that they have no evidence that they were arrested other than in Malawi.

The family and supporters of Mr Chirwa are very disturbed by his threatened trial. Shortly before Mr Chirwa went into exile in 1964, a chief from his constituency named Timbiri was murdered when visiting Zomba, apparently at the invitation of Dr. Banda. It is alleged on the one side that he was killed by agents of the government. On the other hand the government subsequently alleged that Mr Chirwa was responsible for his death. Mr Chirwa's supporters say this was a fabrication, in an attempt to discredit him.

It has now been announced in Malawi that Mr Chirwa may face charges in connection with the murder of chief Timbiri. His supporters have understandable fears for his life, bearing in mind that Albert

Muwalo, the Secretary-General of the single party, was sentenced to death and executed for treason in 1977, and that the leading political figure of the country, Gwanda Chakuamba, was sentenced in 1981 to 22 years' imprisonment for sedition. Anyone suspected of contact with the exiled leaders, like Mr Chirwa, have for many years past been detained summarily without trial.

Of equal concern is the nature of any trial proceedings he may face. Most criminal charges in Malawi are tried by traditional chiefs courts. These violate internationally accepted norms. No defence lawyer or other defence representation is permitted, and the judges of these courts have no legal training. Moreover, the courts are believed to be subject to political direction.

At the time of writing both the International Commission of Jurists and a firm of solicitors in the United Kingdom who have been engaged to represent the interest of Mr Orton Chirwa have received no reply to requests made to the Attorney-General of Malawi four months ago asking for information about any charges preferred and about the court before which he may be tried.

## Somalia

In March 1982 the government of Somalia lifted the state of emergency which had been declared on October 21, 1980, at the height of the refugee flood from the Ogaden, and under which the constitution had been suspended. To follow the effects of this return to constitutional rule, it is necessary to review briefly some of the events and legislation since independence in 1960.

Between 1960 and 1969, Somalia enjoyed a parliamentary democracy and a good measure of political stability. Two general elections were held, three governments succeeded each other, and the first president of the Republic was replaced, all in keeping with the constitution and the democratic institutions of the country. There were no political prisoners in the country, and human rights violations were never reported.



However, a long-lasting and severe drought in the country, coupled with a hotly contested and controversial election in March 1969, and the assassination of the President of the Republic, gave the army leaders the opportunity to stage a coup. At first this was welcomed by those who were discontented with the record of the civilian administration, but their enthusiasm soon died down when they discovered the oppressive nature of the military rule, with mass detentions and executions, elimination of all civil and political rights, and the creation of a highly repressive security network.

## The National Security Service

Immediately after the military take-over, the democratic constitution was abrogated, and all political and professional associations banned. A Supreme Revolutionary Council (SRC) governed the country by decree, exercising legislative, executive and judicial powers.

One of the first decrees issued by the SRC established a national security service (NSS) empowered to arrest, detain and imprison for an unlimited period of time any person "behaving in a manner which may be considered prejudicial to the maintenance of peace, good order and correct administration". The same measures may also be applied to anyone who "by word or by action acts against the objectives or the spirit of the Revolution" (Law No. 1 of January 10, 1970). The writ of *habeas corpus* was abolished by Presidential Decree No. 64 of October 10, 1970. The NSS is headed by the President's son-in-law, Brig. Gen. Ahmed S. Abdulle, who is also a member of the SRC, and is staffed by clansmen of the President.

Para-military groups were also created in each neighbourhood or district with power

to arrest anyone suspected of 'counter-revolutionary' activities. These groups, known as the "Guulwadayal", have their own prisons in Mogadishu and in all provincial capitals. A detention order by the NSS or the Guulwadayal cannot be appealed from nor questioned in the courts. The two groups act with impunity, and hold thousands of individuals at any one time in detention camps and special prisons, carrying out torture, beatings and prolonged interrogations.

The chief of the "Guulwadayal" is another son-in-law of the President.

## The National Security Court

The third arm of the special security system is constituted by the National Security Court. This court was established by Decree Law No. 3 of January 10, 1970, i.e. three months after the army take-over. The main seat of the Court is in Mogadishu, but regional sections have been created all over the country. All the judges of the Court are members of the armed forces appointed by the President. The procedure is that of military tribunals. No legal qualifications are required for such appointment, and none of the present judges has had a legal education. A few civilian advisers with legal education have occasionally been appointed to assist the military judges of the court.

The court has a special prosecutor known as the Attorney General of the Security Court, who is assisted by several prosecutors. All members of the prosecutor's office are either from the army, the police, or the national security service. The special prosecutor and his representatives enjoy an unlimited power of arrest, search, detention and sequestration, not only of property, but of persons as well. The sequestration of persons, causing their indefinite disappearance, or detention in unidentified places, is therefore legally sanctioned (Ar-

title 2(4) of Decree Law No. 3 of January 10, 1970).

The court has jurisdiction over offences provided for by Decree Law No. 1 of January 10, 1970 (see below 'power to detain'); Decree Law No. 54 of September 10, 1970, and Decree Law No. 67 of November 1, 1970, as well as the following crimes contained in the Somali Penal Code: crimes against 'the personality of the State', crimes against public order, and crimes against the public administration when committed by public officers.

The decree of September 10, 1970, containing 26 articles, provides for many security offensives. For example, Article 19 provides that "whoever possesses any seditious printed, typed, taped or written material against the State shall be punished with imprisonment for a term of five to fifteen years". Under Article 21, "whoever spreads any rumour against the Somali Democratic Republic, the authorities of the State or the State policies" is punishable with two to ten years imprisonment.

Decree Law No. 17 of April 7, 1970, has abolished the right of a detainee to consult or see upon arrest his defence lawyer. He is able to see a lawyer only "after the end of all investigations". Decree Law No. 8 of January 26, 1970, has amended article 151 of the criminal procedure code to read:

"No confession by any person shall be used as against such person unless the confession is made before a judge. This restriction on confession as evidence shall not, however, be applicable in cases falling within the jurisdiction of the national security court" (emphasis added).

It is alleged that the majority of the individuals brought up to now before the court have been prosecuted and judged on the basis of confessions extracted through torture. The decisions of the court are final and cannot be appealed, except in the form

of an application for pardon.

Judgments of the regional and district sections of the Court are also final.

## Power to Detain

Law No. 1 of 10 January 1970, aptly entitled "power to detain", provides that the Regional or District Revolutionary Councils have the power to detain any person in the territory of Somalia so long as they may consider it necessary, and whenever it is proved by evidence on oath to the satisfaction of such organs that such a person (a) is conducting himself so as to be dangerous to the peace, order or good government in the Democratic Republic of Somalia, (b) is intriguing against the Supreme Revolutionary Council, or (c) by word or by action, acts against the aims and spirit of the Revolution.

On the basis of this wide-ranging permission to arrest and detain, the above mentioned organs have imprisoned, deported and persecuted tens of thousands of Somalis in the last ten years.

Since 1977 a proliferation of the security services and other organs of repression has taken place. Thus, in addition to the NSS, the following authorities carry out arrests and detention:

- 1) the agents of the Party Control Committee;
- 2) the Guulwadaayaal (Victory pioneers), which now form part of the national militia forces;
- 3) the agents of the security services of the First lady, Mme Khadija, and
- 4) the agents of the National Committee for the eradication of corrupt practices in the public administration, chaired by Gen. Mohamud Ghelle, President of the Security Court.

The first three organs have their own special prisons and "safe houses" in Mogadishu, while the fourth usually takes detainees to the Central prison of Mogadishu.

Since all these organs are assimilated by the regime to the national security service, and are practically considered as special but independent branches of this service, they enjoy the same powers and privileges. Consequently, they also have the right to arrest any person without warrant, and to detain him/her for an indefinite period of time, usually under the pretext that investigations are being carried out.

In addition to the power to detain, law No. 14 of 15 February 1970 on "the establishment of the national security service", confers upon these organs the right to search any person, property or house, and to sequester any property belonging to a person suspected of anti-revolutionary activities. The victims of repression are usually arrested at their homes in the early hours of the morning. Otherwise, they are invited to the offices of one of the above-mentioned organs and arrested there.

## The 1979 Constitution

In 1979, a new Constitution was proclaimed, establishing a one-party state. The constitution contains many provisions purporting to protect human rights, but their effect is strictly limited as the legislation reviewed above remains in force.

As a prelude to the provisions on human rights, Article 19 of the constitution states that "the Somali Democratic Republic recognizes the Universal Declaration of Human Rights...". The rights protected by the constitution are then proclaimed in a detailed manner in chapter II of the constitution.

Some of the fundamental human rights recognized in the U.N. Covenants, and in

most constitutions of the world, are not to be found in the Somali constitution. The right to association is not provided for, nor is the right to form independent trade unions recognized.

Article 7 of the constitution proclaims the Somali Revolutionary Socialist Party as the only legal party in the country and "no other party or political organization may be established". All political and professional associations were abolished soon after the military take-over of 1969, and the new constitution formally endorses their elimination from the life of the Somali people.

With respect to trade unions, Article 12 of the constitution prescribes that "the State shall allow the establishment of social organizations of the workers...". However, "the specific structure, statutes and programmes of the social organizations shall be in consonance with the... programme of the Somali Revolutionary Socialist Party", which means in practice that they are created and controlled by the party. Indeed, the only trade union organization which exists is affiliated to the party, and apart from its name it has little in common with a trade union.

Equally omitted from the constitution is the right to freedom of movement, and in particular the right to leave and to return to the country. Over a hundred thousand Somalis have fled the country in the last few years as a result of the repression practised by the regime. Most of these people had to leave without a passport, since this document is not delivered to suspected or supposed opponents of the regime inside or outside the country.

Article 24 provides for freedom of assembly, participation in demonstrations or processions and freedom of opinion, publication and speech. The exercise of these freedoms is however subject to the proviso that "they shall not contravene the consti-

tution, the laws of the country, general morality and public order...".

This limitation makes the recognition of these rights meaningless in view of the numerous laws enacted by the military regime since 1969 which prohibit the exercise of these freedoms.

The 1979 constitution purports to protect personal liberty and guarantees the right to be informed of the grounds of arrest and to be brought before a judicial authority (art. 26). However no relief has been provided for infringement of this fundamental right by executive or administrative action since the abolition of the writ of *habeas corpus* in 1970. Also, the security services and the regional and district military administrators are still empowered to imprison and detain persons for an unlimited period of time.

Art. 27 of the constitution provides that a detained person shall not be subjected to physical or mental torture, and prohibits corporal punishment. Numerous instances of torture, corporal punishment and physical abuse have been reported in the prisons since the present regime came to power in 1969. In some cases, the victims who died as a result of torture were hurriedly buried, while their families were told that their demise was due to natural causes and denied the right to have their bodies examined by doctors.

## State of Emergency

During the state of emergency the Constitution was suspended, an act which was not provided for in the Constitution. The military Supreme Revolutionary Council was revived, exercising legislative, executive and judicial functions. It would seem that the emergency was directed more to the internal than the external situation. Civil arrest, political uncertainty and a foundering

economy, intensified by a severe drought, had further complicated the uneasy state of affairs in the country. The disappearance and imprisonment of suspects increased. In retaliation for alleged collaboration with the Somali Salvation Front, an opposition movement based in Ethiopia which made repeated attacks against the army in the border zone, many civilians were killed in the Mudug region, their livestock confiscated and their water-reservoirs destroyed. Recruitment into the army was intensified and many draftees were reported to have been shot in January and February 1981 while trying to escape from their camps. Three members of the People's Assembly (the parliament) were arrested and detained without trial, notwithstanding their immunity under the Constitution.

## Return to Constitutional Rule

The state of emergency was formally lifted on March 1, 1982. On this occasion, the President also announced the dissolution of the Supreme Revolutionary Council (SRC), and made a cabinet reshuffle. Almost all the members of the SRC have been given cabinet posts in the new government. A few political prisoners were released during the same week. Among them were the last civilian Prime Minister, Mr. Mohammed I. Egal, and a former chief of the police, Mohammed Abshir. Five members of the People's Assembly remain in detention.

President Barre adopted these measures two weeks before an official visit to the U.S. The U.S. Government had shown reluctance to entertain closer relations with the Somali Government owing to its domestic human rights record, which was further aggravated by the state of emergency, the totalitarian political system avowedly based on "scientific socialism", and the

continuing conflict with neighbouring countries (Ethiopia and Kenya). On several occasions the U.S. government advised President Barre to release at least some political prisoners and to end the state of emergency. The U.S. demands for better relations were said to include also the liberalization of the economy, and the relaxation of the draconian security measures in force in the country.

Available evidence clearly suggests that, despite the ending of the state of emergency, the repression has not diminished. Rather it has spread to certain regions hitherto unaffected by the murders and property destruction which became widespread in 1981.

Demonstrations held in Hargeisa, the capital of the northern region, to protest against the trial of 42 political prisoners, were dispersed by the army with gun-fire, killing 15 persons and wounding about 100. The prisoners consisted mainly of civil servants, medical doctors and businessmen, who were accused of subversion because of their engagement in self-help schemes in the region to improve the living standards of the local population.

Subsequently over 200 persons were imprisoned in Hargeisa as a result of popular protest against their prosecution. At the trial the death sentence was demanded by the state attorney. The Security Court sentenced most of them to life imprisonment.

The situation of human rights violations

does not, therefore, appear to have changed since the lifting of the emergency. All the repressive laws on national security are still in force. Because of increasing popular discontent, and a budding opposition movement, the regime has in fact become more xenophobic and repressive. The economy of the country is in disarray (see World Bank report on Somalia, 1981), and poverty has become more acute and wide-spread. Several members of the government have recently fled the country – among them, the former Minister for Industry, Ali Khalif, and former Minister to the Presidency, Mohamed Said Samanter, as they could no longer tolerate the excesses of the regime.

Opposition to government policies evidently exists at the highest levels within the Party. In June 1982, Ismail Ali Abuurkar, a Vice-President and Assistant Secretary-General of the Party, and Osman Mohamed Jelle, a member of the Party Central Committee, and five other members of the parliament were arrested, deprived of their parliamentary immunity, removed from all offices they held, accused of committing treason against the nation and ordered to be detained 'until such time as they may be brought before the competent court'.

It is clear that the return to the Constitution will have little effect upon civil liberties unless and until the excesses committed by the various security services are brought to an end, and a return made to the rule of law.

## Thailand

Since the article on Thailand in ICJ Review No. 19 (1977), some important events have taken place, including the introduc-

tion of a new and more democratic Constitution, followed by a General Election. Since then there have been successively

four governments under two Prime Ministers, and an unsuccessful attempt at a coup d'état.

The new Constitution came into force on December 18, 1978, after being approved by the National Legislative Assembly created after the 1977 October coup. In April 1979, an election was held for a new House of Representatives. This election was less violent than the previous one. After the election General Kriangsak Chamanan, the out-going prime minister, formed a new cabinet. In February 1980, General Kriangsak resigned due to the acute economic crisis facing the country. This was the first occasion on which a military ruler resigned in Thailand as a result of parliamentary pressure. A closed session of the parliament elected General Prem Tinsulanond as the new prime minister. General Prem, respected for his integrity, was the defence minister in the previous government. In March 1981, General Prem's coalition government faced a crisis and changes were made in the cabinet. This crisis was followed in April by the bloodless and abortive coup.

Whatever may be the political shifts and changes, it is generally accepted that the system now is more open than it was 10 or 20 years ago, and this has been reflected in some of the government decisions. For example, on September 15, 1978 the National Assembly passed a bill to grant pardon to the 18 students who had been on trial since August 25 1977, on charges arising from the incidents at Thammasat University on October 4-6, 1976. (See ICJ Review No. 19.) On August 1, 1979, Parliament voted unanimously to abrogate Decree 22, issued after the 1976 coup, under which certain categories of persons deemed dangerous to society could in effect be detained indefinitely. Another positive decision was the removal of section 200 from the new constitution, which had given the Prime Minister summary powers to punish

without trial, even with a sentence of death, persons suspected of subvertive activities. In June 1981, the government formed a committee under the Minister of Justice to review the cases of persons arrested and punished without trial by the previous Prime Ministers under articles 21, 27 and 200 of the interim constitutions. After deliberating for five months the committee recommended that these persons should be given a mass pardon by a Royal Decree. In January 1982, the report of the committee was submitted to the cabinet. As the cabinet failed to reach agreement on the recommendation, the Prime Minister assigned the issue to the judicial council under the Minister of the Prime Minister's office to work out the details of the pardon to be granted through the Royal decree. This study is expected to be completed by July 1982. 69 persons are still believed to be in prison under these decrees. Some others have been released in April 1982 as part of the amnesty granted to prisoners throughout the country to mark the Bicentennial celebrations.

These developments, so far as they go, are positive and they have been welcomed by human right organizations in Thailand. They have, however, been substantially undermined by some laws and decrees which pose a threat to the normalisation of the situation.

## Military Courts

The government still retains National Administrative Reform Council orders 1, 8, 29 and 30, under which certain categories of crimes must be tried in military courts. Although the cabinet reduced the jurisdiction of the military courts by removing from it cases involving sexual offences, offences constituting public danger, or threats to life, limb or property, the military courts are still responsible for trying cases involv-

ing national security, armed insurgency, kidnapping, arson and sabotage. Persons tried in military courts have the right to counsel, but the verdict cannot be appealed.

## **Powers of Arrest and Detention Without Trial**

On January 26, 1982, the Minister of the Interior issued Regulation No. 4 revoking Regulation No. 3 issued in 1980, under which the authority to arrest a criminal suspect could be exercised by the police only on the basis of incriminating evidence and after obtaining the consent of the administrative officials concerned. By authorising police officers to arrest any suspect without prior administrative consent, Regulation No. 4 increases the powers of the police and the risk of abuse.

The Anti Communist Activities Act which gives the government wide powers was amended on February 1, 1979, so as to revoke its area classification. Under the Act the country was formerly divided into Communist infested areas and non Communist infested areas. The special powers of the Act were applicable only in the Communist infested areas. By abolishing this classification, the government is empowered to take action under the Act against any citizen anywhere in the country. 'Communist activities' is defined very widely. According to the Act, "Communist activities means any action, propaganda, espionage, sabotage, intimidation or anything else which seeks to:

1. endanger the security of the Nation, the Religion, the Monarchy or the democratic form of government with the king as the Head of the State, or
2. change the national economic system

whereby private ownership or the means of production are expropriated by the State without payment or just compensation, or

3. bring about a new social order where all property is shared, except that which is done in a cooperative form or otherwise in accordance with the law.

The Act can be enforced by the Director General for the prevention and suppression of Communist activities, who is appointed by the Prime Minister, the Commanders of the four armies, the provincial governors, soldiers, and policemen above the rank of sub-lieutenant. Any of these officers can search or arrest without a warrant any person suspected of Communist activities and the arrested person can be detained without charge for up to 480 days.

Under the Act, the Commanders of the four armies are empowered to restrict and prohibit all means of communications, to censor letters, telegrams, documents, parcels etc., to close public highways, air or water routes, to ban T.V. and radio broadcasts and to impose restrictions on the ownership or the sale of food, medicine and other necessities. The provincial governors are empowered to ban any meeting, advertisement or entertainment, to detain any person for interrogation and reeducation for up to 15 days, and to impose a curfew. Under the Act, an autopsy can be denied if it is considered a hindrance to the suppression of Communists. The discretion whether to order an autopsy rests with the 'Communist suppression officers', a term which includes the notorious Rangers (see below). Also, all actions taken by officials under this Act are clothed with immunity and no complaints or claims for damages can be made for misuse of the powers.

The revised Act has brought about a situation of *de facto* martial law over the entire country.

It is clear that in certain troubled areas the government is faced with a serious problem of guerrilla insurgency, and has to take stringent enforcement measures. But this is hardly sufficient justification for imposing such measure over the entire country.

## The Rangers

Human rights organisations in Thailand criticise severely the arbitrary and inhuman activities of a paramilitary armed unit created specially for suppressing the communists, known as the Rangers. Though it started as a small unit, there are now nearly 32 battalions. The Rangers are authorised to arrest and search anyone, without a warrant. They are legally protected in all their actions. Trained for only three months, most of the training being on combat techniques, they are ill equipped to wield such authority. The predictable result is that excesses are committed.

The Rangers are assured an award of 10,000 Bhat (US\$ 440) on a body count basis for each insurgent killed. This incentive to kill has increased the propensity of the Rangers to kill even ordinary villagers, and label them as insurgents or sympathizers. These actions are in violation of common Article 3 of the Geneva Conventions 1949, relating to internal armed conflicts, under which "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" is prohibited at all times.

The press in Thailand is still relatively free, though the government became more cautious after the April 1981 coup attempt. The government still retains the N.A.R.C. Decree 42, which forbids publication of

any material or illustration which attacks the institution of the monarchy or the regency, makes accusations or gives distorted or contemptuous or insulting impressions about Thailand and Thai people, or which may cause other countries to lose respect for Thailand or which promotes communism. This Decree hangs like a sword of Damocles threatening press freedom.

## Prostitution

Thailand is facing an economic crisis, giving rise to increased social problems, such as migration, child labour, forced labour and prostitution. The enormous scale of prostitution is peculiar to Thailand, and the deplorable conditions of the women in prostitution raises serious human rights questions.

According to a report made in 1980, by some members of the Public Health Faculty of Mahidol University<sup>1</sup>, there were estimated to be some 700,000 women in prostitution. Studies made on the background of these women concluded that the majority of them come from the north and north eastern parts of Thailand, regions which have the lowest per capita income in the country. A sample survey conducted in 1979 revealed that a majority of them support a minimum of four to five family members and at least one third of their income is remitted back to their families in the villages. In a sample of fifty, eighteen were supporting one or more children. On the basis of these findings and other studies, it has been generally concluded that prostitution is an economic necessity for these women.

Poverty being the main cause, the problem of prostitution has to be seen and

1) 'Report on some types of Prostitutes' by Naengnoi Panjatham with Sukanya Harntrakul and Niramol Prutatorn.



tackled as a social problem arising as a consequence of underdevelopment rather than as just a problem of the individuals concerned. These women have not voluntarily chosen to become prostitutes. Nor is it an easy way out of their poverty. Many of them are enticed into it by deception or by agents and brothelkeepers. For others it is a way of clearing the debts of their parents. Agents will lend money to poor families, as a way of getting the girls to become prostitutes. Once recruited it is very difficult for them to escape from the clutches of the agents and brothelkeepers. Sometimes these women are made to sign documents, the contents of which are not disclosed to them, which are later used as a threatening device. The women are ill-treated and even tortured if they try to escape, or if a customer complains about their non-cooperative behaviour. They are kept under constant watch and in some places even armed guards are used. Deceiving and coercing women into prostitution is an offence under the criminal law but action is very rarely taken against the agents and brothelkeepers.

These women get only 25% of what they earn, the rest is appropriated by the agent and the brothelkeeper. They are made to work under inhuman conditions. Many of them suffer from venereal diseases or cancer of the uterus. In case of pregnancy they are made to abort. The abortion is usually carried out by quacks in unhygienic conditions. After the abortion, they are denied proper food or rest with severe damage to their health.

Added to this is the problem of harassment by the police. Usually, only the woman is charged under the Prostitution Prohibition Act. She may have to spend at least 3,000 Bhat's for the case. This money will usually be advanced by the brothelkeeper, increasing his control over the woman. If the woman is found guilty of

being a prostitute, she has to be sent to a rehabilitation centre. Interestingly it was found that out of the 59 women convicted in one province between July and December 1981, only 10 had reached the rehabilitation centre. The others had been released by the police to the brothelkeepers. This incident which was reported widely in the Thai press, exposes the close link between the police and the brothelkeepers.

Apart from facing these health, economic and legal problems, the women are also faced with a value crisis, leading to emotional tensions. Coming from villages with close family ties they have serious problems in adapting to their new situation, particularly when the traditional Thai society, with its strong belief in the chastity of women, looks down upon them as the embodiment of vice. This attitude of Thai society exposes its double standards, for it is the same society which tolerates or even encourages the institutions that sustain prostitution.

Being a social problem arising out of existing inequalities, the long term solution lies in policies and reforms that can bring about an equitable development in Thailand. It is said that prostitution is the largest industry in the country, and that 10% of all women between the ages of 15 and 25 become prostitutes. If it were possible to abolish it, the economic consequences would be very severe. Those who concern themselves with the plight of these girls are concentrating in the first place in trying to improve their working conditions, and ensuring their right to freedom of movement, free medical services, proper care and rest in the case of abortion or sickness, free time and paid holidays, proper remuneration and protection from exploitation, freedom of choice to discontinue prostitution, and opportunity for alternative employment, not to be considered as criminals under the law, and not to be

held in contempt and, finally, understanding and acceptance by the society. Apart from restoring these rights, they urge that the Thai government should ratify and follow the Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others.

In spite of this and other grave social problems facing the country, it can be said that the human rights situation has improved compared with what it was in the 1960's and the beginning of the 1970's. The transition from an authoritarian to a more de-

mocratic system is always fraught with difficulties. In the words of David Morrel, a political scientist of Princeton University<sup>2</sup>:

"One of the principle tasks facing the present Thai leaders is to achieve the necessary combination of decentralisation, participation and legitimacy based on popular sovereignty in the face of inertia and resistance from the traditional system... in the 1980's and beyond Thais will have to be incorporated more effectively into their political system, as citizens rather than as subjects."

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2) Testimony before the Sub-Committee on Asian and Pacific Affairs of the House Committee on Foreign Affairs during a hearing on US aid to Thailand on March 24, 1981.

# COMMENTARIES

## The Argentine Claim to the Falkland Islands

*"... A harsh, inhospitable and costly addition to the dominions of the crown."*

Thus, Samuel Johnson in his guise as official polemicist described the Falklands, the scattering of some 200 islands that are the cause of the current hostilities between Britain and Argentina.

Although, indeed, inhospitable, being battered by almost constant winds that restrict vegetation to a blanket of moorland, the islands do have some redeeming features, most importantly their very deeply indented coastlines which offer excellent natural harbours. One of the main reasons for the interest shown in the Falklands in the mid-eighteenth century was this abundance of safe anchorages for ships either resting up before tackling the hazardous trip round the Horn or wishing to carry out (or interfere with) trade in the New World.

The islands had a further advantage in that they could provide fresh water as well as supplies – in such form as seals, penguins, geese, ducks, "several sorts of wild berries, among others, strawberries, and a great quantity of wild celery. Many a whale ship has had its crew saved from that horrid disease, the scurvy, by the natural productions of these wild looking hills."<sup>1</sup>

### The Tussle with Spain

Controversy has always seemed to surround the Falklands, beginning with argu-

ments as to who first sighted them. The British claim John Davies, in 1592; the Argentinians claim Spanish navigators who, they say, registered the islands on maps dating as far back as 1523.

In presettlement days, the islands were certainly sighted by seamen of many nationalities and a plethora of names was variously used to describe them. They were referred to in the earliest books as "John Davis's Southern Land". Later, in 1594, they were dubbed "Hawkin's Maiden Land", a name designed to honour the sighter, Richard Hawkins, and "Queene Elizabeth my sovaigne lady and mistress, and a maiden Queene... in a perpetual memory of her chastitie". The Dutch also had a hand in the 'naming of names' and the islands were for a time known as "The Sebaldines", after the Dutch sailor, Sebald de Weert who sighted them in 1599. A map from the late eighteenth century, showing the islands as the Sebaldine Islands, hangs in the Secretariat at Stanley, the capital city on East Falkland.

The name now used by the British, however, originated in 1690 when John Strong visited the islands. He made the first recorded landing there, "found fresh water in plenty and killed an abundance of geese and ducks – as for wood there (was) none". He named the straight between the two main islands (now East and West Falkland) Falkland Sound after Anthony, Viscount Falkland, who was then a Commis-

1) Hon. (later Admiral) George Gray, letter home dated January 1837.

sioner of Admiralty. The name subsequently came to be applied to the island group as a whole.

The Argentine name, on the other hand, originated in visits to the group made, prior to the first settlement in 1764, by French sailors from the seaport of St Malo. Thus, the islands came to be known as "Les Iles Malouines", whence the Spanish "Las Islas Malvinas".

Although both Britain and Argentina claim sovereignty over the Falklands, it was the French who first planted a colony there. In 1763, Louis Antoine de Bougainville sailed from St Malo with two ships carrying families of settlers and live-stock. They landed on East Falkland in February 1764, built a fort along with several huts, and by 1765, after more colonists had arrived, Port Louis boasted a population of 150.

Spain became worried that this French action would encourage the British in their plans to establish a South Atlantic base in the Falklands where ships could take on supplies prior to rounding the Horn and, more importantly, from which Britain might attempt to interfere with Spanish trade in that area. Already, approaches had been made by Britain to determine the Spanish attitude to a proposed British "scientific" expedition to explore the area. That Britain felt she had to confer with Spain regarding this suggests that she was influenced by the various treaties of the time to which she was signatory, in particular the Treaty of Utrecht (1713), by reason of which Spain claimed that Britain had no right to enter the South Atlantic against her wishes. Britain hoped that by dressing up the expedition as "scientific" she could slip it through the treaty provisions. The

Spanish however, realised the real intent behind the venture and rebuffed the British proposals. Britain, anxious at that time to establish good relations with Spain, abandoned the scheme and, in 1749, informed Spain that "His Majesty could in no respect agree to the reasoning of the Spanish ministry as to his right to send out ships for the discovery of unknown and unsettled parts of the world, as this was a right indubitably open to all; yet, as his Britannic Majesty was desirous of showing his Catholic Majesty his great complacency in matters where the rights and advantages of his own subjects were not immediately and intimately concerned, he had consented to lay aside for the present every scheme that might possibly give umbrage to the court of Madrid".<sup>2</sup>

The Spanish fears concerning British intent proved justified however, and in 1764 (15 years later) a British expedition in the charge of the Hon. John Byron was dispatched to report on the Falklands and the feasibility of establishing a station there. Byron, on arrival, took possession of the islands "for his Majesty King George the Third of Great Britain under the name of Falkland's Island". He reported back to the First Lord of the Admiralty, John Percival, second Earl of Egmont, that he had found "one of the finest harbours in the world. I named it after your lordship".<sup>3</sup>

On the strength of Byron's report, Captain John MacBride was sent out to establish the British settlement and he arrived at Port Egmont in 1766.

The French and British presence on the Falklands was shortlived, however, as Spain quickly managed to expel both the "trespassers". In 1766, after an angry diplomatic exchange, and the payment of compen-

2) The Struggle for the Falkland Islands: A study in legal and diplomatic history. Julius Goebel, Jr, LL.B., Ph.D. pp 200-201.

3) Letter from Captain Byron to the Earl of Egmont, 24 February 1765.

sation equivalent to £24,000, the French withdrew. The British were more stubborn but, eventually, in 1770, by a show of force, Spain obliged the small garrison to surrender and return to Britain.

## The Question of Sovereignty As It Stood in 1770

Originally, Spain had based her claims to sovereignty in the New World largely on the papal bulls, most importantly *Inter Caetera* of 1493, in which Pope Alexander VI set out the papal line of demarcation relative to the areas of Spanish and Portuguese colonization and right, and threatened with excommunication anyone entering those areas without permission.

*Inter Caetera*, however, soon proved a weak base on which to build a blanket claim to sovereignty that could stand up against the claims of others. Excommunication could no longer be used as a holy sword of Damocles to hand over the head of, for example, the Protestant British and Dutch monarchs. As for the dominion the Spanish claimed that the Bull gave them over portions of the high sea, "it was not long before it became apparant that (such) claims to exclusive dominion derived their validity not from books, but from the facts of their successful enforcement, and hence the notion of the closed sea (*mare clausum*) presently was restricted to narrower fields of political use and finally was definitely rejected".<sup>4</sup> Thus, British freebooters and French corsairs, freed from the psychological restraints of Papal edicts by Protestantism and the pursuit of gain and knowledge, flouted Spanish authority at sea. Drake's voyage round the world in 1580, 'piratical' activity in Spanish eyes,

gained royal approval, and Elizabeth I, replying to complaints about Drake's activities from the Spanish ambassador, said that "she would not persuade herself that (the Indies) are the rightful property of Spanish donation of the Pope of Rome in whom she acknowledged no prerogative in matters of this kind, much less authority to bind Princes who owe him no obedience, or to make that New World as it were a fief for the Spaniard and clothe him with possession... so that... this imaginary proprietorship ought not to hinder other princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the law of nations, since without possession prescription is of no avail, nor yet from freely navigating that vast ocean since the use of the sea and air is common to all men".<sup>5</sup>

The defeat of the Spanish armada in 1588 more or less put paid to Spain's claim to rule the high seas.

The "power-base" of *Inter Caetera*, the so-called Donation of Constantine – an idea expanded by St Augustine into the accepted church doctrine that the whole world was God's property of which mankind only had the use and which gave to the Pope, as God's representative on earth, the power to dispose of the unoccupied lands of the world – had little appeal to monarchs other than those of Spain and Portugal. Moreover, legal opinion leaned towards the view that it was actual possession that conferred sovereignty over land. Goebel illustrates this by citing both Hugo Grotius' *Mare Librum* (1608) which states that "to discover a thing is not only to seize it with the eyes but to take real possession of it" and that ownership, therefore, can arise only out of physical posses-

4) Goebel *ibid*.

5) Camden *Annales Rerum Anglicae et Hiberniae* (1717), vol 2, pp 359–360.

sion; and Johann Gryphiander's *Tractatus de Insulis* (1623) which also claims that actual occupation is a necessary prerequisite to claiming rights over a 'discovered' territory.

The Spanish, realising the weakness of their position in relying on *Inter Caetera* fell back both on the theory of prior occupation and on various treaties to support their claim to their share of the New World. Important among the latter, was the Treaty of Utrecht (1713), which restored the conditions of navigation and commerce to the status quo at the time of Charles II (1665) and withheld permission to France or "any other nation whatever" to sail to any of the dominions of Spain in America. Britain was a signatory to this treaty.

If, as Spain claimed, the treaty was applicable then Britain had no right to enter the South Atlantic waters and thus, no right to establish her colony. If the treaty did not apply, as Britain claimed, then legal opinion at the time (as exemplified in Grotius and Gryphiander) would still seem to decide the question of sovereignty in favour of Spain, she having derived her sovereignty from the French who, through their occupation, had acquired the original sovereignty over the Falklands.

The British, however, denying that the treaty applied and unwilling to take Grotius and Gryphiander's view of acquisition, based their claim on right by discovery. But according to Goebel, "well into the opening years of the seventeenth century... there was no pretension that discovery could be the source of title; indeed, the lesser maritime powers, by the assertion of a principle of this sort, would have rigorously excluded themselves from the benefits of colonial expansion".<sup>6</sup> Goebel goes on to state that discovery as a source of title was

first considered in 1758 by Vattel in his treatise "Droit des Gens". Even using Vattel as an authority, the British claim is feeble. Vattel says that "navigators going on voyages of discoveries furnished with a commission from their sovereign and meeting with islands or other lands in a desert state have taken possession of them in the name of the nation; and this title has been usually respected, provided it was soon after followed by a real possession".<sup>7</sup>

Considering that MacBride's settlement was separated by 200 years from Davis' sighting and by 100 years from Strong's landing on the islands, it cannot be said that real possession was effected by the British "soon" after discovery.

## Events After 1770

Britain, convinced of the justice of her claim, was incensed by the summary removal of her colony from Port Egmont. Not only was it an "insult offered to the British Crown" but it also meant that Britain was denied a base in an island group that the Earl of Egmont had described as "undoubtedly the key to the whole Pacific Ocean". The prospect of war with Spain loomed large. However, negotiations were opened and in 1771 the Spanish Government agreed "to restore to His Britannic Majesty the possession of the fort and port called Egmont" but this "cannot nor ought any wise to affect the question of the prior right of the sovereignty of the Malvinas Islands, otherwise the Falkland Islands".

The British Government came under attack at home over the wording of the document reserving sovereignty and restricting restoration to Port Egmont only. British attempts to have the Spanish ministry include

6) Goebel *ibid.*

7) Vattel *Droit des Gens* (Lond. 1758) bk 1 c 18 paragraph 208.

the "dependencies" of the place had failed. The uproar would have been even stronger had the conditions of a supposed secret proviso become known. Of this, the Hon. (later Admiral) George Grey, in a letter home dated 1 Nov 1836, writes "the Spanish Government restored Port Egmont and, it has always been supposed, with the secret proviso that England was to abandon the Island upon the plea that the Establishment was not worth the expense".

Whether there was a secret proviso or not, one thing is certain, the British force was withdrawn from the Falklands in 1774, after its face-saving return there in 1771.

Accounts vary as to British action during the three years of resumption of occupation. The Peace Handbook Vol XXI, Issued by the Historical Section of the Foreign Office states that "on September 16 1771, the commander of the Juno was formally placed in possession of the station by the Spanish officer on the spot. A sloop, with some seamen and marines was left to hold it; but the number of the garrison was reduced in the next year; and in 1774 the garrison was withdrawn altogether"; while another source states that "possession was resumed on the 16th September of that year (1771) and until April 1774 the settlement underwent considerable development" (*The Falkland Islands and Dependencies*, Foreign and Commonwealth Office, 1970-71).

This former account squares best with the existence of the 'secret proviso' and the purported reason given by the British for withdrawal, which was economic. Lord Rochford, Secretary of State at the time, described the establishment at Port Egmont as "neither more nor less than a small part of an uneconomical naval regulation".

On leaving Port Egmont in 1774, the

British commanding officer fixed an inscription to the blockhouse door, reading "Be it known to all nations that the Falkland Islands, with this fort, the storehouses, wharfs, harbours, bays, and creeks thereunto belonging are the sole right and property of His Most Sacred Majesty George the Third, King of Great Britain, France and Ireland, Defender of the Faith etc. In Witness whereof this plate is set up, and his Britannic Majesty's colours left flying as a mark of possession by S.W. Clayton, commanding officer at Falkland Islands, A.D. 1774."

The Spanish then had sole occupation of the Falklands and administered them as part of the Province of Buenos Aires. From 1774, the viceroyalty of Buenos Aires appointed governors to the islands, motivated, according to Goebel, by the fear that Britain would try to occupy them again should they be abandoned. It seems that during at least some of this period, Spain used the Falklands as a penal colony. Grey, in the same letter of 1 Nov 1836, notes that on his receiving orders to sail for the islands, "all my friends pitied me, especially as these islands are looked upon by the Buenos Ayreians as a sort of Botany Bay, having been used by the Spaniards as a place for convicts".

The Spanish faded out of the picture with the formal independence of the United Provinces of the Rio de la Plata, later the Republic of Argentina, in 1816. In 1811 the Spanish garrison was withdrawn and "for a number of years there appeared to have been no inhabitants at all and no nation claiming authority",<sup>8</sup> the new state was presumably too occupied at home to attend to more peripheral matters. It should be noted that no attempt was made at this time by any other state to profit from the situation and assert a rival

8) Hon. (later Admiral) George Grey, letter home dated 1st Nov 1836.

claim to sovereignty.

In 1820, the Republic of Buenos Aires asserted over the islands the sovereignty it claimed to have inherited from Spain by sending out a Colonel Jewitt, who took possession of Puerto de la Soledad (formerly Port Louis) in the name of the Republic. Britain did not protest at this action and, indeed, after officially recognising Argentine independence in 1823, she signed a Treaty of Friendship, Trade and Navigation with Argentina in 1825. Both actions were taken without reservation of any question regarding sovereignty of the Falklands.

In 1826, a Hamburg merchant of French origin, Louis Vernet, took a commercial interest in the islands, dealing in cattle and salt fish. "In 1828, the Government of Buenos Aires conceded to him almost an entire private possession of the islands, with the right of warning off all vessels from the fishery; to give him more power he was invested with an official character and styled Governor of Malvinas."<sup>9</sup> Britain protested against this action but did nothing.

Vernet, however, was incautious in the exercise of his new rights, especially those regarding sealing. The seal fishery industry had greatly expanded by this time and the Falklands were visited by vessels of many countries, notably America. Vernet, after warning off several American vessels, took the law into his own hands and seized 3 American ships, detaining their officers and crews. This precipitated American reprisals and in 1831, Captain Silas Duncan of the American warship *Lexington* destroyed the settlement governed by Vernet at Puerto de la Soledad, retook the captured vessels, and declared the islands free of all government.

The next year, the government of Bue-

nos Aires appointed Juan Mestivier civil and military governor ad interim. He sailed, despite British protests reaffirming British sovereignty, to take charge of a penal reserve on East Falkland. However, his soldiers subsequently mutinied and he was murdered.

Meanwhile, in December 1832 Captain Onslow of *HMS Clio* had occupied Port Egmont on West Falkland. He continued to East Falkland arriving in January 1833 to find Jose Maria de Pineda, the commander of Mestivier's ship, attempting to restore order after the mutiny. Onslow told Pineda that he had "received directions to exercise the rights of sovereignty over these islands" and told the Argentinian to leave. Pineda eventually did depart taking with him those settlers who wanted to return to Buenos Aires. Later, Onslow also left, leaving the colony in the hands of Mathew Brisbane, Vernet's agent and William Dickson, Vernet's storekeeper. Soon after Onslow's departure, however, Brisbane and Dickson were murdered by a gang of 3 gauchos and 6 Indians, who were later captured by Lieutenant Henry Smith RN Smith was sent to the colony as governor, arriving in 1834 on board the *Challenger* and being put ashore with 4 men to keep possession of the settlement. He was succeeded by other naval officers until 1843, when an Act of Parliament was passed "to enable Her Majesty to provide for the government of her settlements on the coast of Africa and in the Falkland Islands". Lieutenant-Governor Moody, RE who had reached Port Louis in 1842, was appointed governor, "provision was made for a legislature and the Falkland Islands became a Crown Colony of the ordinary type, with Governor, Executive Council and Legislative Council, as they have since remained".<sup>10</sup>

9) Hon. (later Admiral) George Grey *ibid*.

10) Peace Handbooks, issued by the Historical Section of the Foreign Office.



The substantial settlement of the islands began with the introduction of sheep farming in the 1860's.

## Conclusion

From the rather shaky ground of Papal donation, Spain moved her claim to sovereignty over the Falklands to the surer base of treaty provisions and actual occupation (with a title ceded by the French). During the 43 years of Spanish rule in the islands, governors were appointed, convicts, "mainly rebellious Patagonian Indians, were shipped out... to provide slave labour"<sup>11</sup> and the islands generally treated as Spanish property. The Spanish settlement was withdrawn during the struggle for independence of the Provinces of the River Plate, later the Republic of Argentina, which claimed to have inherited the islands by virtue of their having been part of the Viceroyalty of Buenos Aires under the Spanish. For the 10 years prior to Argentina's planting a colony on the islands, no other state pretending to sovereignty stepped in to establish such a claim, though the gap between the removal of Spanish authority and the formal assertion of Argentine authority would have been an ideal opportunity for doing so. In 1820, after Jewitt had raised the Argentine flag on the islands, Juan Mestivier was appointed governor and there followed 13 years of Argentine occupation – until their eviction by British forces in 1833.

The British on the other hand, originally based their claim to the Falklands on first discovery – a fact which itself is not certain and even if it were, seems to have little or no legal force. Prior to the events of

1833, Britain had had a settlement on the islands for only seven years and three of these were passed jointly with the Spanish garrison (1771–1774). Moreover, Goebel holds that the British withdrawal from Port Egmont in 1774 "disposed of any shadow of right which the British may have had". As they had no claim to prior occupation and could be said to be in breach of the terms of various treaty provisions by sailing into the waters of the South Atlantic, "any right as against Spain could be maintained only by adverse possession. Once this possession was surrendered the claim itself would lapse". The British government in an attempt no doubt to justify to the electorate its professed 'voluntary' abandonment of the Falklands, tried to treat it as an exercise of good judgment and generally to create the impression that the islands were not worth the financial outlay. This is hardly the attitude of a country anxious to press its claim to sovereignty.

Even the actions Britain *did* take to bolster her claim to sovereignty were not very convincing. The plaque left at Port Egmont and the protests lodged on the appointment of Vernet as governor, for example, could be said to amount to trying, with a minimum of effort, to keep the options open.

However, Britain can now base its ownership of the islands more firmly upon 150 years of sole possession and 120 years of substantial settlement. Argentina disputes the British claim based on 'acquisitive prescription' saying that "Argentina not only has never let her sovereignty rights prescribed (sic) but, year after year and government after government had (sic) felt the armed spoliation of a part of its territory deeply and against its national sensibili-

11) The Economist, April 10, 1982, p. 29.

ty".<sup>12</sup> It is difficult to ascertain precisely what action was taken by Argentina to support her claim to sovereignty during British rule in the Falklands. One official document supplied by the Argentine mission to the United Nations in Geneva says merely that "it would be too long to state the enormous repetition of Argentine claims". Other sources<sup>13</sup> indicate that the action amounted to official protests in 1833, 1841, 1849, 1884, 1888, 1908, 1927, 1933, 1946 and representations to the U.N. In 1965, General Assembly Resolution 2065 XX took note of the existence of a conflict between Britain and Argentina over the sovereignty of the islands and invited the two countries to negotiate with a view to resolving the situation in the best interests of the islanders. Prolonged discussions have failed to reach an agreement on terms acceptable to the settlers. Concerning this, Britain takes the position that the islanders themselves are the best judges of their own interests, that they wish to remain British and that "the U.N. has never countenanced the decolonization of a territory by agreeing to hand over its people to alien rule in the face of their persistent opposition".<sup>14</sup>

British reliance on the principle of self-determination raises the issue of what constitutes a 'people' entitled to exercise the right. There is no agreed definition, but in

his study on the right to self-determination for the UN Commission on Human Rights (UN doc. E/CN.4/Sub.2/204 paras 267-79). Mr. Aureliu Cristescu formulated the 'elements of a definition' which have emerged from discussions in the United Nations. The relevant elements are that the term 'people' denotes a social entity possessing a clear identity and its own characteristics, and that it implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population.

If these principles are accepted, it would seem that Argentina as well as Britain can make a claim based on the principles of self-determination.

This brief historical review and statement of the rival claims to the islands may serve to explain why the people of Argentina believe so passionately that the islands were wrongfully seized and settled by the British and why their claim is supported by the peoples of Latin America, and many other non-aligned nations.

Their claim does not, of course, entitle Argentina to attempt to seize the islands by force. If such a right were accepted the fragile peace of the world would be even more seriously endangered, having regard to the numbers of disputed territories and frontiers throughout the world.

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12) An Argentine text "based on previous publications of the Public Information Secretariat of the Presidency of the Nation, with the advice of Rear-Admiral Laurio Destefani and Professor Dr. Calixto Armas Barea".

13) *Le Monde Diplomatique*, June 1982, and releases obtained from the Argentine Mission to the UN in Geneva.

14) Release obtained from the U.K. Mission to the UN in Geneva.

# UN Commission on Human Rights

This year's session (the 38th) of the UN Commission on Human Rights was remarkable for the number of positive decisions reached on controversial topics. This was all the more remarkable having regard to the atmosphere of confrontation at the opening session when the issue of the declaration of martial law in Poland was raised. The atmosphere was also charged by the announcement that the mandate of the Director of the Human Rights Division, Mr. Theo van Boven, would not be renewed, owing to divergencies of view between him and "New York".

The Director has an exceptionally difficult task, in that he is serving an intergovernmental organisation in a field where those who violate human rights are primarily governmental agencies. Mr. van Boven, conscious of his responsibilities towards the peoples as well as the governments of the United Nations, has carried out his duties with imagination, courage, frankness and a deep personal concern for the victims of human rights violations. He has also made a considerable contribution to human rights doctrine, in particular in relating human rights to other major issues, such as development, peace, disarmament and environmental protection<sup>1</sup>.

The Commission adopted 44 resolutions covering almost all items of the agenda. There were two on the Israeli occupied territories, of which the new features included condemnation of the annexation of the Golan Syrian territory, which was declared to be 'null and void and without any international legal effect', and an expression of

alarm that Israel's policy in the occupied territories is based on the so-called "Home-land" doctrine which envisages a mono-religious (Jewish) State that includes also territories occupied by Israel since June 1967, and the establishment of new settler colonies and expansion of existing ones.

Under the item of the right to self-determination, resolutions similar to those of previous years were adopted concerning Kampuchea, Afghanistan, the Western Sahara and Namibia. There were several resolutions relating to human rights in South Africa, Namibia, the Convention on the Crime of Apartheid, and racism and racial discrimination. One of these expressed indignation at the widespread use of child labour in South Africa, torture and other ill-treatment of prisoners in Namibia and South Africa, and oppression and insecurity of black women and children and denial of trade union rights for black workers in South Africa. Another requested the Committee set up under the Convention on the Crime of Apartheid to examine whether the actions of transnational corporations operating in South Africa come under the definition of the crime.

Resolutions under the heading of human rights and scientific and technological developments requested the Sub-Committee to undertake studies on

- the achievements of scientific and technological progress to ensure the right to work and development, and
- the negative consequences of the arms race.

1) A collection of Mr. van Boven's speeches as Director of the Human Rights Division, 1977-1982, has been published under the title *People Matter: Views on International Human Rights Policy*, ed. Hans Thoolen, Meulenhoff, Amsterdam, 1982 (ISBN 90 290 2041 5).

On the subject of economic, social and cultural rights, the Commission's resolution underlined the importance of individual and collective self-reliance on the part of the developing countries as a means of accelerating their development and contributing to achievement of the right to development. The Working Group of Governmental Experts on the Right to Development was asked to submit next year 'concrete proposals for a draft declaration on the right to development'. In an intervention on this item the Secretary-General of the ICJ suggested that the key concept of the right to development at the international level was solidarity, and at the national level participation. In order to make a reality of participation it was essential that the intended beneficiaries should be free to organise themselves in accordance with the rights of association and freedom of expression.

### **The Sub-Commission**

Two resolutions proposed by the Sub-Commission were approved. One authorizes an annual Working Group on Indigenous Populations, to meet before the sessions of the Sub-Commission, a proposal which had been recommended by the NGO Conference on Indigenous Populations held in Geneva in September 1981. A second resolution authorizes the Sub-Commission to send a delegation to visit Mauritania, pursuant to an invitation by the Government, in order to study the situation on the question of slavery and slave trade and to ascertain the country's needs.

A third resolution recommends that an outstanding study by Mr. A. Bouhdiba on the Exploitation of Child Labour (E/CN.4/Sub.2/479) be printed, and invites the Sub-Commission to prepare a concrete programme of action to combat violations of

human rights through the exploitation of child labour.

A resolution sponsored by Costa Rica, requesting the Sub-Commission to formulate a first study on possible terms of reference for the mandate of a High Commissioner for Human Rights, was adopted by 29 votes to 8, with 6 abstentions. This appears to be the first time that a positive resolution on this important subject has been adopted within the United Nations.

Australia sponsored a resolution urging that, when in exceptional cases an alternate is appointed temporarily, it must be kept in mind that the appointment of a government official may not be in keeping with the expert character of the Sub-Commission. During the discussion some criticism was made of the way the Sub-Commission functioned in 1981, with some 14 alternates, most of them being members of Permanent Missions in Geneva.

### **Missing and Disappeared Persons**

The mandate of the working group on disappearances was renewed for another year. This year's report of the working group described the complaints it had received and the comments on them of the governments concerned, but the group has not yet felt able to make any findings or recommendations. It is to be hoped that in the coming year it will be able to present a report which reaches conclusions on particular cases and makes specific proposals.

During the debate on this item, the question of the capacity of NGOs to decide who shall represent them was raised by the Argentine Ambassador, who challenged the right of the ICJ representative, Dr. Emilio Mignone, to speak, alleging that he was "politically motivated". After a prolonged debate lasting, together with adjournments, for 4 1/2 hours, the Secretary-General of

the ICJ was eventually permitted to reply to the objections made by the ambassador.

Dr. Mignone was then allowed to take the floor. The right of NGOs to decide who to appoint as their representative was thus confirmed.

## Chile

A resolution on Chile reiterated the Commission's "serious concern at the persistence and, in certain respects, the deterioration of the situation of human rights in Chile, as indicated by the Special Rapporteur, and particularly:

- a) The disruption of the traditional democratic legal order and its institutions by maintenance and expansion of the emergency legislation, and the promulgation of a constitution that fails to reflect a freely expressed popular will and whose provisions waive, suspend or restrict the enjoyment or the exercise of human rights and fundamental freedoms;
- b) The intensification of practices such as arbitrary detention and confinement in secret places, often accompanied by torture and inhuman or degrading treatment which, on occasion, result in unexplained deaths;
- c) The persecution, intimidation and imprisonment, as well as the banishment and forced exile of a number of persons who participate in trade union, academic, cultural and humanitarian activities."

The resolution appealed to the Chilean authorities to take concrete steps to end the state of emergency and these violations of human rights. Meanwhile, the mandate of the Special Rapporteur, Mr. Abdoulaye Dieye, was renewed for a further year.

In an intervention on behalf of the ICJ, Dr. Artucio, an ICJ legal officer, comment-

ed in an analysis of the new Constitution that the authority of the government rests not on the will of the people, but on that of the President and the armed forces. Expression of any opinions other than those of the authorities in whatever field, including cultural, trade union, educational or local government matters, is repressed or hampered. Illegal and *incommunicado* detentions, threats and other harassments continue. The Amnesty Law of 1978 serves to protect torturers and police officials guilty of extra-judicial killings and disappearances.

## Situations in Particular Countries

Perhaps the most interesting discussions and decisions this year related to situations in particular countries under the item of gross violations of human rights.

Under the confidential procedure of ECOSOC resolution 1503, situations were discussed relating to Argentina, Haiti, German Democratic Republic, Uruguay, Paraguay, South Korea and Venezuela. It is understood that the first four countries were kept under consideration for a further year.

It must be pointed out that the Commission continues to deal with these cases in a manner hardly contemplated by ECOSOC resolution 1503. Instead of determining, in accordance with the resolution, whether the situation requires a thorough study or an investigation by an *ad hoc* committee, the Commission enters into a confidential dialogue with the government concerned, using the implied threat of an unfavourable report to the ECOSOC as a means of pressuring the government to improve the human rights situation in its country. Consequently, a government which 'co-operates' with the Commission, by continuing a discussion with it, avoids condemnation. The only country to be re-

ported on adversely to the ECOSOC under resolution 1503 was Equatorial Guinea, which had refused to reply to the Commission. Even then, the report to the ECOSOC was made after the offending regime of President Macias had been overthrown.

This has led some to take the view that the procedure is operating almost as a protection to the countries concerned. Perhaps in consequence, it is increasingly becoming the practice for delegations to raise situations publicly and for the Commission to appoint a special rapporteur to enquire into and report upon the situation concerned.

Situations in five countries were examined in this way this year, namely Poland, Iran, El Salvador, Guatemala and Bolivia.

## Poland

The Commission decided to request the Secretary-General or a person designated by him to undertake a thorough study of the human rights situation in Poland and to present a comprehensive report next year. The Polish delegate stated that his government would not cooperate, though the resolution requests it to do so. It is to be hoped that the government of Poland will reconsider its decision, and bring forward more detailed information to support the statement it has already made to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights. This gave, in general terms, the reasons for its declaration of a public emergency threatening the life of the nation, and the provisions of the Covenant from which it has derogated.

## Iran

The Commission expressed its deep concern at the continuing reports about grave

violations of human rights in Iran, such as summary and arbitrary executions. It requested the Secretary-General to establish direct contacts with the government of Iran on the human rights situation, to continue his efforts to endeavour to ensure that the Bahai's are guaranteed full enjoyment of their human rights and fundamental freedoms, and to submit a report to the next session.

## El Salvador

The Commission, after examining the report of its Special Representative, Mr. José A. Pastor Ridruejo, confirming the persistence of 'murders, abductions, terrorist acts and all grave violations... perpetrated by governmental paramilitary organisations and other armed groups', and bearing in mind that the situation 'has its root causes in internal political, social and economic factors', expressed 'its deepest concern at the deteriorating situation', urged the government to take the necessary steps to ensure full respect for human rights and decided to extend the mandate of the Special Representative for a further year.

## Guatemala

After deploring that the government of Guatemala had not cooperated with the Secretary-General in his efforts to establish direct contacts, so that the Commission could be more fully informed about the human rights situation, and noting the assurances given by the government during the session to be cooperative in future, the Commission expressed its profound concern at the continuing deterioration of the situation, and requested the Chairman to appoint a Special Rapporteur to make 'a thorough study of the human rights situa-

tion in Guatemala'. This is believed to be the first occasion that the Commission has ordered a 'thorough study' and, significantly, did so under the public and not the confidential resolution 1503 procedure.

## Bolivia

The Commission received the report of its Special Envoy, Dr. Hector Gros Espiell, who concluded that 'following July 17, 1980, grave, massive and persistent violations of human rights occurred in Bolivia', but that since September 4, 1981, there had been an improvement in the situation. The Commission requested the Secretary-General to provide advisory services and other forms of appropriate assistance requested by the government of Bolivia to help the government to take appropriate measures guaranteeing the enjoyment of human rights, and decided to extend the mandate of its Special Envoy for another year.

## Advisory Services

The provision of advisory services is an important contribution which the United Nations can make to a country which is seeking to rectify the effects of a grave situation of violations of human rights. Two other such situations were considered by the Commission.

In relation to Equatorial Guinea, the Commission regretted the delay in the implementation of the measures envisaged in the Secretary-General's plan of action following the recommendations made by his Expert, Professor Volio, in the task of restoring human rights in the country. The Commission recommended the ECOSOC to request the Secretary-General, with expert assistance if necessary, to discuss with the

government the role the UN could play in implementing the plan of action.

In relation to Uganda, the Commission requested the Secretary-General "rapidly to establish contact with the government of Uganda in order to provide, within the framework of the programmes of advisory services, all appropriate assistance to help the government of Uganda to take measures to continue to guarantee the enjoyment of human rights and fundamental freedoms, paying particular attention to the following matters:

- a) The need for appropriate assistance to restore a law library for the High Court and Ministry of Justice;
- b) The need for a qualified and experienced expert to serve as Commissioner for the revision of Ugandan law, in conformity with recognised norms of human rights and fundamental freedoms, and the printing of consolidated volumes of the revised laws;
- c) The need for the training of prison officers with a view to securing the application of recognised norms of treatment of prisoners;
- d) The need for the training of police officials, particularly investigative and scientific experts".

## Human Rights and Mass Exoduses

The former UN High Commissioner for Refugees, Prince Sadruddin Aga Khan, presented a detailed report on human rights and mass exoduses. As originally distributed to the Commission (E/CN.4/1503 of 31 December 1981), the report contained three annexes: one on mass exoduses in Equatorial Guinea, East Bengal, Burundi, Uganda, Sahel, Chile, Angola, Cyprus, Namibia, West Asia, Western Sahara, Zimbabwe, South Africa, the Philippines, Zaire,

Burma, Nicaragua, Uganda, Chad, Cuba, Haiti and El Salvador; one containing four case studies, on Afghanistan, Ethiopia, Indo-China and Mexico; and one containing an overview of international migration in Africa South of the Sahara, the Americas, Asia, Europe and North Africa, and the Middle East.

Before the debate took place, a number of governments had expressed concern about the Annexes, fearing that they might prejudice acceptance of the report. Accordingly, the Special Rapporteur decided to omit the annexes. The original report was withdrawn and it was re-issued, reduced from 178 to 63 pages<sup>2</sup>.

The re-issued report was commended by the Commission and brought to the attention of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, established by the General Assembly in December 1981. The Commission also invited comments on the study and on the nine recommendations it contains. The first of these called for an updating of refugee, nationality and labour law and fresh consideration of asylum practice in the context of the promotion of a New International Humanitarian Order.

## Summary and Arbitrary Executions

In his speech at the opening session, Mr. van Boven had drawn attention to the grave increase in violations of the right to life and in particular summary, arbitrary and extra-judicial killings, in most cases by, or instigated or tolerated by, governmental agencies.

During a debate on this topic the Sec-

retary-General of the ICJ intervened, referring to examples of disrespect for the right to life, *inter alia*, in El Salvador, Guatemala, Thailand, Iran, and Morocco.

The Commission stated that it was "deeply alarmed about the occurrence of summary or arbitrary executions, including extra-legal executions, that are widely regarded as being politically motivated", and its proposal to appoint a Special Rapporteur to examine questions relating to them has been approved by the ECOSOC.

## Draft Convention on the Rights of the Child

The Working Group discussed a number of important and difficult issues relating to adoption, children of separated parents of different nationalities, children kidnapped and taken across frontiers, children temporarily or permanently deprived of parental care owing to imprisonment, exile, deportation or other judicial or administrative sanctions. There was a widespread feeling among those attending the working group that more progress would have been made had it not been for what appeared to be obstructive delays imposed by the US representative.

## Draft Convention on Torture

Under its new Chairman, Mr. Burgers of the Netherlands, the Working Group made substantial progress in identifying and narrowing the areas of disagreement. It is to be hoped that the Working Group will be able to complete its consideration of the draft next year.

2) Those who wish to read the text of these annexes will find them with a bibliography reproduced in a special issue of *Transnational Perspectives* entitled *Human Rights, War and Mass Exoduses*, obtainable from C.P. 161, 1211 Geneva 16, Switzerland.



# Human Rights Committee

## Decisions Under the Optional Protocol

The Committee's consideration of individual cases under the Optional Protocol has undergone important changes since the last commentary published in this Review.<sup>1</sup> At that time the Committee had published 'final views' on six cases. All of them concerned Uruguay, and concerned familiar patterns of torture, lengthy detention and violation of defence rights of political prisoners. The governments's lack of cooperation, in particular its persistence in giving general or evasive answers, handicapped the Committee's early efforts to interpret and apply the standards set forth in the Covenant. From the 11th to 15th Sessions the number of cases decided by the Committee more than quadrupled.<sup>2</sup> The decisions concern a number of other State Parties. The diversity of the allegations and the cooperative attitude shown by most of the governments concerned has resulted in an enrichment of the Committee's jurisprudence concerning various provisions of the Covenant. The number and complexity of the decisions precludes their being summarized here, but some of the most important may be mentioned.

## Extraterritoriality

Perhaps the most far reaching decision concerns the responsibility of State Parties

for violations of the rights of persons outside their national territory. Article 2(1) of the Covenant provides that each State Party "undertakes to respect and to ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the present Covenant...".

In two decisions adopted at its 13th Session the Committee confirmed<sup>3</sup> that a State Party may be responsible under the covenant for acts of government agents which violate the rights of citizens beyond the borders of the state. The cases are similar: the *Lopez* case (R.12/52) concerns a Uruguayan kidnapped in Argentina by Uruguayan security forces and secretly transported to Uruguay; the *Celiberti* case (R. 13/56) concerns a Uruguayan kidnapped in Brazil by Uruguayan agents who returned her to Uruguay. In both cases the abduction and secret transfer were found to be arbitrary arrests and detentions in violation of Art. 9(1) of the Covenant. In the former case the Committee also found that Uruguayan military officers had committed torture, in Argentina as well as in Uruguay. It was also found that the author had been persecuted for his trade union activities, in violation of his right of freedom of opinion, freedom of expression and freedom of association. It should be noted that the Committee's findings confirm the existence of illegal collaboration between security forces in the Southern Cone, denounced in ICJ Review No. 24 in June 1980.

The Committee reasoned that Art. 5(1)

1) ICJ Review No. 25, December 1980, covering Sessions 7 to 10.

2) The number of decisions published, including decisions to discontinue (the *Waksman* case, R.7/31) and "interim decisions" (the *Bleir* case, R.7/30) is now thirty.

3) This result was already suggested by the decision on admissibility in the *Waksman* case R.7/31, a case in which decision on the merits was avoided because the government took appropriate steps to resolve the matter complained of.

(which states "Nothing in the present Covenant may be interpreted as implying for any State... the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein...") prevents a State Party from relying on the territoriality clause of Art. 2(1) to escape responsibility for acts perpetrated by its agents on foreign soil. It also noted that there is no territoriality clause in Art. 1 of the Optional Protocol.

In a separate opinion one member expressed concern that the language used in the decision was too broad, and observed that "in principle, the scope of application of the Covenant is not capable of being extended by reference to article 5". He preferred to justify the Committee's decision by relying on the intention of the drafters of the Covenant, which was only "to restrict the territorial scope of the Covenant in view of... situations where enforcing the Covenant would be likely to encounter extraordinary obstacles." Normally a government is unable to protect the rights of citizens outside its territory except by representations through diplomatic channels. The difficulties involved in extending the rights recognized in the Covenant to persons in an occupied territory constitute another example.<sup>4</sup> He agreed, however, that it was never envisaged to "grant States Parties unfettered discretionary power to carry out wilful and deliberate attacks... against their citizens living abroad." (The *Lopez* case, individual opinion, para 2).

## The Right to a Passport

The right to a passport is not recognized in terms by international human rights instruments, nor is a general right to travel outside one's own country. The Covenant, for example, mentions only a general "right to liberty of movement" within the territory of a State Party (Art. 12(1)), the right to enter one's own country (Art. 12(3)) and the right to leave any country, including one's own" (Art. 12(2)). Convincing arguments have been made, however, that a right to a passport is a necessary consequence of the right "to leave any country..."<sup>5</sup>

In a decision adopted at its 15th Session in the *Vidal* case (R.13/57) the Committee found that Uruguay's refusal to renew the passport of a citizen living in exile violates Art. 12(2) and called upon the State Party to provide her with "a passport valid for travel abroad." This decision not only confirms the existence of a right to a passport implicit in the text of Art. 12, but also raises an interesting question regarding the existence of a "right to travel abroad". In this case the individual was already abroad, and was able to return to Uruguay, at least in theory, since the government had offered her a travel document valid for that purpose only. Could the possibility mentioned in the decision of her being unable to leave Uruguay in the future, if she decided to return there, be the reason for finding that she has a right to a passport? Or does the decision imply that the combined effect of Art. 12(2) and (3) is to oblige a State Party

4) These examples were given by the representative of the State which offered the words "and within the territory" as an amendment to the draft text of the Art. 2(1). See E/CN.4/SR 138 p 10-11; E/CN.4/SR 194 pp 5-8.

5) See José D. Ingles "Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country" E/CN.4/ Sub.2/229/Rev. 1 1963, p. 13 and *Rodriguez y Rodriguez*, cited in "The Right to Leave and Return", Vasak and Liskovsky, Editors, 1976, p. 215.

to do more than simply permit a person to enter and leave its own territory, i.e. that there is some broader duty to facilitate, or at least not to obstruct, travel by its citizens abroad. The Committee gives no reasons for its decision, apart from the brief remark that "a passport is a means of enabling him (sic) to leave any country including his own..." (para. 7).

Although the decision that a right to a passport exists in this case is alone of major importance, its full implications will only be revealed by future cases.

### **Sexual Discrimination and Membership in an Indian Community**

Another decision, important for its implications for the Committee's working methods as much as for the substance of the decision, concerns the Indian Act of Canada. This law establishes certain rights or privileges to which only Indians are entitled and defines who shall be legally entitled to be considered an Indian. Principal among the rights accorded to Indians is the right to land set aside for exclusive use of Indian communities. Pursuant to the same law, Indian women who marry non-Indian men lose their status as an Indian and the rights which attach thereto, including the right to live on land set aside for their community.

A member of the Maliseet Indian band, deprived of Indian status by virtue of her marriage, complained of sex discrimination, violation of family rights and the right to marry, and violation of Art. 27, which provides

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

The government argued that, although she had lost special privileges extended to officially-recognized Indians, she "is enjoying all the rights recognized in the Covenant, in the same way as any other individual within the territory of Canada and subject to its jurisdiction" (para 9.8).

The Committee decided that, regardless of the definition of Indian established by Canadian law, the person concerned was ethnically a Maliseet Indian and thus entitled to the rights set forth in Art. 27. While recognizing that the State Party needs to establish a legal definition of persons entitled to live on an Indian reserve in order to prevent wasting of its resources and to preserve the identity of its people, the Committee declared that such provisions must have a reasonable justification and must not be inconsistent with other provisions of the Covenant, such as the non-discrimination clauses. Finding no adequate justification in this particular case, where the woman was denied the right to live with her community despite her divorce from the non-Indian husband, the Committee found a violation of Art. 27. No specific recommendations were made, and no views expressed on the conformity of the law with the Covenant in other cases, e.g. where the woman is not divorced. No opinion was expressed on the other violations of the Covenant.

The issue of the rights of indigenous people has begun to receive some attention in recent years, after many years of ne-

"In those States in which ethnic, reli-

glect.<sup>6</sup> The unfortunate legacy of this neglect has been the total absence in international law of legal norms, procedures and concepts which take into account the peculiar nature of the problem. The great breakthrough in human rights was to make the individual the subject of international law. Protection of the rights of the Indian, however, depend in the first instance on the protection of the Indian community or nation, whose existence is often threatened inter alia by imposition of alien cultural values. Resolution of conflicts between the rights of individuals and the rights of the community – i.e. recognition of a degree of autonomy necessary for them to survive as distinct communities and avoid assimilation – is not a simple task. The question to be posed is whether it can be done viewing these conflicts in the usual optic of a conflict between an individual and a State Party, without giving a voice to the community involved. The question of whether the Committee can rely on the individual and the State Party adequately to present the issues involved is posed in a particularly acute way in the present case, where the government was largely in agreement with the author of the communication.

The State Party reported to the Committee that it intended to present a reform bill before the Parliament which would give Indian bands the right to define membership in the band, provided that there be no discrimination on the basis of sex, religion and family affiliation (paras. 5 and 9.5).

While one can hardly question the deci-

sion that a divorced Indian woman should not be denied the right to return to her community, the Committee lost an important opportunity, it is submitted, to recognize the legitimate interest of the Indian community in this matter by inviting them to make their views known to the Committee. This might have been done under Rule 64(2) of the Committee's Rules of Procedure, which provides

“All reports, formal decisions and other official documents of the Committee... relating to... the Protocol shall be distributed by the Secretariat to all members of the Committee, to the States Parties concerned and, as may be decided by the Committee, to others concerned (emphasis added).”

An Indian community deprived by law of the right to define membership in the community would clearly seem to qualify as a “concerned party”.

This would require a departure from the present practice of keeping the substance of communications and identity of their authors confidential until final views are adopted.<sup>7</sup> It is submitted, however, that nothing in the Optional Protocol or the Committee's own Rules of Procedure require this confidentiality. Art. 5(1) of the Protocol provides that the Committee “shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party

6) Notably, the NGO Conference on Indigenous Rights held in Geneva in 1977, the meeting of Experts on Ethno-development and Ethnocide sponsored by UNESCO and the Latin American Faculty of Social Sciences in San José in 1981, the UN Regional Seminar on discrimination against indigenous peoples held in Managua in 1981, the decision of the UN Commission on Human Rights to create a permanent Working Group on the Rights of Indigenous Peoples (Resol. 1982/XIX) and the International Labour Office's recommendation that Convention 107 on Indigenous and Tribal Peoples be updated.

7) This is somewhat of a simplification, in that the Committee has also published a decision to discontinue consideration of a communication, and an “interim decision” (see note 2, supra).

concerned" and Art. 5(3) provides that the Committee shall hold closed meetings when examining communications.

The use of the mandatory "shall" in Art. 5(1) coupled with the absence of any express indication that these should be the exclusive sources of information suggest that the Committee is not precluded from relying on information from other sources in formulating its final views.

The purpose of Art. 5(1), it is suggested, is to indicate the two elements which must be taken into consideration by the Committee. Furthermore, even if the Committee were restricted to receiving information from these two sources, this would not prevent it from considering legal arguments or "observations" received from other sources. The distinction between information and "observations" or "explanations or statements clarifying the matter under consideration" is recognized in Rules 91 and 94, and in this very case the Committee addressed a request for "information and observations" to the State Party and the author of the communication.

The requirement of Art. 5(1) that the Committee's deliberations on individual communications be conducted in private in no way requires confidentiality about the subject matter under consideration. The reason for deliberating in camera, a practice observed in most tribunals throughout the world, is presumably to encourage thorough and uninhibited discussion of the issues by the members of the Committee. The broad, albeit discretionary power to disclose information concerning communications under consideration recognized by Rules 36, 64(2) and 83 also refutes the suggestion that the practice of confidentiality is mandatory.

The policy considerations usually invoked in favour of confidentiality, it is submitted, have little weight here. The obligation of states to cooperate with the Commit-

tee's consideration of individual communications is not discretionary, but is defined clearly by the Protocol, as the Committee emphasized in the *Sendic* case (R.14/63). The fact that the Committee's views on the merits of admissible communications will be published in due course regardless of the outcome diminishes a State Party's interest in maintaining confidentiality during the proceeding.

There may indeed be advantages in regularly publishing some information about communications received at an early stage of the proceedings. Firstly, it is likely to increase the publicity given to the Committee and its work, a concern which has frequently been expressed by members of the Committee. Secondly, it is likely to provoke discussion of the issues raised by the communication in academic and human rights circles, thus creating a public body of commentary which might be useful to Committee members, in their personal capacity at least.

### **Marriage to Non-Citizens and Sex Discrimination**

A case concerning differential treatment of marriages between male or female citizens and aliens gave the Committee an opportunity to express its views on this common form of discrimination, as well as to decide numerous secondary issues. In communication R.9/35 S. Anmeeruddy-Cziffra and 19 other Mauritian women complained of laws which required aliens married to Mauritian women and wishing to reside in the country to obtain a residence permit, and provided that any such man in the country was subject to deportation at the discretion of the Minister of the Interior by an unreviewable order.

Seventeen of the women were unmarried. The Committee found that none of

them had shown that she was "actually facing a personal risk" of an infringement of any right under the Covenant, and that they were not 'victims' in terms of Art. 1 of the Protocol. With respect to the three married women, the Committee stated "not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents an interference by the State Party in the family life of the Mauritian wives and their families" (para. 9.2(b)2(i)3). This reveals a broad view of the type of injury which entitles one to submit a communication under the Protocol and represents an important addition to the jurisprudence of the Committee.

The state advanced the argument that the discrimination, if any, was based on the sex of the non-citizen husband, and since the Covenant confers no right on non-citizens to enter a particular state, there was "no discrimination in respect of a right recognized in the... Covenant" as required by Art. 2(1). The argument was rejected, the Committee finding that the discrimination affected the wife as well as the husband.

The state further argued that the law does not prevent a woman from marrying the person of her choice or exercising any of the other rights invoked, although a woman might be forced to choose between the possibility of exercising certain rights (e.g. the right to run for political office) and the possibility of living with a spouse who has no right of residence.

Finding the law to be inconsistent with the Covenant solely because of the sex distinction, the Committee did not address the other issues raised by the case. It recommended immediate relief for the victims of the discrimination and amendment of the laws in question. The question remains whether the amendment will give husbands of citizens the same favorable treatment now accorded to wives of citizens, or

whether all non-citizen spouses will be required to obtain permission to reside in the country. In the latter case, it seems likely that the Committee will again be asked to examine some of the issues it has declined to decide in this case, in particular whether the "precarious situation" resulting from the absolute discretion accorded by these laws does not violate the Covenant regardless of the differential treatment based on sex.

### Freedom of Expression

In a decision adopted at its 15th Session in New York, in the case of *Hertzberg* (R. 14/61), the Committee recognized the right of state controlled broadcasting corporations to censor radio or television programmes which concern homosexuality.

The authors of the communications include four persons who participated in programmes which were censored prior to broadcast, and a lawyer whose description of discrimination against homosexuals in employment was broadcast. The editor of the programme was prosecuted under a provision of the Penal Code which provides "Anyone who publically encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour...". Although the editor was acquitted, the lawyer alleged that the prosecution under this law infringed his right to "seek, receive and impart information..." under Art. 19 of the Covenant. In general it was alleged that fear of prosecution under this law had caused the broadcasting corporation to censor the other programmes in question, and that it is "extremely difficult, if not impossible, for a journalist to start preparing a programme in which homosexuals are described as anything else than sick, disturbed, criminal or wanting to change their sex"

(para. 2.6) They argue that Art. 2(1) and 19 create an affirmative duty on the part of States Parties to "ensure that the (broadcasting corporation) not only deals with the subject of homosexuality but also that it affords a reasonable and in so far as possible, an impartial coverage of information and ideas on the subject (para. 7).

The State Party replied that the criminalisation of public encouragement of homosexual acts reflects moral beliefs shared by a large part of the population, that a parliamentary committee had expressly provided that the law should not hinder the presentation of factual information on homosexuality, that no one had ever been convicted under the above-cited provision of the Penal Code and that the censorship was due to general policy considerations rather than the influence of this provision of the Penal Code.

Preliminarily, the Committee decided that the lawyer had suffered no injury as a result of the prosecution of a third person, and that it would consider only the question of the censorship actually suffered by the other authors, without regard to the provision of the Penal Code. Citing the *Anmeeruddy-Cziffra* case (see above) it defined its task as "clarifying whether the restrictions applied against the alleged victims... disclose a breach of any of the rights under the Covenant". It also rejected the contention that a right exists "to express (oneself) through a medium like TV, whose available time is limited", but proceeded to consider whether censorship of an existing programme prepared with the general approval of responsible authorities might not violate the freedom of expression recognized by Art. 19.

The question turned on whether this censorship came within the restrictions permitted by the third paragraph of Art. 19, which permits restrictions which are "provided by law and necessary... for the pro-

tection of national security or of public order... or of public health or morals". The way in which this clause is interpreted has additional importance in that similar clauses are found in the articles concerning freedom of movement, freedom of association and freedom of assembly.

The Committee decided it was not necessary to examine the texts of the censored programmes to determine whether the censorship was "necessary... for the protection of... public health or morals". Since standards of public morality vary considerably from one country to another, the Committee reasoned that "a certain degree of discretion must be accorded to the responsible national authorities" and the Committee "can not question the decision of the responsible organs of the (broadcasting corporation) that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour" (para. 10.3 and 10.4).

It is unfortunate that, having stated the intention of reviewing the restrictions actually experienced by the authors rather than the conformity of the disputed law with the Covenant, the Committee should decline to examine the content of the censored statements and instead give blanket approval to a broadcast corporation policy of censoring material concerning homosexuality. In refusing to examine the censored statements it refuses to recognize a difference between the positive portrayal of homosexuality – a state of being or psycho-social condition affecting large numbers of persons – and encouragement to commit certain categories of sexual acts. This is all the more difficult to justify in that the state disclaimed the intention of "hindering the presentation of factual material on homosexuality" (albeit in defence of the penal law) and one of the pro-

grammes was part of a series on "Marginal groups in society" intended to overcome discrimination. In addition, by giving such broad discretion to the authorities the Committee effectively eliminates from Art. 19(3) the requirement that the restriction be necessary to protect public morals.

In a separate opinion three members of the Committee suggest that the sole reason the broadcast policy does not violate the Covenant is that the purported affirmative duty to publish objective information on homosexuality does not exist. "Access to media operated by others is always and necessarily more limited than general freedom of expression," they state. "It follows that such access may be controlled on grounds which do not have to be justified under Art. 19(3), para 5."

On the scope of restrictions permitted by Art. 19(3) the separate opinion states

"the conception and contents of "public morals" referred to in Art. 19(3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9(2) of Chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under Article 19(3). It must also be shown that the application of the restriction is necessary." (para 3).

Another interesting aspect of the case is

that the Committee allowed the 'authors' of the communication to be represented by a non-governmental organisation, the "Organization for Sexual Equality".

### Derogation from the Covenant in Times of Emergency

Recently decided cases clarify certain aspects of the right of States Parties to derogate from their obligations under the Covenant in times of a public emergency threatening the life of the nation. In previously decided cases scarcity of information from the State Party had led the Committee simply to dismiss the attempt to invoke the right to derogate with the standard phrase "The Covenant (Art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation."<sup>8</sup>

In the *Landinelli* case (R.8/34) the authors had been candidates for political office in Uruguay in the elections of 1966 or 1971 on the lists of parties declared illegal after the 1973 coup d'état. They claimed a violation of Art. 25 of the Covenant by reason of "Institutional Act" No. 4, which deprived them of all political rights for a period of 15 years because of their candidacy in those elections on behalf of the parties in question.

The State Party attempted to justify the measure simply by referring to its notice of derogation sent to States Parties<sup>9</sup> and stating that it had "temporarily derogated from some of the provisions relating to political parties".

8) See the *García* case (R.2/8); the *Torres* case (R.1/4); the *Millan* case (R.1/6); the *Grille* case (R.2/11); the *Buffo* case (R.8/33); the *Sala de Touron* case (R.7/32), and the *Weinburger* case (R.7/28).

9) CCPR/C/2/add.3/p4 (notification dated 28 June 1979).



For the first time the Committee expressly suggested that the substantive right to derogate "may not" depend upon compliance with the requirement of formal notification to other States Parties set forth in Art. 4(3). At the same time it explained in more detail than it had done previously the reasons why it was unable to recognize the asserted right of derogation. The State Party's notice of derogation, the Committee stated "confined itself to stating that the existence of the emergency situation was 'a matter of universal knowledge'; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary." (para. 8.2).

Although further information had been promised, it had not been received. "A State", the Committee concluded, "by merely invoking the existence of exceptional circumstances, can not evade the obligations which it has undertaken by ratifying the Covenant" (para. 8.3). On the merits of the claim, the Committee stated that even if there were a public emergency permitting derogation from the Covenant, it did not see how depriving persons of all political rights for such a period of time, without distinction as to whether the individual sought change by peaceful means or by violence, could possibly be considered "necessary". In so doing the Committee has drawn attention to an essential, and frequently disregarded, principle concerning states of emergency: all measures taken pursuant to states of emergency must be of the shortest possible duration. In addition, in insisting on the distinction between those who promote their political ideas by peaceful means and those who advocate

violence, the Committee rejects a large part of the Doctrine of National Security, which underlies the extended states of emergency in several Latin American states, namely the idea that the duty of the military to protect national security includes the duty to rid the nation of a broad spectrum of 'unnational, non-Christian and non-western' thought.<sup>10</sup>

The right of derogation was also invoked in two cases concerning Colombia decided at the Committee's 15th Session, the *Salgar de Martejo* case R.15/64, and the *Suarz de Guerrero* case (R.11/45).

The former was submitted by a journalist convicted of a weapons offence by a military court. She alleged violation of the right to appeal (Art. 14(5)), the right to trial before a "competent, independent and impartial court established by law", (Art. 14(1)) and deprivation of liberty not "on such grounds and in accordance with such procedures as are established by law" (Art. 9(1)). In addition, since she was convicted of sale of a weapon after having been previously acquitted of possession of a weapon, she alleged a violation of the principles of *non bis in idem* and *res judicata*, which correspond to Art. 14(7). On the issue of derogation, she claimed *inter alia* that the state of siege in effect in Colombia did not conform to the requirements of Art. 4(1) since it was proclaimed in 1976 in response to a short-lived strike in the national health service and had simply been extended indefinitely.

The State Party's attempt to invoke the right of derogation was rejected on the ground that even though in national law the measures complained of were adopted pursuant to the state of siege, the State Party's notice of derogation mentioned only derogation from freedom of assembly

10) See Senese, "The State of National Security in Uruguay, International Law and the Right of Peoples to Self Determination" in *The State of Emergency II*, SIJAU, Paris 1981.

and freedom of expression. This being so, the Committee did not examine more closely the author's comments about the 1976 state of siege. As in the *Landinelli* case, the Committee warned that "merely invoking the existence of a state of siege" does not permit a state to "evade (its) obligations... under the Covenant".

On the merits, the Committee found that, despite its classification as a *contra-venção* in Colombian law, the offence was serious enough "in the circumstances" to be considered a "crime" in terms of Art. 14(5) for which a right of appeal to a higher tribunal was required. What circumstances permitted this conclusion are not stated; the person concerned had received a one-year sentence and had been released unconditionally after 3 1/2 months. The Committee recommended that she be given an adequate remedy and that the law be amended.

The Committee declined to decide the other alleged violations of the Covenant stating that the authors' allegations were too general - a view which does not seem to be supported by the summary of the submissions of the parties, particularly with respect to the alleged violation of Art. 14(1).

The importance of the second Columbian case lies more in its illustration of the danger which excessive use of emergency powers poses for human rights than in the legal issues involved. It concerned Legislative Decree No. 0070 of 20 January 1978, a decree issued by the president pursuant to the 1976 state of siege. The decree amended Art. 25 of the Penal Code, which concerns defences to the charge of homicide. It provided that homicide is justified "if committed by the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of

and trafficking in narcotic drugs."

In April 1978 a raid was ordered on a certain house in Bogota in the belief that a former ambassador kidnapped by a guerrilla organisation was being held there. Although the ambassador was not found at the time of the raid, the police decided to remain in the house and await the return of the suspected kidnappers. Seven persons who arrived and entered the house were killed by the police. Although the police initially claimed the victims had brandished or fired weapons, a report of the Institute of Forensic Medicine later proved that none of the victims had fired a shot. Each of them had been shot at point-blank range, certain of them in the back or head. The report proved that they had not been shot at the same time, but at various times as they arrived at the house. One of them, a woman, was shot repeatedly after she had already died of a heart attack. An administrative investigation was conducted, and resulted in the dismissal from the police force of all the individuals who participated in the incident. Criminal proceedings were also begun, in the same court which had authorized the raid, the 77th Military Criminal Court. The Inspector General of Police, in his capacity as presiding judge, ordered the proceedings discontinued by reason of Decree 0070. This ruling was overturned on appeal. In December 1980, however, the eleven participants in the raid were acquitted, by reason of Decree 0070, after trial in the military Consejo de Guerra Verbal (a "council of war" whose proceedings are unrecorded). The lawyer for the victims was not allowed to participate in the trial. It was not established that the persons killed by the police were actually responsible for the kidnapping.

The State Party was found responsible for violating "the supreme right of the human being", the right to life, and amendment of the law was recommended.

# ARTICLE

## The Right to Development and Human Rights

by  
Theo C. van Boven\*

### United Nations and NGO's

I feel somewhat embarrassed, not because participants at this meeting referred to the United Nations in a critical manner, but because you started off today with a very fascinating dialogue on what directives for future policies NOVIB may expect from you as representatives of various non-governmental organizations in your countries. Now, I was wondering what things of relevance can I say in this context, because I have been asked to address myself to the Right to Development as a Human Right, and in particular because I am supposed to speak from the level of the United Nations. We, in the United Nations, we work on the so-called global level. Now, the more global you are, the more abstract you tend to become. This morning it was rightly said that we should not be abstract, but very concrete. We should be down to earth. After all, many of us around this table are from grassroot movements. In the United Na-

tions one thing is quite clear, most persons are not from the grassroots. The United Nations is an inter-governmental organization, which leaves the non-governmental sector at the margin.

Now, I could try to explain what is the impact of the non-governmental sector on the work of the United Nations. I could explain that it is not negligible, that there is some impact perhaps on the margins of the organization. I could also explain that we, as workers in the human rights division, feel ourselves also on the margin, in an organization and an environment where we do not feel very much at ease.

What benefit could we draw from you as non-governmental sectors in your various societies and what benefit could you draw, if any, from the United Nations? I have prepared myself to discuss first of all the right to development, but I am somewhat embarrassed because I do not know whether it really fits in to your discussions.

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This article is reproduced with the kind permission of NOVIB (Netherlands Organisation for International Development Cooperation) from their report of an international seminar in December, 1980, on Human Rights and Development Cooperation. The frankness of Mr van Boven's speech to the seminar may indicate to the reader some of the reasons why his contract as Director of the Division of Human Rights was not renewed this year. Those who wish to follow more closely Mr van Boven's immense contribution as Director of the Division are referred to the collection of his speeches entitled *People Matter: Views on International Human Rights Policy*, ed. Hans Thoolen, Meulenhoff, Amsterdam, 1982 (ISBN 90 290 2041 5).

## Human Rights: Conservation or Liberation

It is a matter of experience that great proclamations and definitions of human rights emerged from revolutionary situations. Great statements on human rights often followed a time of upheaval where people reappraised their positions, their interests, their rights which they had acquired with great sacrifice. Now there is a danger with these kind of statements and proclamations, that they become in the course of time rigid and that they no longer function as dynamic tools in society. Human rights are often considered by many as legalistic and perhaps self-defensive principles. They may be narrowed down to legal procedures, and on the international level these procedures tend to favour the rights and the interests of governments rather than the rights of the individuals or of the peoples.

You spoke today about the ambiguities and the ambivalences of NOVIB on the subject of human rights. Of course the United Nations is even more ambivalent, because the Charter was proclaimed in the name of the peoples of the United Nations. But in practice, the peoples have little to say, unless you have the fiction that the governments really represent the interest of the peoples.

The western concept of human rights is certainly more defensive or more protective than the concept of many developing countries.

When, for instance, in 1950 the European Convention on Human Rights was drafted, this was intended particularly to defend the Western democratic values against threats from both outside and inside. However, in the United Nations, we learned that human rights have also different dimensions, not only in the sense of defending and protecting rights. As was stated

this morning, human rights have often been functioning as the rights of the privileged, both at world level and also in national and local societies. But the dispossessed, the under-privileged – and that is the majority of the world – regard human rights as instruments of liberation and emancipation.

This means a *much more dynamic view*: the rights of the have-nots, who still have to acquire rights. They see human rights as instruments of change. And this is the human rights struggle between those who see human rights as instruments to preserve and to keep the situation as it is, and those who see human rights as instruments of change and as aspirations for a more just and humane society.

## A Structural Approach

It is against this background of the rights of the have-nots, the rights to liberation and emancipation, that the United Nations in the late sixties, started a new approach, namely to relate human rights to the larger problems in the world, to relate human rights to development, to illiteracy, to poverty, to aggression, to racial discrimination, to large patterns affecting the masses in the world. A World Conference was held in 1968 in Teheran (probably to bolster up the image of the rulers: the shah and the shah's sister invited the United Nations to come). That Conference, in the framework of the International Human Rights Year, adopted what became known as the Proclamation of Teheran, which is still, and that is the irony, a pretty good document, relating human rights to these large world issues and not only considering human rights in the narrow sense of procedures and of individual rights, as important as they may be.

In the course of years, and this is the contradiction and the irony to which I just referred, countries like Iran and Argentina

were in the forefront in pressing for a new approach of human rights, in itself a valid approach, and what could be called the structural approach to human rights, placing them in the political, economic and social context of countries and societies, linking them to peace and development, linking them also to the establishment of a new international economic order.

Some of these countries, which at home were repressing large sectors of their population and making a mockery of political freedoms, pressed for what later became a very significant resolution (namely General Assembly resolution 32/130 of 1977). This clearly emphasized that human rights should be interpreted in the context of the structures of society, and underdevelopment, poverty, aggression, imperialism, foreign domination, colonialism, neo-colonialism, have a big impact on the enjoyment of human rights in various parts of the world.

For instance, this country, Holland, lived 5 years under German occupation which largely affected the enjoyment of many rights of the whole Dutch population. Similarly, colonialism and many other forms of foreign domination have an impact on human rights. We cannot ignore this.

Now, it is also in that line of thinking that we have discovered that violations of human rights, as they occur, are often symptoms of deeper causes of injustice. And as we have said in one of our policy documents of the United Nations (Medium Term Plan 1980-1983), it is therefore necessary to work for just structures of society and for the elimination of the root causes of violations of human rights. Bearing in mind that unjust structures create conditions under which human rights are denied, it is important that such adverse phenomena be identified and analysed in order to develop and apply remedial measures.

The other day, I had the pleasure of meeting again the new Nobel Peace Prize

winner, Adolpho Perez Esquivel from Argentina. In various presentations he was making in the United States, he also stressed that certain structural factors, related to national security, militarization of society, the sales of arms, activities of transnational cooperations, tend to reinforce and perpetuate inequality and injustice. He also said that there is a link between a child dying of starvation in the arms of his or her mother and a person dying at the same time under torture.

## The Right to Development

It is also in this line of thinking of the so-called structural approach to human rights, that the notion of the right to development emerged. Some people call this new type of rights, such as the right to development, the right to peace, the right to a healthy environment, or the right to the common heritage of mankind, the third generation of human rights. The first being civil and political rights, the second generation economic, social and cultural rights and these collective rights which I just mentioned the third generation of human rights. These new rights have also been called solidarity rights.

The right to development has also been related to the establishment of a new international economic order. And in this famous resolution of 1977 in the framing of which, as I said, countries like Iran, Cuba, Argentina and others played an important role, it is stated that "the realization of the new international economic order is an essential element for the effective promotion of human rights and fundamental freedoms and should be accorded priority". It is also said that "the right to development is a human right and that equality of opportunity is as much a prerogative of nations as of individuals within nations".

This stress on the new international economic order as an essential element for the enjoyment of human rights, in the world at large, is very well taken. In its basic essence the new international economic order would entail that the rich countries, the industrialized countries, would have the political will and be prepared to share their economic power with the weak countries. That is, I think, in a very simple phrase a basic tenet of the new international economic order.

### **New International Economic Order: A Prerequisite?**

We see now, that rich industrialized countries are propagating human rights in the world at large. But they are not prepared to share their economic power.

They are not prepared to work for fundamental changes bearing in mind the profits and the advantages they draw from the economic relations in the world. It is perhaps for many of our western countries easy to clean up their own garden and to establish a relatively high degree of enjoyment of human rights in their own territories, while at the same time profiting from violations of human rights occurring elsewhere, or promoting systems of injustice, making profits from sales of arms or from exploitative activities of transnational corporations, thus becoming an accomplice to violations of human rights elsewhere.

This is somewhat the hypocritical position in which many of these countries find themselves. And so when the majority in the United Nations demand the implementation of a new international economic order and the sharing of powers, and the response from the rich countries is largely negative, the stand of these rich countries on human rights in the world at large loses a great deal of credibility.

However, in the United Nations, there are many ambiguities. The non-aligned countries, such as Argentina, are now in 1980 moving new texts in which they emphasize the necessity of establishing the new international economic order to ensure the promotion and full enjoyment of human rights and fundamental freedoms for all.

This is now formulated almost as a precondition, so that the new international economic order would be a prerequisite for the enjoyment of human rights in the world. This could mean that, as long as the new international economic order is not established, one may continue violating human rights without being declared guilty of this, because there is not yet a new international economic order. Here, we identify a dangerous trend in the United Nations, in as much as it legitimizes a pretext for continuing to violate human rights.

### **What Kind of Development?**

If we speak about the right to development, what, in fact, is development? This is one of the most fundamental questions. What is development and development for whom? Who are the subjects of the right to development?

These questions were already touched upon in our discussions today. The NOVIB is trying to devise for the coming decade new policies, also on human rights. In the United Nations we are launching the third development decade. The first and second development decades were not much of a success, although in the strategies for the first two development decades some very pertinent things were said about development and human rights. Perhaps it is somewhat tragic that in the strategy for the third development decade not even a reference is made to human rights.

In a review and appraisal report in connection with the first development decade, it was said that one of the greatest dangers in development policy lies in the tendency to give an overriding and disproportionate emphasis to the more material aspects of growth. It was stated that the end may be forgotten in preoccupation with the means, and that human rights may be submerged and human beings seen only as instruments of production, rather than as free entities for whose welfare and cultural advance the increased production is intended.

In the second development strategy, it was said in the same line of thinking, that the ultimate objective of development must be to bring about sustained improvement in the wellbeing of the individual and bestow benefits on all members of society.

If undue privileges, extremes of wealth and social injustices persist, then development fails in its essential purpose.

And as Mr. Theunis said this afternoon, it is certainly not welcome if countries imitate the pattern of development of the so-called developed countries and developed societies. These societies are often characterized by patterns of alienation of many people, economic profit, over-consumption, non-participation in decision making, and environmentally unsound policies.

## Many Forgotten Peoples

The other question is who are the beneficiaries of the right to development. Well, of course, first of all, everybody, every individual, and his or her right includes the realization of the entire range of rights which are spelled out in the international instruments of the United Nations. And these individuals, these people should not be the object of development, but the subject of it. But the right to development has also certain collective components, collec-

tive dimensions, encompassing not only the rights of individuals, but also the rights, for instance, of minorities, in order to preserve their own characteristics, their cultural values.

We have been learning, particularly in recent years, that the right of development pertains also to indigenous populations in connection with their right to land, their cultural heritage, the preservation of their own identity. Mr. Eide, a Norwegian social scientist and human rights activist, rightly observed in a paper that he presented to a United Nations seminar that "the discussion of the rights of indigenous people have brought home to the development debate a new dimension. It is not simply a question of avoiding discrimination, it is a requirement to accept their own ethnic identity and culture and thereby, in fact, to accept their conception of development".

So it was correctly stated that development is not a uniform pattern, but a recognition of the characteristics, the heritage, the cultural background of various different groups in the world, and in particular indigenous populations, who perhaps more than anybody else have been the victims of profit making, of discrimination, of expansion, of exploitation by all kinds of selfish and self-serving interests.

Speaking about indigenous peoples, when we visited Chile in 1978 at a United Nations fact-finding mission, it struck me how little we knew of the Mapuches.

We knew a great deal of the suffering of the socialists or the communists, because they have their friends in societies here in Europe; they have at least, in spite of all repression, certain means of communications. People knew about them, but very little was known about the suffering of the indigenous peoples, who had no means of contact, who had no friends abroad. The Mapuches told us about the army coming in their villages and communities, killing at

random dozens or hundreds of people. We knew very little about them from the reports which we had so far received. This is an example that there are many forgotten peoples, who are voiceless and who have few means of communication.

## Violation of Human Rights

A basic problem is to what extent an inconsistency may exist between the quest for development and the promotion and protection of human rights.

We have been addressing ourselves to this problem in a study, which we prepared some two years ago on the international dimensions of the right to development<sup>1</sup>. First of all we raised the question: should one category of human rights be accorded priority over another category of rights?

In general terms the answer is clear. The preamble to the international covenants on human rights states: "that in accordance with the Universal Declaration of Human Rights the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights".

In other words, these various categories of rights, whether you call them the first or second generation of rights, are equally important. In the Proclamation of Teheran and in other important resolutions such as General Assembly resolution 32/130, the concept of the indivisibility and interdependence of all human rights was reaffirmed.

I would like to make it clear that the level of economic development of a country can never justify gross violations of human rights. This stems also from the re-

mark I made in connection with the realization of the new international economic order. The realization of that new international economic order is very important and essential, but the fact that it has not yet been realized can never justify acts of torture, arbitrary arrests, killings and assassinations.

The Director of the United Nations Division of Human Rights declared in his opening statement to the Commission on Human Rights in 1979, "it is a fact that the realization of human rights is strongly impeded by the unjust international economic order, but deliberate gross violations of human rights can rarely be related to such external factors alone. Internal and external causes need to be seen in their proper perspectives, and while structural factors have a great bearing upon the full realization of human rights, they should not be used as excuses for perpetuating violations of human rights. Violations of human rights affect human beings the same way, irrespective of the level of development of societies to which they belong or of their economic and social systems. To a person who is tortured, arbitrarily imprisoned or executed, it does not matter whether he or she lives in a developed or developing country, or under one political or economic system or another. For him or for her the results are the same."

## Ends and Means

In a study prepared by the International Labour Organization the relationship between the right to freedom of association and the quest for economic development was also considered and the attitude of the International Labour Organization was clearly stated as follows: "There can be no

1) UN document E/CN.4/1334.



justification for sacrificing either economic development or freedom of association. Sustained economic development has always been considered an important factor of social progress, but it is not an end in itself. Rather it is a means towards achievement of social and humanitarian aims, which should not be lost out of sight."

In our study on the international dimension of the right to development it is also said, in the same line of thinking that "the relationship between the right to development and other human rights, is a fundamental one. The key to its understanding lies in not losing sight of the end through a preoccupation with the means. A development strategy based on political repression and the denial of human rights could perhaps appear to succeed in terms of specific overall economic objectives, but full and genuine development would never be achieved."

How, is the right to development, a viable and workable concept, or even a tool? Can we use this notion of the right to development? I do not care so much about the term right to development, but I would like to use this right to development debate as a vehicle, as a means to introduce human rights in the development process.

Up till now, in the United Nations and in many national administrations, the human rights dimension has been lacking in projects and programmes for development. One of the essential things is to get human rights integrated in development programmes and projects. In the United Nations Development Programme, in the International Labour Organization, in bilateral plans and programmes, in the I.M.F. or the World Bank. Some people look at human rights as a new religion. We try also in the United Nations to be sort of missionaries, to preach human rights to the rest of the U.N. system. In that we are not always successful, in as much as we are being told by

others not to bother them with human rights, because they do not want to get into controversies.

Last week the Economic Committee of the General Assembly was discussing a resolution on assistance to Equatorial Guinea. The only reference to human rights in that resolution was deleted because they said in the Committee that this is not their competence. Human rights should be handled, according to them, by the Social Committee or — to put it bluntly — by the human rights idiots.

There is a marginalizing tendency in the United Nations and also in national administrations. I recently talked at the State Department in Washington to some of the human rights people, and their future looks very grim at the present time. I told them that in the United Nations they try to isolate human rights to make human rights a separate category, or in other words to marginalize human rights. They said in the State Department, that this sounded very familiar to them, even to those who worked in the Carter administration.

I am not so familiar with the work of NOVIB, but I think what would be important in projects is to have a sort of human rights impact statement, whenever you start a project, to see what impact it has on human rights, what would be the side-effects on human rights.

## Human Rights Impact of Projects

Just to give you one example, how difficult these things are.

We were dealing some time ago with serious complaints concerning the fate of Indian tribes in Paraguay, and we discussed these matters with somebody who was carrying responsibility there. He presented to us a development project designed to benefit the Indians, who happened to be fisher-

men and hunters. The authorities presented to us a settlement plan and asked the United Nations to finance that. I consulted one of my colleagues, who knew more about indigenous peoples than I do and he said: "Be very cautious, for two reasons. They are fishermen and hunters, nomads. Now, can we as United Nations cooperate in a plan where they are forced to settle as farmers? This would change their traditional way of life. This may be forced upon them against their will. Can we cooperate in that? To what extent have they been consulted?" So that already makes you hesitate. Secondly, my friend also suggested that this settlement might be used as a buffer zone, because it was to be in an area close to the Brazilian border, as a buffer zone against Brazilian expansion. So perhaps this whole plan might serve some strategic military purpose. Another reason to

be careful.

These are the types of questions which may arise in concrete situations. On the surface the settlement plan looked attractive, but what are the human rights implications? What notion do you have of human rights, in such a situation?

We, as Europeans here, are we fully aware of these problems? You, in your work, have probably been facing these types of problems. But by way of illustration, I just mentioned how difficult these issues are. In as much as we now have in many projects an environmental impact statement, we also have to take into account what the human rights impact may be.

A lot of practical work but also a great deal of conscientization and education has to be done, at all levels, certainly at the level of grassroots, and last but not least, also at the level of the United Nations.

# ***BASIC TEXTS***

## **ILO Convention 141**

### **CONVENTION CONCERNING ORGANISATIONS OF RURAL WORKERS AND THEIR ROLE IN ECONOMIC AND SOCIAL DEVELOPMENT.**

- The General Conference of the International Labour Organisation,  
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixtieth Session on 4 June 1975, and  
Recognising that the importance of rural workers in the world makes it urgent to associate them with economic and social development action if their conditions of work and life are to be permanently and effectively improved, and  
Noting that in many countries of the world and particularly in developing countries there is massive under-utilisation of land and labour and that this makes it imperative for rural workers to be given every encouragement to develop free and viable organisations capable of protecting and furthering the interests of their members and ensuring their effective contribution to economic and social development, and  
Considering that such organisations can and should contribute to the alleviation of the persistent scarcity of food products in various regions of the world, and  
Recognising that land reform is in many developing countries an essential factor in the improvement of the conditions of work and life of rural workers and that organisations of such workers should accordingly co-operate and participate actively in the implementation of such reform, and  
Recalling the terms of existing international labour Conventions and Recommendations—in particular the Right of Association (Agriculture) Convention, 1921, the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949—which affirm the right of all workers, including rural workers, to establish free and independent organisations, and the provisions of numerous international labour Conventions and Recommendations applicable to rural workers which call for the participation, inter alia, of workers' organisations in their implementation, and  
Noting the joint concern of the United Nations and the specialised agencies, in particular the International Labour Organisation and the Food and Agriculture Organisation of the United Nations, with land reform and rural development, and  
Noting that the following standards have been framed in co-operation with the Food and Agriculture Organisation of the United Nations and that, with a

view to avoiding duplication, there will be continuing co-operation with that Organisation and with the United Nations in promoting and securing the application of these standards, and

Having decided upon the adoption of certain proposals with regard to organisations of rural workers and their role in economic and social development, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this twenty-third day of June of the year one thousand nine hundred and seventy-five the following Convention, which may be cited as the Rural Workers' Organisations Convention, 1975:

#### *Article 1*

This Convention applies to all types of organisations of rural workers, including organisations not restricted to but representative of rural workers.

#### *Article 2*

1. For the purposes of this Convention, the term "rural workers" means any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of paragraph 2 of this Article, as a self-employed person such as a tenant, sharecropper or small owner-occupier.

2. This Convention applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not—

- (a) permanently employ workers; or
- (b) employ a substantial number of seasonal workers; or
- (c) have any land cultivated by sharecroppers or tenants.

#### *Article 3*

1. All categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

2. The principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression.

3. The acquisition of legal personality by organisations of rural workers shall not be made subject to conditions of such a character as to restrict the application of the provisions of the preceding paragraphs of this Article.

4. In exercising the rights provided for in this Article rural workers and their

respective organisations, like other persons or organised collectivities, shall respect the law of the land.

5. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Article.

#### *Article 4*

It shall be an objective of national policy concerning rural development to facilitate the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring the participation of rural workers, without discrimination as defined in the Discrimination (Employment and Occupation) Convention, 1958, in economic and social development and in the benefits resulting therefrom.

#### *Article 5*

1. In order to enable organisations of rural workers to play their role in economic and social development, each Member which ratifies this Convention shall adopt and carry out a policy of active encouragement to these organisations, particularly with a view to eliminating obstacles to their establishment, their growth and the pursuit of their lawful activities, as well as such legislative and administrative discrimination against rural workers' organisations and their members as may exist.

2. Each Member which ratifies this Convention shall ensure that national laws or regulations do not, given the special circumstances of the rural sector, inhibit the establishment and growth of rural workers' organisations.

#### *Article 6*

Steps shall be taken to promote the widest possible understanding of the need to further the development of rural workers' organisations and of the contribution they can make to improving employment opportunities and general conditions of work and life in rural areas as well as to increasing the national income and achieving a better distribution thereof.

#### *Article 7*

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

#### *Article 8*

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

#### Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

#### Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

#### Article 11

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

#### Article 12

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

#### Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

*Article 14*

The English and French versions of the text of this Convention are equally authoritative.

## **ILO Recommendation 149**

### **RECOMMENDATION CONCERNING ORGANISATIONS OF RURAL WORKERS AND THEIR ROLE IN ECONOMIC AND SOCIAL DEVELOPMENT.**

- The General Conference of the International Labour Organisation,  
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixtieth Session on 4 June 1975, and  
Recognising that the importance of rural workers in the world makes it urgent to associate them with economic and social development action if their conditions of work and life are to be permanently and effectively improved, and  
Noting that in many countries of the world and particularly in developing countries there is massive under-utilisation of land and labour and that this makes it imperative for rural workers to be given every encouragement to develop free and viable organisations capable of protecting and furthering the interests of their members and ensuring their effective contribution to economic and social development, and  
Considering that such organisations can and should contribute to the alleviation of the persistent scarcity of food products in various regions of the world, and  
Recognising that land reform is in many developing countries an essential factor in the improvement of the conditions of work and life of rural workers and that organisations of such workers should accordingly co-operate and participate actively in the implementation of such reform, and  
Recalling the terms of existing international labour Conventions and Recommendations—in particular the Right of Association (Agriculture) Convention, 1921, the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949—which affirm the right of all workers, including rural workers, to establish free and independent organisations, and the provisions of numerous international labour Conventions and Recommendations applicable to rural workers which call for the participation, inter alia, of workers' organisations in their implementation, and  
Noting the joint concern of the United Nations and the specialised agencies, in particular the International Labour Organisation and the Food and Agriculture Organisation of the United Nations, with land reform and rural development, and  
Noting that the following standards have been framed in co-operation with the Food and Agriculture Organisation of the United Nations and that, with a view to avoiding duplication, there will be continuing co-operation with that Organisation and with the United Nations in promoting and securing the application of these standards, and



Having decided upon the adoption of certain proposals with regard to organisations of rural workers and their role in economic and social development, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation, adopts this twenty-third day of June of the year one thousand nine hundred and seventy-five the following Recommendation, which may be cited as the Rural Workers' Organisations Recommendation, 1975:

## I. GENERAL PROVISIONS

1. (1) This Recommendation applies to all types of organisations of rural workers, including organisations not restricted to but representative of rural workers.

(2) The Co-operatives (Developing Countries) Recommendation, 1966, further remains applicable to the organisations of rural workers falling within its scope.

2. (1) For the purposes of this Recommendation, the term "rural workers" means any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of subparagraph (2) of this Paragraph, as a self-employed person such as a tenant, sharecropper or small owner-occupier.

(2) This Recommendation applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not—

(a) permanently employ workers; or

(b) employ a substantial number of seasonal workers; or

(c) have any land cultivated by sharecroppers or tenants.

3. All categories of rural workers, whether they are wage earners or self-employed, should have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

## II. ROLE OF ORGANISATIONS OF RURAL WORKERS

4. It should be an objective of national policy concerning rural development to facilitate the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring the participation of rural workers, without discrimination as defined in the Discrimination (Employment and Occupation) Convention, 1958, in economic and social development and in the benefits resulting therefrom.

5. Such organisations should, as appropriate, be able to—

- (a) represent, further and defend the interests of rural workers, for instance by undertaking negotiations and consultations at all levels on behalf of such workers collectively;
- (b) represent rural workers in connection with the formulation, implementation and evaluation of programmes of rural development and at all stages and levels of national planning;
- (c) involve the various categories of rural workers, according to the interests of each, actively and from the outset in the implementation of—
  - (i) programmes of agricultural development, including the improvement of techniques of production, storing, processing, transport and marketing;
  - (ii) programmes of agrarian reform, land settlement and land development;
  - (iii) programmes concerning public works, rural industries and rural crafts;
  - (iv) rural development programmes, including those implemented with the collaboration of the United Nations, the International Labour Organisation and other specialised agencies;
  - (v) the information and education programmes and other activities referred to in Paragraph 15 of this Recommendation;
- (d) promote and obtain access of rural workers to services such as credit, supply, marketing and transport as well as to technological services;
- (e) play an active part in the improvement of general and vocational education and training in rural areas as well as in training for community development, training for co-operative and other activities of rural workers' organisations and training for the management thereof;
- (f) contribute to the improvement of the conditions of work and life of rural workers, including occupational safety and health;
- (g) promote the extension of social security and basic social services in such fields as housing, health and recreation.

### III. MEANS OF ENCOURAGING THE GROWTH OF ORGANISATIONS OF RURAL WORKERS

6. In order to enable organisations of rural workers to play their role in economic and social development, member States should adopt and carry out a policy of active encouragement to these organisations, particularly with a view to—

- (a) eliminating obstacles to their establishment, their growth and the pursuit of their lawful activities, as well as such legislative and administrative discrimination against rural workers' organisations and their members as may exist;
- (b) extending to rural workers' organisations and their members such facilities for vocational education and training as are available to other workers' organisations and their members; and
- (c) enabling rural workers' organisations to pursue a policy to ensure that social and economic protection and benefits corresponding to those made available to

industrial workers or, as appropriate, workers engaged in other non-industrial occupations are also extended to their members.

7. (1) The principles of freedom of association should be fully respected; rural workers' organisations should be independent and voluntary in character and should remain free from all interference, coercion or repression.

(2) The acquisition of legal personality by organisations of rural workers should not be made subject to conditions of such a character as to restrict the application of the provisions of Paragraph 3 and subparagraph (1) of this Paragraph.

(3) In exercising the rights which they enjoy in pursuance of Paragraph 3 and of this Paragraph rural workers and their respective organisations, like other persons or organised collectivities, should respect the law of the land.

(4) The law of the land should not be such as to impair, nor should it be so applied as to impair, the guarantees provided for in Paragraph 3 and in this Paragraph.

#### *A. Legislative and Administrative Measures*

8. (1) Member States should ensure that national laws or regulations do not, given the special circumstances of the rural sector, inhibit the establishment and growth of rural workers' organisations.

(2) In particular—

(a) the principles of right of association and of collective bargaining, in conformity especially with the Right of Association (Agriculture) Convention, 1921, the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949, should be made fully effective by the application to the rural sector of general laws or regulations on the subject, or by the adoption of special laws or regulations, full account being taken of the needs of all categories of rural workers;

(b) relevant laws and regulations should be fully adapted to the special needs of rural areas; for instance—

(i) requirements regarding minimum membership, minimum levels of education and minimum funds should not be permitted to impede the development of organisations in rural areas where the population is scattered, ill educated and poor;

(ii) problems which may arise concerning the access of organisations of rural workers to their members should be dealt with in a manner respecting the rights of all concerned and in accordance with the terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Workers' Representatives Convention, 1971;

(iii) there should be effective protection of the rural workers concerned against dismissal and against eviction which are based on their status or activities as leaders or members of rural workers' organisations.

9. There should be adequate machinery, whether in the form of labour inspection

or of special services, or in some other form, to ensure the effective implementation of laws and regulations concerning rural workers' organisations and their membership.

10. (1) Where rural workers find it difficult, under existing conditions, to take the initiative in establishing and operating their own organisations, existing organisations should be encouraged to give them, at their request, appropriate guidance and assistance corresponding to their interests.

(2) Where necessary, such assistance could on request be supplemented by advisory services staffed by persons qualified to give legal and technical advice and to run educational courses.

11. Appropriate measures should be taken to ensure that there is effective consultation and dialogue with rural workers' organisations on all matters relating to conditions of work and life in rural areas.

12. (1) In connection with the formulation and, as appropriate, the application of economic and social plans and programmes and any other general measures concerning the economic, social or cultural development of rural areas, rural workers' organisations should be associated with planning procedures and institutions, such as statutory boards and committees, development agencies and economic and social councils.

(2) In particular, appropriate measures should be taken to make possible the effective participation of such organisations in the formulation, implementation and evaluation of agrarian reform programmes.

13. Member States should encourage the establishment of procedures and institutions which foster contacts between rural workers' organisations, employers and their organisations and the competent authorities.

#### *B. Public Information*

14. Steps should be taken, particularly by the competent authority, to promote—

(a) the understanding of those directly concerned, such as central, local and other authorities, rural employers and landlords, of the contribution which can be made by rural workers' organisations to the increase and better distribution of national income, to the increase of productive and remunerative employment opportunities in the rural sector, to the raising of the general level of education and training of the various categories of rural workers and to the improvement of the general conditions of work and life in rural areas;

(b) the understanding of the general public, including, in particular, that in the non-rural sectors of the economy, of the importance of maintaining a proper balance between the development of rural and urban areas, and of the desirability, as a contribution towards ensuring that balance, of furthering the development of rural workers' organisations.

15. These steps might include—

- (a) mass information and education campaigns, especially with a view to giving rural workers full and practical information on their rights, so that they may exercise them as necessary;
- (b) radio, television and cinema programmes, and periodic articles in the local and national press, describing the conditions of life and work in rural areas and explaining the aims of rural workers' organisations and the results obtained by their activities;
- (c) the organisation, locally, of seminars and meetings with the participation of representatives of the various categories of rural workers, of employers and landlords, of other sectors of the population and of local authorities;
- (d) the organisation of visits to rural areas of journalists, representatives of employers and workers in industry or commerce, students of universities and schools accompanied by their teachers, and other representatives of the various sectors of the population;
- (e) the preparation of suitable curricula for the various types and levels of schools appropriately reflecting the problems of agricultural production and the life of rural workers.

### *C. Education and Training*

16. In order to ensure a sound growth of rural workers' organisations and the rapid assumption of their full role in economic and social development, steps should be taken, by the competent authority among others, to—

- (a) impart to the leaders and members of rural workers' organisations knowledge of—
  - (i) national laws and regulations and international standards on questions of direct concern to the activity of the organisations, in particular the right of association;
  - (ii) the basic principles of the establishment and operation of organisations of rural workers;
  - (iii) questions regarding rural development as part of the economic and social development of the country, including agricultural and handicraft production, storing, processing, transport, marketing and trade;
  - (iv) principles and techniques of national planning at different levels;
  - (v) training manuals and programmes which are published or established by the United Nations, the International Labour Organisation or other specialised agencies and which are designed for the education and training of rural workers;
- (b) improve and foster the education of rural workers in general, technical, economic and social fields, so as to make them better able both to develop their organisations and understand their rights and to participate actively in rural development; particular attention should be paid to the training of wholly or partly illiterate workers through literacy programmes linked with the practical expansion of their activities;
- (c) promote programmes directed to the role which women can and should play in the rural community, integrated in general programmes of education and

- training to which women and men should have equal opportunities of access;
- (d) provide training designed particularly for educators of rural workers, to enable them, for example, to help in the development of co-operative and other appropriate forms of servicing activities which would enable organisations to respond directly to membership needs while fostering their independence through economic self-reliance;
  - (e) give support to programmes for the promotion of rural youth in general.

17. (1) As an effective means of providing the training and education referred to in Paragraph 16, programmes of workers' education or adult education, specially adapted to national and local conditions and to the social, economic and cultural needs of the various categories of rural workers, including the special needs of women and young persons, should be formulated and applied.

(2) In view of their special knowledge and experience in these fields, trade union movements and existing organisations which represent rural workers might be closely associated with the formulation and carrying out of such programmes.

#### *D. Financial and Material Assistance*

18. (1) Where, particularly in the initial stages of development, rural workers' organisations consider that they need financial or material assistance, for instance to help them in carrying out programmes of education and training, and where they seek and obtain such assistance, they should receive it in a manner which fully respects their independence and interests and those of their members. Such assistance should be supplementary to the initiative and efforts of rural workers in financing their own organisations.

(2) The foregoing principles apply in all cases of financial and material assistance, including those in which it is the policy of a member State to render such assistance itself.

# Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

*The General Assembly,*

*Considering* that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

*Considering* that the Universal Declaration of Human Rights<sup>1</sup> and the International Covenants on Human Rights<sup>2</sup> proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief,

*Considering* that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

*Considering* that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

*Considering* that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

*Convinced* that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination,

*Noting with satisfaction* the adoption of several, and the coming into force of some, conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various forms of discrimination,

*Concerned* by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

*Resolved* to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief,

*Proclaims* this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

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1) General Assembly resolution 217 A (III).

2) General Assembly resolution 2200 A (XXI), annex.

### Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

### Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

### Article 3

Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

### Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

### Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

5. Practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.



#### Article 6

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by accession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

#### Article 7

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

#### Article 8

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

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*Report of a seminar in Kuwait, Geneva, 1982, 95 pp.  
Available in english (ISBN 92 9037 014 9) and french (ISBN 92 9037 015 7),  
Swiss Francs 10, plus postage.*

The purpose of this seminar was to provide a forum for distinguished moslem lawyers and scholars from Indonesia to Senegal to discuss subjects of critical importance to them. It was organised jointly with the University of Kuwait and the Union of Arab Lawyers. The Conclusions and Recommendations cover such subjects as economic rights, the right to work, trade union rights, education, rights of minorities, freedom of opinion, thought, expression and assembly, legal protection of human rights and women's rights and status. Also included are the opening addresses, a key-note speech by Mr. A.K. Brohi and a summary of the working papers.

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### Development, Human Rights and the Rule of Law

*Report of a Conference held in The Hague, 27 April-1 May 1981, convened by the ICJ.  
Published by Pergamon Press, Oxford (ISBN 008 028951 7), 244 pp.  
Available in english. Swiss Francs 15 or US\$ 7.50.*

Increasing awareness that development policies which ignore the need for greater social justice will ultimately fail was the key-note of the discussions at this conference. It brought together economists, political scientists, and other development experts together with members of the International Commission of Jurists and its national sections. Included in the report are the opening address by Shridath Ramphal, Secretary-General of the Commonwealth and member of the Brandt Commission, a basic working paper by Philip Alston reviewing the whole field, shorter working papers by leading development experts, and a summary of the discussions and conclusions, which focussed on the emerging concept of the right to development.

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### Ethnic Conflict and Violence in Sri Lanka

*Report of a mission to Sri Lanka in July-August 1981 by Professor Virginia A. Leary  
of the State University of New York at Buffalo.  
Geneva, December 1981, 88 pp. (ISBN 92 9037 011 9).  
Available in english, Swiss Francs 7 or US\$ 3.50, plus postage.*

After a careful survey of the background, causes and nature of ethnic conflict and violence and an examination of the legal and administrative measures adopted by the government, Prof. Leary formulates her findings and recommendations. Among her conclusions are that police behaviour has been discriminatory towards the minority Tamils and that the recently promulgated Terrorist Act violates Sri Lanka's international obligations.

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