PLANTATION .....

This idea will be further supported by a consideration of the very nature of the Sri Lankan moneyed class. When they accumulate some capital, they prefer to invest in land and real estate. As I pointed out, the crisis of the plantations and the shift of comparative advantages are primarily the result of absentee ownership, either of state or of private landlords. The proposed system of partial destatization will not solve this fundamental problem. In Kenya the tea economy is set on competitively firmer ground by a 'revolutionary break-up of the ... plantations,' to borrow Allan Nevin's phrase in another context. De Silva (1982:280) writes:

> The absence of a positive relation between the size of a cultivation unit and the quality of produce is evident in Kenya. Aided by the Kenya Tea Development Authority (KTDA), small holders achieve yields comparable with those on estates and the processing of tea is done in large cooperative factories. KTDA also enforces quality standards for the green leaf purchased from small holders. In Kenya, since the early 1960s, and in Malawi more recently, tea production has been increasingly on small holdings.

This, backed up by a macro plan on land use, is definitely a radical measure which may revolutionize agrarian relationships in the country, possibly leading it on the 'American' path of capitalistic development. It would also contribute to reactivate 'black money' hoarded by the Sri Lankan moneyed class. The production of tea and rubber could be organized in large factories owned by the State Plantations Corporation, private companies or cooperatives. The competition between them will be advantageous to small scale green leaf producers and also promote a more pluralistic ownership structure.

My basic contention is that the issues involved cannot be solved in the sphere of management or of pure economics but in the sphere of political economy. The management of the economy requires creative thinking, not the facile repetition of abstract formulas designed in Washington.

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ICJ ON THE NGO COMMISSION

The International Commission of Jurists (ICJ) is a non-governmental and non-political organisation which has consultative status with the UN Economic and Social Council, UNESCO and the Council of Europe. It draws its support from judges, law teachers, practitioners of law and other members of the legal community and their associations.

The Commission's objective is to promote the understanding and observance of the rule of law throughout the world; it has defined this concept as, among others, " to protect the individual from arbitrary government and to enable him to enjoy the dignity of man". The Commission's work thus focuses on the legal promotion and protection of human rights and freedoms.

In the pursuit of this objective, the ICJ conducts studies or inquiries into particular situations or subjects, publishes reports on them and intervenes with governments concerning violations of the rule of law.

The ICJ commissioned Dr. Stephen Neff, a lecturer in Public International Law at the University of Edinburgh, to visit Sri Lanka and to study the mandate and operation of the Presidential Commission of Inquiry in respect of non-governmental organisations (hereafter the NGO Commission). In the course of his visit in May -June 1991, Dr. Neff met representatives of NGOs, lawyers acting for NGOs as well as government officials and those connected with the NGO Commission.

The ICJ submitted the draft report to the government in July and asked for an opportunity for an ICJ delegation comprising of Sir William Goodhart, QC., and Dr. Neff to discuss its findings with the government and with the members of the NGO Commission; it expressed its willingness to modify any criticism which appeared, on discussion, to have been overstated or unjustified. This request was denied; the ICJ was informed by the Permanent Representative of Sri Lanka to the UN in Geneva that any comment or critique on the operations of the Commission "would be a violation of the principle of non-interference in matters that are deemed to be sub-judice".

The ICJ renewed its request, arguing that the proceedings of the Commission were not 'sub-judice' and asked for a response from the government by 6 September 1991. There has been no response.

The Report was published in Geneva by the ICJ in November with the following comment:

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ICJ ON THE .....

The ICJ is of the opinion that it would be pointless to defer publication of the report until the NGO Commission has completed its work since it would be too late for any procedural defects to be rectified. It however wishes to stress that it has always been and is still ready and willing to develop a genuine dialogue and exchange of information with the Sri Lanka Government about the issues raised in the report.

THE REPORT

The report first examines the background to the Commission, noting that its immediate roots were "in a report, not as yet published by a government committee, not as yet publicly named or identified." Three of its findings have been made public in the Gazette notification setting up the Commission; these are

i. that 3000 NGOs function in Sri Lanka,

ii. that "no framework has been established for monitoring the activities and funding" of these groups,

iii. that (most crucially) "some of the funds received from foreign sources as well as generated locally are allegedly being misappropriated and/or being used for activities prejudicial to national security, public order and/or economic interests and for activities detrimental to the maintenance of ethnic, religious and cultural harmony among the people of Sri Lanka".

The report notes that the terms of reference of the Commission are very broad. However, the Commission is to report, in essence, on three matters:

i. the misuse of funds,

ii. the legal framework for the supervision of NGOs,

iii. other related matters relevant to the determination of the above matters.

The Report then discusses the Commission's working methods. Their information is gathered in four ways:

i. Information supplied by the general public in response to a notice published by the Commission in newspapers of 10.1.1991,

ii. Questionnaires issued to NGOs,

iii. Hearings conducted by the Commission,

iv. Investigations conducted by the police unit attached to the Commission.

The Report then discusses the right of freedom of association with regard to international norms and in the law of Sri Lanka and of other selected jurisdictions. There is also a section on 'instructive case law on freedom of association'. The Report's general conclusion is that

> the principle of freedom of association is not absolute. There can be, accordingly, no convincing case made that NGOs have an international legal right to function totally free of government intervention under all circumstances. At the same time, it may be confidently asserted that government supervision of NGOs or inquiry into their activities should not be so heavy handed or intrusive as to render the right of freedom of association altogether nugatory.

Based on this background material and the briefings Dr. Neff had with government and Commission officials in Sri Lanka, the Report analyses the current attitudes among the NGO community, foreign donors, the government and the Commission. It thereafter goes on to make certain recommendations to the government. These recommendations are reproduced below.

A. GENERAL CONSIDERATIONS

The government of Sri Lanka, like any government, functions in a sort of dual capacity. On the one hand, it is custodian and guardian of the general interest of the society at large. In this capacity, it is the right - if not indeed the duty - of the government to subordinate the private interests of individuals to those of the larger collectivity. At the same time, however, the government is the guardian of the fundamental human rights of persons subject to its jurisdiction. When acting in this capacity, the state is obliged to take the greatest care to ensure that the interests of the larger society - however legitimate they may be in principle - do not unreasonably trespass into the realm of basic rights. The problem, of course, lies in determining what is reasonable.

The single most important consideration to bear in mind in this regard is one that has been stressed on several occasions already. That is the impossibility of striking the correct balance between the rights of the many and the rights of the few by considering the matter in the abstract rather than the concrete. This was a dominant theme extending throughout the American case-law on freedom of association. It also lies at the root at the mistrust that many NGOs harbour about the Commission - that the Commission's functioning must be evaluated not in isolation but rather in the full context in which it is operating.

The general conclusion must be, therefore, that the government of Sri Lanka cannot discharge its obligations in the human rights sphere simply by pointing to the impartiality of the members of the Commission which it has appointed to look into the activities of NGOs. It should, rather, be held to be under an obligation to take what steps are feasible to ensure that the entire process of inquiry into NGOs, in the broadest sense, is conducted as fairly as possible. Looking to the future - ie to the regulatory regime which might ultimately be enacted - the same general consideration applies. In the light of all of the particular circumstances of the case, the government of Sri lanka is obliged to institute a type of regulatory regime which is tailored as narrowly as possible to the protection of the legitimate public interest while leaving, at the same time, the maximum "breathing space" for the principle of freedom of association.

Because of the very nature of these guiding principles, it is impossible, on the strength of the single brief mission undertaken thus far by the ICJ, to state in elaborate detail what steps the Sri Lankan Government needs to take (or refrain from taking) in the specific situation at hand. Nevertheless, certain conclusions on the more important issues may be offered with some cautious confidence, both as to the functioning of the NGO Commission and, for the longer run, as to the ultimate regulatory regime,

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if one should be imposed, for NGOs in Sri Lanka.

B. THE NGO COMMISSION

The most important consideration may be stated readily enough, if in necessarily rather general terms. The Commission must be genuinely, and not merely nominally, a vehicle for finding facts that will be relevant to the regulation of NGOs. It may not be used as a device for intimidating NGOs. Drawing on the analogy of the American case-law, it should be stressed that what is crucial here is not the motivation of government in setting up the Commission, but rather what the **actual effect** of the Commission's operation is, in the actual prevailing circumstances in Sri Lanka. The impartiality of the members of the commission is, to be sure, a most important factor in this area. But it is not the decisive one in itself. The decisive factor - or rather complex set of factors - is the overall context in which the Commission's investigations take place. If the Commission functions in such a way as to lead to harassment of NGOs, then the commission's manner of operation should be changed. It is not crucial (again drawing on the lessons from the American case-law) that the harassment is the result, in the immediate and proximate sense, of the actions of parties other than the government or the NGO Commission.

Bearing this general principle in mind, several aspects of the commission's operations call for serious re-examination. One is the extreme breadth of the terms of reference. This is an extremely worrying factor when considered in conjunction with two other aspects of the Commission's hearings. These three factors, in combination if not singly, make an unacceptably repressive atmosphere. This way of operating makes for the airing of wild accusations which receive significant publicity. The result is all too likely to be the building up of a general atmosphere of hostility against the NGOs, irrespective of the precise findings which the Commission may provide in due course.

It is obviously too late to rescind the general notice of January 1991. But the Commission should exercise considerably more discrimination in the choice of its witnesses. There is nothing intrinsically wrong with inviting the general public to come forward with information or views - on the contrary, it is positively a good thing for the Commission to sample as broad a cross section of public opinion as possible. Evidence of this kind should, however, be submitted in writing rather than taken orally, where it attracts publicity of often undeserved prominence. The better procedure is probably to use such information only for the purpose of deciding what witnesses to call. The Commission should then have a firm policy of reaching its conclusions only on the basis of the public oral testimony. By this means, the more irresponsible and sensationalist accusations against NGOs can be prevented from doing inordinate harm, without the Commission being in any way deprived of sources of information which it might legitimately wish to have.

Restrictions on press reporting of the Commission's hearings are undesirable in principle, as infringements of freedom of the press. The press is not, to be sure, always responsible. Nevertheless, it should always be as free as possible.

Another general consideration of the utmost importance is that the NGO Commission's activities ought not to cross over the line from information-gathering into the sphere of criminal prosecution. Police investigations should, at a minimum, be undertaken only under the most careful supervision of the Commission itself, rather than of the Commission's staff. The preferable course of action is that police investigations in the Commission's name ought to be stopped altogether and the police unit attached to the Commission disbanded. If the authorities wish to investigate possible crimes, with a view to prosecuting those responsible, they should do this through the normal law-enforcement channels. As things stand presently, there is unacceptably great scope for police harassment of NGOs under the general auspices of the Commission.

The amount of information sought from the NGOs in the questionnaire and the supplementary questionnaire appears excessive - yet another consequence of the extreme breadth of the Commission's terms of reference. The lesson from the American case-law might be borne in mind here, that a commission of inquiry ought not to engage in exposure for the sake of exposure. The greater the intrusion of government into the internal workings of associations and into the private lives of persons connected - sometimes only extremely tangentially - with NGOs, the greater the threat to the vital rights of privacy and freedom of association. No neat formula can mark off the permitted from the forbidden in this area. But the guiding principle should be that a commission of inquiry should not be allowed to engage in comprehensive and indiscriminate investigations into every single instance of the phenomenon that it is investigating. It should be borne in mind, instead, that the Commission's proper task is to obtain a reasonable idea of the kind of abuses that might exist in the area that it is investigating, together with a reasonable idea of the extent of these abuses (and hence of the urgency of the need for legislation). The Commission's proper task, in other words, is to express its opinion as to what regulatory regime, if any, would be appropriate for NGOs, not to ferret out every single individual instance of wrong-doing whether possible or actual. Here again, the danger is that the Commission will cross the fine line that divides information gathering from law enforcement. There is even a threat in this regard to the sacrosanct legal principle of a presumption of innocence. In this situation, it looks as if NGOs are being placed under a burden of establishing their **bona fides** - with the contempt power being held in reserve for those who refuse to cooperate.

C. THE SUBSTANTIVE REGULATION OF NGOs

It may be premature to expound on this subject, since the NGO Commission has not yet produced its findings. Nevertheless, certain general standards should be borne in mind that any regulatory regime should meet. Here again, the considerations are necessarily of a rather general nature.

The most important consideration is that, when the vital human right of freedom of association is at stake, the government is obligated to tread wearily. The state may certainly have valid regulatory interests. But those interests must not be allowed to function as instruments of harassment. Regulations must be fitted as carefully as possible to the particular problems that they are addressing.

The most obvious conclusion to emerge from this general point concerns the general character of any regulatory regime affecting NGOs. Broadly speaking, there are two possible strategies to follow in this area: a preventive one and a reactive one. These descriptions are largely self-explanatory. A reactive regime is oriented towards the identification of abuses after they have occurred, with a view then to punishing the miscreant responsible. A preventive system, in contrast, is designed to ensure that misdeeds do not occur at all. A preventive regime, by its nature is likely to entail more heavy-handed and comprehensive regulation than a reactive one. →

Preventive regimes are, in general, anathema when they involve a trespassing upon fundamental rights. Perhaps the clearest example involved freedom of speech (or liberty of expression), in which there is a long standing rejection, in principles, of policies of prior restraint. The same should apply in the area of liberty and association, which is a right of a similarly fundamental character. The conclusion, then, is that, while the government of Sri Lanka is entitled to be concerned about the problem of fraudulent practices by NGOs, that concern should, in principle, manifest itself in a policy of vigorous prosecution of such wrongs after they occur.

It should not be used to justify a control system so heavy-handed as to dissuade persons from joining or contributing funds to NGOs.

It is probably safe to conclude - although there is no firm international law authority on the matter - that certain very basic regulatory steps may be justified in the NGOs sphere. The state is probably at liberty to require all NGOs to notify the government of their existence, to provide a statement of their functions and to identify their officers. It seems likely that the government can reasonably claim certain powers to inspect the accounts of such groups as well. These are the sorts of regulations to which ordinary companies are typically bound to submit, and they seem basically reasonable.

It may be noted that Sri Lanka possesses a regime broadly of this kind with respect to one very special category of NGOs: voluntary social service organisations. This category of NGOs is in a special position because of the nature of the tasks they undertake, which is he provision of reliefs and services to particularly vulnerable groups or persons, such as the mentally retarded or physically disabled, the poor, the sick, orphaned and destitute, together with disaster victims. (This definition is found in Section 18 of the relevant law, the Voluntary Social Service Organisations Act of 1980). In conversation with Sri Lankan officials some dissatisfaction was openly expressed with this law, to the effect that it was insufficiently strict.)

On the question of regulating the sources of funding of NGOs, it would appear that there is no justification for a general prohibition, or even restriction, on the right of an NGO to receive as much funding from foreign sources as it is skilful or fortunate enough for it to raise. There may be cases, to be sure, in which funds from particular foreign sources might legitimately be found by a government to be undesirable. But the raising of funds is one of the most important attributes of the effective functioning of the right of freedom of association. There seems no reason why association across national boundaries should be prohibited or restricted in the general case.

A notorious instance in which direct restrictions on the acquisition of funds by NGOs from foreign sources were imposed involved the Republic of South Africa. Its Affected Organisations Act of 1974 allowed government to declare organisations to be "Affected". When that happened, it became a criminal offence for persons either to canvass for or to receive funds from a foreign source. This legislation was used, predictably, against anti-apartheid organisations. It rightly attracted widespread condemnation from the human rights community.

One final point concerns the possibility of there being different regulatory regimes for different types of NGOs. There is some receptivity on the NGO Commission, at least in principle, to the idea that different categories of NGOs might be entitled to different degrees of autonomy. The concern here is that the position of human rights advocacy groups in particular must be protected to the greatest extent possible. A case can certainly be made for stricter regulation of NGOs which are charitable in the somewhat narrow sense of having identifiable persons under their more or less continuous care. NGOs which run, say, nursing homes or boarding schools or mental institutions would fall into this category. To the extent that their charges are not able to look after their own interests effectively, a case must be made for a government mechanism that would do so on their behalf, but a mechanism which- it cannot be overemphasised - may not be a mere cloak for the subverting of the proper functioning of the NGO in question.

It might be noted that the United Kingdom's regulatory regime for NGOs is broadly of this character. The basic legislative framework is the Charities Act of 1960, which confers onto persons called charity commissioners an array of powers. Charitable groups (with some exceptions) are required to register with the commissioners and to provide certain information to them about their activities. The commissioners have the right to institute inquiries into particular charities or into classes of charities. They can call for the production of a wide variety of types of evidence. They can also compel persons administering charities to attend and give oral evidence to them under oath. They possess contempt powers similar to those of courts of law. They also have the power to impose a range of penalties onto charities which misbehave. They may remove offices, transfer property, freeze bank accounts and impose restrictions of various kinds onto the activities of charities.

These are quite substantial powers, but it should be appreciated that, under British Law, the definition of a charity is relatively narrow, so that many NGOs doing work of a public service character would not so qualify. (Amnesty International, for example, has never been regarded as a charity within the meaning of British law.) Although distinctions will inevitably be difficult to draw in marginal cases, it would appear that a good case would be made for distinguishing human rights advocacy groups from charities of the kind just described. The true function of human rights advocacy groups is not to undertake relief work for victims of oppression but rather to safeguard and promote the rule of law for the society as a whole. For such groups, strict scrutiny of the kind arguably appropriate for charities would be unnecessary, and probably even harmful.

More broadly, it may be concluded that the stricter the system of NGO regulation in general, the greater will be the justification for considering human rights advocacy to be entitled to qualitatively different treatment. This entitlement would be based upon the general interest of Sri Lankan society as a whole in the existence of a climate of vigorous human rights protection. Admittedly, the lighter the regulation of this category of NGOs, the greater will be the scope for the kind of abuses and misconduct that the NGO regulatory system is designed to combat. In that sense, risks are involved in treating these NGOs differently and more lightly than others. But in the interest of effective protection of human rights norms for the whole of the society, this risk (which, it may be supposed, is not great) should be taken. ■