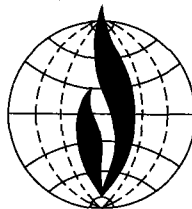


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# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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# HUMAN RIGHTS IN THE WORLD

## Bahrain

### Forced Exile in the Legal System

#### Introduction

Various international, regional and national NGOs maintain that the authorities in Bahrain systematically practice forced exile.<sup>1</sup> One report states that around 600 Bahraini families are affected by this practice.<sup>2</sup> Another report claims that during 1993 alone, 128 Bahraini nationals were forcibly expelled from Bahrain.<sup>3</sup> The reports reveal two patterns of forced exile. After examining the patterns of forced exile, this report will give a brief introduction to the legal system in Bahrain. Forced exile will then be examined under Bahraini domestic law, with an emphasis on laws concerning nationality and passports. The report will also examine Bahrain's position under international law.

#### I The Patterns

There are two patterns of forced exile in Bahrain.

1 The first pattern, reportedly, concerns some Bahraini citizens who were

imprisoned for political crimes and who, upon release, were asked to sign documents forbidding them from having any future political activity. If they refused, they were immediately expelled from Bahrain. It has been reported that some of these citizens were Shiite and of Persian origin.

2 The second pattern apparently concerns a number of Bahraini nationals who left Bahrain following the dissolution of the Bahraini Parliament in 1975, or following an alleged *coup d'Etat* in the early 1980s.

When Bahraini citizens attempted to return to Bahrain in the last few years, they were systematically detained at the entry ports. After interrogation, They were given passports valid for a period not exceeding one year with an authorization to enter a limited number of countries, normally five (Yemen, Iraq, Syria, Jordan and Lebanon). They were then forced to leave Bahrain for another State chosen by the Bahraini authorities.

1 The International Commission of Jurists (ICJ) sent an inquiry to His Highness Al-Sheikh Issa Bin Salman Al Khalifa, the Emir of Bahrain, concerning a Bahraini citizen, Mr. Abdul Jalil Al Nu'aيمي, who was, apparently, expelled from Bahrain on 17 April 1994. To date, the ICJ has not received an answer.

2 *Fédération Internationale des Ligues des Droits de l'Homme*, "Des menaces pèsent sur un militant des droits de l'homme," 19 avril 1994.

3 *The Committee for the Defence of Human Right in Bahrain*, "Testimony on the Treatment of Repatriating Bahraini Citizens by the Security Authorities," Annex II, "List of Deportees During 1993."

## II Legal Background

In Bahrain, the legislative power is vested in the Emir and the National Assembly (Article 32/b), and laws cannot be promulgated unless approved by the National Assembly and ratified by the Emir (Article 42). Additionally, the Emir has the right to propose laws, and the power to ratify and promulgate them (Article 35/a).

If events occur that require urgent steps during parliamentary recess, the Emir may issue, on his own initiative, Emiri Acts to deal with these events. The acts shall have the power of law, so long as they are not in violation of the Constitution. They shall be viewed by the National Assembly within 15 days from the date of their promulgation if the Assembly is being held, and in its first meeting if it has been in recess.

The Emiri acts regulating nationality and forced exile were enacted in the absence of the Assembly. According to the Constitution, the Emir has the right to dissolve the National Assembly by an Emiri Act, specifying the reasons for the dissolution; the Assembly shall not be dissolved subsequently for the same reasons. If the Assembly is dissolved, parliamentary elections for a new Assembly shall be held no later than two months after the dissolution. If elections do not take place within this period, the dissolved Assembly retains all its constitutional powers, meets immediately as if the dissolution had not taken place, and conti-

nues its activities until a new Assembly is elected (Article 65 Constitution).

On 26 August 1975, Emiri Act No. 14 was issued dissolving the National Assembly. Subsequently, Emiri Act No. 4 /1975 was issued suspending Article 65 of the Constitution and other articles relevant to the organization of parliamentary life. These two Acts, which are still in force, constitute a violation of Articles 65, 32/a, and 42 of the Constitution. Consequently, the legislation examined in this report - which relates to forced exile and nationality - and which has been promulgated after the issuance of these two Acts is unconstitutional.<sup>4</sup>

## III The Practice of Forced Exile Under Bahraini Law

### a The Constitution

Article 17(c) of the Constitution of Bahrain provides that it is forbidden to expel Bahraini citizens from Bahrain or prevent them from returning to it. This article covers both patterns of forced exile: the refusal of entry of Bahraini nationals in Bahrain, and forced expulsion of political prisoners upon their release.

In Article 20, additionally, the Constitution provides that there can be no crime and no penalty except as defined by law. Thus, if the authorities in Bahrain are using forced exile of citizens as a punishment or as a means of

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4 Since 1974, the following laws have been adopted unconstitutionally by the Emir and the Council of Ministers: The Law of Procession and Gathering of 1973, the Penal Law of 1976 and its amendments of 1982, the Law of The Supreme Civil Court of Appeal (The State Security Court) of 1976 and its amendments of 1982, the Law of Proceedings before the Courts of 1971, The Law of Legal Council of 1980, The Law of Citizenship of 1989, and the Law of Passports of 1975 and its amendments.

pressure against the expelled or his family members, then they are acting in violation of the provisions of the Constitution of Bahrain<sup>5</sup>.

## b Legislation

Article 17(c) of the Constitution, is greatly undermined by Bahraini law governing nationality and passports.

The link between nationality and passports on the one hand, and the right to leave one's country and to return to it on the other hand, is evident. A common requirement is that nationals shall possess a valid passport in order to be able to leave and return to their own country. Apparently, the authorities in Bahrain have been using the argument that Bahraini citizens do not have valid travel documents in order to refuse their entry into Bahrain.<sup>6</sup> In doing so, they base themselves on laws that give them a considerable amount of discretionary power which is open to abuse. To illustrate this, the following is an examination of Bahraini laws concerning nationality and passports.

Nationality and passports in Bahrain are governed by the Nationality Law of 1963 and its amendments; the Passport Law No. 11 of 1975 and its amendments, and Decision No. 15 of 1976 issued by

the Minister of Interior, containing an executive act of the Passport Law of 1975.

Article one of the Passport Law No. 11 of 1975 states that a person who enjoys the Bahraini nationality cannot leave the Bahraini territory or return to it unless he has a passport or an equivalent travel document issued in accordance with the provisions of this Law.

According to the Decision of the Minister of Interior, there are two documents that can replace passports: *laissez passer* and temporary passports. They both contain several constraints on their holders: they are valid only for a one yearly journey, cannot be renewed, and should be withdrawn by the authorities upon entry to the country (Article 30). These documents are *inter alia* issued for:

- wives who are not registered in their husbands' passports, and who do not possess passports of their own (par. 3).
- wives who are registered in their husbands' passports, but whose husbands are abroad or deceased (par. 4).
- any person who does not possess a passport, or who lost his passport, and is in a situation of urgency (par. 5)<sup>7</sup>.

Normal passports are issued for five

5 Article 14(7) of the International Covenant on the Civil and Political Rights reads: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

6 *Amnesty International*, "Banned from Bahrain: Forcible Exile of Bahraini Nationals," December 1993, at 3.

7 Although not strictly relevant to the issue of forced exile, it is interesting to note that the above article is placed within a legal context that severely restricts women's right of movement. According to the Decision of the Minister of Interior, a woman is prohibited from having her own passport or from being registered in the passport of her husband, unless the husband gives his approval (Article 14). Moreover, Article 30 contains by itself a grave restriction on the right of women to movement. Accordingly, even if the wife is registered in her husband's passport, her movement is restricted, if the husband is dead or if he is abroad.

years and are subject to renewal for another five years, and then are no longer valid.<sup>8</sup> Apparently, a citizen would then have to apply for a new passport<sup>9</sup>. The procedure of renewal in itself leaves the authorities with means of control over the citizens<sup>10</sup>. This control is even stronger when it concerns students' passports which are valid for a period not exceeding five years, and shall be renewed yearly (Article 1/b).

Another restriction is that the countries which the citizen can enter shall be listed in the passport at the time of issuance; more countries can be added later at the request of the bearer.<sup>11</sup>

These restrictions are aggravated by Article 15 of the Law of Passports which states that if serious reasons exist, the Minister of Interior can refuse to issue or renew passports, or withdraw them altogether. Although the person concerned enjoys some judicial guarantees,<sup>12</sup> the gravity of this article is evident. The term "serious reasons" is undefined and ambiguous, which leaves the Minister of Interior with discretionary powers.

Article 15 puts forward the legal question of whether refusal to issue or renew passports, or their withdrawal, constitutes *ipso facto* a deprivation of nationality.

In such a case, according to Article

17/1 of the Constitution, nationality is determined by law, and no native born citizen shall be deprived of his nationality unless he commits treason, or acquires double nationality, subject to the conditions set by law. Moreover, Article 100 of the Law of Nationality of 1963, as modified in 1989, provides that nationality may be withdrawn from a Bahraini national by an Emiri Decision in the following situations:

- if he joined the military services of a foreign country, and remained therein despite the order of his country to leave;
- if he assisted, or joined the services of an enemy country;
- if he caused harm to the security of the State.

It is not clear whether these three situations constitute "serious reasons." If so, the lack of clarity of the provisions allows the Minister to misuse his powers. Also, if "serious reasons" comprise additional reasons to the aforementioned, then it is arguable that Article 15 unconstitutionally enlarges the capacity of the State to deprive citizens of their right to nationality.

As seen above, the authorities of Bahrain enjoy an unacceptable level of discretionary power with respect to the

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8 Article 11 of the law of passports; Article 20 of the Decision; and Article 1 of the Act of Modification No. 3 of 1977.

9 Article 10 of the Decision.

10 According to Article 12, the Department of Immigration and Passports would then have to check the nationality of the person, and the date and place of birth before issuing a new passport.

11 Article 14 of the Law of Passports.

12 The person subjected to such a measure has a right to lodge a complaint to the Higher Civil Court within one week of the decision, and the Court shall consider the complaint urgently. Moreover, the person has a right to appeal against the judgment of the Higher Civil Court before the Higher Civil Court of Appeal within one week of the judgment.

issuance of travel documents. This power is exercised throughout the period of validity of the passports and during the renewal procedure. The authorities are, apparently, misusing these powers to facilitate the expulsion of Bahraini citizens, and in doing so are violating the Constitution

#### IV Forced Exile Under International Law

The right to leave and to return to one's own country is provided for in international law.<sup>13</sup> Bahrain's obligation to respect this right is twofold, customary and conventional. As to the customary obligation, it is well established that "the concordance of State practice and common *opinio juris* created a legal obligation according to customary international law."<sup>14</sup> The ICJ considers the Universal Declaration of Human Rights to be a part of this body of law. It states that "no one shall be subjected to arbitrary arrest, detention or exile;" and that "everyone has the right to leave any country, including his own, and to return to his country."<sup>15</sup> Additionally, Article 15 of the Declaration states that "everyone has a right to a nationality," and "no one shall be arbitrarily deprived of his nationality nor denied of his right to change nationality."

Moreover, and although Bahrain has not ratified the International Covenant on Civil and Political Rights, Article 12 (2,3) of the Covenant helps to further

define this right and the customary practice of States. It states that "everyone shall be free to leave any country, including his own," and that "the above-mentioned [right] shall not be subject to any restrictions except these which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with other rights recognized in the present Covenant." As already mentioned, the right to leave one's country and the right to acquire a travelling document are inseparable. Thus, refusal to grant passports to citizens should be seen in light of the conditions contained in this Article.

As to its conventional obligations under international law, Bahrain has ratified the Convention on the Elimination of Racial Discrimination and is bound by the provisions contained therein. According to Article 5 of this Convention, States Parties "undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:..., (i) The right to freedom of movement and residence within the border of the State; (ii) The right to leave any country, including one's own, and to return to one's country."

It is alleged that some of the Bahraini nationals who were expelled from

13 O. Schachter, *International Law in Theory and Practice*, 1991, Nijhoff, at 339.

14 Document E/CN.4/1987/10, "Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or consideration arising therefrom," 10 July 1987, at 11.

15 Articles 9 and 13(2), respectively.

Bahrain, and suspected of being political opponents, are Shiite and of Persian origin, or suspected of having links with Iran. If a direct link between their origin and their expulsion is established, then Bahrain is acting in violation of its obligations under the Articles mentioned above.

## V Conclusion

Forced exile violates the Constitution

of Bahrain as well as conventional and customary international law. The legal provisions examined in this report have been used by the authorities to facilitate practices of forced expulsion of Bahraini citizens. They reveal that the right to leave and return to one's own country, the right to acquire a nationality, and not to be deprived arbitrarily of a nationality, and the right to possess valid legal documents are not respected.

# Bolivia

## Countering Impunity

In issue 51 of its Review, the ICJ published an article entitled "Bolivia: A Historic Ruling Against Impunity." The article reported and analysed the judgment of the Supreme Court of Bolivia by which the former dictator, General Luis Garcia Meza, and 47 other persons, were sentenced to long terms of imprisonment for crimes they perpetrated during and after the *coup d'Etat* of 17 July 1980 against the constitutional government.

The conclusive sentence rendered in the city of Sucre on 21 April 1993 confirms the illegality of the *coup d'Etat* and of other human rights violations, including numerous assassinations as well as various instances of corruption and embezzlement of public funds. At the time the article went to press, 11 of the accused had been caught and imprisoned; one of them, the former Minister of the Interior, Colonel Luis Arce Gomez, was already detained in a jail in the United States of America where he had been sentenced for drug trafficking. The other accused escaped justice and fled. Two of them were subsequently caught

in Bolivia and subjected to the process of law.

The most notorious of the accused, General Garcia Meza, was arrested on 11 March 1994 in an apartment in Sao Paulo, Brazil, during a nationwide federal police operation against drug traffickers. General Garcia Meza was in possession of a false Uruguayan passport. A request for his arrest had previously been made to Interpol. Soon after his arrest, the Bolivian authorities officially requested his extradition from Brazil.

Once the extradition has been granted and the Supreme Court decision implemented, the former dictator will be imprisoned. This exemplary case constitutes a new step forward in the struggle against impunity for the perpetrators of grave human rights violations. The Bolivian judgment should dissuade other persons from usurping power through unlawful means and, once in power, from keeping it by ordering assassinations, enforced disappearances, torture and other grave crimes.



# Iraq

## Introduces Corporal Punishment

On 4 June 1994, the Revolution Command Council in Iraq promulgated Decision No. 59, introducing corporal punishment in its Penal Code.

The ICJ has two primary concerns regarding Decision 59.

First, the Revolution Command Council represents the executive power. Decision 59 is of a legislative nature, and should be adopted by the legislative and not the executive power.

Second, corporal punishment introduced in Decision 59 violates Iraq's obligations under international law and legalizes a cruel and inhuman punishment.

### Legal Background

Decision 59 adopted in June 1994 amends Penal Code No. 111 of 1969. It provides:

- Any person who commits any crime of theft as enacted in Articles 440, 441, 442, 443, and 445 of Penal Code No. 111 of 1969, and Article 117 of the Military Criminal Law No. 13 of 1940, and the crime of theft of cars shall be punished by amputating his right hand from the wrist; and in the case of repetition of crime the author of the crime is punished with amputating his left foot from its joint (Article 1).
- In situations where the person commits armed theft, the punishment is the death penalty (Article 2).
- The punishment of amputation does not apply in the following situations:
  - If the value of the object stolen does

not exceed five thousand dinars;

- If the theft took place between two married people, or between relatives of the third degree;
  - If the author of the theft is a juvenile.
- If the court determines that the circumstances of the author of the crime or the circumstances surrounding the crimes enacted in Article 2 (a, b) of this Decision constitute judicial mitigating circumstances, it shall render a verdict of life imprisonment instead of the death penalty (Article 3).

### ICJ Concerns

#### 1 Separation of Powers

The Penal Code of 1969 (Act No. 111 of 1969) and Decision 59 which modified it, were promulgated by the Revolution Command Council, based on its competence provided for in Article 42 (a) of the Constitution of Iraq. Article 42 (a) endows the Council with the power to promulgate "legislation and decisions having the force of law."

In February 1994, the ICJ issued a report entitled *Iraq and the Rule of Law*. In its report, the ICJ pointed out the following concerns:

- a There is no separation of powers in Iraq. An essential legislative power is provided for the Revolution Command Council in Articles 42 and 43 of the Constitution of 1970. The power to legislate endowed on the Council in Article 42 (a) is general

and all-embracing.<sup>16</sup> In addition Article 43 (a) vests the Council with the sole authority to promulgate legislation concerning defence and public security matters. Joined together, the two articles endow the Council with an absolute legislative authority.

The principle of separation of powers dictates that the parliament, which represents the people, should be the principal legislative power. An independent judiciary should have the power to guarantee that the legislative power is not vested in the hands of the executive, that laws are constitutional, and that laws are respected by everybody, including the executive.

The Revolution Command Council represents the executive power and its members are assigned by name in the Constitution of 1970.<sup>17</sup> The result is that there is no guarantee that the laws adopted by the Council represent the will of the people.

- b The result is that most of Iraq's legislation has been promulgated by the Revolution Command Council, in matters that concern the people, but without any representation of the will of the people, and without any control either from the legislative or judicial power. Thus, Decision 59 comes among a long list of laws adopted by the Council through legislation and general decisions having the force of law.

This is worsened by the fact that the Council adopts legislative enactments by a majority vote among its members, at closed meetings. Consequently, there is no access to the deliberations made within the Council before the adoption of laws.

## **2 Decision 59 Constitutes a Serious Precedent**

Corporal punishment introduced in Decision 59, constitutes cruel and inhuman punishment under both international law and Iraqi domestic law.

The provisions of Decision 59 are in violation of Iraq's obligations under international law.<sup>18</sup> Article 7 of the International Covenant on Civil and Political Rights, to which Iraq is a Party, reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

On a domestic level, the provisions of Decision 59 are in contradiction with Article 22 (a) of the Constitution of 1970 which prohibits all kinds of physical and psychological torture.

Moreover, Iraq claims that its legislation is formulated according to "the spirit of the present age and in light of the past experiences of the Arab nations."<sup>19</sup> Consequently, except for matters of personal status, which are governed by the

<sup>16</sup> See *Iraq and the Rule of Law*, ICJ, February 1994, at 23-26.

<sup>17</sup> Article 37(b) of the Constitution of 1970.

<sup>18</sup> Iraq ratified the International Covenant on Civil and Political Rights on 25 January 1971.

<sup>19</sup> Article 18 of the Constitution of the Baath Party.

Islamic Shari'a, the Shari'a - as a legal system - does not constitute the ideological basis of the legal system in Iraq. Thus, although corporal punishment is recognized within the Islamic legal system, its application in Iraq is contrary to what Iraq claims.

### 3 The Role of the Judiciary

The ICJ is concerned that the judiciary has already applied corporal punishment based on Decision 59. According to a report issued by Amnesty International,<sup>20</sup> this decision was applied in late June 1994, in two cases. Two men convicted of stealing carpets

from Bahriz al Kabir mosque were sentenced to the amputation of the hand by the Criminal Court in Baghdad. It is not clear when the sentences will be executed, or whether the defendants will have a right to appeal.

As mentioned above the provisions of Decision 59 are unconstitutional, both because they are adopted by the executive power, and because they contradict the Constitution of 1970. The fact that the Criminal Court, reportedly, applied them reinforces what the ICJ argued in its Report *Iraq and the Rule of Law*, that the judiciary in Iraq is not independent, and that it is dominated by the Revolution Command Council.<sup>21</sup>

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20 Amnesty International, MDE 14/04/94, 24 June 1994.

21 *Iraq and the Rule of Law*, *op.cit.*, at 43-59.

# Mexico

## Preliminary report of the ICJ mission to Mexico with regard to the insurrection of indigenous peoples in Chiapas 1-10 February 1994

In the light of the news received regarding the armed indigenous insurrection in the State of Chiapas, in the south-eastern territory of the Republic of Mexico, the International Commission of Jurists (ICJ) decided to send a mission urgently to Chiapas. The mission was composed of Dr. Eduardo Duhalde (from Argentina) and Dr. Alejandro Artucio (from Uruguay); its task was to inform itself directly about the situation, contact all the sectors involved, and offer its services to promote a solution of the conflict through dialogue.

It must be emphasized that the mission received generous cooperation and support from the Federal Government and the local authorities, which facilitated its work. The members of the mission had interviews with the federal, State and local authorities, with national and non-governmental organizations, journalists, priests and ministers of the Catholic Church, and with members of the indigenous communities.

In the early hours of 1 January 1994, while the population was still celebrating the New Year, a heretofore unknown armed organization, the *Ejército Zapatista de Liberación Nacional* (EZLN) (Zapatista National Liberation Army) initiated an offensive, occupying by force of arms a broad region several hundred kilometres long, encompassing various towns and population centres. The Federal Government reacted rapidly,

ly, sending thousands of soldiers (more than 10,000) into the area, and heavy fighting took place between them and the guerrillas. It is known that there were many victims, although the exact number has not been established as yet. The fighting continued with intensity for five days, followed by seven other days of sporadic combat. On 12 January, by unilateral decision, the President of Mexico ordered the armed forces to halt and offered the insurgents a dialogue which was accepted by the latter, who also decided to suspend hostilities. It is noteworthy to indicate that with the agreement of both parties secure conditions for initiating the peace dialogue are being sought, but in the meantime a virtual cease-fire exists.

Some figures will give a clearer idea of the reasons for the crisis.

The State of Chiapas is an extensive mountainous area with altitudes which range between 850 and 2,500 metres above sea level. Its land area covers 75,634 km<sup>2</sup>, is covered with dense forest and has a long land frontier with Guatemala. It is a very rich State, mainly in coffee, cocoa, wood, maize, bananas and various other fruit, cattle, cloth, handicrafts, petroleum and hydroelectric resources.

Most of the population (according to the 1990 census of the *Instituto Nacional de Estadística, Geografía e*

*Informatica* there were 210,500 inhabitants) is indigenous and lives in rural areas. This indigenous population consists of five different ethnic groups: Tzeltal, Tzotzil, Zoque, Tojolabal and Choles. From a linguistic point of view, 32% of the indigenous population does not speak Spanish, but only one or several of the indigenous languages. The illiteracy rate of the region is the highest in the country (up to 30.1%, taking into account not only the Spanish language, but also literacy in the native languages). In the indigenous communities this percentage rises to 47.5% (Los Altos), 46.7% (Selva Lacandona) and 37.3% (border area).

There is a great shortage of health centres, with one operating theatre for every 100,000 inhabitants and an infant mortality rate higher than the national average; there is a doctor for every 1,500 inhabitants. The main causes of death are intestinal and respiratory infections, malnutrition and malaria.

Chiapas is the State with the lowest salaries in Mexico. With regard to the labour situation, there is extreme exploitation of the workers (who are in general indigenous) by the landowners and the traders. Although almost 60% of the electrical energy for the entire country is generated in this region of Mexico, 34.9% of communities and 33.1% of houses do not have electricity. According to the official figures of the 1990 census, in the urban areas there are very few houses which have the basic services: in Altamirano half the houses have no running water; only one out of four has a sewage system and electric light; in Las Margaritas only one-fourth of the houses have running water; nine out of ten have no sewage system; and only one out of three has electric light. The overall pic-

ture is one of extreme poverty and a situation of exasperating underdevelopment in contrast to the other States of Mexico.

Added to this is a marked discrimination against the indigenous population, expressed most notoriously in the "caciquism" (tyranny) displayed by the big proprietors, who keep armed bands - actual paramilitary groups called "white guards" - which are responsible for oppression and abuses of all kinds against the indigenous population. The tremendous lack of self-esteem of the latter leads the landowners and big traders to believe that they are not deserving of respect in regard to their traditions and culture, their integrity as human beings, or even their lives. In recent decades many serious violations of human rights have taken place in Chiapas: murders of peasants and indigenous leaders during land conflicts; violent uprooting of indigenous communities occupying land of which the possession is being contested; imprisonment and abuse of peasants and indigenous persons fighting for land; abuses of authority. On the political level there are continual fraud and electoral irregularities, which invariably lead to a result where the party in power (PRI) obtains 100% of the votes registered in many electoral circuits. All of this is accompanied by total and complete impunity for the transgressors. In the most recent years of the present administration the federal government has undertaken a programme for the development and assistance of the State of Chiapas, called PRONASOL. This effort, although praiseworthy and opportune, was late and plainly inadequate.

These circumstances made for a potentially explosive situation and a culture

medium for the political and military organization of the indigenous population (according to statements made by the EZLN itself, they began to organize ten years ago). The history of recent decades shows that a large number of indigenous movements in Chiapas demanding land, better living conditions and social justice were greeted either with repression or with indifference. When it thought that peaceful methods had been exhausted, the indigenous population took to arms to have its voice heard, in what more than one Mexican intellectual has characterised as "the rebellion of the forgotten."

In their public statements, the insurgents have affirmed that they do not aim at a power takeover, but that they want the extreme injustice and discrimination to which they are subjected to be corrected. It is evident that in view of the fact that the Mexican Republic is a whole and that therefore Chiapas is not a separate entity, they also demand democratic changes in the overall political system. Finally, they are against the North American Free Trade Agreement (NAFTA) signed by Mexico with the United States of America and Canada, because they believe that it will lead to an increase in poverty and will place Mexico in a subordinate position.

The indigenous explosion of 1 January consisted of the simultaneous military occupation of a number of municipalities, towns and population centres. Among these, to mention only the most populated cities in the region, were San Cristobal de las Casas (80,000 inhabitants), Ocosingo, Altamirano, Las Margaritas and Oxchuc. Then, on 2 January, they attacked the principal military concentration in the region, the General Headquarters of the 31st

Military Zone, known as the "Rancho Nuevo," which is located a few kilometres from the town of San Cristobal de las Casas.

Due to the resistance they encountered, they were unable to take the Headquarters. In the cities which they occupied, the insurgents took over the main municipal buildings, destroyed furniture and set fire to the administrative archives. Near San Cristobal they took over the public jail and freed the prisoners. They also took some hostages, although all of these, with the exception of the ex-Governor of the State (1982-1988), General Absalon Castellanos, were released within a few hours. General Absalon Castellanos was released on 16 February.

The military deployment of EZLN surprised the analysts of military matters, indicating as it did a strong operational capacity, disciplined coordination of the forces and a high level of strategic planning. It has not been possible to establish the numbers mobilized in the Zapatista Army militia (*Ejercito Zapatista*), but reliable sources estimate that not less than 1000 were involved. According to witnesses, not all were well armed; some had modern guns (AR 15 and AR 16) but others had old hunting guns and 22 rifles. Some did not have firearms at all. The fighting was particularly intense in Altamirano, Ocosingo and in the General Headquarters of the 31st Military Zone, causing much loss of life on both sides (the exact number continues not to be known, but a possible estimate for the entire conflict would be between 200 and 300 dead and a similar estimated number of wounded). In the most populated city, San Cristobal, there were fortunately no victims, but only damage to the City Hall, from

which the insurgents withdrew on 2 January.

The armed forces and the public security forces were immediately mobilized and more than 10,000 troops converged on the conflict zone within a short time, with light and heavy arms, including tanks, cannon, aeroplanes and helicopters. The operations were directed principally by the Army, occasionally assisted by the Air Force and, in the urban centres, by the police. On 12 January, by unilateral decision, the President of Mexico ordered the armed forces to halt the offensive and to stop shooting; they were to respond only if attacked or if the civilian population were attacked. Simultaneously the Chief of State offered the insurgents the possibility of a dialogue in order to re-establish peace, thus anticipating the features of what would later be the Amnesty Law adopted by Parliament. On its side, on the same day, EZLN decided to respond by suspending "all offensive operations against the federal troops." EZLN did not make any specific statement with regard to the offered amnesty, although in press interviews with the authorities it was reported that they were discussing it, saying that there was nothing "to forgive."

Initially the government attributed the responsibility of the insurrection to outside influences and foreign involvement from Guatemala and El Salvador, but it soon altered its position. The mission remains convinced that the forces of EZLN are composed almost entirely of indigenous persons; this is shown by its dead, the wounded who were cared for in the hospitals of Altamirano and Ocosingo, and the fighters who were captured.

Without detriment to the preceding

facts, which were obtained *in situ* and summarized from the official and non-official data - the accuracy of which was properly evaluated and examined by the mission - we can report on certain investigations and arrive at a number of conclusions.

During the armed attacks to dislodge the insurgents of Ocosingo (the only city still occupied when the Army arrived) and of Altamirano, fatalities occurred among the civilian population and the combatants on both sides.

The mission is in a position to affirm that during the offensive, and also in the days following, the government troops were guilty of serious violations of human rights, as described below.

Government agents, and more precisely Army troops, carried out summary executions of prisoners; some of these had been wounded before capture. It was possible to confirm this reliably during medical examination of the exhumed bodies, carried out by pathologists in the presence of the members of the mission, in seven cases (five in the city of Ocosingo and two in Las Margaritas).

Other persons, between 20 and 25, may also have been victims of summary executions, as for example the wounded who were removed by the Army from the hospital of Ocosingo during the fighting. The same may be true for the Zapatistas who had taken a microbus and had been intercepted, which started a battle in the vicinity of the General Headquarters of the 31st Military Zone ("Rancho Nuevo"); there are strong indications that not all of its 14 occupants died fighting. Among these is the fact that, according to the photographs taken by the *Ministerio Publico Federal* (Federal Public Ministry), some of the bodies are lying in the road or in the gutter along-

de. Moreover, it is a known fact that in this type of fighting, there are generally more wounded than dead. In any case, the National Commission of Human Rights is conducting an investigation to determine the circumstances of each of these deaths; the principal difficulty is that the Army has not provided information on where the bodies are buried, so that their examination has not yet been possible.

Dozens of cases of arbitrary detention of members of the civilian population suspected of collaboration or merely of sympathy with the Zapatistas have been confirmed; their number may exceed 200. Most of these prisoners underwent torture or abuse in military units, being punched and kicked, and in a few cases having their head forced underwater up to the point of suffocation. Most of the detained were freed at the end of a month and only 32 were still in prison when the mission left Chiapas.

There are well-based fears that many involuntary disappearances may have occurred. For the moment it would be premature to come to definitive conclusions, given the fact that the armed conflict caused 8,500 persons to flee their homes, and that in a region of the kind described it is very difficult for the families to obtain information on the fate and whereabouts of their relatives. Nevertheless, the mission is in position to affirm reliably that there are approximately 20 persons whose whereabouts have remained unknown after their detention. These were not persons who fled into the mountains, but individuals who, according to concordant testimonies, were detained by government agents. Further, in more than one case they were seen in military units by witnesses who were later freed. The compe-

tent State departments and the national NGOs are attempting to collect the relevant information.

Concerning the investigations in progress on possible violations of human rights, the (governmental) National Commission of Human Rights was immediately sent into the area and set up offices there. The mission of the ICJ can confirm that the National Commission took up its duties in an impartial and responsible manner and has exerted great efforts. Its President, Lic. Jorge Madrazo, provided the mission with valuable information, including data on the cases of summary execution.

The Mexican NGOs have been particularly active in the region, supporting those who have suffered and promoting conditions for the peace dialogue. Praise should also go to the Catholic Bishop of the diocese of San Cristobal de las Casas, Monsignor Samuel Ruiz, who has agreed to take on the role of intermediary in setting up the dialogue between the two parties, together with Lic. Manuel Camacho Solís, designated by his Excellency the President of the Republic as Commissioner for Peace and Reconciliation. The Federal Government of Mexico has also extended an invitation to the International Committee of the Red Cross (ICRC), so that it may provide assistance to the victims of the conflict and to the civilian population, and also carry out visits to persons detained because of the events. The ICRC has responded favourably and sent its representatives to the State of Chiapas.

The mission of the ICJ was not able to confirm whether bombardment of the civilian population had occurred, as it had been informed by the international



press. The mission focused on this point in particular at each place visited (San Cristobal de las Casas, Ocosingo, Altamirano, Oxchuc, Las Margaritas); the inhabitants were questioned and places were inspected. There had indeed been bombing with rockets from aeroplanes and helicopters, but everything seems to indicate that the objectives were concentrations of the forces of the Zapatista army, outside the towns.

Concerning the alleged abusive conduct against the civilian population on the part of the insurgents of the Zapatista army, the ICJ mission has not received complaints of abuses ascribed to them, although it repeatedly inquired about this in various affected areas. The only cases are the imprisonment and deprivation of liberty of General Absalon Castellanos Dominguez, the appropriation of cattle from the landowners and the destruction by fire of the archives of various municipalities. Their behaviour towards the wounded from the government forces who fell into their hands was humane. As an example, when withdrawing from Altamirano they left four members of the police who had been wounded in the fighting in the care of the Sisters of Charity who give medical assistance in the hospital of Altamirano.

One final detail with regard to the Amnesty Law adopted by the Federal and State Parliaments on 20 January 1994 is as follows: although the ICJ is

pleased that the amnesty is being used as a peace mechanism, it deplors that this law has been formulated in such general terms as to include certain offences committed by government agents which should be excluded from an amnesty, at least until the events have been investigated, those responsible have been judged, the relevant penal sanctions have been applied and the victims or their families have been compensated. We are referring to such offences as the murder of prisoners (summary executions), forced disappearances and torture. These deeds, because of their seriousness, should be excluded from any amnesty, as required by international law arising from the treaties to which Mexico is party, at least until the steps listed above have been accomplished.

The armed indigenous insurrection in Chiapas has had a deep impact on the whole of Mexican society, an impact which has affected the political system in its entirety, especially as it occurred at the time when the political parties were beginning their electoral campaigns in preparation for the presidential elections of August 1994. At the site, the State Governor - severely questioned by the Zapatistas - has been replaced and the State Congress of Chiapas has designated a new Governor, Mr. Javier Lopez Moreno.

## ARTICLES

# Resettlement or Repatriation: Screened-Out Vietnamese Child Asylum Seekers and the Convention on the Rights of the Child

Daniel O'Donnell \*

During the late 1970s and early 1980s, the dramatic situation of Vietnamese boat people, ruthlessly preyed upon by pirates and denied asylum by many countries of South East Asia, stirred the conscience of the international community. Today, eighteen years after the fall of the Republic of Viet Nam, the problem of Vietnamese asylum seekers has long since relinquished its leading position among humanitarian issues competing for public attention. Yet the problem persists, and some 60,000 Vietnamese linger in camps throughout South East Asia.<sup>1</sup>

The first *ad hoc* international plan to address the Indochinese refugee crisis was adopted at the Meeting on Refugees and Displaced Persons in South East Asia, which took place in

Geneva from 20 to 21 July 1979. The essence of the solution adopted at that meeting was the agreement of the countries of South East Asia that they would provide temporary asylum to all boat people, on condition that they would be resettled elsewhere, in industrialized countries having greater ability and willingness to absorb them. This agreement was undoubtedly a major achievement in alleviating the plight of the boat people and securing greater respect for internationally recognized humanitarian principles.

By 1987 this plan came under strain, however, due to continued outflow of thousands of asylum seekers annually, and the growing reluctance of the resettlement countries to continue receiving large numbers of Vietnamese boat people.<sup>2</sup> This

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1 Opening Statement of the High Commissioner for Refugees, Meeting of the Fifth Steering Committee of the International Conference on Indochinese Refugees, 14 Feb. 1994, at 1.

2 See Bronée, Sven A., *The History of the Comprehensive Plan of Action*, *International Journal of Refugee Law*, Vol.5, No. 4, Oxford, 1993, and Helton, Arthur, *The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control*, in *Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Refugee Convention*, Lawyers Committee for Human Rights, New York, 1991, at 16.

situation led to the convening of a second international conference, the International Conference on Indo-Chinese Refugees, which took place in Geneva, in June 1989, and which adopted the Comprehensive Plan of Action for Indo-Chinese Refugees, better known by the acronym "CPA".<sup>3</sup>

The Comprehensive Plan of Action differed from the previous approach mainly in that there was no longer a presumption that all those fleeing Viet Nam were seeking to escape repression or persecution. From this point on, Vietnamese arriving in neighbouring countries were to be screened in order to separate those entitled to refugee status from economic migrants. The former would continue to be resettled, but "screened out" asylum seekers, i.e. those not able to establish their claim to refugee status, would be returned to Viet Nam. The Plan also provided that a special screening procedure would be established for unaccompanied minors, based not only on the usual standard of "well-founded fear of persecution," but also on the "best interests" of the child and the principle of family unity.

Over one million Vietnamese have been resettled since 1975, mostly

in Australia, Europe and North America.<sup>4</sup> This has created powerful "pull" forces contributing to the continued exodus of asylum seekers, which was not substantially reduced until some two years after the inauguration of the CPA screening procedures, which effectively screened-out a majority of the new arrivals in every country of the region.<sup>5</sup> The result is the large population of "screened-out" asylum-seekers spread throughout five "countries of first asylum" in South East Asia: Indonesia, Malaysia, the Philippines, Thailand and Hong Kong.<sup>6</sup> Under the CPA, efforts must be made to convince this population to return to Viet Nam voluntarily; if such efforts fail, other methods "recognized as being acceptable under international practices" may be resorted to.<sup>7</sup> The Government of Hong Kong was the first to adopt such measures, in October 1991, under the "Orderly Return Programme." Indonesia adopted a similar policy in October 1993 and the CPA Steering Committee recently called on other countries to adopt similar measures, in order to ensure that the repatriation of non-refugees is completed by the end of 1995.<sup>8</sup>

3 UN doc. A/44/523.

4 Helton, *supra*, p.12, note 1, citing UN doc. SC IV/Doc.3 of 29 April 1991.

5 The number of boat people arriving in these countries was 71,364 in 1989, the year the CPA was adopted; 30,936 in 1990; 22,422 in 1991, and 55 in 1992. UNHCR doc. A/AC.96/808 (Part II), par. 2.0.9. In 1991, the percentage of boat people "screened out" ranged from a high of 87% in Hong Kong to a low of 58% in the Philippines. Helton, *supra*, at 52.

6 In this context the term "country of first asylum" is commonly applied to Hong Kong, despite the fact that it is not a country but a part of Chinese territory temporarily under the sovereignty of the United Kingdom. The CPA does not apply to the estimated 250,000 Vietnamese who have obtained refuge in the People's Republic of China.

7 CPA, par.12 and 14.

8 Statement by the Meeting of the Fifth Steering Committee of the International Conference on Indochinese Refugees, 14 Feb. 1994, para. 15 -17.

In February 1994, the "screened-out" population included nearly a thousand unaccompanied children under the age of 18.<sup>9</sup> The countries of first asylum have been understandably reluctant to force screened-out child asylum-seekers to return to Viet Nam, but relatively few have taken the decision to return voluntarily. However, the reluctance to take more decisive measures, coupled with long delays in making eligibility decisions, has meant that most of these children have remained in camps, separated from their families, for periods of three years or more.<sup>10</sup> Finally, in 1993, the UNHCR decided to give priority to expediting the repatriation of such children, under a programme referred to as the "Family Reunification Operation."<sup>11</sup> Under this programme, while efforts to convince unaccompanied children to repatriate voluntarily continue and "volrep" continues to be the preferred solution, the child's consent is no longer considered a prerequisite for his or her return to Viet Nam for purposes of reunification with his or her family. Implementation of the "Family Reunification" programme began slowly, however, with only 180 children being returned to their parents in Vietnam during the first 10 months.<sup>12</sup> The CPA Steering Committee recently set the end of 1994 as target date for family reunifi-

cation/repatriation of all screened-out unaccompanied minors remaining in countries of first asylum.<sup>13</sup>

This article analyzes the situation of screened-out child asylum-seekers, in particular the urgent and sensitive question of non-consensual repatriation of unaccompanied children, from the perspective of the Convention on the Rights of the Child. It does not address, except in passing, the innovative standards and procedures for evaluating the cases of unaccompanied child asylum seekers adopted under the CPA, nor the way by which screening of child asylum seekers was carried out in practice. Now that the CPA process enters its final stages, closer study of those questions would be timely and valuable. However, given the urgent need to take appropriate measures to resolve the situation of screened-out children who have endured prolonged separation from their families without further delay, the present article focuses on the rights of this screened-out population in their present situation.

## 1 The Situation of Screened-Out Child Asylum-Seekers in South East Asia

The case load of screened-out child asylum-seekers in countries of first

9 Opening Statement of Chairperson, Meeting of the Fifth Steering Committee of the International Conference on Indochinese Refugees, 14 Feb. 1994, at 2.

10 In 1992, 85% of the children in the Philippines camp for screened out asylum seekers had arrived in the Philippines in 1988 or 1989, and 48% of the children surveyed in a study of child asylum seekers in Hong Kong had arrived during those years. Living in Detention, *infra*, note 15, at 1; Psychosocial Well-Being, *infra*, note 15, at 8.

11 UNHCR doc. A/AC.96/808 (Part II), par. 2.0.13.

12 Statement by the Meeting of the Fifth Steering Committee, *supra*, note 8, para. 23.

13 *Ibid.*

asylum in January 1993, according to UNHCR sources, was as follows:

Philippines	301
Indonesia	139
Thailand	245
Malaysia	214
Hong Kong	2052
<b>Total</b>	<b>2951</b>

Nearly half of this case load, 46%, were 16 or 17 years of age; 39% were between the ages of 12 and 15, and 15% were under the age of 12.

The term 'child' is applied in this paper to all persons under the age of 18. This is in keeping with 1988 UNHCR Guidelines on Refugee Children, as well as Article 1 of the Convention on the Rights of the Child, which provides that the Convention shall apply to all persons under the age of 18 "unless, under the law applicable to the child, majority is attained earlier." All of the countries of first

asylum, except Malaysia, are Parties to the Convention on the Rights of the Child, as is Viet Nam.<sup>14</sup>

Studies on the psychological condition of child asylum seekers in Hong Kong and the Philippines have recently been published by the International Catholic Child Bureau.<sup>15</sup> Although these studies show some differences in the experiences of children in these two countries, and even in different camps in Hong Kong, taken together they provide a valuable overview of the background and present situation of Vietnamese child asylum-seekers found in camps in countries of first asylum.

At the time of these studies, 44% of the child asylum-seekers in Hong Kong, and 24% of those in Palawan, the Philippines, were accompanied by one or both parents.<sup>16</sup> Many of those not accompanied by their parents were "attached" to another responsible adult: 45% of the child asylum seekers in Hong Kong, and 36% in the

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- 14 CRC/C/24, Annex III. It should be noted that, although the age of majority in Vietnam for most purposes is 18, the government has agreed to expedite repatriation by waiving the pre-repatriation security screening for children under the age of 16 only.
- 15 McCallin, Margaret, *Living in Detention: a review of psychosocial well-being of Vietnamese children in the Hong Kong detention centres*, International Catholic Child Bureau, Geneva, 1992 and *The Psychosocial Well-Being of Vietnamese Minors in the Philippines: A Comparison with Hong Kong*, ICCB, Geneva, 1993. Both studies were based on surveys prepared with the assistance of Drs. James Garbarino and Edgardo Menveille, experts in psychology and psychiatry, respectively, having prior experience with child refugees, and were carried out in 1992 with the assistance of Community and Family Services International.
- 16 *Living in Detention*, at 3; *Psychosocial Well-Being*, at 1. The Hong Kong and Philippine studies covered only children over the ages of 10 and 12, respectively, since the aim was to study the situation of children having fled Vietnam, and not those born in the camps. Consequently, unless otherwise indicated, all figures regarding to child asylum seekers in Hong Kong and the Philippines refer to children from 10 to 18 in Hong Kong and from 12 to 18 in the Philippines. It also should be noted that, although 44% of the population of children between the ages of 10 and 17 in Hong Kong were accompanied, only 27% of the sample surveyed were accompanied. *Living in Detention*, Table 1, at 8.

Philippines.<sup>17</sup> Only 11% of the children in Hong Kong, and 40% of those in Palawan, were neither accompanied by a parent nor "attached" to another adult.<sup>18</sup> The Hong Kong study contains disturbing findings concerning the psychological state of child asylum-seekers:

"... the principle effects characterizing the majority of children in the sample are depression and anxiety. They are typically sad, lacking in energy and disinterested in what is going on around them. Their daily lives are overwhelmingly characterized by fears for their personal safety. They suffer from psychosomatic symptoms of anxiety and are restless and have problems concentrating. Memories of distressing events they have experienced intrude on their thoughts."<sup>19</sup>

"Unless immediate attention is paid to their needs," the experts participating in the

study warn, "long-term psychological and psychosocial consequences for these children [will be] very severe."<sup>20</sup>

These symptoms were due in part to traumatic events suffered during flight and, in part, to conditions and experiences in the detention camp. On the average, the children interviewed in Hong Kong suffered more than three traumatic experiences during their flight from Viet Nam, ranging from storms and lack of food and water to physical or sexual assault, and more than three additional traumatic experiences while in detention.<sup>21</sup> One child in three reported suffering or personally witnessing such serious occurrences as rape, physical abuse, suicide or murder during his or her stay in the asylum camp.<sup>22</sup> Uncertainty concerning the outcome of the screening process, and delays in obtaining a decision, were also considered a "significant source of stress."<sup>23</sup>

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17 *Living in Detention*, at 3 (3,466 children between the age of 10 and 17); *Psychosocial Well-Being*, at 1. The standard definition of "accompanied", according to the 1988 UNHCR Guidelines on Refugee Children, is "those who are separated from both parents and are not being cared for by an adult who, by law or custom, has responsibility to do so." (par.130) The Guidelines emphasize the importance of interim foster placement of unaccompanied child asylum seekers and refugees within the child's own community, especially for young children. (par.139-43) Such children are referred to as "attached." The term "unaccompanied" is ambiguous: while some authors use it to refer to children who are neither "accompanied" nor "attached", in the present article, which focuses on the relationship of the child and his or her family, the term "unaccompanied" is used to refer to all child asylum seekers separated from both parents, regardless of whether or not they are "attached" to another adult.

18 *Living in Detention*, at 3 (863 children between the age of 10 and 17); *Psychosocial Well-Being*, at 1.

19 *Living in Detention*, at 15.

20 *Ibid.*, at 22.

21 The 603 children interviewed reported witnessing personally a total of 2,083 traumatic events during their voyage, and 1,958 traumatic incidents while in the camps. *Ibid.*, at 18-19.

22 In 28 cases, the children reported sexual assault, 68 cases of physical assault, 60 reported having witnessed a suicide and 54 having witnessed murder. *Ibid.*

23 *Ibid.*, at 2.

The level of stress observed was lower in Palawan, apparently due to the less frequent exposure to traumatic events in the camp, and qualitative differences in the kind of incidents experienced.<sup>24</sup> The number of child asylum seekers in Palawan reporting sexual abuse or assault was only half that reported in Hong Kong, for example, and only 6% of the children in Palawan reported having experienced or witnessed riots or generalized physical violence, as compared to 44% and 32% of the children in Hong Kong.<sup>25</sup> Despite these differences, the study emphasizes that the level of stress reported among children in Palawan is unacceptably high, and that continued exposure to this situation represents a danger to their healthy psychosocial development, particularly for unaccompanied children.<sup>26</sup>

In both studies, the investigators found children without parents had similar levels of stress, regardless of whether or not they were "attached" to another adult caretaker.<sup>27</sup> This suggests that the "temporary foster care" arrangements emphasized in the UNHCR guidelines as a stop gap measure for protecting unaccompanied child asylum seekers can not be considered an effective means for satisfying

to the psychosocial needs of children separated from their parents, nor an acceptable alternative to prompt restoration of family unity. Indeed, there is some evidence in the Palawan study that "attached" children are at greater risk of certain kinds of exploitation or abuse than those who are neither accompanied nor attached.<sup>28</sup>

## 2 The Principle of Family Unity

In general, children are entitled to the same basic human rights as adults. They have the right to life, the right not to be tortured, the right not to be detained arbitrarily or in sub-standard conditions, the right to adequate health care, and most of the other rights and freedoms recognized by international human rights law.<sup>29</sup> One right is of special importance to children, however: the right to family unity. The importance of this right has been recognized since the earliest human rights instruments. The Universal Declaration of Human Rights, the first such instrument adopted by the United Nations, declares that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>30</sup> The 1959 Declaration on the Rights of the Child

24 *Psychosocial Well-Being*, at 11.

25 *Ibid.*, at 12. The most frequently reported traumatic events in Palawan were demonstrations, forced separation from family or friends and forced relocation. *Ibid.*, at 5.

26 *Ibid.*, at 12.

27 *Living in Detention*, at 3; *Psychosocial Well-Being*, at 13.

28 Attached children reported being affected by prostitution and threats or "bullying" more often than did either children living with a parent or children living alone. *Psychosocial Well-Being*, at 7.

29 Basic rights to which children are not a priori entitled include the right to marry and found a family, the right to a public trial, the right to participate in elections and the right to work.

30 Art.16 (3)

further elaborates on this concept, stating:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, whenever possible, grow up in the care and under the responsibility of his parents..."<sup>31</sup>

These precepts are reaffirmed by the Preamble to the Convention on the Rights of the Child, which states in part:

"[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities..."

"[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

The above-mentioned studies confirm the serious consequences of the separation of child asylum-seekers from their parents, and the UNHCR has cited the principle of family unity as the justification for its new "Operation Family Reunification," aimed at expediting the repatriation of screened-out children. The question of family unity is thus an appropriate point of departure for an analysis of the rights of screened-out minor Vietnamese asylum-seekers under the Convention on the

## Rights of the Child.

Many of the substantive provisions of this Convention revolve around the importance of the family for the well-being of children, the responsibilities of parents towards children, and the responsibilities of the State with regard to the parent-child relationship. While the Convention does contain an article on the rights of child refugees and asylum-seekers, it does not contain any provisions specifically concerning unaccompanied asylum-seekers whose claim for refugee status has been examined and rejected. It is, therefore, necessary to seek guidance concerning the rights of children in this situation from the principles set forth in provisions concerning related matters. The relevant articles of the Convention, considered in more detail below, include Article 22, concerning child refugees and asylum-seekers; Article 10, which concerns family reunification; Articles 23 and 39, concerning the rights of handicapped children and the right to rehabilitation; Article 5, concerning the duties of parents and other persons to care for their children; Article 7, concerning the right to identity; Article 9 concerning the separation of children from parents in order to protect the best interests of the child; and Article 12, concerning the right to be heard.

### **3 Article 22 of the Convention and the Rights of Child Refugees and Asylum-Seekers**

The right of children to live with and be cared for by their parents is not

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31 Principle 6.



absolute. The Convention recognizes certain situations in which the separation of children from their parents may be compatible with the rights and best interests of the child. One such exception is implicit in Article 22, which concerns child refugees and asylum-seekers. This article provides that:

“a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or any other person, receive appropriate protection and assistance in the enjoyment of applicable rights set forth in the present convention and other international human rights or humanitarian instruments...”

The main object of this article is to ensure that the claims of children to refugee status are examined on the merits, despite their status as minors, regardless of whether or not their lawful guardians are in a position to make a claim on their behalf. The reference to rights under other international instruments applies principally to the 1951 Convention on the Status of Refugees.<sup>32</sup> Under this Convention, persons entitled to refugee status have the right not to be returned to their

country of origin.<sup>33</sup> Thus, the Convention on the Rights of the Child implicitly recognizes the right of children who are refugees not to be returned to their country of origin, even though this may mean separation from their parents.

Article 10 of the Convention on the Rights of the Child is intended, *inter alia*, to reconcile the right of refugee children not to be returned to their country of origin with the principle of family unity. It provides that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.” Thus, applications by the parents of refugee children for the right to leave their country and to enter the country where their children have found refuge - or, inversely, applications by children to leave their country and join parents who enjoy refugee status abroad - should, pursuant to this article, be dealt with in a “positive, humane and expeditious manner.”<sup>34</sup>

In so far as asylum-seekers are concerned, accepted international practice recognizes a provisional right to remain in the first country of refuge until such time as a determination is made as to whether or not they are entitled to refugee status and the

32 The Philippines and the United Kingdom (for Hong Kong) are the only “countries of first asylum” which are Parties to the Convention on the Status of Refugees. The United Kingdom ratified the Convention on 11 March 1954, and the Protocol on 4 September 1968; the Philippines acceded to the Convention and the Protocol on 22 July 1981.

33 Article 33.

34 It will be noted that this is an imprecise obligation, and no clear duty is imposed on the countries concerned to actually grant permission to leave or enter.

rights which attach thereto, in particular the right not to be returned to their own country.<sup>35</sup> This implies a right for child asylum-seekers to remain in the country of refuge until such time as the refugee status determination has been made, even though this transitory situation may involve separation from their parents. However, once it has been determined that the asylum-seeker is not entitled to be considered a refugee, the rights derived from refugee status, including the right not to be returned to one's own country, do not apply. In these circumstances, the former asylum seeker has no more rights than any other non-citizen, and is subject to normal legal provisions concerning immigration. In practice, in nearly all cases this means that they are illegal migrants, and subject to repatriation.

#### **4 The Right to Special Care and Resettlement on Humanitarian Grounds**

The duty of a State Party to protect the rights set forth in the Convention on the Rights of the Child extends to all children within the country, regardless of their citizenship, national origin or legal status.<sup>36</sup> Some children who have entered a country in the hope of obtaining asylum may have special needs which can not be met in their country of origin. Children with certain mental or physical handicaps, to whom Article 23 of the Convention grants a right to spe-

cial care, may be unable to obtain the kind of care they need in their own country. Children who have been victims of abuse, neglect or exploitation, to whom Article 39 grants the right of rehabilitation and resocialization, also might be unable to obtain appropriate treatment if repatriated.

In special cases, where a child has an urgent need for a certain kind of care or treatment which is unavailable in his or her country of origin, it could be argued that the country in which the child is living should not return the child to his or her country of origin, if return would entail a grave risk to the child's health or well-being, regardless of whether or not the child is entitled to refugee status. This is an exception which would need to be applied restrictively, for two reasons: firstly, because it involves separation of the child from his or her parents, and secondly, because it requires requesting the host country, or a third country, to grant permission to remain on what are essentially humanitarian grounds, rather than as a matter of right under international refugee law.

The special procedures established under the Comprehensive Plan of Action for the evaluation of cases of unaccompanied child asylum-seekers provide that such considerations should be taken into account. Inspired by the Convention on the Rights of the Child, the procedures provide that decisions concerning minors should not be based exclusively on the

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<sup>35</sup> See the Recommendation regarding eligibility procedures adopted by the UNHCR Executive Committee in October, 1977, par. (VII), reproduced in the UNHCR Handbook on the Determination of Refugee Status, Geneva, 1988, par. 192.

<sup>36</sup> Article 2.1.

child's eligibility to refugee status under the standard definition set forth in the 1951 Convention on the Status of Refugees, but should also take into account the principles of family unity and the best interests of the child.

A distinction is made, in the guidelines on unaccompanied child asylum-seekers adopted under the CPA, between those under the age of 15 and those over that age.<sup>37</sup> Children over the age of 15 are presumed to be mature enough to have a "well-founded fear of persecution," and the screening process begins with an evaluation of eligibility for refugee status according to the conventional criteria. If it is determined that the child has a well-founded fear of persecution he or she presumably will be referred for resettlement; if not, the case will be reviewed by a Special Committee in order to "select a durable solution in the best interest of the minor."<sup>38</sup> When the child is under the age of 15, there is a presumption that he or she is not mature enough to have a well-founded fear of persecution, and the case is considered directly by the Special Committee charged with identifying the "solution" in the best interests of the child.<sup>39</sup> Pursuant to the special CPA procedures, some child asylum-

seekers who would not qualify for refugee status under the 1951 Convention have been recommended for resettlement on the basis of medical conditions requiring treatment not available in Viet Nam, for example, or on the basis of family reunification with other relatives when the parents in Viet Nam have a record of child abuse.<sup>40</sup>

### **5 Family Unity, Consensual Separation or Transfer of Custody and the Best Interests of the Child**

The Convention also recognizes an exception to the principle of family unity when separation is necessary for the protection of the best interests of the child. Article 9 indicates that children may be separated from their parents for this reason, provided that certain conditions are met, in particular, that the decision is made by the competent authorities, in accordance with the applicable law and procedures, with the right to judicial review of the decision.

This article is not directly applicable to Vietnamese child asylum-seekers, who have not been separated from their parents by the decision of any authority but rather, in most cases, decided to flee their homes, either at

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37 The Special Procedures are not intended for child asylum seekers accompanied by a parent, because the determination made with regard to the parent normally would be applied to accompanying minor children as well. 1988 UNHCR Guidelines on Refugee Children, par.15

38 Note on Unaccompanied Minors (the CPA guidelines), par. 10. This two stage process is envisaged for all children in this age group, but one presumes that, if the first stage results in a determination that there is a well-founded fear of persecution, consideration of the "durable solution" in the best interest of the child will necessarily preclude the possibility of repatriation.

39 *Ibid.*, par. 5 and 11.

40 Interviews with CFSI staff who participated in the deliberations of the Special Committee in the Philippines.

their own initiative or with the encouragement of their parents.<sup>41</sup> Article 9 is, nevertheless, relevant, because of the implications of the clause which refers to children who are separated from their parents *against their will*. This clause refers to the will of parents, and the clear implication is that children have no right to decide for themselves that they wish to leave the family home. This is confirmed by the absence of any reference to freedom of movement in the Convention on the Rights of the Child - one of the few civil rights or liberties recognized under general human rights law which is not reaffirmed in this instrument. International human rights law does not recognize an exception to the principle of family unity for children who simply do not wish to go home, unless the conditions established in Article 9 are met, that is, unless competent authorities decide that there are compelling reasons underlying the child's wish, and separation is necessary in order to protect the best interest of that child.

The question of parental consent to the departure of their children is a complex and sensitive one. Many, if not most, child asylum-seekers left Viet Nam with the approval or encouragement of their parents, often in the company of an older sibling or aunt or uncle. Comparing the situation of these children with that of child asy-

lum-seekers in other parts of the world, the experts who participated in the ICCB study conclude:

"What distinguishes their experience, and is saddening, is that it is on-going and unremitting. In addition, the attached and unaccompanied children are experiencing this situation not only alone, but in most cases at the request of their families."<sup>42</sup>

Does the Convention allow parents to consent to the departure of children from home, and if so, under what circumstances? How broad is parental discretion to entrust care of their children to other persons? Have the Vietnamese child asylum-seekers in effect been abandoned, or are they suffering from parental neglect? If so, what are the implications for family reunification?

Article 5 of the Convention indicates that States should respect not only the responsibilities, rights and duties of parents concerning their children, but also the responsibilities, rights and duties of "members of the extended family or community, as provided for by local custom." This implies that a decision by parents to entrust, or share, responsibility for care and upbringing of their children to other relatives, or even with unrelated members of the community, is not

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41 According to McCallin, 54% of the unaccompanied children in Palawan, and 45% of those interviewed in Hong Kong, indicated that they had left Viet Nam at their parents instructions. *Living in Detention*, at 14; *Psychosocial Well-Being*, at 3. Less than 10% of the children seeking asylum indicate that they left involuntarily or "by accident" (e.g. they may have been working on a fishing boat used to flee Viet Nam). *Psychosocial Well-Being*, at 3. (Note that this figure refers to the percentage of all child asylum seekers, including those accompanied by a parent.)

42 *Ibid.*, at 22.

necessarily incompatible with the Convention.

However, the general principle recognized in Article 5 must be interpreted in the light of other, more specific provisions. One such provision is Article 7, which provides that "as far as possible," a child shall have the right to "know and be cared for by his or her parents." This suggests that parental responsibilities should not be transferred to others unless there is a valid reason for doing so. Article 7 applies to all children and all possible forms of separation, whether voluntary or not. For this reason, it states a lower standard than Article 9, which concerns the involuntary separation of children from their parents, and which requires that separation must be necessary in order to protect the best interests of the child.

The lower standard implicit in Article 7 does not mean that parents have unlimited discretion to transfer parental rights and duties to others. Certain conditions are implicit in Articles 8 and 12: the arrangement should not adversely affect the right to identity, in the sense of knowledge of true nature of family relationships, and the child who is old enough to form an opinion about the arrangement should be able to express his or her views, and have them taken into account. Beyond these conditions, the most pertinent criteria for evaluating such arrangements should be the kind of treatment which the child receives while in the care of persons other than his or her parents. If the child enjoys

understanding and suitable moral guidance, adequate living standards, access to education, leisure and health care, and the other basic rights enumerated in the Convention, the arrangement may be compatible with the Convention, especially if the parents themselves would have been unable to ensure effective enjoyment of such rights. If, on the other hand, the child is exploited, physically or emotionally neglected or abused, discriminated against or forced to live in substandard conditions while in the care of persons other than his or her parents, then the transfer of custody can not be considered compatible with the rights of the child.<sup>43</sup>

One must assume that, in most cases, the decision of parents of Vietnamese child asylum-seekers who entrusted care and custody of their children to persons fleeing the country was made in the expectation that their children would find a stable home elsewhere, perhaps with members of the extended family, where they would enjoy living conditions better than those which their parents could offer. It is also probable that some parents acted from more selfish motives, or mixed motives, especially regarding the possibility of joining their children abroad if they succeeded in obtaining refugee status and being resettled. Determining the considerations which actually motivated each parent at the time such decisions were made would be an impossible task. Since there is ample evidence that most parents were motivated by the desire to provide their children with a better life, whe-

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43 It should be noted that this issue only arises under article 5 with regard to informal arrangements which are traditional in a given society, not modern, cross-cultural extra-legal arrangements such as "private" adoption.

ther in terms of liberty, education or economic opportunity, the only reasonable course of action is to give parents the benefit of the doubt, and assume that their decisions were motivated by the best interests of their child as perceived by them at the time. Thus, although allowing children to depart as boat people exposed them to great hardship and risk, it would be inappropriate to equate the action of parents who ordered or allowed their children to flee with abandonment or neglect.

For child asylum-seekers who have been screened-out, and who live confined to camps, reality is far removed from the dreams which stimulated their departure. Most parents, if they appreciated the conditions in which their children actually live, and understood that they have no hope of resettlement, presumably would conclude that it is in the best interests of their children to return. Such evidence as is available indicates that, in fact, the reaction of parents is mixed, but that there is more pressure to resist repatriation than to repatriate.<sup>44</sup> If parents knowingly and deliberately chose to let their children remain in such a situation in full awareness of the consequences, their attitude might well constitute abandonment or, at least, neglect. The process of locating parents, informing them of the conditions in which their children are living and, especially, convincing them that there really is no chance of

resettlement, is not an easy one. It may be that, as further progress is made, in particular in disabusing parents of the illusion that persistence in refusing to return will be rewarded, the number of parents seeking repatriation of their children may increase dramatically. The difficulty is that, as actions speak louder than words, many parents may persist in the belief that resettlement is still possible until the day that their children reappear on the doorstep.

Even if encouraging children to flee their country in perilous circumstances or to remain abroad in unwholesome detention camps were to be considered the equivalent of neglect or abandonment, this would not necessarily lead to the conclusion that the children should not be returned. Under the Convention on the Rights of the Child, the preferred approach is not to view neglect or abandonment as irrevocably terminating parental rights and responsibilities, but as triggering intervention by the competent authorities with a view to helping the family overcome its problems and restoring a healthy parent-child relationship, whenever possible.<sup>45</sup> Only in special circumstances, such as evidence that parental abuse, exploitation or neglect is likely if the child were to return home and the existence of a viable alternative solution (e.g. adult siblings or other family members living abroad who are willing to assume custody), should serious consideration

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44 According to McCallin, 11% of the children in Palawan and 5% of the sample interviewed in Hong Kong indicated that there was "family pressure to repatriate", while 43% and 14%, respectively, indicated that there was family pressure not to repatriate. *Psychosocial Well-Being*, at 10. (The data does not distinguish between pressure from parents and from other relatives.)

4. See articles 9.3, 18.2, 19.2, 25.

be given to pursuing resettlement rather than repatriation.

This approach is the one most compatible with the Convention because repatriation creates conditions more favourable to the eventual reparation of any problems which may exist within the child-parent relationship. Only a severe threat to the well-being of the child should lead to the adoption of measures, like resettlement, which create a nearly insurmountable obstacle to the reparation of the parent-child relationship. There is another reason for favouring repatriation in these circumstances, as well. If refusal to encourage children to return home were to be equated with "abandonment," and considered sufficient reason not to promote family reunification, this would in effect give parents an incentive to refuse to accept their responsibilities toward their children, encouraging them in the conviction that by rejecting their children they may improve their chances of resettlement.

Unless compelling special circumstances are present, then, there are strong reasons for concluding, in conformity with the rights and principles set forth in the Convention on

the Rights of the Child, that children whose claims for refugee status have been rejected should be returned home. The principle of family unity dictates that children have an unrenounceable right to be brought up by their parents, and parents a corresponding duty to care for their children. When none of the exceptions recognized by the Convention apply - that is, it has been determined that the child is not a refugee, when no competent authority has decided that the best interests of the child require that the child be separated from his or her parents, and when the child has not been placed with parental consent in a situation which is prejudicial to his or her welfare and incompatible with his or her basic rights - the principle of family unity obliges the governments concerned to restore the child to his family without delay.<sup>46</sup>

## **6 Repatriation and the Child's Right to be Heard**

The right of the child to be heard "in all matters affecting the child" is one of the key principles underlying the Convention on the Rights of the Child. Article 12 indicates that this right

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46 Other provisions of the Convention on the Rights of the Child reinforce this conclusion, although they are not directly or expressly applicable to children whose claims for refugee status have been rejected. Article 8.1 indicates that "family relations, as recognized by law, form part of the identity of a child, which the state is under a duty to protect", and article 8.2 adds that "Where a child is illegally deprived of some or all the elements of his or her identity, States Parties shall provide assistance or protection, with a view to speedily re-establishing his or her identity." The circumstances in which many screened out children live may be considered to have a deleterious effect on their "family relations," triggering the duty recognized in the second paragraph. Article 11, which provides that State Parties "shall take measures to combat the illicit transfer and non-return of children abroad," might also be viewed as applicable to return screened-out unaccompanied child asylum seekers. Finally, if parents request the return of their children not entitled to refugee status, the countries of asylum have an obligation under article 10 to respond to such request "in a positive, humane and expeditious manner."

attaches once the child is sufficiently mature to have the capacity to form his or her own views, and that "the views of the child [should be] given due weight, in accordance with the age and maturity of the child." What are the implications of this principle for the screened-out child not entitled to refugee status, with regard to the prospect of repatriation and family reunification?

A distinction must be made between the proceedings before the Special Committee responsible for determining eligibility for refugee status and/or examining other factors which might warrant resettlement and the situation of the child once the screening process has been completed and it has been determined that he or she should return home. The proceeding before the Special Committee is an administrative hearing. Consequently, under the second paragraph of Article 12, the child must be provided with "an opportunity to be heard ... either directly, or through a representative or appropriate body."

Once such a decision has been taken, the administrative proceeding is over and the child no longer has a right to be heard, as such.<sup>47</sup> Under the first paragraph of Article 12, however, the child does have a right to express his or her views freely and to have those views taken into account "in accordance with the age and maturity of the child." The right to "be heard" in judicial or administrative proceedings is a for-

mal right, akin to the adult's right to due process, while the right to "express views" concerning "matters" which affect the child, and have those views duly appreciated by adults, has more to do with the place of the child in society, and the way children should be treated in a broad range of situations.

This child's right to express his or her views, and the obligation to give appropriate weight to the child's views, does not mean that the child has any power of decision - the right to accept or to refuse - with regard to the measures which the Special Committee has decided should be taken. Indeed, the scope of any decisions which remain to be made is very limited. If the child is not entitled to refugee status, he or she has no legal right to remain in the country. Moreover, as indicated above, children have no legal right to decide to live separately from their parents. This is especially so if the parents request that their child be returned, in which case the government has an obligation under Article 10 of the Convention to respond to the request "in a positive, humane and expeditious manner."

In these circumstances, it would seem that it would only be possible to take the views of the child into account with regard to limited matters, such as the timing of departure and the persons in whose company the child will travel.<sup>48</sup> The importance of listening to the child's views is not

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47 The right to be heard would revive if the special committee decided to review its decision.

48 In the event that the parents are separated or divorced, the views of the child should also be taken into account in determining where the child will live, but this is a decision over which the Vietnamese authorities have competence, and which in any event should only be taken after the child has had an opportunity to renew his or her acquaintance with both parents.



limited to their value as an input into decisions which need to be made, however. Giving the child an opportunity to freely express his or her views - even if, in some cases, their views consist of demands which are impossible to meet - is essential to the social and psychological development of the child. Helping the child understand that certain hopes and aspirations can not be realized, why this is so, and how to adjust, is an essential part of the process of maturing. In normal circumstances, it is the responsibility of the parents to provide the children with help and guidance in this process. In their absence, it is incumbent upon the authorities who have such children in their care to shoulder this responsibility as best they can. This can be considered part of the responsibility of the State to provide "special protection and assistance" to children separated from their parents, recognized by Article 20 of the Convention.

Children who have been separated from their parents and country for long periods may well need assistance in preparing themselves for return. Article 19 of the Convention guarantees the right of the child to protection not only against physical abuse, but also against "all forms of physical or mental violence." In an extreme case, forcing children to repatriate abruptly, without any preparation for such a momentous change in their lives, could constitute psychological violence. In preparing children for repatriation, however, care should be taken to

avoid fostering illusions as to options which do not exist, or the right of the child to make decisions, which would only be counter-productive from the viewpoint of the child's own welfare.

### **7 Article 39, the Right to Assistance in Repatriation and Family Reunification, and the Best Interests of the Child**

Article 39 of the Convention recognizes the right of children who have been victims of "neglect, exploitation or abuse" to "appropriate measures [for] physical and psychological recovery and social integration." Although the Convention does not expressly identify exile as an experience which gives rise to a right to rehabilitation and resocialization, experience demonstrates convincingly that the complex of experiences commonly suffered by child refugees, in particular unaccompanied minors, has a psychosocial impact no less serious than many other forms of neglect, exploitation or abuse.

An appropriate programme for promoting the social reintegration of children returning from exile would include not only pre-return counselling of children, but also prior contacts with their family, in order to evaluate the capacity of the family to receive the child, and to sensitize the parents to and prepare them to cope with the needs of their returning children.<sup>49</sup> Ideally, the programme should also

49 Paragraph 14 the CPA guidelines for unaccompanied minors recognizes this need, providing that if the Special Committee makes a *prima facie* decision that return is in the best interests of the child, it is incumbent upon the UNHCR to contact the child's family in order to "assess [their] willingness ... to accept the return of the minor and their ability to provide appropriate care." Note on Unaccompanied Minors, par. 14.

include counselling of the child and his or her family after return, when difficulties in adjustment occur.

The criteria for determining which children should return to their country of origin, as indicated above, includes not only a determination of refugee status, but also evaluation of the relative appropriateness of repatriation/resettlement on the basis of the principles of the best interests of the child and family unity. The procedure established under the CPA provides that, when information concerning the situation of the family in the country of origin was necessary to evaluate the claim made by a child asylum seeker, final decision should be postponed while efforts were made to verify the claims in the country of origin.<sup>50</sup> It also provides that decisions that repatriation is in the best interest of a child should not be considered final until the family has been contacted, and their willingness and ability to provide the child with appropriate care evaluated.<sup>51</sup> Apparently, this aspect of the procedure was not implemented systematically, either because of fear that contacts with the families could provoke reprisals, because the child's allegations regarding the family situation seemed lacking in credibility, or due to the lack of sufficient means to investigate all such cases during the eligibility procedure.

This gives rise to the possibility that, when contacts are made with the families of children in exile in preparation for reunification, situations may be discovered which indicate that reu-

nification may be problematic. It may be discovered that the parents are separated or divorced, no longer living or in poor health, that the child was not living with his or her parents before departure, that circumstances indicate a substantial risk that the child will be ill-treated, etc.

Such situations, hopefully rare, would need to be approached with care, taking into account the best interests of the child. Circumstances of this kind do not have a bearing on refugee status. Under accepted international law, if a child is not a refugee, he or she has no option but to return to his or her country of nationality, even if repatriation will not result in family reunification. While family reunification is the most compelling reason for the return of unaccompanied, screened-out child asylum-seekers, it is not the only reason. The country of nationality, like their parents, have a duty to receive their children and, under international law, no other country has a duty to take them in.

In such situations, a two-fold response may be foreseen. In general, if preliminary contacts with parents indicate that problems exist, efforts should be made to ensure that the children concerned, if they return to their country, would be treated in a way compatible with the Convention on the Rights of the Child. If the parents are divorced or separated, would decisions on custody be based on the best interests of the child? If immediate return to the parental home would not be in the best inter-

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50 *Ibid.*, par. 12.

51 *Ibid.*

ests of the child, what options are available? Would they be able to stay with some other member of the family? Would foster care be available? Would they be confined to a closed institution? Is community based, group residence a possibility? In principle, family reunification should remain the goal, even if immediate return would be not be feasible, or if the family would need some assistance in adjusting to the return of the child.

On the other hand, if the pre-return visit reveals information which, had it been available earlier, might have resulted in a decision that resettlement would be in the best interests of the child, it may be necessary to review the decision. This would be appropriate, for example, in the case of children having relatives both in their country of origin and elsewhere, where the pre-return investigation

reveals facts which make it appear that the interests of family unity would be better served by resettlement than by repatriation. In such cases, the best interests of the child may require that an effort be made to explore the possibility of obtaining resettlement on humanitarian/family reunification grounds.

While the best interests of the large majority of screened-out child asylum-seekers require prompt repatriation and reunification, the best interests of some individual children may require making an exception to the rule. What the Convention on the Rights of the Child requires, in effect, is a solution which will safeguard the interests of the few without sacrificing the interests of the many - a challenge which lies at the heart of all human rights endeavours.

# Rethinking Bosnia and Herzegovina's Right of Self-Defence: A Comment

Winston P. Nagan\*

The war of aggression against Bosnia and Herzegovina grinds on pitilessly. Millions of refugees have been generated, hundreds of thousands of people, mostly non-combatants, have been killed, rape camps, death camps, and torture camps have been exposed. The tens of thousands of women and children, who have been raped are now no more than an unpleasant footnote, a diplomatic irritant to the negotiating foreign policy establishment of Europe and North America.

The onset of winter 1994 was an ecological fact critical to the humanitarian situation in Bosnia and Herzegovina. President Clinton promised more fiscal intervention. This meant that in addition to supporting the UN monitoring presence, there would be more food and improved logistics in the form of air drops, firmer dialogue with rogue militias and deals with crooks, thugs, and war criminals to permit some destitute, displaced Bosnian survivors to live until the next shelling.

The overwhelming fact that continues to confront the moral fabric of the post-Cold War era is this: the war of aggression in Bosnia and Herzegovina is a war of

genocide. The second important fact is that there is no decisive international will to stop the genocide, and the holocaust prescription "never again," has become meaningless. In this pathetic moral desert, the European Community and its security and human rights concerns has become severely tarnished. The UN has not yet emerged from its convoluted entanglements in this crisis. Already its deeply flawed presence, its "MacKenzie" factor, and its moribund impotence in the face of aggression, genocide, denigration of humanitarian law, outright rejection of human rights and the right to humanitarian aid of the victims, will require generations to overcome.

North America has found a place to hide behind "Euro" initiatives, UN responsibilities, Security Council resolutions, domestic crises, new vistas of economic and security concerns (NAFTA and the Pacific rim). We are incapable of avoiding the widely perceived fact that when it comes to genocide, war crimes, crimes against the peace, and the outright rejection of the Rule of Law, there is a clear, unequivocal, failure of will.

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What does this mean for the Bosnian people? It means precisely this: unless the Bosnian State is given the support to defend its political independence and territorial integrity, it will be destroyed, and the rules of international law and order will have been subverted by aggression and murder for the next several generations. Second, if the Bosnian people are not given the support to defend themselves from extinction, the forces of racism and terror will win, and a new set of rules about human indignity will stand victorious over the rules civilization has formulated and prescribed in the aftermath of World War II. The law of the UN Charter will be a hypocritical promise, and no more.

What prevents the Bosnian State and people from defending their State, and their right to exist? The answer is as astonishing as it is simple: the Security Council Resolution 713 imposes an arms embargo on Bosnia and Herzegovina, that is to say, on the victim of an armed attack in violation of Article 2(4) of the UN Charter. This Resolution was passed on the initiative of the Belgrade authorities who persuaded the Security Council to impose an indiscriminate arms embargo on both the perpetrators and the victims of aggression. The operative part of this resolution reads as follows:

“6. Decides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the

Secretary-General and the Government of Yugoslavia.”

This Resolution has had the unfortunate consequence of promoting what it was meant to constrain: an expansion and intensification of the war itself. The Resolution imposed an arms embargo on the poorly armed Bosnians, making them vulnerable targets of aggression on the part of Belgrade and its surrogates who controlled and regulated the fourth most powerful assembly of armed forces in Europe. By extinguishing the Bosnian capacity to acquire support for self-defence, the Resolution removed any constraint that a self-defence deterrence capability may have held to improve both the security picture of the region, and the negotiating prospects for a sustainable peace. In other words, the victim States were virtually unarmed; they were now also deprived of the support of any responsible State committed to repelling the aggression and willing to assist the victims as an aspect of its obligations under the UN Charter. Indeed, early on, the Clinton administration saw the incongruous nature of the overall international response to the aggression against Bosnia viz., that intervention to repel aggression on a collective or individual basis was being ruled out as an option, and the right of the victim States and peoples to defend themselves was being apparently abrogated by the Security Council Resolution 713. Either the response of the international community must envision a collective security responsibility to send in troops or whatever is militarily necessary to repel the aggression and stop the genocide, or the Bosnians must have their Article 51 right to self-defence unimpaired by anaemic or inept international interventions.

Having understood the problem, the "new" United States administration floated the idea of removing the arms embargo placed on the Bosnians. To use a well-worn metaphor, the United States ran into a brick wall at the diplomatic level. At the political level, it became clear that the Security Council was not going to revisit Resolution 713, and the historic weakness of the Council became obvious: a veto by any of the five permanent members could freeze into existence Resolution 713; more than that a threat of the use of the veto would prevent it from reaching the floor of the Council.

In floating this possibility, the US policy-makers as indicated ran into a major stumbling block. It was impossible to get the Security Council to rescind the Resolution. The threat of the use of the veto by any of the other four permanent members would mean that even if the conditions which were obtained when the Resolution was passed no longer hold true, the Resolution would stand. In other words, in order to promote peace and security, the Resolution needs to be changed or redefined. In its present form it does exactly the opposite of what its original intent might have been. In effect, it validates aggression, under the guise of promoting international peace and security. Worse still, the Resolution prevents precisely the kind of intervention needed to stop genocide, that is to say, the unintended consequence of the Resolution is to promote or tolerate the vilest of all international crimes, the crime of genocide.

This outcome raises an acute problem for the international constitutional system. If the effect of a Security Council resolution, under Article 24 and Chapter VII does not vindicate the purpose of the resolution itself, (i.e., promote and main-

tain international peace and security), and if that resolution has the effect of supporting aggression and genocide, must such a resolution be interpreted to undermine or extinguish (1) a State's right to self defence under Article 51, (2) a people's right to self-defence, if its physical existence is sought to be extinguished?

The public position of US and other public policy-makers appears to be that there is no political or legal way to get around Resolution 713. The juridical standing of Resolution 713 is indeed a complex issue. The simple answer to this complex question has been to accept political and *juridical paralysis*. In the first place, the problem with the Resolution is that it provokes both legal and political difficulty. This raises the tricky constitutional question of which institution of international authority and control has the appropriate institutional competence to mediate between the political and legal organs of international authoritative decision, and how far these powers reach before they subvert the legitimate security interests of individual States. From a strictly legal perspective, it may be difficult for the World Court to hold that the Security Council has acted in a unconstitutional manner, thus placing the Court in a position to review a "political" decision of a political body of the UN system.

The first important point to note is that this is a problem of a politico-juridical character. Competencies over defence-related national security matters have this inherent character. Hence the practice of States is often reflected in the notion of the *dédoulement fonctionnel*, the State as a "double" law-prescribing actor. In practical affairs then, a State may both claim what its political and

legal interests are in preserving its core defence needs and act upon the definition of those needs, insisting that its position (as it would appear to objective, third party appraisers) is consistent with legal-political expectations required by international law. Hence the interplay of law and politics is inherent in the issue. Second, the problem of the allocation of competence is not simply the World Court versus the Security Council, it is also a fundamental issue of allocating competence between the Council and individual member States who have inherent rights of self-defence allocated to them under the UN Charter. This includes expectations about their inherent right to determine *when* their existence is threatened, and *how* to defend their security interests under international law. Stating the problem in these terms requires that we look more carefully at the text of Resolution 713 as well as of the UN Charter itself, in addition to the operational expectations that practice has generated since World War II.

### **An Analysis of the Text of Security Council Resolution 713 and Related Resolutions**

From a textual perspective Resolution 713 holds that it is being prescribed "for the purposes of establishing peace and stability in Yugoslavia." The Resolution requires the immediate implementation of a general and complete arms embargo "in Yugoslavia" and that this embargo will remain in place until the Council decides to remove it after "consultation" between the Secretary-General and the Government of Yugoslavia. The Resolution thus does not take into account States recognized as sovereign and independent that are not "in

Yugoslavia." The Resolution envisions "consultations" with the "Yugoslav government" and "not" other governments regarding the termination of the embargo. The basic fact is that subsequent to the passage of Resolution 713 new independent, sovereign states were factually and juridically recognized. These States are new in the sense that they did not "exist" when the Resolution was adopted and thus could not have been within the contemplation of those who prescribed it. On 6 March 1992, long after the Resolution in question was passed, Bosnia and Herzegovina declared its independence from Yugoslavia. On 4 April 1992 the town of Bijelina came under attack from the Yugoslav National Army. It should also be noted that on 15 May 1992 the Security Council called for the withdrawal of the Yugoslav army from Bosnia and Herzegovina or submission to Bosnian command. On 6 April 1992 Bosnia and Herzegovina was recognized by the UN as a sovereign member of the international community of States. So much for the important "dates."

The Security Council adopted Resolution 724 on 15 December 1991. This Resolution affirmed Resolution 713 and refers specifically to the State of Yugoslavia. No other State is specified. Resolution 727 (8 January 1992) also explicitly affirmed Resolutions 713 and 724. This Resolution accepts the Secretary General's Report S/23363 of 5 January 1992. The Resolution and report make no reference to States other than Yugoslavia. Paragraph 33 of the Secretary-General's report does have a reference suggesting that the embargo "would continue to apply to all areas that have been part of Yugoslavia." The interpretative question is whether this

language must be construed to include non-Yugoslav States that *had* been part of the Yugoslavia. As a threshold matter all the language referred to (713, 724, 727 and Sec.Gen Rept. S/23363) do not mention States other than Yugoslavia. The element of uncertainty as to interpretation is brought in by the affirmation of Resolutions 713 and 724 which do not go as far as a possible interpretation of this quoted language might suggest. In other words Resolution 727 was not meant to go beyond Resolutions 713 and 724, but language in a report which was incorporated into the Resolution carries a possible interpretation that goes beyond the plain textual import of these Resolutions and which are themselves incorporated into Resolution 727. Since Resolution 713 conditions the end of the arms embargo "in consultation" with the "Government of Yugoslavia" and no other governments, it would appear that from a purely textual perspective the words in paragraph 33 must be construed as to go no further than that envisaged in Resolution 713. Moreover the specific provision for consultation with the Yugoslav government cannot be construed to mean consultation with governments other than the Yugoslav one. The specific language of paragraph 33 also holds that the embargo "would continue to apply to all areas that have been part of Yugoslavia." The critical words are "would continue." This ostensibly meant the embargo of arms to areas "in Yugoslavia" or a part of Yugoslavia which at that time included Croatia and Bosnia and Herzegovina, would continue until the Secretary-General and the Government of Yugoslavia "consult" with each other. This is however a plainly absurd conclusion. Indeed, it should be clearly understood that these States subsequently

were internationally recognized as sovereign independent States outside of Yugoslavia. Thus, it would seem that reasonable construction of this paragraph in the context of Resolution 713, 724 and the affirmation of these Resolutions in 727 suggests that these terms ought not be expansively interpreted to cover either the Republic of Croatia or Bosnia and Herzegovina by implication within the reach of the embargo on Yugoslavia itself. The areas that have continued to be "Yugoslavia" are Serbia and Montenegro.

Paragraph 33 also makes reference to "any decisions on the question of recognition of independence notwithstanding," implying that it is meant by implication to cover the independent republics (Slovenia, Croatia, Bosnia and Herzegovina and Macedonia as well as "Rump" Yugoslavia) and by further implication to be incorporated by reference into Resolution 727 and by still further reference to Resolution 713, and by still further implication to limit the applicability of Article 51 to a recognized, sovereign State subject to an armed attack in violation of Article 2.4 of the Charter. Apart from the tenuous connecting links between paragraph 33 and the UN Charter itself, the references such as they are and the implications, such as they are, must be read in light of the plain language of Resolution 713, and the political-jural context that relates to its prescription. The phrase "in Yugoslavia" is obviously not meant to apply to sovereign nation States "not" in Yugoslavia, unless there is a clear intention to amend Resolution 713 by Resolution 727. There is no indication that such was the intent of the Security Council. These decisions on the issue of recognition and independence could only



have had reference to Slovenia and Croatia since these States were awaiting the decision on the recognition of their claims to sovereignty and independence. Bosnia and Herzegovina had not been declared independent and thus no issue of the recognition of Bosnia and Herzegovina was pending before the UN.

An important element in determining the meaning and reach of Resolution 713 reposes in the clause that stipulates the condition and processes of its duration. The Resolution stipulates that its termination will only be prescribed "after consultation between the Secretary-General and the Government of Yugoslavia." This implies as a factual matter the continuing unity of the Yugoslav State rather than a State that is factually and juridically in a State of dissolution, as determined by the Badinter arbitration commission, or Yugoslavia must realistically be identified as those remaining republics who claim to be the successor State to the former Yugoslav federation, i.e., Serbia and Montenegro. The embargo is supposed to end when the key protagonist and aggressor "State" agrees to consult with the Secretary-General of the UN. A resolution or a part of a resolution must never be read to produce an absurd result, and the Security Council's resolutions must not be interpreted to imply such an outcome when more rational and reasonable constructions of its resolutions are juridically possible. Security Council Resolution 757 of May 1992 not only imposed sanctions against "Yugoslavia," it branded Yugoslavia as an aggressor and a violator of international law and the UN Charter. If any rational implication by reference and reasonable construction can be inferred from Resolution 757

it is that it factually and juridically replaced Resolution 713 regarding the situation in Bosnia and Herzegovina. In (17) April 1993, Resolution 820 of the Security Council - again - designated the activities targeting Bosnia and Herzegovina as aggression, it condemned the ethnic cleansing and affirmed the sanctions imposed on Rump Yugoslavia.

### **Resolution 713 in the Context of the UN Charter**

The UN General Assembly, the United States Congress and many other concerned participants in the international community are deeply concerned at the mischief that has attended the interpretation of Resolution 713. Also they are concerned that it has brought into disrepute both the UN and the collective capacity of the international community to defend the most basic values of peace, humanitarianism, human rights and essential dignity in Bosnia and Herzegovina and Croatia.

We start with the Charter article that spells out the powers of the Security Council: Article 24. This article does not vest the Security Council with "exclusive" power or competence over matters of international peace and security. The text indicates that the Council has only a "primary" responsibility for international peace and security matters. This is a point of interpretation affirmed by the World Court in the *Expenses* case. Indeed, it has long been recognized that the Security Council's competence was deeply flawed because of the veto allocated to the permanent members. This meant that security threats, for example, to superpower interests or interests of the permanent members of the Council

could be impaired by a veto (a single vote), and thus provide no coherent international response to the problem of peace and security, as a major issue of international concern. This is precisely what happened during the Korean War, when the United States got around the Soviet veto by the constitutional innovation known as the "Uniting for Peace Resolution." This resolution held that when the Security Council was paralyzed by a veto and a breach of international security continued, a residual authority lay in the General Assembly, if a two-thirds vote could be obtained, to act to terminate breaches of international peace and security.

In the context of the Cuban missile crisis, the United States interpreted its obligations under Article 24, Chapter VII and Article 51 to first preserve its inherent right to self-defence. That is to say, it first acted, and then took the issue to the Security Council under Article 51. The United States construed the words "primary" not to undermine its competence to determine for itself what it should do to defend its security interests under its Article 51 competence. A State under Article 51 is clearly allocated the inherent right of self-defence. The principle instrument of Western security concerns (NATO) is not organized under Article 53, which would nominally place it under the jurisdiction of the Security Council, but under the self-defence principle of Article 51. The Western security alliance had specifically preserved for itself the rights of individual and collective self-defence against Russian-Soviet imperialism.

The public position taken by France in the context of the Nuclear test ban cases was to rigorously affirm that its testing

programme was an intrinsic part of its self-defence domestic security authority, and not a matter to be adjudicated by the World Court. More recently, the Libyan government challenged the legality of a Security Council resolution that seemed to trump Libya's rights and obligations under a multilateral treaty (*The Lockerbie case*). The wide powers of the Council were recognized, although the precise point was textually found in Article 103 of the UN Charter. This provision holds that: "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under *any other* international agreement, their obligations under the present Charter shall prevail" (emphasis supplied).

The provisions of Article 103 do not refer to obligations that do not arise under the Charter itself. The self-defence prescription is a Charter right, hence the *Lockerbie* decision adds little to the mediation between the competence of the Security Council as an aspect of international jurisdictional concern and the competence of a State to defend itself when the international framework of peace and security is ineffectual in stopping aggression and genocide.

Let us take a closer look at the critical textual provisions of the UN Charter to show that the Bosnian right to self-defence is unimpaired by Resolution 713. As indicated earlier, under Article 24 of the Charter the Security Council has "primary responsibility for international peace and security." This phrase is preceded by the following terms: "In order to ensure prompt and effective action by the United Nations, its members confer...." This language may most plausibly be read as the language of

restraint (i.e., the "primary responsibility" is conditioned on not only "prompt" but "effective action)."

Resolution 713 does not envision "effective" action or "prompt" action to stop aggression in the State of Bosnia and Herzegovina. It does not as a factual matter give either effective or prompt action to terminate breaches of international peace and security. There is strong legal authority supporting the proposition that the term "primary responsibility" does not mean "exclusive responsibility," as articulated in the "Uniting for Peace Resolution" and the *Expenses* case. The terms are further qualified by the notion of a "prompt" and "effective" form of intervention. This has not happened in Bosnia as an appreciation of the background context will amply demonstrate.

Let us now turn to Article 25 of the Charter. This Article holds that "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." This Article must of course be interpreted in the light of the *whole* Charter, including Article 51. The mere fact that a resolution (Resolution 713) has been adopted does not obviate the obligation that it be rationally interpreted to secure rather than undermine the text and the purposes of the Charter itself. That is to say, Resolution 713 must be interpreted so as to further the purposes of the Charter, not to undermine them. The critical phrase in this article is "In accordance with the present charter," and not truncated parts of the instrument.

The jurisdiction of the Security Council over threats to the peace, breaches of the peace and acts of aggression is given a wide ambit of necessary

discretion under Article 39. This provision reads as follows: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide which measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security." Article 39 must of course be read in the first place, in the light of Article 24 and the limitations on the powers of the Council indicated in it. It must also be read in the light of the last article in Chapter VII viz., Article 51. The discretion given the Council in Article 39 must as well be interpreted in the light of the possibility of Security Council paralysis as a consequence of the exercise or threat of the exercise of the veto.

Now let us come to the provision in the Charter made for self-defence, Article 51. The text of this Article is not uncontroversial. However, the controversies of interpretation about the meaning of an "armed attack" and whether the Article may be fairly read as permitting or proscribing an attack in anticipation of an attack from the "enemy" State, are not issues that constrain or expand the meaning of Article 51 in the context of the war in Bosnia and Herzegovina. Bosnia has made no preparations for war, had no territorial designs on its neighbours, the immediate history is replete with efforts in the Bosnian government, at every level of international communication, to employ peaceful methods of conflict resolution, and to comply fully with the mandate of international law. The exact opposite is the case with the aggressor coalition under the direction and control of the Belgrade élite. To fully appreciate what a proper appreciation of Article 51 means to the existence of the

Bosnian State and people, it is imperative that the text of that Article be fully reproduced:

“Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of the rights of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

This is a complex provision, whose basic constitutional premise is not altogether obvious. Put in the context of Chapter VII (the chapter that authorizes the Security Council to use force if necessary to maintain or restore international peace and security) this provision seems on the surface to imply a negation of Chapter VII. That is to say, the entire meaning of Chapter VII makes the issue of peace and security a “decision-making” matter of international, collective concern of the Security Council *and* at the same time makes international peace and security a matter of individual or collective “self-defence” that is inherent in the framework of Charter expectations.

The ostensible conflict between jurisdiction of the Council based on “international concern” and jurisdiction of indivi-

dual sovereign States based on “self-defence” cannot be reconciled by abstract textual analysis, unless that analysis is squarely put into the context of the actual conflict. In other words, reconciliation in the sense of rationally determining when an issue of international peace and security and when the priority of self-defence kicks in can be only rationally done if the context of the conflict is systematically assayed, including the critical perspectives - the identifications, claims and expectations of all the relevant actors. The contextual background will disclose that Belgrade and its surrogates intended to use force to establish a “greater” Serbia, that is, has used the strategies of aggression, atrocity, ethnic cleansing and widespread violation of humanitarian law and human rights prescriptions. It will also be readily seen that the Government of Bosnia has done all that international law has required to keep the peace, exhaust pacific methods of dispute resolution and respect human rights and fundamental freedoms regardless of race, religion or ethnic background. Belgrade’s patterns of identification have been xenophobic and racist, its claims for a greater Serbia imperialistic and its strategies a rejection of law and civility.

In the present situation, Resolution 713 purports to extinguish Article 51. That is to say, acting under Chapter VII and Article 24, the Security Council is in effect claiming a competence to trump Bosnia and Herzegovina’s rights under Article 51, right declared in this Article to be of an “inherent” nature. The text of the Article states that “Nothing in the present Charter shall impair the inherent right... of self-defence.” This part of the Article represents a clear allocation of power or competence to a State that

the business of defending its existence, its basic security values and interests from an "armed attack" is in the first place, a power constitutionally allocated to that State (the target or victim State) of an armed attack, and its allies, those who are able and willing to come to the assistance of that State to assist in its capacity to defend its territorial integrity, political independence and juridical sovereignty.

The text of Article 51 also envisions a sequencing of jurisdiction between the State utilizing an Article 51 competence to defend itself, and the subsequent or sequential role of the Security Council. Article 51 indicates that when a State acts under this competence or power it must immediately report its conduct to the Council. It should be noted that this is precisely what the United States did in the context of the Cuban missile crisis, it first acted against the threat to the United States, and then reported its actions to the Council. It is precisely for this reason that NATO, as a region security arrangement, is organized under Article 51 of the Charter. This technical requirement of action followed by reporting rests on a pragmatic and technically important rationale.

Pragmatically, the major powers would never wholly cede the responsibility of self-defence, or national security, to an international organ like the Security Council in a world that is by its nature still highly decentralized in the *de facto* distribution of real or effective power in the world power process. That world or global power process carries high expectations of violence, much of which is largely unauthorized coercion. In such a situation no State, willing to call itself a State, would sacrifice the existence of itself and its people by conceding the

right to self-defence to an international body of good intentions but one with a record of sporadic and indifferently capacities to maintain its role as the global manager of global security and peace expectations. These capacities had their limits clearly underlined during the height of the Cold War when the superpowers and other permanent Council members could paralyze a meaningful security role for the Security Council by invoking the veto, or simply threatening to invoke the veto, as a means of keeping an issue off the Council's agenda. It was precisely for this reason that the United States did not take the Cuban missile crisis to the Security Council first, and then attempt to act. Indeed, had it sought direct Security Council intervention to dismantle and remove the missiles, the USSR would have exercised a veto, and then the US would have been faced with the task of interpreting such action so as not to compromise its inherent right to protect its own security interests, or risk being stuck with a position that compromised that very right. An important technical point that emerges from the interpretation of the scope or reach of Article 51, is that it must be contextually interpreted to understand the problem of priority of competence between the different actors, institutions and interests in which coercion is threatened or used in order to realistically and rationally allocate competence or power between, for example, the Council and the States involved in a conflict situation.

The context of coercion in Bosnia and Herzegovina will also disclose that while the "people" of Bosnia existed and were recognized as a people in international law, the State was not recognized as a State when the Resolution was passed.

The subsequent recognition of the State of Bosnia means that, technically, the Resolution only applied to the "people" and not the State, and therefore the State and its allies are not bound technically by the Resolution unless and until that resolution is modified or supplemented to explicitly hold that the recognized and sovereign State of Bosnia and Herzegovina is bound by Resolution 713. A restriction on the sovereignty of a State cannot be presumed in matters that relate to the security and existence of a State and its people. Resolution 713, thus, cannot be presumed to impair the specific right of Bosnia and Herzegovina under Article 51, unless there is a clearly expressed intention to use Chapter VII to constrain recourse to Article 51. Since Bosnia did not juridically exist as a State and was not, as a *de facto* State, attacked when the Resolution was passed, the Resolution may fairly be interpreted as reaching only so far as it does not impair Bosnia's rights to self-defence, as viewed from the perspective of a third party appraiser. As applied to the "people" of Bosnia and Herzegovina, the resolution does not take into account the notorious fact, juridically recognized by the World Court and the Security Council itself, that genocide is being practised against the people of Bosnia. Since genocide is a universal crime, and its prohibition is a peremptory principle of international law (*jus cogens*), the Resolution's effect is to unintentionally condone or support "genocide." The only rational way to avoid placing responsibility for genocide on an important UN institution, is to clarify the reach of the Resolution - to assure the people of Bosnia and Herzegovina that their right to receive security assistance to prevent their extinction is not a consequence intended by Resolution 713. Unfortuna-

tely, the Security Council is in no position to clarify the "reach" of Resolution 713 because Britain, France, Russia and China, all with diverse interests and concerns in the region, would exercise the veto.

Since it is politically unfeasible, to get the Council to revisit the Resolution, the only other option that *is* juridically correct and politically feasible, is for all States to assume and *declare* unilaterally that (I) Resolution 713 was never meant to further aggression against a member of the UN (II) Resolution was never meant to serve as a cover for genocide and the violation of a *jus cogens* principle of international law and (III) all States may provide the Bosnians that level of support necessary to secure their physical existence, and that level of support necessary to repel the aggression.

Finally, the latter part of Article 51 holds that the inherent right of self-defence is sequentially limited "until the Security Council has taken measures necessary to maintain international peace and security..." The operative qualification in this allocation of sequential jurisdictional competence are the terms, "necessary to maintain." Even the most cursory appreciation of the contextual features of the war in Bosnia and Herzegovina will clearly indicate that the Security Council's intervention has neither approximated the "necessary" conditions to maintain peace and security, let alone the termination of aggression and genocide. This brings us to the fourth point a State may unilaterally declare under the law of the UN Charter.

A State may declare as a fact that the Security Council's competence to effectively and promptly restore international

peace and security is limited to precisely that set of "necessary" conditions. The non-fulfilment of these conditions which prescribe the competence of the Council should not be interpreted to impair the right of individual or collective self-defence, when the invocation of that right is consistent with the major purposes of the UN Charter. Thus, unless, or until the Security Council specifically holds that Resolution 713 covers the State of Bosnia and Herzegovina, specifically holds that there is no aggression, no genocide, no war crimes, no unlawful territorial conquests, States have an obligation under Article 55, to promote *inter alia*, "peaceful and friendly relations" between States; "respect for the equal rights and self-determination of peoples"; "universal respect for human rights and fundamental freedoms." Under Article 56, all States members of the UN pledge themselves to take "joint and separate action" to achieve the purposes of Article 55. It seems to me that these articles are a compliment to Article 51 which allocates competence to individual States and alliances of States in matters of peace, other security concerns, and which implicitly acknowledge that there will be situations in which the organs of the UN may not be able to act when necessary, or to act either promptly or effectively. I would submit that Bosnia and Herzegovina presents just such a case. The responsibility for international action to protect peace, security, human rights must then fall upon the individual States and their allies, to uphold the Charter, and the international Rule of Law. From what I have said, there is no legal bar in law or in policy to provide the Bosnian State and people with the necessary, proportionate assistance to permit them to defend themselves from brutal extinction.

## Post Script

The problem posed by Resolution 713 has been the subject of much discussion in public policy circles in the Islamic world, in the United States and, more recently, in Western Europe. The issue was raised before the World Court in the Brief of Bosnia-Herzegovina by its agent Professor Francis Boyle, and the importance of this issue was alluded to in the separate opinion of Judge Lauterpacht.

Former British Prime Minister Margaret Thatcher, a long time advocate of lifting the arms embargo on Croatia and Bosnia and Herzegovina, has argued that the right to self-defence as codified in UN Charter (Article 51) codifies a right that precedes the Charter and therefore cannot be abridged by Resolution 713. Individual members of the US congress have argued, essentially on institutional and policy grounds, that the Resolution will further weaken the capacity of the Security Council to perform its difficult collective security, peace keeping role effectively. On policy grounds they assume that arming the Bosnians will prolong the war and will endanger the UN monitors and humanitarian aid workers on the ground. The United Nations General Assembly (General Assembly Resolution A/48/1/50; 20 December 1993) reaffirmed that Bosnia and Herzegovina is a sovereign independent State and a member of the UN, and that it is entitled to all rights set out in the UN Charter, including the right to defend itself from aggression. The same Resolution expresses its concern about the continuing war situation in Bosnia and Herzegovina and calls upon the Security Council to exempt Bosnia and Herzegovina from the arms embargo and at the same time urges member States to extend their

cooperation to the Republic of Bosnia and Herzegovina in the exercise of the inherent right to individual and collective self-defence, in accord with Article 51.

On 27 January 1994 Senate Resolution (Res S1281 Policy on Termination of United States Arms Embargo) declared in a vote of 87 to 9 that no UN embargo would be valid under Article 51 and that in effect the embargo was a United States Arms Embargo. The Resolution called on President Clinton to end it. Fifty-one US Senators addressed a letter to President Clinton supporting unilateral action by the US to lift the arms embargo urging that if the US took the first step her allies would follow.

The Foreign Relations Authorization Act (30 April 1994) signed into law by President Clinton adopted the Senate Resolution relating to the "Policy on Termination of the United States Arms Embargo." On 9 June 1994 the House of Representatives approved the Defence Department Authorization bill which contained an amendment designed to compel President Clinton to unilaterally lift the arms embargo on Bosnia and Herzegovina. News reports indicate, *inter alia*, that Iran has "openly" delivered a "planeload of military material to the Bosnian Muslims" (Graham Fuller, *Iran's Coup in Europe*, The Washington Post, 15 May 1994, p.7).



# Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations:

## The Case of Somalia

Willy Lubin\*

### Introduction

Who can say that he feels no pain when he sees, televised directly from Somalia, pictures of skeletons hanging with the withered breasts of thread-like women. We have also seen thousands of peasants and cattle farmers pursued, unable to cultivate their lands and feed their animals. All were condemned to die of hunger because, where they lived, the profiteers of a regime rich in sophisticated weapons were competing in war-like frenzy. Their chiefs had called themselves "warlords."

The international community naturally showed total solidarity in attempting to end the dramatic situation of Somalia and "restore hope" once again to this population.

Was this "to relieve a failing State" or "the altruistic renaissance of colonialism?"

Whatever the alternative scenarios, the important point is that action was necessary. There are cases where the international community must replace a

failing government, as explained by the Secretary-General of the United Nations, Mr. Boutros Boutros Ghali, at the World Conference on Human Rights, held in Vienna on 14 June 1993:

"... the question of international action should come up when States prove to be unworthy of this mission (to protect human rights) ...under such circumstances it is up to the international community, i.e. the international world-wide or regional organizations, to take over from failing States."

The same is said by those who had allowed themselves to be convinced that, with the advent of the Cold War, the hour of the United Nations had finally come and that the new international order, born from the ruins of the former Soviet block, could make effective the role attributed to the United Nations by its Charter.

Consequently, "peace-keeping" operations have grown as never before in recent years<sup>1</sup>, and one of the most recent

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1 Between 1945 and 1987 there were 13 such operations, whereas since 1987, 15 have been carried out.

operations has been that in Somalia - UNISOM.

This operation, if perhaps successful on the humanitarian level, was transformed into a true nightmare in the field; dozens of "blue helmets" and hundreds of Somali civilians have been killed, not counting the wounded and the material damages. The Somalis are no longer dying from hunger, but from the bullets of the "blue helmets", who were there in order to "restore hope" and not in order to crush it.

The rebel general, Mohamed Farah Aidid, accuses the United Nations of "violating" his mandate and "sabotaging" the peace plan. The United Nations, for its part, attributes the responsibility to the faction of General Aidid.

Whatever the degree of responsibility of either party in this conflict, one thing is certain: human rights should be respected and protected by both sides. In this regard the failure is flagrant.

Moreover, once the United Nations begins to use force, there arises not only the problem of its "neutrality", but also and especially that of its international responsibility in the case of violations of the Charter.

It is especially this last problem which will be examined very briefly in the present study.

Somalia represents a model event for the Third World. We should draw some lessons from it.

Before examining the international responsibility of the United Nations (Part II) and its consequences (Part III),

we must look at the hidden background of the "peace-keeping" operation in Somalia (Part I).

## **I The Secret Background of a "Peace-Keeping" Operation**

In order to explain the secret background of this operation, one must focus on two ideas: the role of the West, and the *true nature of the United Nations forces in Somalia.*

### **a Is the West Neutral?**

The United Nations operations should not allow us to forget the responsibility which the West bears for imposing on the Somali economy adjustment programmes which helped to ruin the country.

Indeed, an economics professor at the Social Sciences Faculty of the University of Ottawa, Mr. Chossu Dovsky, has explained<sup>2</sup> that the programme imposed at the beginning of the 1980s by the International Monetary Fund (IMF) and the World Bank on the Somali government endangered the fragile balance between the nomadic and the sedentary sectors. One of the functions of this austerity plan was to free the funds destined for the reimbursement of the debts contracted by Somalia with the members of the Paris Club and especially with IMF itself. The latter refused - as usual - to reschedule the debt. The consequences of this structural adjustment programme which was poorly adapted to Somalia were:

- an increase in nutritional dependency; food assistance was multiplied by 15<sup>3</sup>. This caused a rural exodus and migration of the producers, to the detriment

2 See *Le Monde diplomatique*, July-August 1993.

3 See *Africa News*, report of 13 May 1993.

of traditional products, leading to an impoverishment of the agricultural communities. The best arable land was taken by the military and those in good standing with the regime;

- the devaluation of the Somali shilling. This caused an increase in prices, decrease in buying power and collapse of the infrastructure.

The Somali economy as a whole was thus caught in a vicious circle in the same way as other small countries, including Haiti, which were ruined because of the dumping prices of subsidized imported cereals.

## **b Are the Forces of UNISOM "Peace-Keeping" Forces?**

The "peace-keeping" forces are neither the armed forces which the Security Council might itself establish (Articles 43 and 47 of the Charter of the United Nations) nor those organized by the member States on the basis of an invitation<sup>4</sup> or of an authorization<sup>5</sup> from the Security Council.

These two types of forces may employ coercive measures to re-establish peace in the country or region concerned.

As regards Somalia, we think it would be inaccurate to speak of "peace-keeping forces," since these forces were established by a few member States on the basis of an authorization from the Security Council.<sup>6</sup>

The peace-keeping forces differ from

the forces in Somalia by their mandate, which is to keep the peace. Under this heading there are two large types of operation carried out by the United Nations.

In the first one the United Nations forces have the specific mandate of keeping the peace by supervising the armistice agreements or the cease-fire, which constitute a precondition for the use of these forces (examples: UNTAC in Cambodia, UNPROFOR in the former Yugoslavia and MINHUA in Haiti).

The second type of operation consists of sending an observation mission, as for example the group of United Nations military observers to India and Pakistan (UNMOGIP in 1949).

It is a multinational force authorized by the Security Council which operates in Somalia. This force is subject to the regulations of international humanitarian law which must be respected. For this purpose, the States which furnish the contingents are required to give them appropriate instructions, and the United Nations has the same obligation with regard to a unified command. Further, if necessary, infractions of the regulations of international humanitarian law must be suppressed by the national authorities of the contingent concerned.

However, beyond these initial problems, it is the question of the international responsibility of the United Nations which should be examined.

4 The example of Korea in 1950.

5 The case of the Gulf in 1990.

6 Palwankar Umesh, *Applicability of humanitarian international law to peace-keeping forces*, *Revue internationale de la croix-rouge*, May-June 1993, n. 80, at 245-259.

## II The Responsibility for Fault and the Responsibility for Risk of the United Nations

Any legal system implies that the legal entities assume responsibility when their behaviour infringes the rights and interests of other legal subjects. This is particularly so in the international community, where the United Nations plays the role of regulator. Let us not misunderstand. It is indeed a question of the responsibility of the United Nations as an organization, and not the responsibility *in solidum* of the member States. As was said above, dozens of "blue helmets" and hundreds of Somali civilians have been killed, without counting the wounded and the material damages.

Who is responsible? To whom will the families of the victims turn for an accounting?

With regard to the "blue helmets," it is the United Nations and the States providing the troops which settle the question between them; however, with regard to the civilian victims, to ignore the problem indicates a very short-term perception.

It is understandable that there are some who do not dare to bring up the problem within the framework of an international conference, but there are various means of assuming responsibility without weakening one's authority. It is not the aim of this study to question the abilities and justification of "peace-keeping" operations. It is obvious that their importance need no longer be reconsidered, just as it is clear that the United Nations can no longer continue to be simultaneously a fierce

defender of human rights and the first to violate them. The United Nations must be able to assume and accept its responsibility.

### a Responsibility for Fault of the United Nations

#### 1 Attribution of International Responsibility to the United Nations

When the behaviour which is being denounced has come from persons or organizations under its actual authority, international responsibility may be attributed to the United Nations.

In Somalia, as said by Mr. François Leotard<sup>7</sup>, there are two forces: "on one side, the American forces, placed under American command, and on the other, those placed under the command of the United Nations."

In that case, even if perpetrated by the American forces, the illicit act should be attributed to the United Nations, its perpetrators having acted in the name of that organization.

No legal distinction is thus required between the "two forces" which make up UNISOM. The United Nations may be held responsible for the acts perpetrated by the totality of these forces because, we believe, it did not take adequate precautions to protect the Somali civilian victims.

According to this theory, the responsibility of the United Nations might be involved not through the United Nations itself, but because of the objectionable behaviour of its own organizations, which have not observed the vigilance which is their responsibility.

7 Minister of Defence of France, *L'heure de vérité* - France 2, September 1993.

2 *Circumstances on the Basis of which the Acts of the "Blue Helmets" in Somalia Are not Illicit: the State of "Military" Necessity?*

Although the United Nations has refused to compensate the victims of acts committed by the "peace-keeping" forces because of military necessity, it has recognized its responsibility for acts of pillage and violence committed by these forces outside of military operations.<sup>8</sup> In the case of Somalia, this reasoning would go counter to the principles of international law in general and of international humanitarian law in particular, since the "state of military necessity" cannot be a reason for exoneration, as this concept assumes a serious and imminent danger to an essential interest (that of the United Nations or of the international community?)

From the legal point of view, the state of necessity in general cannot cancel out the illicit nature of the violation of a right unless several conditions are met:

- the exoneration must not have been excluded by a treaty, expressly or merely in spirit;
- the violation of the right was the only possible means;
- this violation may not prejudice an equally essential interest of the victim;
- no violation of a norm of *jus cogens* was involved.

In the light of this analysis, we can imagine the differences in assessment by international opinion which would arise if the United Nations were to argue "the state of military necessity" as a reason for refusing to compensate the

victims of acts committed by the "peace-keeping forces" in Somalia.

The essential interest of the international community, and thus the United Nations, was to save human lives. Have we the right to destroy some lives under the pretext of wishing to save others?

**b The Responsibility for Risk of the United Nations?**

Certain activities of the United Nations may cause serious damage to man and/or to his environment. In Somalia these may be bombings which destroy human lives, houses, breeding centres, etc. In such cases, responsibility for risk might be admissible. When the activities are compatible with international law, it would be very difficult to imagine any possible responsibility of the United Nations for fault, which is an internationally illicit occurrence. However, responsibility for risk might be admissible.

In Somalia, the victims might benefit from compensation without having to demonstrate fault by the United Nations. It would be sufficient for them to prove that the United Nations forces refused to observe a new form of obligation of vigilance, i.e. that of not opening fire on a crowd of civilians.

In the present case we might accept the general hypothesis of responsibility for risk in parallel to responsibility for fault.

**c Prejudices Caused to the Somali Victims**

The responsibility of the United Nations as a result of defaulting on a rule of international law would be purely

8 A.J.NU - 1965, at 41.

theoretical if the illicit acts had caused no damage.

However, if responsibility for risk is involved, the damage itself is the generator of responsibility; because there is damage, there are rights in favour of the victims.

Since international law ignores popular action, i.e. the possibility of any other subject, only those subjects who can establish that they have individually suffered a prejudice, will be able to initiate an action in responsibility.

It would thus be the task of the Somali "government" to defend the right of its citizens (who are not considered subjects of international law). But since the situation suits the "government" politically, it is difficult to imagine that this same government will ask the United Nations for compensation.

### 1 *Direct, Material, Moral Prejudice?*

According to constant international jurisprudence and practice, only direct damages can involve the responsibility of the United Nations. Proof of the existence of a causality link between the damage and the illicit act will be sufficient. In Somalia, it is obvious that the act of opening fire on a crowd of civilians (illicit act) has resulted in dead and wounded (prejudice or damage).

In principle, the existence of a material prejudice, whatever its nature and object, is always sufficient to involve the responsibility of its perpetrator.

Why should the United Nations be

exonerated from repairing such damages? The same would be true for moral prejudice, as *it has become the rule to take moral prejudice into account* since the award of 1 November 1923 in the Lusitania case.<sup>9</sup>

### 2 *Mediate Prejudice*

In Somalia, the victims are subjects of national law, which leads to the problem of the international legal personality of these victims. Nevertheless, it must be realized that the claim that individuals are not subjects of international law is deceptive. Indeed, almost all international texts aim at regulating the behaviour and activities of individuals. To avoid this denial of justice there is the well-known legal detour known as the *écran étatique*, where the State is used as a smoke-screen. However, as said above (point II, paragraph C), it is hard to imagine Somalia as siding with its citizens. Such an endorsement would indeed be desirable, as it would avoid a *tête-à-tête* between the United Nations and Somali citizens:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law."<sup>10</sup>

### 3 *The Principle of Prior Exhaustion of Domestic Remedies and the Case of Somalia*

9 The Lusitania, a ship torpedoed by a German submarine in 1916 (see the report of awards, Vol. VII, at 34-37).

10 Judgment of 30 August 1924 in the Mavrommatis case.

A State cannot, in the name of diplomatic protection, introduce an international protest before the individual who has been the victim of the illicit act has exhausted all the domestic remedies - amicable and contentious - provided and made available by the legal system of the State whose responsibility is sought.

This rule cannot be absolute, as it is based on assumptions. It cannot be invoked when internal appeals do not exist or are not effective. This is the case in Somalia, where any appeal is likely to remain illusory.

For example, in the case of the United Kingdom against the United States, the xenophobia of the magistrates has been invoked by the interested parties to prove that the use of the domestic procedures was impossible.<sup>11</sup>

### **III Consequences of the "Responsibility of the United Nations"**

Any rule of law - internal or international - involves two kinds of obligation: most importantly, it must be respected, and it must also repair the consequences of its non-respect.

With regard to international law, even today we continue to question the timeliness of a true system of international penal law. Moreover, in the case of Somalia we find it difficult to imagine how the Somalis, who are civil victims, could insist on sanctions against the United Nations or other subjects of international law who are the perpetrators of breaches which can be described as crimes on the basis of that same international law.

In the absence of this possibility of sanctions, we wonder whether the United Nations, as defender of human rights, does not have an obligation to repair the damages caused in Somalia.

#### **a The Obligation of the United Nations to Repair?**

If, according to international law, each State is in the first instance responsible for respecting the basic rights of any individual under its jurisdiction and if in relation to other States the United Nations - as representative of universal morality - is responsible for respecting human rights and working towards their full realization, the organization cannot be exonerated from the obligation of repairing any default to these rights.

Such an obligation was expressed as long ago as 1928 by the Permanent International Court of Justice:

"The Court finds that it is a principle of international law, and even a general concept of law, that any violation of a responsibility entails the duty of repairing it."<sup>12</sup>

In the same case, the Court also declared:

"The essential principle is that reparation should, as far as possible, cancel out all the consequences of the illicit act and re-establish the situation which would have been likely to exist had the said act not been perpetrated."

In Somalia it would be possible to repair the material damages as, for example, only the reconstruction of

11 R.S.A., Vol. III, at 1767.

12 Decree n. 13 of 13 September 1928, series A, n. 17, at 47.

the houses which have been destroyed would be required. However, with regard to the irreversible effects, it is not possible to return things to their previous state and reparation by equivalence, i.e. compensation, would have to be considered.

Grotius said that<sup>13</sup> money is the measure of the value of things; in the case of Somalia, the payment of an indemnity would be the most suitable mode of reparation.

Might it not be possible to envisage a "compensation fund for the victims of the United Nations within the framework of peace-keeping operations?" This fund would be financed by voluntary contributions, as is the case in other situations.

With regard to the moral damages, compensation would be inadequate. The most suitable type of reparation would, here too, be a moral one. We are thinking of satisfaction: the United Nations could express regrets, or present excuses to the Somali people, whose dignity and honour have been damaged.

#### **b Perspectives for the Future: Humanisation of the "Peace-Keeping" Operations**

If one thing is certain, it is that we cannot expect answers of general import in the near future. Further, in an international conference we would be coming too close to the "hard core" of the supremacy of the United Nations and the idea which some have of the Charter. However, there is an urgent need to re-gild the image of the United Nations. The "peace-keeping" operations must be

carried out for human rights, with human beings and not against them.

We very much wish that the United Nations could develop an overall programme of action on human rights. Such a plan should recommend a whole range of concrete measures aimed at the triumph of human rights and humanitarian international law, and should include action by the United Nations itself. The following points in particular should be among these recommendations:

#### **i The prevention of human rights violations within the framework of "peace-keeping" operations**

Human rights were not respected in Somalia principally because the present mechanisms, which are too repressive, are no longer appropriate. Instruments which anticipate the violation of these rights must therefore be adopted; this would, in fact, place human rights before political considerations and economic interests.

#### **ii The indispensable compensation**

As said above, we would wish to see the establishment of an adequate system of compensation for the victims of serious violations of human rights within the framework of "peace-keeping" operations. A compensation fund should be instituted for this purpose, on the basis of voluntary or other contributions.

#### **iii Respect of international humanitarian law by the "peace-keeping" forces**

While UNISOM refused, initially, to

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13 Grotius, the author of *De jure belli ac pacis* (On the Law of War and Peace) is the father of public international law.



allow the International Committee of the Red Cross to visit the war prisoners who were the supporters of General Aidid, an officer of the UNISOM force told journalists: "The United Nations is not a State. It is not a signatory to the Geneva Convention and its Protocols. Consequently, the United Nations has no duty to respect international human rights law."

Although these remarks are both shocking and odd, we have no special comments to make on them. Anyone may be mistaken, intentionally or otherwise. We would simply like to add that human rights and international humanitarian law are complementary, and thus both require an appropriate response by the United Nations. This being the case, the functioning of international humanitarian law must be reinforced by affirming (or reaffirming) the responsibilities of the United Nations forces with regard to the protection of war victims. At present too much suspicion weighs on the "blue helmets." Is the United Nations not in the process of losing its credibility?

## Conclusion

Must the United Nations choose between the will of States and that of the people?

Any black-and-white answer to this question would be rash and, further, the will of the people should be that expressed by the governments within the United Nations - but reality indicates otherwise.

In any case, voices have been raised to criticize, and even to condemn, the United Nations. It is indeed true that what has been accomplished begs many questions with regard to the choice of

situations; why Kuwait and not Palestine? Why in Somalia and not in the former Yugoslavia? Why has the United Nations backed down before the threat of a handful of Haitian military?

Observers of international politics are not surprised by these developments. The operations carried out until now have had their uses, despite their limitations. However, the United Nations is an intergovernmental organization. It represents united governments. *De facto*, the action of the "universal" organization is only the result of the will of these governments, and not of the people. Strategic, political and economic interests prevail, and this is also true of the United Nations system. The people must take action so that human rights obtain priority once more. Those peoples who are subjected to all kinds of violations of their basic rights expect a great deal more from the United Nations. As to the Somali operation - which, in the humanitarian field, has been a partial success - it makes it possible to envisage, from now on, recourse to force in order to carry out humanitarian assistance, even if the hidden factors remain "strategic."

We are certainly very far away from that world organization - the United Nations - of which we dreamt at the end of the Cold War, but the United Nations still has resources which will allow it to take protective measures and, especially, to regain its presently contested credibility.

*Medice cura te ipsum*, it is often said. The phrase expresses well what the United Nations must do in the months to come.

# Equality: Between Hegemony and Subsidiarity

Eric Heinze\*

## Introduction

The right to equality - or, more precisely, the right against discrimination<sup>1</sup> - qualitatively differs from other fundamental human rights in the international corpus<sup>2</sup>. A number of other rights allow, at least in theory, a clear demarcation between the extent of permissible international scrutiny and the extent of permissible national autonomy. The location of that boundary depends largely on the nature of the particular right

in question. Yet to draw that line in the case of equality is, in a sense, to draw it for all human rights law. Its parameters may reveal much about the parameters of human rights law as a whole.

Would an expansive equality right entail excessive intrusion on domestic sovereignty? Would the delicate balance between "hegemony" (pervasive intervention) and "subsidiarity" (respect for local autonomy), a balance from which the very legitimacy of human rights law

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- 1 Equality is not a single concept but a cluster of concepts including, for example, equality in the law, equality before the law, equal protection of the law, non-discrimination, and affirmative discrimination. The relationships among these concepts is complex, and subject to controversy. B. G. Ramcharan provides a basic distinction between "equality" and "non-discrimination." Equality may mean only "equal treatment for those equally situated ... indeed, equal treatment for unequals is itself a form of inequality." Non-discrimination clauses, on the other hand, "are designed to make clear that certain factors are unacceptable as grounds for distinction," such as race, religion, gender and other human classifications. "Equality and Non-discrimination," in *The International Bill of Rights: The Covenant on Civil and Political Rights* 246, 252 (L. Henkin, ed., 1981). They spell out exactly "what it is that must be equal, and according to which criteria." F. Sudre, *Droit international et européen des droits de l'homme* 179 (1989) ("ce qui doit être égal et selon quels critères"). See also P. van Dijk and G.J.H. van Hoof *Theory and Practice of the European Convention of Human Rights* 539 - 41 (2nd ed. 1990); W. McKeane, *Equality and Discrimination under International Law* 1 - 13 (1984), T. Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Processes* 11 - 17 (1986); M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (1976). E. W. Vierdag, *The Concept of Discrimination in International Law* (1973). Although these distinctions are crucial to the legal concepts informing the right of equality, they need not be reviewed here. For present purposes, only the concepts of "equality" and "non-discrimination" are invoked, and can be read interchangeably.
- 2 Although international instruments (such as declarations and conventions) have given detailed expression to human rights, these are not the sole source of human rights law. Human rights, like other international legal norms, ensue from conventional, customary, and other sources. The term "international human rights corpus" (or, in shorthand, "the international corpus") is used here to signify human rights from any of these sources. On sources of international law, see, e.g., Nguyen Quoc Dinh, P. Daillier, and A. Pellet, *Droit international public* 110 -12 (4th ed. 1992) (discussing, *inter alia*, Art. 38(1) of the Statute of the International Court of Justice).

derives, become unduly skewed in favour of the former? Such fears have prevented drafters of international instruments from declaring the legitimate extent of the privacy right<sup>3</sup>.

This article argues that such fears are unwarranted. Part One outlines the tension between international intervention and national autonomy, as reflected in a variety of rights. Part Two examines the difference, with respect to that tension, between those rights and the right to equality. Part Three argues that the right to equality should be broadly construed; for no threat to the legitimate, overall balance between intervention and autonomy in the international order would be posed.

## I Background

Like other international law, the legitimacy of human rights law derives largely from the balance it strikes between two conflicting impulses: on the one hand, intervention in, and, on the other hand, respect for, domestic sovereignty. Human rights law must constantly strike this balance in situations that are morally controversial and often embarrassing.

Human rights law posits a "minimum core" of norms claiming universal autho-

rity<sup>4</sup>. Yet, precisely because these norms do not generally purport to be more than minimal, human rights law also recognizes a sphere of domestic autonomy. At times peremptory<sup>5</sup>, it nevertheless refuses hegemony. It rejects general meddling in the domestic affairs of States, instead interceding, if at all, only in the event of specific violations of specific rights.

Minimal though they might be, human rights set a tall order, representing not only a complete catalogue of classical, liberal-democratic rights, but also ambitious economic, social, cultural, peoples', and other kinds of rights. Yet, by its own terms, human rights law is also devoted to cultural diversity. It rejects homogenization of beliefs or world views. It declines to articulate an overarching moral order<sup>6</sup>. It presupposes a principle of subsidiarity: the irreducible authority of the individual State to determine its own destiny in meaningful ways.

Strengthening of the European Union has contributed to the increasing currency of the concept of subsidiarity, particularly since its rather prominent appearance in the Treaty of Maastricht Art. 3(B).<sup>7</sup> Not surprisingly, the balance between intervention and autonomy is well illustrated in European human rights law. The European Convention of

3 Cf. text accompanying n. 42 *infra*.

4 See, e.g., Nguyen Quoc Dinh *et al.*, *op. cit.*, *supra*, n.2 at 632; P. M. Dupuy, *Droit international public* 154 (1992); L. Kühnhardt, *Die Universalität der Menschenrechte* 25, 28, 30, 41, 45-46 (1987); J. Donnelly, *The Concept of Rights* 82 - 83 (1985); J. Shestack, "The Jurisprudence of Human Rights" in *Human Rights and International Law* I 69, 82-83 (T. Meron, ed., 1984).

5 See text accompanying note 14 *infra*.

6 See, e.g., E. Heinze, "Beyond Parapraxes: Right and Wrong Approaches to the Universality of Human Rights Law," 12 *Netherlands Quarterly of Human Rights* (publication December 1994). C. Tomuschat, "International Standards and Cultural Diversity," *Bulletin of Human Rights* (Special Issue, 1985); L. Henkin, *The Age of Rights* 2-3, 5-10, 32-39, 157-80, 183-90 (1990); J. Donnelly, *Universal Human Rights in Theory and Practice* 63-65, 110-14 (1989).

7 Cf. Nguyen Quoc Dinh *et al.*, *op. cit.*, *supra*, n.2, at 574.

Human Rights is explicitly drafted as a limited charter of rights. Violations of express provisions may prompt unpromising Court pronouncements on the internal laws, policies, or practices of the member States. Yet claims not linked to such provisions, however serious, are left to domestic resolution. Similarly, although the International Bill of Human Rights<sup>8</sup> and its progeny are written less restrictively, there can be no doubt that many issues of profound impact are reserved for State determination.

The balance between intervention and autonomy is reflected in a number of international norms. On the one hand, each person is entitled "to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations..."<sup>9</sup> On the other hand, the particular form that such a tribunal may take and the procedures it is to follow (whether, for example, it is "inquisitorial" or "adversa-

rial") are left to a significant degree of State discretion.<sup>10</sup> Similarly, "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law..."<sup>11</sup> Yet which acts are to be considered criminal, and how severely they are to be punished is also left largely to domestic choice.<sup>12</sup> These two examples illustrate a principle of subsidiarity both in the "form" (judicial procedure) and "content" (substantive law) of domestic determination of rights. As another example, "[m]en and women of full age ... have the right to marry and to found a family."<sup>13</sup> Yet the details of marriage and family law are highly specific to local customs, varying appreciably from culture to culture, and from jurisdiction to jurisdiction.

These examples point to a cognizable demarcation between the extent of permissible international scrutiny and the extent of permissible national autonomy. Certainly, as is always the case

8 The International Bill of Human Rights is a compendium of the three cornerstone instruments of contemporary international human rights law: the Universal Declaration of Human Rights, UN General Assembly Resolution 217A (III), UN Doc. A/810, at 71 (1948), Art. 10, (hereinafter cited as UDHR); the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200A (XXI), GAOR, 21st Session, Supp. n° 16, 49 (1966); and the International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), GAOR, 21st Session, Supp. N° 16, 52, Art. 14, (hereinafter cited as CPR). For texts or excerpts of these and other instruments cited herein. See United Nations Centre for Human Rights, *Human Rights: A Compilation of International Instruments* (1988); *Basic Documents on Human Rights* (I. Brownlie, ed., 3rd ed. 1992); P. Sieghart, *International Law of Human Rights* (1983).

9 UDHR Art. 10.

10 But see the more extensive provisions of CPR Art. 14.

11 UDHR Art. 11

12 Any limits posed by human rights law remain at the margins. For example, no one may be subjected to "cruel, inhuman or degrading" punishment, UDHR Art. 5, CPR Art. 7; nor may anyone be penalized for the peaceful practice of non-dominant religious beliefs, UDHR Art. 18, CPR Art. 18; or for peaceful expression of dissident political beliefs, UDHR Art. 19, CPR Art. 19.

13 UDHR Art. 16(1). Cf. CPR Art. 23(2).

when distinctions are drawn for legal purposes, disputes are likely to arise in "borderline" cases. Nevertheless there is little doubt that some fair, working delimitation, revisable if necessary, can be ascertained.

If the equipoise between hegemony and subsidiarity is evident in the examples just cited, it is less so in the case of other rights. Rights against torture and genocide, for example, are absolute. Peremptory norms (*jus cogens*) apply absolutely, with little discretion on the part of States to regulate their exercise.<sup>14</sup> Yet these peremptory norms govern quite specific activities. (And their imposition certainly poses little threat to cultural specificity.<sup>15</sup>) Here again, disputes will certainly arise in controversial cases. However, the overall balance between interference and autonomy remains abundantly intact.

These examples suggest that the contours of the balance between intervention and autonomy will depend largely on the nature of the particular right at issue. At one extreme, as in the case of peremptory norms, it must be struck strongly in favour of international law. At the other extreme, as in the case of ordinary, everyday rights raising no human rights concerns, it must be

struck strongly in favour of domestic autonomy. In cases such as the first three examples cited above, which involve complex syntheses of fundamental rights and local laws and procedures, a more even equilibrium can be achieved.<sup>16</sup>

## II A Qualitatively Different Right

Yet the right to equality does not fall so readily into place along this scale. Identifying the proper balance between interference and autonomy with respect to this right requires not simply a reflection on the meaning and importance of equality itself, but rather an understanding of the very nature of human rights law, in light of the tension between intervention and autonomy just described.

By definition, the right against discrimination can have no "independent" existence. It is meaningful only in combination with other rights. It is "correlative" rather than "substantive."<sup>17</sup> It is meaningful only as a right against discrimination in the enjoyment of the right to free speech, the right to organize, the right to fair trial, and so forth. There is no right against discrimination in areas not governed by rights or obliga-

14 See the Vienna Convention on the Law of Treaties of 1969, Art. 53; Nguyen Quoc Dinh *et al.*, *op. cit.*, *supra* n.2, at 200-01, 631-32; Donnelly, *Universal Human Rights*, *op. cit.*, *supra*, n. 6, at 12-13. The international community may at times be ill situated to prevent or prosecute violations of such norms. That defect, although significant and in need of redress, does not mar the normative applicability of the rights at issue. See, e.g., Heinze, *op. cit.*, *supra*, n. 6.

15 International condemnation of egregious human rights abuses can rarely, if ever, be countered credibly with appeals to "cultural relativism." See Heinze, *op. cit.*, *supra*, n. 6.

16 Cf. Henry Steiner's notion of a continuum of consensus governing the universality of human rights in "Political Participation as a Human Right," *Harvard Human Rights Yearbook* Spring 1988, at 77, 79-85. Cf. also Heinze, *op. cit.*, *supra*, n. 6.

17 See Bossuyt, *op. cit.*, *supra*, n. 1, at 68-69; see also 133-34. But compare Ramcharan's use of the term "independent right," *op. cit.*, *supra*, n. 1, at 253-54.

tions. A manufacturer of frozen apple pies may lawfully "discriminate" against farmer Smith's apples in favour of farmer Johnson's.<sup>18</sup> And anyone is free to prefer brown hair and brown eyes over blonde hair and blue eyes.<sup>19</sup> *De gustibus et coloribus non disputandum est.*<sup>20</sup> As Bossuyt notes, "[m]ême un traitement discriminatoire dont le motif est généralement condamné (tel que la race) ne peut être juridiquement interdit, si ce traitement ne concerne pas un droit... reconnu."<sup>21</sup>

But is the equality right correlative only to other fundamental rights acknowledged within the international corpus? Or to all rights within a given domestic jurisdiction?

Imagine that human rights law does not impose any duty on States to provide a particular service. If a State nevertheless provides that service, but in a discriminatory way (*apartheid* provides easy examples, gender discrimination provides more controversial ones<sup>22</sup>), does it thus violate international human rights law? Imagine, for example, that a particular State provides the basic minimum of health care foreseen by human rights law to all citizens equally. However, government officials are worried about declining population growth and juvenile delinquency. In a tacit effort to encourage women to stay home and raise children "voluntarily" - thus offending the purpose, yet just narrowly avoiding obvious mate-

18 Such an example is deliberately frivolous, and, in particular, deliberately avoids allusion to a State agent. For it is precisely the grey area between the obvious extremes outlined in this paragraph that is at issue. But note that the problem of discrimination among purely private parties, without State action, and thus of third-party applicability of fundamental rights (*Drittwirkung*), because it addresses areas of potential discrimination not governed by international norms, is relevant to the issues raised here. See Ramcharan, *op.cit.*, *supra*, n. 1, at 261-63; E.A. Alkema, "The Third-Party Applicability or 'Drittwirkung' of the European Convention of Human Rights," in *Protecting Human Rights: The European Dimension* 33 (F. Matscher and H. Petzold, eds., 1990); A. Drzemczewski, "La convention européenne des droits de l'homme et les rapports entre particuliers," in *Cahiers de droit européen* N° 1, 3, (1980).

19 See Bossuyt, *op.cit.*, *supra*, n. 1, at 73-75. Cf. Ramcharan, *op. cit.*, *supra*, n. 1, at 262.

20 Cf. Bossuyt, *op. cit.*, *supra*, n. 1, at 75.

21 *Op. cit.*, *supra*, n. 1, at 74. ("[e]ven discriminatory treatment based on a generally condemned motive (such as discrimination on the basis of race) cannot legally be proscribed if that treatment does not pertain to an already recognized right." - EH).

22 Ramcharan, discussing the CPR, argues:

"[A] law setting a reasonable age for marriage does not violate Article 23(2). But setting a different (though also reasonable) age for marriage for members of a particular race or religion would violate Article 2(1) (and probably Article 26), even if [it] did not violate Article 23."

*Op. cit.*, *supra*, n. 1, at 256. Fair enough. Yet this example might be all too easy. What if a "different (though also reasonable) age" were set for women, as has in fact been the case in law or practice in much of the world? The overall argument in Ramcharan's essay cogently suggests that this, too, absent reasonable justification (itself a potentially ambivalent criterion), would violate international non-discrimination norms. Cf. *infra*, text accompanying n.42 *infra*. Cf. also the International Convention on the Elimination of All Forms of Discrimination against Women, UN General Assembly Res. 34/180, (1979), Art. 16 (1) (a), (hereinafter cited as CEDAW). However, saying so might, at the very least, prove controversial. And implementing actual change might be difficult.

rial infractions, of CEDAW<sup>23</sup> - the government provides two additional services to married women, four additional services to women that are married and pregnant, six additional services to women that are married and have children, and increasing numbers of other options as women have more and more children. Such government action thus discriminates (against, say, unmarried women), but not in an area "substantively" governed by human rights law. Yet is that discrimination itself a violation of human rights law?

If not, then, paradoxically, the non-discrimination right may be applied in a discriminatory way. (Ramcharan notes, incidentally, that "the application of [non-discrimination] principles to economic, social, and cultural rights was strenuously resisted" in UN General Assembly debates on the leading human rights covenants.<sup>24</sup> Thus even the correlation of non-discrimination to certain fundamental rights within the international corpus is controversial). This would mean a considerable, perhaps excessive, concession to subsidiarity. Hypocrisy seems inescapable.

And if so, then - paradoxically? - a country that provides the services at least to some people violates human rights law, whereas a country not providing them to anyone does not. The human rights regime might appear hegemonic (or "arrogant" or "imperia-

listic") indeed if it can reach so far into domestic law as to seek to engineer changes in local, social programmes not substantively linked to any requirements of human rights law. (Not to mention that such intervention would, for example, confront a vision of the social roles of men and women, which, itself, may have a culturally sensitive and specific character - but that is another issue.)

The tried and true human rights activist might find this entire issue academic. Day-to-day practice yields such egregious abuses, falling well within the bounds of recognized, fundamental rights, that it might often be superfluous to search beyond those bounds for additional evidence of violations. In particular, where discrimination takes place, it often so clearly implicates fundamental rights, as to obviate any requirement for evidence of other forms of discrimination.

And yet this issue can hardly be avoided. One way or the other, actual claims of discrimination correlated to non-fundamental rights<sup>25</sup> must be answered. This is all the more true insofar as they may indicate latent but detrimental social tensions of an entrenched and comprehensive nature. Moreover, the success of initiatives to prove governmental violations of human rights, including depictions of the violations claimed, may well depend on whether all

23 *Op. cit. supra*, n.22. Formally, CEDAW is binding only upon signatory States. However, to the extent that it merely elucidates prior conventional or customary gender discrimination norms (as codified, for example, in the UDHR and the United Nations Charter), it may well serve as an authoritative (re)statement of these. In any event, for the purposes of the hypothetical scenario developed here, we can assume that the country in question is a party to CEDAW.

24 *Op. cit. supra*, n.1, at 251.

25 That is, to rights not included as fundamental rights within the international corpus. Cf. *supra*, n. 2.

forms of discrimination, including those correlated to non-fundamental rights, are to be recognized; or whether, instead, it is to be assumed that some forms of discrimination simply do not count.

### III The International Instruments

At a level concededly more theoretical, but nonetheless essential to the legal status of human rights law and jurisprudence, resolution of this issue will reveal much about the entire balance between legitimate interference and domestic autonomy, between hegemony and subsidiarity, in human rights law.

The European Convention explicitly limits the applicability of the Article 14 non-discrimination right to the exercise of other rights enumerated in the Convention.<sup>26</sup> Moreover, if a case can be resolved on the basis of other rights claims, the Court may reject, or decline to address, the issue of discrimination.<sup>27</sup>

Nevertheless, in three ways, this non-discrimination right is broader than it first appears. First, the linkage requirement stipulates only discrimination *with respect to* another Convention right. It does not require that there have been *violation of that other right*.<sup>28</sup> In the *Abdulaziz, Cabales and Balkandali*

case<sup>29</sup>, the Court found no violation of the complainant's right to privacy, but did find that they had suffered discrimination in the enjoyment of that right (or, to put it another way, violation of the privacy right consisted *only of* discrimination in its enjoyment). This can be called the "linkage" principle. Second, and this is another aspect of the linkage principle, a State may not have to undertake a given measure in order to give effect to a Convention right; however, once it does take that measure, it must apply it without discrimination.<sup>30</sup> Thus, ironically, a State discriminatorily providing a right, privilege, or service not required by the Convention may be in violation, whereas a State not providing it at all may not be in violation. This aspect of the linkage principle was established in the "*Belgian linguistic*" case and confirmed in *Abdulaziz*, where precisely this kind of discrimination, hence violation of both aspects of the linkage principle, was found.<sup>31</sup> Third, although Article 14 explicitly lists a number of non-discrimination categories, such as race, sex, language, and religion, its "other status" clause is not dead letter, and does not require amendment of the Convention to be given effect. The Court will invoke it to condemn any form of discrimination that it deems invidious, even if highly local

26 See, e.g., van Dijk and van Hoof, *op. cit.*, *supra*, n.1, at 532-33. Cf. Bossuyt, *op. cit.*, *supra*, n.2, at 532-33.

27 See *Dudgeon case*, judgment of 22 October 1981, Series A no.45, at 26; X and Y v. The Netherlands, judgment of 26 March 1985, Series A no.91, at 14.

28 See Van Dijk and van Hoof, *op. cit.*, *supra*, n.1, at 534-35.

29 Judgment of 28 May 1985, Series A no.94

30 See Van Dijk and van Hoof, *op. cit.*, *supra*, n.1, at 534-35, 547.

31 The European Court of Justice has reached similar results concerning issuance of residence permits to foreign cohabitants of legal residents. Accordingly, it not only complements a broad approach to ECHR Art. 14, but also suggests the possibility of a broadening of the non-discrimination norm beyond the confines of the ECHR.



mores are at issue. Thus in *Marckx*, the Court declared discriminatory treatment of unwed mothers,<sup>32</sup> in *Inze v. Austria*, children born out of wedlock,<sup>33</sup> and in *Darby*, people not registered as resident,<sup>34</sup> inconsistent with the Convention, despite the absence of such categories among the enumerated categories of Article 14, or in that article's *travaux préparatoires*. This can be called the "other status" principle. Although this principle has no direct bearing on the applicability of the non-discrimination norm beyond enumerated ECHR rights, it does suggest a rejection of unduly literal ("positivist") construction of the non-discrimination norm, in favour of greater substantive equality.

If these expansive possibilities have already become the established jurisprudence of a non-discrimination norm so restrictive in its original conception,<sup>35</sup> then the international non-discrimination norm, which does not so clearly contain any coupling requirement, would appear all the more expansive, all the more applicable to local rights generally, beyond the confines of the substantive human rights enunciated

within the four corners of the international instruments.

If, for example, UDHR Article 2 appears to limit the non-discrimination right to the "rights and freedoms set forth in this declaration,"<sup>36</sup> Article 7 nevertheless assures, "All are equal before the law and are entitled without any discrimination to equal protection of the law." The CPR and other instruments contain similar provisions. These conventional provisions are probably, themselves, reiterations of a customary, perhaps peremptory, international non-discrimination norm.<sup>37</sup> The conjunctive wording suggests not only that rules within a jurisdiction must be applied equally to all - arguably an obvious, tautological proposition, inherent by definition in any *Rechtsstaat*, in any system governed by the Rule of Law<sup>38</sup> - but also that the substantive rules themselves may not invidiously favour one class of people over another.<sup>39</sup> Similarly, it has been almost twenty years since Bossuyt persuasively argued that the apparent preclusion of an "other status" principle in the United Nations Charter has no bearing on the explicitly expansive non-

32 Judgment of 13 June 1979, Series A no.31.

33 Judgment of 28 October 1987, Series A no.126.

34 Judgment of 23 October 1990, Series A no.187.

35 In fact there is a fourth. In *East African Asians v. United Kingdom* the Commission found racial discrimination to violate the Article 3 prohibition of inhuman or degrading punishment - independent of Article 14, and thus not constrained by the coupling requirement. *Yearbook of the European Convention on Human Rights* 928 (1970). However, the status of this approach as a jurisprudential principle is not yet clearly established.

36 Cf. Bossuyt, *op. cit.*, *supra*, n.1, at 67-68.

37 See Ramcharan, *op. cit.*, *supra*, n.1, at 249-50, 269. The history of unanimous international condemnations of *apartheid* and other forms of discrimination, particularly racism, confirms this view.

38 See Bossuyt, *op. cit.*, *supra*, n.1, at 76-77.

39 See Ramcharan, *op. cit.*, *supra*, n.1 at 253-59; Bossuyt, *op. cit.*, *supra*, n.1, at 83.95. It is questionable whether Sudre takes account of these provisions when he claims, "*C'est l'égalité devant le texte conventionnel et non devant le Droit en général qui est proclamé...*" *op. cit.*, *supra*, n.1, at 180. ("It is equality before the convention text and not before the law in general that is proclaimed." - EH).

discrimination clauses of subsequent international instruments, such as UDHR and CPR.<sup>40</sup>

Must subsidiarity, then, entirely yield to the hegemony of the equality right? If so, does the equality right, in all of its conceivable applications, form part of *jus cogens*? (Again, not a controversial proposition for discrimination such as *apartheid*, but perhaps more so for other forms).

That may well be the intent of UDHR Article 7 and related provisions in the international corpus. At the very least, such a construction would preserve the full integrity of the non-discrimination norm by avoiding hypocritical application. It is in this spirit that Ramcharan criticizes Tomuschat's restrictive reading of CPR Article 26:<sup>41</sup>

"Tomuschat suggests that Article 26 provides merely for "equal protection in the application of the law." I do not

think that the arguments he advances for this conclusion are persuasive. He admits that there was ambiguity with regard to the intention of the authors of the Covenant. This should have led him to the literal meaning of the terms. Instead, Tomuschat goes to great lengths to suggest that what appears in the Covenant as "equal protection of the law" should instead be read as "equal protection in the application of the law." Only the clearest evidence that this was the intention of the drafters could justify such a conclusion. This evidence, as Tomuschat recognizes, is distinctly lacking."<sup>42</sup>

More important, however, is the question whether such a concession to "hegemony" harms the *overall* balance between interference and autonomy. Again: let us clearly acknowledge that an expansive non-discrimination right would warrant international supervision of the full panoply of ordinary, everyday

40 *Op. cit.*, *supra*, n-1, at 41-56. Cf. text accompanying nn. 32-34 *supra*.

41 CPR Art. 26 reads:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

42 *Op. cit.*, *supra*, n.1, at 255 n.27. In a further critique Ramcharan adds:

"It is ... somewhat unrealistic and unconvincing to suggest, as does Tomuschat... that the Covenant "lacks a comprehensive guarantee of non-discrimination as meaning equality of or in the law." Tomuschat does not give sufficient credit to the context in which the Covenant was drafted. The Charter of the United Nations had already recognized as a main pillar of the new international order the principle of non-discrimination. This was recognized by the International Law Commission during the preparation of the Draft Declaration on the Rights and Duties of States. The Universal Declaration of Human Rights further consolidated the principle of non-discrimination. When this context is taken into account, it becomes very difficult to maintain that the Covenant lacks a comprehensive guarantee of non-discrimination."

*Id.* at 258 n.38. Interestingly, the UN Human Rights Committee found in a series of judgments that the Netherlands was compelled under CPR Article 26 to respect the non-discrimination norm in its distribution of certain social benefits which, themselves, are not foreseen in CPR. This suggests an international analogue to the second branch of the ECHR "linkage" principle.

rights that constitute domestic law, far beyond the "minimum core" of fundamental rights that constitute the international corpus.

Yet this is not necessarily a bad thing. It does not threaten complete, or even grave, disruption of the general balance between intervention and autonomy. Even if international law were to embrace this expansive jurisprudence of equality rights, the intrusion into ordinary, everyday domestic law would remain limited to the criterion of discrimination - a criterion which, in today's world, could hardly be called unexpected or unexplainable. It would still reserve substantial liberties for States to decide their own policies. In the case of the hypothetical scenario proposed above, this resolution would still allow a State to promote any number of policies encouraging population growth and child guidance, but to do so only in non-discriminatory ways. Generally speaking, then, States would retain broad freedom to experiment with different policies, plans, and projects, and to maintain their cultural uniqueness.

## Conclusion

Like other international law, the legitimacy of human rights law depends largely on its ability to preserve a balance between, on the one hand, intervention in State domestic affairs, and, on the other hand, respect for State autonomous sovereignty over those affairs. This balance is substantially maintained in the international human rights corpus, and reflected in a number of particular rights. Yet it is challenged by the right of equality. If that right's correla-

tion to other rights within the international corpus is indisputable, its applicability to rights beyond that corpus, to ordinary, everyday rights, has not yet been conclusively determined. Nevertheless, there are strong legal bases for expanding the scope of the equality right beyond strict correlation to the specific fundamental rights of the international human rights corpus. For example, the ostensibly narrow non-discrimination norm of the European Convention of Human Rights has been given broader effect in the jurisprudence of the European Court. Thus the Court has found violation of the non-discrimination norm 1) even where the substantive right to which it was linked had not been violated; 2) even where the substantive right, privilege, or service to which it was linked was not mandated by the Convention; and 3) even where the category under which discrimination was claimed did not count among the Convention's explicitly enumerated categories (i.e., sex, race, language, colour, etc.). As the non-discrimination norm in the international human rights corpus is not as rigidly formulated as its European counterpart, it would appear all the more suited to capacious construction and application. Certainly, an expansive view of the international equality right would bring whole areas of domestic law under the purview of international scrutiny, possibly shifting the balance between interference and autonomy. Yet that balance would by no means be destroyed, or even significantly harmed. The requisite surveillance would be of a specific and limited kind, and would not obstruct States' substantial prerogatives to shape their own destinies.

## COMMENTARY

### The United Nations Commission on Human Rights: 50th Session

The Fiftieth Session of the UN Commission on Human Rights took place in Geneva, Switzerland, between 31 January-11 March 1994. The common theme of opening speeches and introductory remarks was the fact that the Fiftieth Session was the first after the UN World Conference on Human Rights, held in Vienna in June 1993, which had produced a Declaration and Plan of Action. The task of the Commission was to be mindful of Vienna and work towards the implementation of its Plan of Action and the realisation of the goals set by the Conference.

The shelling of the Sarajevo Market Place and the Hebron Massacre during the second and fourth weeks respectively of the Commission sittings, witnessed denunciations by the Commission and a message to the UN Secretary-General on the first matter.

"The voice of the moral conscience of mankind," no less, was what the post of High Commissioner for Human Rights constituted, in the words of the incumbent, José Alaya Lasso, a former Ecuadorian Foreign Minister, in an address to the Commission on 3 March. The High Commissioner averred that he would follow strictly the limits of his mandate and the political guidelines laid down by the General Assembly. He would be impartial and would not act on inappropriate political considerations. Echoing the slogan of the Vienna

Conference, he promised to promote democracy, development and human rights, paying specific attention to the right to development. International security was contained in the slogan-based trilogy.

The adoption of resolution 1994/64, albeit after three weeks of negotiations, calling upon the Special Rapporteur on Racism to "examine within his mandate, any form of discrimination against Blacks, Arabs, Muslims, xenophobia, negrophobia, antisemitism and related intolerance," has been seen as a milestone in the history of the Commission, for its first time reference to antisemitism.

Perhaps the single substantive issue to emerge most prominently during Commission debates was that of impunity, which figured in the reports and addresses of rapporteurs and special representatives and the submissions of NGOs, on a variety of issues, including in particular, torture, enforced disappearances, extra-judicial executions, civil defence forces and the rights of the child.

Finally, by way of general observation, it was quite apparent during debates on certain issues, and in particular that of the right to development and the socio-economic rights, that deviations were developing in the much vaunted 'consensus of Vienna.' Res. 1994/21, on the right to development, underlining that right as universal and inalienable, did not

attain consensus and was adopted by a vote of 42 to 3 with 8 abstentions and several expressions of reservation, even on the part of certain States which had voted for it.

## State of Human Rights World-Wide

A number of procedures and agenda items are involved under this head and certain countries, notably the Israeli Occupied Territories and South Africa, are the subject of separate agenda items.

### 1503 Confidential Procedure

The Commission considered, *in camera*, situations in nine States: Armenia, Azerbaijan, Chad, Rwanda, Estonia, Kuwait, Somalia, Viet-Nam and Germany. It was decided to discontinue the proceedings with regard to the last five States.

## Advisory Services

### Cambodia

Following a visit to Cambodia, the Special Representative of the UN Secretary-General, Justice Michael D. Kirby, who is also Chairman of the ICJ Executive Committee, stated that Cambodia's task was to reconstruct anew the institutions of civil society. Armed resistance to the elected government was resulting in a state of lawlessness. Justice Kirby's report was well received and his mandate was renewed.

### Guatemala

In light of the report of the independent expert, the Commission exhorted the government to adopt the necessary

legal and political measures to ensure judicial independence; to investigate and to bring to justice those who violated human rights; to abolish the system of armed civil defence committees, and to strengthen policies and programmes relating to its indigenous population. Advisory services were to be continued.

### Somalia

The report of the independent expert stated: "For the purposes of the implementation of any human rights programme, the situation in Mogadishu remains vital, as without a central administrative structure it is not possible to lay down the foundations of a permanent programme of human rights for Somalia." (Para 22. E/CN.4/ 1994/77 (Add.1).

The question of violation of rights involving USOM forces, not referred to in the Commission's resolution on Somalia, was characterised in the report as a matter within the power of the UN Secretary-General.

The Commission called for the extension of the Expert's mandate to : "assist the Special Representative of the UN Secretary-General for Somalia through the development of a long-term programme of advisory services for re-establishing human rights and the Rule of Law."

Under this item the Commission also decided to extend the mandate of the independent expert for **El Salvador**, for the purpose of providing advisory services and of reporting to the Commission on developments on human rights in that State.

The situation in **Angola**, was placed under this agenda item for consideration at the 51st Session.

## **Occupied Arab Territories, Including Palestine**

The Occupied Territories are considered by the Commission under Item 4, which is specific to the question, as well as under item 9, which is concerned with self-determination of persons subject to colonial domination and foreign occupation.

The UN Commission reaffirmed, with the United States of America voting against and one abstention, that the installation of Israeli civilians in the Occupied Territories was illegal and constituted a violation of the relevant provisions of the Geneva Conventions on the Protection of Civilian Persons in Time of War. A resolution to broadly similar effect in relation to the Syrian Golan Heights, was adopted with 25 abstentions and the 'no' vote of the United States of America. (Res. 1994/1 and 2). Res. 3, alleging denial of the right to self-determination in the Occupied Territories reflected the view expressed in debate, that despite the peace accord between Israel and the PLO, human rights abuses by Israel persisted. The Commission welcomed the peace process and considered, in res. 1994/4, that an active UN role, could assist in the implementation of the Declaration of Principles of 13 December 1993. Iran and the Syrian Arab Republic voted against the resolution whilst Libya and Sudan abstained.

In an oral intervention the ICJ reiterated the findings of its December 1993 mission on the civilian judicial system under Israeli military occupation. The mission had found interference by the military in the civilian court system and the existence of constraints on the legal profession and access to justice.

## **South Africa**

Items 5 and 6 relate respectively to violations of human rights in South Africa and to the adverse consequences for human rights of the assistance given to the regime. Discussions under item 6 however, effectively related to the question of the monitoring of the transition to democracy in South Africa, and the item was so renamed by res. 1994/8.

The report of the Working Group on Southern Africa highlighted the escalation of violence, continued deaths in police custody and recommendation that decisive measures be taken to guarantee security without discrimination, the creation of true judicial independence and the abolition of the Bantustans.

Another report of Mrs. Judith Attah, Special Rapporteur on South Africa of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, focused on the issue of equal political participation; the problem of violence and the support fund for the creation of a national multi-party peace-keeping force, as also the role of the international community in the transition to democracy. The ten recommendations of the Rapporteur, all endorsed by the Commission in the resolution first cited, called for technical and material support from the international community and the UN for the proposed peace-keeping force and for the elections of 27 April 1994, support which would be needed both before and subsequent to the elections.

In an oral intervention the ICJ stressed that, given the real threat of intimidation and violence posed by the militarily powerful right wing groups, serious attention should be paid to its recommendation of a reserve international

peace-keeping force to be put at the disposal of the South African Independent Electoral Commission.

## **Country Reports : Gross Violations of Human Rights Considered in Public Procedures**

### **Cuba**

The UN Special Rapporteur reported the total refusal of the government to cooperate with him in any way and the Cuban representative on the Commission confirmed his State's intention never so to do. The Commission extended the mandate of the Special Rapporteur and requested an interim report to the 49th Session of the UN General Assembly in 1994.

### **China**

The passage of a motion, not to proceed, by 20 votes to 16, with 17 abstentions, killed-off a proposed resolution of the United States of America, the United Kingdom and most West European States, expressing concern over continuing reports of human rights violations in China.

### **Haiti**

The Commission condemned the interruption of the democratic process in 1991 and the overthrow of President Jean-Bertrand Aristide, who had earlier addressed it. The mandate of the UN Special Rapporteur, who was requested to visit Haiti in the near future, was extended for one more year.

### **Islamic Republic of Iran**

The report of the Commission's representative detailed information on alleged violations of the main civil and poli-

tical rights in Iran; highlighted the questions of freedom of religion and the right to property in relation to the Bahai community; and exposed the situation of the Kurd and Naraoui people; the problem of refugees and the bombing of the Ashraf base of the self-styled National Liberation Army of Iran. The Iranian justification of the bombing was premised on the UN Charter and the principle of self-defence and the protection of citizens of the border areas. The situation of women; the problems of drug trafficking and drug abuse and the use of the death penalty in relation thereto, and the question of the persecution of the relatives of Iranians living abroad were also reported on. The relevant resolution requested a report to the 49th Session of the General Assembly.

### **Iraq**

The oft-repeated and strongly emphasized theme of the UN Special Rapporteur was that "the current suffering in Iraq" was due to the government's refusal to take advantage of Security Council resolutions, 706 and 712 of 1991, offering a UN supervised "food for oil" sale to benefit the population. The report detailed the position as regards civil and political rights, and in discussing the question of the right to property cited the recently published ICJ study entitled, "Iraq and the Rule of Law" (February, 1994). The situation of women and children and violations affecting the Kurds and Marsh Arabs and Turkomans were detailed. It was observed that the extreme methods of abuse deployed by the State constituted techniques to "terrorise the population by highlighting the impotence of resistance." Iraq retains its place under the agenda item.

## **Sudan**

The report on this State which detailed violations of human rights and included reports of slavery and of organized child abductions, emphasized that its concern was only to measure the situation of human rights in Sudan against the international obligations that the country had actually undertaken to observe. In this connection, it was stated that provisions of the Penal Code violated the two Covenants as well as the Convention on the Rights of the Child. The UN Special Rapporteur, Mr. Gaspar Biro (Hungary), found it necessary to add that the source of the Code - a reference to the Islamic Religious Law - made no difference whatsoever to the issue. The observation, and indeed the report, provoked an hour long rant from the Sudanese representative, alleging *blasphemy* on the part of the Special Rapporteur. Res. 1994/79, adopted without a vote, expressed concern at the large number of internally displaced persons and the restricted access on the part of the latter to humanitarian aid. It demanded an explanation of air attacks on civilian populations and urged a redoubling of efforts for a solution to the civil conflict.

In a special statement the Chairman of the UN Commission condemned the abuse of UN Rapporteurs as abuse directed at the Commission itself.

## **Afghanistan**

The Commission urged all Afghan parties to undertake, where appropriate under UN auspices, all possible efforts to bring about a comprehensive political settlement in order to obtain peace and the full restoration of human rights in Afghanistan. Afghanistan retains its

place under this agenda item "as a matter of high priority."

## **Myanmar (Burma)**

The Commission noted that no progress had been made towards turning power over to a freely elected government and also the continued detention of a number of political leaders. The facilitation of an early return of Myanmar refugees and their full re-integration, as well as the implementation of an understanding between the office of the UNHCR and the government, with regard to refugees in Bangladesh, was requested of Myanmar.

## **Former Yugoslavia**

In a so-styled omnibus resolution, 1994/72, the Commission expressed repulsion, concern and dismay at occurrences in Bosnia and Herzegovina, Croatia, Serbia and Montenegro, and in particular at the practice of ethnic cleansing in areas under the control of the self-proclaimed Serbian authorities. The Commission welcomed the establishment of the International Tribunal for the prosecution of serious violations of international humanitarian law in the territory of Former Yugoslavia. A "human rights component in any internationally negotiated arrangements for Bosnia and Herzegovina" was also recommended. Two further resolutions on Bosnia and Herzegovina as well as Kosovo, condemning genocide, ethnic cleansing and the shelling of civilian populations in a number of specified places in Bosnia and Herzegovina, and Serbian discriminatory practices against ethnic Albanians in Kosovo, were also adopted. Rape and the abuse of women as a weapon of war and, distinctly, as an instrument of ethnic cleansing, was condemned and declared a war crime,



in res. 1994/77, adopted without a vote. The resolution also demanded that the perpetrators be put on trial and punished by the International Penal Tribunal.

### Equatorial Guinea

The Commission requested that all political groups and parties should play an active part in political and social life, to ensure transition to democracy. It expressed its serious concern at the persistence of violations of human rights, such as arbitrary arrests and detentions of political opponents often accompanied by torture, as the UN Special Rapporteur, Mr. Alejandro Artucio (Uruguay), who is also an ICJ Legal Officer, had noted in his report to the Commission. The Commission also deplored the situation and legal and social status of women in this country. It called for the release of all persons detained or sentenced for political reasons. Finally, the Commission requested the UN Secretary-General to provide the Government of Equatorial Guinea, with technical assistance, but "in those specific areas suggested by the Special Rapporteur (i.e. training courses and seminars for government officials, including judges and the police and also independent lawyers and political leaders). The mandate of Mr. Artucio was renewed.

### East Timor, Romania and Sri Lanka

These were the subject of a Commission statement welcoming in the case of Sri Lanka, efforts of the government to handle the situation in the north of the country so as to prevent injury to civilians and also revision of emergency laws. Concern was expressed, in a Chairman's statement, over

continuing allegations of violations in East Timor, despite positive measures taken by Indonesia. Cooperation between that government and the ICRC was also called for. It was noted that Romania had made progress on the path to democracy.

### Miscellaneous

Situations in the States concerned and the relevant reports were noted in Commission resolutions. The disruption of the democratic process in **Burundi**, was strongly condemned as was the practice of forced population displacements in **Zaire**. The situation in this State had been considered for some years under the 1503 procedure; it will henceforth be treated under item 12 and a Special Rapporteur was appointed. Steps towards democracy in **Togo** were welcomed and the State encouraged to seek technical assistance from the UN Centre for Human Rights. With respect to **Bougainville**, the Commission requested the Secretary General, "in light of developments between the date of the adoption of this resolution (1994/81) and 30 September 1994," to consider the appointment of a special rapporteur to report to the Commission's 51st Session.

Throughout the Session and particularly in debate on items 9 and 12, there were impassioned interventions by NGOs and fierce exchanges between India and Pakistan over **Kashmir**, with both States making references to a report (which at that time had not been released) of the 1993 ICJ mission to the territory. A draft resolution on this issue by Pakistan, condemning India was not proceeded with. The status of **Tibet** was discussed under this item. The indigenous rebellion in Chiapas, **Mexico**, was

also the subject of debate and the report of an ICJ mission to Mexico was distributed amongst delegations, NGOs and the world press. The ICJ joined 26 other NGOs in calling for the appointment of a Special Rapporteur for **Colombia**, in view especially, of remarks about that country in the reports of the Special Rapporteurs on Extrajudicial Executions, Torture and the Working Group on Enforced Disappearances. In addition to remarks on most of the countries already referred to, the ICJ brought to the attention of the Commission a massacre allegedly involving Security Forces in Naniachar Thana, **Bangladesh**.

### **Extra-Judicial Summary or Arbitrary Executions**

The Special Rapporteur presented allegations against 73 States during 1993, in which year 217 urgent appeals concerning 1,300 persons had been sent to 52 governments. Between November 1993 and February 1994 another 40 such appeals had been sent. More than 2,300 cases had been brought to the attention of 51 governments during 1993 (E/CN.4/1994/7 and Add.1). The rapporteur noted the increased use of the death penalty and, distinctly, the extension of its scope in several countries, accompanied in some cases by the truncating of defence rights. The death penalty, according to the Special Rapporteur, was *per se* a denial of the right to life, and in the circumstances described, constituted summary or arbitrary execution.

Impunity, which was becoming common practice constituting denial of justice and the destruction of the Rule of Law, was passionately denounced. Res. 1994/82, encourages governments, UN

bodies and agencies and inter-governmental organs to train and educate military forces, law enforcement officials and similar personnel, as well as UN peace keeping and observer missions on human rights and humanitarian law issues connected with their work.

### **Rights of Persons Subject to Detention or Imprisonment**

#### **Arbitrary Detentions**

The Working Group of five had received 183 communications in the course of 1993, which had been brought to the attention of 31 governments. Some 67 decisions on 286 cases had been taken. The Group's proposal for the elaboration of a declaration on *habeas corpus*, as a device protective against arbitrary detention and one which constitutes a personal right, non-derogable even in times of emergency, was to some extent reflected in resolution 1994/32, which encourages States to make provision for *habeas corpus* or similar procedures.

Detentions by non-State entities had been considered by the group of five, which had concluded that in the context of its mandate, 'detention' referred solely to those ordered by the State. But in view of the reality of the issue, the group contemplated declaring itself competent in the case of detentions by armed groups, within the meaning of the Geneva Conventions and especially common Article 3. In all cases it was considered that there was need for compliance with Article 14 of the ICCPR. The issues of urgent appeals, visits *in situ* and the problem of special courts figured in the report. The group's mandate was extended for three years.

## **Torture and other Cruel Inhuman or Degrading Treatment or Punishment**

Information from 60 countries had been received by the UN Special Rapporteur. The criteria for the decision to make an urgent appeal was the subject of observation in the report because of a request by two States therefor. The Special Rapporteur had concluded that the procedure was preventative and not *per se* accusatory. Factors included, the previous reliability of the source of information, its internal consistency, the findings of other international bodies and the existence of national legislation permitting *incommunicado* detention and thus facilitating torture. No State had invited the Special Rapporteur to visit. Res. 1994/37 encourages States to invite visits and generally reflects the concerns of the report.

## **Draft Optional Protocol to the Convention Against Torture**

The open-ended Working Group had used a draft submitted by the Government of Costa Rica, and had heard from representatives of the ICRC and the European Committee for the Prevention of Torture as also the UN Special Rapporteur on Torture. The protocol seeks to set up a system of visits to places of detention in State signatories. Its purpose would be preventive and the legality of any detention would not be its concern - which was to evaluate conditions in places of detention. Further, the aim was to ensure that the State did not infringe its obligation to guarantee that a person held in detention on the order of a State authority, was free from torture and maltreatment. The draft was perceived to embody the aspirations and purposes of clause 61 of the Vienna

Declaration 1993. The group will continue its work for two weeks prior to the 51st Session of the UN Commission.

## **Enforced or Involuntary Disappearances**

The Working Group of five had received 523 communications in 1993 and had transmitted 3,162 new cases of enforced disappearances to governments. The report noted the plethora of Commission resolutions urging the group to look into a variety of matters ranging from the plight of street children and the activities of armed groups and drug traffickers, to the effective protection of human rights in the administration of justice, gender-desegregated data and the need for governments to take legislative and other steps to prevent and punish acts of enforced disappearances.

As to disappearances in **Former Yugoslavia**, the Working Group made a proposal, endorsed by the UN Commission in res. 1994/39, that all cases of missing persons in any part of the former State, should be investigated under a special procedure regardless of whether the victim was a civilian or a combatant and regardless of whether the perpetrators were "connected to the government or not." This type of disappearance was of a kind not ordinarily within the mandate of the Working Group. The resolution referred to, invites governments to take measures to ensure punishment of violators under this head, the question of impunity having been raised in the report.

The ICJ oral intervention related to the finding of a mass grave in **Sri Lanka** in late 1993, a matter previously communicated to the Working Group.

## **Impunity of Violators of Human Rights**

The UN Commission had before it, its Sub-Commission resolution, 1993/37, which had noted that the Vienna Conference had supported Commission efforts to intensify the fight against impunity and which had decided to request a study on impunity with respect both to civil and political rights and those of a socio-economic character. It had also invited governments, regional, inter-governmental and non-governmental organizations to provide information on the question. The Commission, in res. 1994/44, endorsed the UN Sub-Commission's request for a study and welcomed the interim report before it, which was made pursuant to a 1992 resolution of the Sub-Commission.

The ICJ had, jointly with more than 20 NGOs, prepared a document for the attention of the rapporteurs of the Sub-Commission.

### **Independence and Impartiality of the Judiciary and Jurors, Independence of Lawyers**

Res. 1994/41, establishes a Special Rapporteur on the Independence of the Judiciary. The mandate is as follows :

- (a) To enquire into any substantial allegation sent to him or her and to report conclusions thereon;
- (b) To identify and record not only

attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services;

- (c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting the independence of the judiciary and lawyers.

The ICJ, in an oral intervention before the UN Commission, strongly supported the appointment of a Special Rapporteur on the Independence of the Judiciary. Dato' Param Cumaraswamy (Malaysia), Member of the Commission of the ICJ, was appointed to the post.

The ICJ also presented its *Madrid Principles on the Relationship Between the Media and Judicial Independence*<sup>1</sup>, the Basic one of which declares : "It is the function and right of the media, to gather and convey information to the public and to comment on the administration of justice, including cases, before, during, and after trial, without violating the presumption of innocence."

### **Freedom of Expression and Opinion**

The Special Rapporteur, in his report to the UN Commission, outlined his proposed methods of work and declared

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1 A group of 39 distinguished legal experts and media representatives, convened by the International Commission of Jurists (ICJ), its Centre for the Independence of Judges and Lawyers (CIJL), and the Spanish Committee of UNICEF, met in Madrid between 18 - 20 January 1994. The objectives of the meeting were : (1) to examine the relationship between the media and judicial independence; and (2) to formulate principles to help the media and the judiciary develop a relationship that serves both freedom of expression and judicial independence. For further information on this meeting, see *ICJ Newsletter* No. 57, April 1994. Copies of the Madrid Principles are available at the ICJ International Secretariat in Geneva.

that he would draw upon the practice established and experience gained through the various thematic mechanisms of the Commission and particularly those on summary executions, enforced disappearances, torture and arbitrary detention. He would adopt the methods and modalities that he deemed most appropriate to his tasks. Res. 1994/33 specifically welcomed the rapporteur's remarks on his proposed methods of work. However, the distinguished intervention of the London-based NGO named *Article 19* should be borne in mind, to the effect that most denials of free expression involved activities much more sophisticated than those associated with torture and so forth.

### **Internally Displaced Persons**

The UN Commission heard that there were now about 25 million internally displaced persons world-wide as against 20 million refugees. There were no specific norms in the area and no international instruments. The UN Secretary-General's Representative, Mr. Deng, proposed a convergence of humanitarian law and refugee law to deal with and focus on the needs of the internally displaced. Considerable variation in the willingness of national authorities to provide protection was also noted. There was need too for the establishment of an *early warning system* to alert the international community to the likelihood of circumstances which could result in major displacements. The Representative's concerns are reflected in res. 1994/68. The Representative had visited Sri Lanka in 1993 and had been invited by the Governments of Burundi and Colombia to visit their countries.

## **Special Human Rights**

### **Children**

The Commission decided in res. 1994/90, to consider as a matter of priority, at its next session, a sub-item entitled "question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their prevention and eradication."

Res. 1994/91, welcoming UN General Assembly. Res. 48/157 of 1993, on children in armed conflicts, recommends to ECOSOC the convening of an inter-sessional working group, prior to the 51st Session, "to elaborate as a matter of priority, a draft optional protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflicts."

### **Women**

In a resolution on the integration of women's rights into the human rights mechanisms of the UN and the elimination of violence against women, the UN Commission without a vote, decided to appoint for a period of three years, a special rapporteur on violence against women. The appointee will look into the causes and consequences of this violence, will seek and receive information from governments and all other relevant sources; recommend measures, ways and means, at the national, regional and international levels, to eliminate public and private violence against women and its causes and to remedy its consequences and finally, is to work closely with other special rapporteurs, groups and experts of the UN Commission and its Sub-Commission (Res. 1994/45).

Mrs. Radhika Coomaraswamy (Sri Lanka) was appointed to the post.

### **Indigenous Peoples**

The UN Commission requested the Working Group on Indigenous Populations to identify possible programmes, projects and so forth, for the International Decade of the World's Indigenous People. The Working Group is also to give priority consideration to the possible establishment of a permanent forum for indigenous peoples and to submit suggestions for alternatives, to the UN Commission (Res. 1994/26 and 28).

### **Draft Declaration on the Rights and Responsibilities of Human Rights Defenders**

The report of the Working Group's ninth session was before the UN Commission. Although progress on the draft has been slow, the Commission expressed its satisfaction with the progress made during the session. A joint intervention made by the ICJ together with eight other NGOs however, deploring proposed amendments to the draft declaration and specifically the proposed addition, emanating from Cuba, of a paragraph 4 to Ch 5 Art. 5. This sets out amongst other duties, that of all persons must "refrain from using the promotion and protection of human rights for political purposes extraneous to the humanitarian essence of those activities" (See, E/CN.4/1994/81. Annex I).

The NGOs reminded the UN Commission that the purpose of the declaration was not to protect States from human rights defenders, but to ensure their protection in the course of their legitimate activities under international law.

### **Economic Social and Cultural Rights; the Right to Development**

The UN Commission considered reports on : a seminar on appropriate indicators for measuring progress in the realisation of the rights concerned; the debt crisis and adjustment programmes; human rights and extreme poverty; the updated report on the right to own property, and; the practice of enforced evictions.

In its intervention on these items, the ICJ suggested "the development of a Gross Violation of Economic, Social and Cultural Rights category by the UN Commission" and that violations of these rights should be "considered by the Commission in much the same way that it has considered civil and political rights."

The ICJ proposed a study on the justifiability of economic, social and cultural rights.

Res. 20/1994, on the realisation of economic, social and cultural rights, adopted by a roll call vote of 52 to 0 (with one abstention), recognized the importance of "indicators as a means of measuring progress in the realisation of human rights" as referred to in the Vienna Declaration and, invited States to identify specific national benchmarks for giving effect to "the minimum core obligations" necessary for the "minimum essential levels of each of the rights."

The resolution also encouraged the drafting of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, granting the right of individuals or groups to submit communications alleging non-compliance with the Covenant.

Res. 21/1994, on the right to development, adopted by 42 votes to 3 (with 8 abstentions) decided that the Executive

Secretaries of regional economic commissions and the heads of international financial institutions, should participate actively in future sessions of the Working Group on the Right to Development.

A seminar on extreme poverty and human rights was approved in res. 12/1994.

The apparent goal of the Commission to be derived from the resolutions under the heading discussed, is the establishment of a permanent mechanism of evaluation for the realisation of economic, social and cultural rights, and the right to development.

### **Agenda Reform**

About midway through the Session, a sitting was given over to debating proposals from the Chairman, Mr. Peter Van Wulfthen Palthe, of the Netherlands, consisting of a clustering, with deletions and proposed additions, of agenda items.

It became clear that there would be no easy acceptance of agenda reforms - certain States would not countenance the absence, for example, of a separate item on South Africa - and an inter-sessional working group was proposed to deal with the matter.

At the final sitting of the 50th Session, and after intensive consultations and negotiations, the UN Commission endorsed a fundamentally altered draft decision proposed by the Chairman. An inter-sessional working group, operating on a basis of consensus, (one of the major amendments to the draft), will discuss the clustering of agenda items, with a view to proposing (rather than deciding) the clustering of agenda items and the making of a preliminary inventory of other reforms. The chairman of the group - the Chairman of the 50th Session - will report to the 51st Session.

With this decision, the deliberations and activities of the 50th Session of the UN Commission came to an end.

# JUDICIAL APPLICATION OF THE RULE OF LAW

## Aloeboetoe *et al.* vs Republic of Suriname A Judgment of the Inter-American Court of Human Rights\*

In this case, decided in September 1993, the American Court of Human Rights considered the "various forms and modalities of effecting reparation" for breach of rights and obligations under the American Convention on Human Rights, as provided for under Article 63 thereof. Article 63 reads as follows:

"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that

fair compensation be paid to the injured party."

This article, the Court asserted, "codifies a rule of customary law which is one of the fundamental principles of current international law."<sup>1</sup>

### Background To Reparation Judgment

In its judgment of December 1991, the Inter-American Court had unanimously noted the admission of responsibility by the defendant State, the Republic of Suriname, for the facts giving rise to the case; determined that the dispute as to the facts had been concluded and had decided to keep the case in its docket in order to fix reparations and costs<sup>2</sup>.

\* This paper has been prepared by Mrs Margaret de Merieux, Senior Lecturer of Law, University of Barbados.

- 1 The Court cited at this point, its own judgment in *Velasquez Rodriguez* (Series C. No. 7) and *Godinez Cruz* (Series C. No. 8); the *Factory at Chorzow Cases*, No.8, (1927) P.C.I.J. and No.13 (1928) P.C.I.J.; Interpretation of Peace treaties with *Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion* (1950) I.C.J. Rep.228.
- 2 In a communication to the Court in the course of the reparation proceedings, the Surinamese government emphasised that its admission of responsibility had its fundamental basis in the fact that the State had retaken the road to democracy in May 1991 and in the commitment of the President "to respect and promote... human rights." This position was not, the Government declared, to serve as a pretext to impose compensation payments in the millions, which would only serve to impoverish the country further.



The facts presented to the Court in the case brought before it by the Inter-American Commission on Human Rights, were that a group of Surinamese Army soldiers had attacked, beaten and detained a number of unarmed Maroons (or Bushnegroes) on suspicion of belonging to the Jungle Commando. Thereafter, whilst some of the detainees were allowed to go free, seven persons, including a 15 year old, had been driven away in the direction of the Surinamese capital (Paramaribo). Six of them had subsequently been killed, having previously been ordered to dig their graves. The seventh person, injured during escape, but not pursued, survived and was able to give an account of the events. With maggots in his wounds, and having witnessed the eating by vultures of the bodies of some of his mates, he was evacuated to a hospital after twenty-four hours of negotiations with the Authorities. He died shortly thereafter. His account of the massacre was confirmed by eye-witnesses and by the observations of a search party.

### Reparations Claimed Before the Court

The Commission claimed violations by Suriname of Articles 1,2,4(1),5(1),7(1) (2) (3) 25(1) (2) of the American Convention on Human Rights<sup>3</sup>. In its brief in the matter of reparation under Article 63 (1), it set out detailed proposals for the payment of specified sums as:

(i) Moral damages to the Saramacas

tribe *per se*, being the tribe from which the victims came;

- (ii) Moral damages to the adult dependants of the victims;
- (iii) Moral damages to the children of the victims;
- (iv) Material damages to the children of the victims;
- (v) Actual damages to the adult dependants.

The Commission also requested the payment of sums in Surinamese Guilders and United States Dollars to cover legal costs and a distinct sum for expense.

In its judgment of September 1993, the Court declined reparation for moral damage to the tribe; denied any form of compensation for dependants *as dependants*; ordered reparation as moral damages for the successors of the victims (as also to ascendants-parents) and granted material damages to the victims successors-wives and children. Expenses incurred by the next of kin in investigating the fate and whereabouts of the massacred men were granted. The Court refused the Commission legal costs, the expenses incurred by its officers in travel to Suriname, as also the cost of actuarial, financial and other advisory (legal) services. The basis of the refusal was that expenses for the fulfilment of functions assigned to the Commission and Court had to be met by these organs of the Convention System as part of the duty to perform these functions.

3 These articles relate respectively to the obligation on the State Party to respect the rights set out in the Convention; the obligation to take legislative or other measures to give effect to the rights; the rights to life, humane treatment and personal liberty ( 7(1) (2) (3), and the right to judicial protection. The Court appears to have proceeded on the basis that the right violated was that to life.

## **The Reparations Principle: the Applicable Law**

In *Aloeboetoe et al v. Suriname*, the place and function of three systems of law, international, national and tribal were engaged. The basic proposition with regard to Article 63(1), was that it was governed by international law in all its aspects- "scope, characteristics, beneficiaries, etc.," and that as a consequence, the judgment in applying and interpreting the article, imposed international legal obligations, not to be made subject to the national law of the defendant State.

International law, demanded that violations of the right to life, take the form of pecuniary compensation (para 46), such compensation referring primarily to the actual damage suffered, as also, moral damage suffered by the victims themselves.

Having determined that the damage suffered by the victims would be noticed by the Court without proof of damage, the Court had to find or assert a proposition of law by which to determine to whom compensation could be granted. The Court asserted that the right to compensation inhering in the victims was "transmitted to their heirs by succession as the damages payable for causing loss of life represent an inherent right that belongs to the injured parties."

The transmission proposition was not stated to be grounded in international law, and indeed the Court went on to say that it was for that reason "that national jurisprudence generally accepts that the right to apply for compensation for the death of a person passes to the survivors affected by that death." In so far as the issue concerned the identification of the successors of a victim the clarification

came in paragraph 61. The Court admitted the absence of a "conventional or customary rule that would indicate who the successors of a person" were and as a consequence determined that, there was no alternative but to "apply general principles of law" (Art. 36 (1) (c) of the Statute of the International Court of Justice).

The Court then referred not to a principle recognized by civilised nations as occurring in the Statute cited, but the "norms common to most legal systems that a person's successors are his or her children" (para 62). At this point, the Court determined "that the rules generally accepted by the community of nations should be applied," and immediately thereafter, that "these general legal principles refer to "children," "spouse" and "ascendant." These terms were to be interpreted according to local law and the local law was not to be Surinamese law, but Saramaca custom. Saramaca law was taken by the Court as a given fact -Surinamese law "not being effective in the region in so far as family law was concerned." The Court's path from Article 36 (1) (c) of the Statute of the International Court of Justice to Saramaca custom strikes an ironic note in the judgment.

On the basis of data specifically required of the Commission and admitted by the Court, the latter organ established a list of successors and ascendants having earlier asserted that it would make no distinction as to sex, with regard to ascendants, even if that might be contrary to Saramaca custom.

It should be noticed in conclusion, that in the interpretation of Article 63, the judgment in fact sanctions the application of all three systems of law, as it had asserted that it could be useful to refer

to the national law in force before concluding that, what was then called the local law, would be that of the Saramaca. Clearly too, the application of national and customary law was an act of "international adjudication" under the aegis of an international law principle, in this case, that invoked by the Court being that embodied in Article 36 (1) (c) of the Statute referred to earlier. In the determination of the applicable law by which to identify "successors," a matter of general significance for the status of treaties between tribal or indigenous peoples and their former master-colonists or conquerors of their lands was raised. The Commission had asserted for the Saramacas, an internal autonomy, entailing governance by their own laws, grounded specifically on a treaty of September 1762, between the Saramacas (constituted of runaway Africans) and the Dutch, "the obligations of which were applicable," it was argued by the Commission, "by succession, to the state of Suriname." The Court, however, applying the notion of *jus cogens superveniens* declared the treaty a nullity because it contained provisions which countenanced and furthered the institution of slavery<sup>4</sup>. No such treaty, it was affirmed, could be invoked before an international human rights tribunal.

Slavery, along with racial discrimination and torture are now established as contrary to *jus cogens* and in this way, protection therefrom is now seen as forming part of customary international law<sup>5</sup>.

The stand taken by the Court, while intelligible and in accord with Article 64 of the Vienna Convention on the Law of Treaties<sup>6</sup>, is not problem-free, given that tribal and indigenous groups the world-over seek now to base claims on and otherwise place heavy reliance on treaties, not of recent vintage and which could easily contain provisions offensive to *jus cogens*, as currently conceived<sup>7</sup>. There must then be a wider question as to the wisdom of the wholesale invalidation of these treaties once they contain offensive provisions which in the instant case can in no event be put into effect.

### Reparations and the Tribal Group *per se*

Perhaps the issue of greatest interest raised by the *Aloeboetoe* litigation, was the attempt by the Commission to obtain compensation for the Saramacas tribe as a group *per se*, especially in light of the current push for the "rights of peoples."

The Commission's claim for reparation as moral damages to the tribe can be

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- 4 Under the treaty the Saramacas undertook to "capture any slaves that (had) deserted, take them prisoner and return them to the Governor of Suriname," for payment.
  - 5 Generally cited in this connection are the following cases: *South West Africa Advisory Opinion (Second Phase)* 1966 I.C.J.Rep.6,298; *Barcelona Traction (2nd Phase)* 1970 I.C.J. Rep.3, 32 and 304; *Namibia Opinion* 1971 I.C.J. Rep. at 78-81. In the jurisprudence of the American Convention, see, *Pinkerton and Roach*, observations of the American Commission (8H:R:L:J:345) (1981) 66.
  - 6 The article states : If a new preemptory norm of international law emerges any existing treaty which is in conflict with that norm becomes void and terminates.
  - 7 See, e.g., Interim Report to the U.N. Sub-Commission on the Prevention of. Discrimination and Protection of Minorities, being a "Study on treaties, agreements and other constructive arrangements between States and Indigenous populations." (E/CN.4/Sub.2/1992/32.).

seen to be based on two distinct grounds. It was argued that the actual social structure of the Saramaca, whereby the individual was attached to the group, over and beyond his attachment to his family, was such as would, where there was damage to the individual, cause damage to the community as such. This, it should be noticed, was not an argument that the massacre of the seven was an attack on the tribe *per se*—an argument that might well have necessitated the pointing to a right inhering in the tribe *per se*, and one not readily identifiable in the Convention.

An argument similar to that stated above was also before the Court in an *amicus curiae* brief submitted by the International Commission of Jurists (ICJ), in July 1992, which claimed that “the nexus between violation of the Convention and the moral damage suffered was sufficient not just as to family members” as established in earlier cases, “but as to the members of the Saramacan tribe as well.” The brief asserted that the only limitation on the payment of compensation for moral damage set out in the *Lusitania Claims*, was that the injury, “must be real and actual rather than purely sentimental and vague<sup>8</sup>.” To these arguments the Court replied: “All persons... also generally belong to intermediate communities. In practice the obligation to pay moral compensation does not extend to such communities; if in some exceptional case such compensation has ever been granted, it would have been to a community that suffered direct damages” (sic).

The reference to direct damage, suggests that the wrongful acts constituting Convention infringements would have had to be targeted at the group as such. This pinpoints the fact that the judgment was concerned with the injury done to the seven victims and damage to them, reparation for which was merely transferred to their successors and ascendants<sup>9</sup>.

The second ground on which the claimants premised the claim for payment of compensation to the Samaracas, was the violation of the “rights that the tribe apparently have over the territory they occupy,” by the Surinamese army when it entered the territory. These rights originated in the treaty referred to earlier but as the Commission did not claim a status in international law for the tribe, the Commission effectively based its claim, as pointed out by the Court, “on an alleged violation of a domestic legal norm regarding territorial autonomy,” derived from the treaty. The Court made short shrift of this ground, not on the basis that the Commission had shown no breach of a right under the Convention and inhering in the tribe, but on the ground that the source of the alleged right under domestic law being a treaty declared by the Court to be a nullity, there was an end of the matter. “No provision of domestic law,” the Court opined, “either written or customary, has been relied upon to establish the autonomy of the Samaracas.”

Observations made earlier about the court’s approach to the treaty are relevant at this point, but independently of

8 18 A.J.I.L. 361-373.(1924).

9 The Court appears at one point, to consider the harm suffered by the third party family members themselves, when at para 76, it was said: It can be presumed that parents have suffered morally as a result of the cruel death of their offspring.

this, is the question whether the autonomy claimed, however premised, could in fact found the basis for a claim to reparation under the Convention in the absence of any clause therein, amounting to an autonomy or self-determination right, as in the main international, as distinct from regional, instruments<sup>10</sup>. The Convention right to life, by implication, was in turn the basis of the claim founded on the autonomy right. The Court said: "The assumption that a domestic rule on territorial jurisdiction was transgressed in order to violate the right to life does not of itself establish the right to moral damages claimed on behalf of the tribe." The issue comes back to "directness" of a breach of a Convention right and the matter of its location in the entity for which compensation is claimed. This issue is commented on further in the conclusion of this note.

The judgment in *Aloeboetoe*, may well serve to highlight the absence of any concept of group rights in the American Convention.

## Calculation of Compensation

### Mechanisms for Effecting Reparation

In the calculation of the sums payable, the Court based itself on the precedents set in the *Velasquez Rodriguez* and *Godinez Cruz Cases*, with the result that in the assessment of compensation for moral damages, "indemnification" had to "be based upon the principles of equity," whilst for the assessment of compensation "in the matter of loss of earnings,"

the Court had to "arrive at a prudent estimate of the damages, given the circumstances of each case."

In determining the amount of reparation for actual damage, the method was to calculate the earnings of victims for their working lives. June 1993 was the month used, as it was in this month that "a free exchange market was established in Suriname, (and) this made it possible to avoid the distortions produced by a system of fixed rates of exchange," in an inflationary economy. Suriname had declared its intention to make payments in the national currency only, so as to conform to domestic law. The Court however, calculated the annual income of each victim in Surinamese Guilders and then converted it into USA Dollars at the exchange rate in effect on the free market.

As to reparations for moral damage, the Court accepted the total amount proposed by the Commission for each victim, determined that a lump sum payment was appropriate and adjusted the amount payable to include "compensatory interest, calculated at the rate in effect on the international market" (para 92).

After granting expenses incurred as a result of the disappearance of the victims, the Court pointed-out that the "compensation fixed for the victims' heirs," included an amount for their education. Noting however, that continued education would not be achieved merely by the grant of compensatory damages, the Court declared Suriname to be under an obligation to reopen a school at the

10 The reference is to Article 1, in each case of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as also Article 27 of the first mentioned Covenant.

location at which most of the children involved lived and, in addition, that steps should be taken to make operational and to reopen a medical dispensary already in place in the location.

In determining the type of reparations to be granted therefore, the Court was prepared to be innovatory to the extent that it went beyond the ordering of monetary compensation and stated the 'social welfare' obligations of the State to the heirs of the victims. This attitude was also apparent in the Court's approach to the mechanisms by which reparation was to be dispensed. After ordering the payment of a stated sum into the *Suritrust* and the establishing of two trust funds for minor and adult beneficiaries respectively, the Court ordered the creation of a foundation to act as trustee administering the funds and "with a view to providing the beneficiaries with the opportunity of obtaining the best returns for the sums received in reparation." The foundation, the officers of which were identified in the judgment, was seen "as a means of contributing to a true and effective protection of human rights in the Americas," as the ICJ had suggested in its *amicus curiae* brief.

The judgment expressly forbade the taxing or restricting of the activities of the foundation or the administration of the trust funds beyond the current levels, and declared that any modifications of prevailing conditions had to be favourable to the foundation and funds. There was to be no interference in the decisions of the foundation.

Again, the Court decided to "supervise compliance with the reparations order before taking any steps to close the file on this case."

Finally, the declaration of the Court,

based on its views in *Velasquez Rodriguez* and *Godinez Cruz*, that the "State is obligated to use the means at its disposal to inform the relatives of the fate of victims and... the location of their remains," and stated to be of particular importance in the Saramaca context, is to be noticed as a significant means of giving effect to the prescriptions of Article 63, for the making of reparations on a violation of Convention Rights.

### Conclusion

The judgment in *Aloeboetoe*, both reasserts and, at the same time, highlights the boundaries of the basic proposition made in *Velasquez Rodriguez*, that "it is a principle of international law... that every violation of an international obligation which results in harm creates a duty to make adequate reparation." In addition and distinctly, the Court reaffirmed the principle that monetary compensation for non-material damage is to be awarded under international law particularly in the case of human rights violations.

In *Aloeboetoe*, the compensation awarded was for damage suffered by the victim right-bearers, the compensation being transmitted to heirs-successors and ascendants. The main issue of contention therefore, in the case, was the question of the award of compensation for non-material damage to third parties in the instant case, the tribe, on the basis of the established violation of the rights of the victims. The decision of the Court to refuse compensation to the tribe, must amount to a 'declaration', that the tribe as a species of third party, had no legal interest recognized in international law and compensable under that law, arising from the violation. It can thus be seen

that the proposition cited from *Velasquez Rodriguez*, is too wide, as harm to third parties or entities on a violation of an international obligation, will not necessarily give rise in the Court's view to compensation therefor.

The distinct question of compensation for breach of the autonomy rights of the Saramacas either in anticipation or in consequence of the violation of the victims rights again raises a 'directness of harm' issue, but as suggested earlier, may point in the main to the absence of provision for self-determination or other rights attributable to peoples or groups

in the American Convention on Human Rights, rather than to the failure to point to a norm of domestic law conferring autonomy, other than the treaty declared a nullity.

The application of tribal law under the aegis of a norm of international law has been characterised earlier as a notable feature of the case. Finally, the decision of the Court to supervise the process of the actual making of reparation augurs well for its role in promoting and protecting fundamental rights and freedoms under the Convention.

## **BASIC TEXTS**

# **United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**

*Resolution 47/135 - 18 December 1992*

*The General Assembly,*

*Reaffirming* that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion,

*Reaffirming* faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

*Desiring* to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that

have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

*Inspired* by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities,

*Considering* that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of states in which they live,

*Emphasizing* that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,

*Considering* that the United Nations has an important role to play regarding the protection of minorities,



*Bearing in mind* the work done so far within the United Nations system, in particular by the Commission on Human Rights, the Sub-commission on Prevention of Discrimination and Protection of Minorities and the bodies established pursuant to the International Covenants on Human rights and other relevant international human rights instruments in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

*Taking into account* the important work which is done by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

*Recognizing* the need to ensure even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

*Proclaims* this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

#### **Article 1**

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

#### **Article 2**

1. Persons belonging to national or ethnic, religious and linguistic minorities

(hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the rights to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong of the regions in which they live, in manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

#### **Article 3**

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-

exercise of the rights set forth in the present Declaration.

#### **Article 4**

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

#### **Article 5**

1. National policies and programmes shall be planned and implemented

with due regard for the legitimate interests of persons belonging to minorities.

2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

#### **Article 6**

States should cooperate on questions relating to persons belonging to minorities, *inter alia*, exchanging information and experiences, in order to promote mutual understanding and confidence.

#### **Article 7**

States should cooperate in order to promote respect for the rights set forth in the present Declaration.

#### **Article 8**

1. Nothing in the present Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.
2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.
3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

4. Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

#### **Article 9**

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.

## **The Madrid Principles on the Relationship between the Media and Judicial Independence**

### **Introduction**

A group of 40 distinguished legal experts and media representatives, convened by the International Commission of Jurists (ICJ), its Centre for the Independence of Judges and Lawyers (CIJL), and the Spanish Committee of UNICEF, met in Madrid, Spain, between 18-20 January 1994. The objectives of the meeting were

- to examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Basic Principles on the Independence of Judiciary;
- to formulate principles addressing the relationship between freedom of the expression and judicial independence.

The participants came from Australia, Austria, Brazil, Bulgaria, Croatia, France, Germany, Ghana, India, Jordan, Netherlands, Norway, Palestine, Poland, Portugal, Senegal, Slovakia, Spain, Sri Lanka, Sweden, Switzerland and the United Kingdom.

The following are the Principles:

### **The Madrid Principles on the Relationship between the Media and Judicial Independence**

#### **Preamble**

- Freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise laws.
- The media have an obligation to respect the rights of individuals, protected by the International Covenant, and the independence of the judiciary.

- These principles are drafted as minimum standards and may not be used to detract from existing higher standards of protection of the freedom of expression.

### **The Basic Principle**

1. Freedom of expression<sup>1</sup> (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
2. This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (U.N. Document E/CN.4/1984/4).
3. The right to comment on the administration of justice shall not be subject to any special restrictions.

### **Scope of the Basic Principle**

4. The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even where investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused

and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press information about the investigation or the circumstances being investigated.

5. The Basic Principle does not exclude the holding *in camera* of proceedings intended to achieve conciliation or settlement of private causes.
6. The Basic Principle does not require a right to broadcast live or recorded court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

### **Restrictions**

7. Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised only by a judge.
8. Where a judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the exercise of that power and, if exercised, a right of appeal.
9. Laws may authorise restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of minors and of members of other groups in need of special protection.
10. Laws may restrict the Basic Principle in relation to criminal proceedings in the interest of the

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1 As defined by article 19 of the International Covenant on Civil and Political Rights.

administration of justice to the extent necessary in a democratic society

(a) for the prevention of serious prejudice to a defendant;

(b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim.

11. Where a restriction of the Basic Principle is sought on the grounds of national security<sup>2</sup>, this should not jeopardise the rights of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.
12. In civil proceedings, restrictions of the Basic Principle may be imposed if authorised by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.
13. No restriction shall be imposed in an arbitrary or discriminatory manner.
14. No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction.

Moreover, the order to restrict shall be subject to review by a judge.

## Annex

### Strategies for Implementation

1. Judges should receive guidance in dealing with the Press. Judges should be encouraged to assist the Press by providing summaries of long or complex judgements of matters of public interest and by other appropriate measures.
2. Judges shall not be forbidden to answer questions from the Press relating to the administration of justice, though reasonable guidelines as to dealing with such questions may be formulated by the judiciary, which may regulate discussion of identifiable proceedings.
3. The balance between independence of the judiciary, freedom of the press and respect of the rights of the individual - particularly of minors and other persons in need of special protection - is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups: legal recourse, press council, Ombudsman for the press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

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2 For the proper scope of the term "national security", see sections 29-32 of the Siracusa Principles (ICJ Review N° 36, June 1986)

# **Towards a Professional, Independent and Effective Arab Human Rights Movement**

## **A Workshop held between 5-7 January 1994 in Amman, Jordan**

Under the auspices of His Royal Highness, crown Prince Hassan Ben Talal, the International Commission of Jurists (ICJ) held a workshop in the Jordanian capital, Amman, between 5-7 January 1994, entitled "Towards a Professional, Independent and Effective Arab Human Rights Movement."

The workshop was attended by 31 active members of Arab non-governmental human rights organizations (NGOs). The purpose was to exchange opinions, experience and expertise pertaining to the consolidation and development of daily practical work in the field of human rights in the Arab world.

The participants stressed the fact that Arab NGOs were facing numerous common predicaments during the stages of their evolution and development, particularly in relation to formulating their objectives, defining and developing professional work methods. In addition to administrative and fund-raising dilemmas.

Over the three days, several working papers were discussed. They dealt with a number of internal and external challenges facing the Arab human rights movement. During the discussion on the dilemmas confronting the movement, a reference was made to the emergency situation which prevails in the Arab world, as well as the concerns arising

from Arab culture, society and human rights, as well as the consequences of Islamic political movement on human rights in the region.

During the discussion on internal challenges, the workshop assessed the methods of conducting daily work of human rights organizations, especially with regard to monitoring and documenting, legal research and publishing, offering legal advice, social awareness and mobilization. Additionally, a number of prototypes of Arab human rights organizations were reviewed. The effects of daily activities on the nature of the organization, be it "populist" or professional, and the degree of its internal democracy, were considered. The ability of employees to make decisions; the availability of trained, specialized cadres, as well as the availability of funding sources, were also discussed.

Furthermore, the workshop discussed the relationship between human rights organizations and political movements, whether governmental or in the opposition, especially the membership of politicians in human rights organizations and whether it should be restricted. Relationships with Arab parliaments were also a subject of discussion.

Towards the end of the workshop, the participants discussed the possibility of re-organizing the Arab human right

movement; how to bypass the conflict of trust and how to define short and long term strategies.

The participants produced the following recommendations:

### **Recommendations concerning Arab governments:**

- 1 Arab governments must work to uphold the principle of the Rule of Law; unequivocally adhere to human rights and move to amend laws that are in conflict with them.
- 2 Official authorities must immediately move to legalize Arab human rights NGOs and permit their activists to function freely and without intimidation.
- 3 All human rights activists who are being detained in the Arab world must be released at once.
- 4 Arab legislative bodies are called upon to amend existing laws in a manner that conforms to international human right laws and must establish permanent working committees for the defence of Arab human rights.

### **Recommendations concerning internal action within human rights organizations:**

1. **Consolidating professionalism in the action of Arab human rights organizations:**
  - 1.1 Professionalism in human rights organizations is the cornerstone of the independence and perennality of these institutions. Bolstering professionalism requires a solidification of the institutional management of these organizations and a true practice of the principles of

democracy and human rights in the conducting of daily work, particularly within the process of decision making.

- 1.2 Membership of these organizations must be based on a clear criteria: certitude and faith in the principles of human rights. These criteria should be incorporated in the organization's principle by-laws and membership regulations. Responsibilities should be given to qualified and experienced activists.
- 1.3 The presence of full time, qualified workers is crucial for the action of any professional institution.
- 1.4 Training courses should be developed for workers in the human rights field by using all available opportunities. For this goal to be achieved effectively, it is advised that organizations carry-out a conclusive survey to determine the professional level of their employees.
- 1.5 NGOs must develop means of communicating by way of seminars and workshops in order to resume discussion on the various aspects of professional work methods in the field of human rights.

2. **Application of human rights criteria within NGOs:**

In order to avoid double standards, human rights standards should be applied inside the human rights organizations themselves by way of solidifying internal democracy so that the organization itself becomes an example to society.

This can be accomplished by:

- 2.1 Developing democratic procedures within NGOs in order to reduce instances of minority decisions and allow the entry of all employees, especially women, in the process of decision making. Such procedures must cover all types of communications including those between the headquarters and the regional offices .
- 2.2 Curtailing the monopoly of a few individuals on assignments inside the organizations by allowing young, qualified people to effectively and actually participate in institutional functions.

### **3 The independence of NGOs from political regimes and parties:**

- 3.1 The independence of human rights organizations must be safeguarded, sustained and exemplified in the daily functions of the organization through developing appropriate by-laws and regulations to prevent the organization from having membership that is either not dedicated to, or has goals against human rights.
- 3.2 It is advisable to restrict the role of leaders of political parties within the hierarchy of human rights organizations.

### **4 Creating a human rights culture in society**

- 4.1 Creating a fertile ground for human rights in society will certainly ensure their protection in the long term. Thus, wide ranging programmes concerning human rights education must be established to reach the whole of society.

The media can be creatively and effectively mobilized for this purpose.

- 4.2 Special attention must be given to the training of teachers as well as human rights specialists. Also, workshops for the general public must be organized and the various professional cadres put to good use.
- 4.3 The effort of Arab human rights departments and centres, local and regional, must be supported in order to bolster human rights knowledge in the Arab world.

### **5 Cooperation among Arab human rights NGOs**

- 5.1 Arab human rights organizations must display solidarity when the rights of their workers are violated.
- 5.2 They must establish practical programmes for the purpose of sharing expertise, including the exchange of employees for specific periods in order to train others or advise in fields where various expertise are required.
- 5.3 They must develop their means of communications and the exchange of publications as well as attempt to bypass the political obstacles that alienate human rights organizations from each other.

### **6 Funding for human rights NGOs**

- 6.1 The policy of funding NGOs must be clear, documented and must ensure independence of NGO decision making.
- 6.2 Funding must be unconditional. The organization itself, rather than the funder, must draw pro-



grammes of action and projects for which it wishes to obtain foreign funding.

- 6.3 An independent Arab fund must be established to aid NGOs cover their expenses so as to avoid reliance on foreign aid. This fund should be supervised by non-partisan individuals known to be free from political influence. The financial reports of this fund must be conclusive and made accessible to the public.
- 6.4 Creative ideas should be exchanged regarding local organizations self-financing.

## **7 General recommendations:**

- 7.1 A study must be drafted on the legal status of Arab human rights organizations and their relationship with official human rights

bodies. A guide to Arab NGOs, their functions and structures, must be published.

- 7.2 Human rights organizations must exploit the legal system creatively and strengthen their relationship with judges and advocates.
- 7.3 Local Arab organizations should draw benefit from the experience and mandate of NGOs with consultative status with the United Nations.
- 7.4 Human rights organizations must contrive their priorities in accordance to actual needs on the ground in order to effectively confront the deteriorating situation of human rights in their perspective areas. Thus, they will remain faithful to their aims and programme of action, and augment their reliability.

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