

HUMAN RIGHTS

FEATURES

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Between the lines, a pattern emerges

The two major battles in Room XVII will be on country resolutions and on rationalisation of the CHR

The Commission is in its fourth week. It has inched it way through the agenda. It has not done too badly in terms of the time constraints. The battle lines are also being drawn more clearly. It is evident that the two great battles of this Commission will be the debate on country resolutions and the issue of the rationalisation of the work of the CHR. The Asian and African member states of the CHR perceive that most of the country resolutions emanate from the European Group. They feel that Europe is using country resolutions to browbeat them on other issues. Many from Nairobi to Teheran, from Tripoli to Jakarta feel that this is part of intrusive diplomacy threatening their national sovereignty concerns. As the analysis on page two reveals, that perception is not well grounded. Slaying imaginary dragons is more difficult than dealing with real ones.

The Europeans believe that they are running many more of the resolutions as the United States which ran quite a few in the past seems to have outgrown this role or has just worked out a strategy which has not been spelt out clearly enough even to its allies. In fact, Europe has taken over the briefs on resolutions that the United States ran in the past. For example, Europe took over the resolution on South Eastern Europe from the Americans. The present EU resolution on the Sudan was a brief that was earlier run by the United States.

Coupled with the reluctance to run resolutions, the US has not been too helpful with many of the EU initiatives. The Italian draft resolution on Afghanistan is a case in point. The US would like it buried. Setting precedents for post conflict situations given the realpolitik of a post conflict Iraq is clearly not kosher in Washington's eyes.

The EU resolution on Sudan is clearly also seen as lost. (see story below) The Special Rapporteur on the Sudan has bent over backwards to placate Khartoum. Oil interests ranging

from India to the United States are helping to lift the siege on Khartoum.

Khartoum, in the meanwhile, has been on a diplomatic offensive and broken out of its sense of earlier isolation. It has intelligently melded the support from the African Regional Group with that from the Organisation of Islamic Countries (OIC) with the new found voice of the Non Aligned Movement that is will-

The writing on the wall...

...is that the descendants of the Mahdi have rounded their wagons well while the sons of Gordon Pasha are once again walking into the ambush on the banks of the Nile. Some in Europe believe that they do not have the necessary votes and while they will be the brave Six Hundred and go down fighting on a traditional Item 9 resolution, there are others who believe that negotiations with Khartoum need to be opened on a Chairman's statement. Sudan itself is not going to help in this and provide the necessary consensus. It is hoping that the ubiquitous Item 19 (Advisory Services) will once again ride to the rescue of another state which needs closer scrutiny rather than dollops of assistance.

See page 2

ing to tilt at a number of windmills with a quixotic Malaysia at its helm. The South Africans have been key to building the African consensus around Sudan, in contrast to their abstention on this issue last year. It is diplomatic footwork emanating from Pretoria that has firmed up many in Francophone Africa who would have otherwise gone along with the EU resolution. (see box)

The EU resolution on Chechnya also seems to be doomed to fail. The Russians are not even willing to recognise that there is a very real human rights dimension to the conflict there. Zimbabwe, riding on the coattails of South Africa and Kenya has also done its arithmetic

better than the Europeans. However, Europe sees the longer-term political advantages of going down fighting on this one. This issue of the HRF elsewhere throws light on the abominable human rights situation in Zimbabwe and all right minded people must worry that impunity seems to be the order of the day for the worst violators thanks to the geographical phalanxes that are here to stay. (see p5)

Beijing is now confident that the traditional China resolution brought by the US will be a memory. It is the fourth week of the Commission and Washington seems to be still undecided as to what to do on this issue. They are yet to broach the subject to their EU interlocutors. A Cuba resolution is however on the anvil.

The EU will be putting forward a draft on North Korea and it will be interesting to see the line-up in Asia on that resolution. The EU's draft on Turkmenistan could not be more timely as we reveal elsewhere in this HRF: Niyazov thinks he is the lord of Tartary and all that he surveys. (see p6)

It is right that last year most country resolutions emanated from the EU. But this is not the full story. For that one has to look carefully at the voting on the 10 African and Asia Group member mandates reviewed at the 58th session, dealt with in detail in this HRF. Of the six African Group member drafts, only one (Sudan) was adopted by a marginal vote of one, three were adopted by consensus (Burundi, DRC and Sierra Leone), and one was dropped (Equatorial Guinea), with the Europeans abstaining. Of the four Asian Group member drafts, two were adopted without a vote (Afghanistan and Myanmar), one dropped on a marginal vote (Iran) and one with a vote (Iraq). Thus, only the EU resolutions on Sudan and Iraq remain truly contentious. As for imaginary dragons, they ultimately have to face the cold hard lance of fact, maybe then we can turn back to the real ones.

SAHRDC Daily Briefings

Schedule for the week

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THURSDAY 10 APRIL	The Subcommittee and its Working Groups: Not quite useless yet...
FRIDAY 11 APRIL	Advisory Services: How to not let governments get away with it!

Will the CHR give up on Sudan?

IN 1993, the Commission on Human Rights (CHR) passed a resolution (1993/60) appointing a Special Rapporteur to monitor the situation in Sudan and expressing "deep concern at the serious human rights violations in the Sudan, including summary executions, detentions without due process, forced displacement of persons and torture...". Earlier, the situation of human rights in the Sudan had been discussed at the CHR's 47th session, in 1991, under the Confidential Procedure. It continued to be discussed under the Confidential Procedure at the

CHR's sessions in 1992 and 1993.

A decade on, little has changed. However, if the majority of the Commission's members this year believe - and they do, as the whispers around Room XVII indicate - that the impoverished, war-racked country no longer needs monitoring, the Special Rapporteur, Mr Gerhart Baum, may not see his wish of "stronger involvement of the United Nations in the Sudan" fulfilled.

In his interim report submitted to the General Assembly nine years ago, the first Rapporteur

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Regional group positions on country-specific procedures at the 58th session

AT the 58th Session 14 countries were the subject of draft resolutions under Item 9. The numbers from each regional group they were as follows: African Group (6), Asian Group (4), Eastern Group (2), GRULAC (1) and Israel. The introducers and sponsors of the original draft resolutions were as follows: Western Group (Chechnya, DRC, Iran, Iraq, Myanmar, Sierra Leone, Sudan, S.E. Europe, and Zimbabwe), African Group (Burundi and Equatorial Guinea), GRULAC (Cuba), OIC and others (Israel), and the Chairman (Afghanistan). The EU introduced by far the most drafts, introducing 8 of the 14 draft resolutions. Of the six drafts on African countries, the EU and the Western Group introduced 4 (DRC, Sierra Leone, Sudan and Zimbabwe).

There is, therefore, some merit in accusations that the majority of country specific proposals last year came from the EU. On many of these, however, the EU was sponsored by other states, including many states from the Eastern European Group and Japan (DRC and Sudan), and Nigeria, Niger and Sierra Leone (Sierra Leone). Of the four drafts resolutions on members of the Asian Group, the EU introduced three, with the only Asian Group sponsor being Japan (Iraq). A fuller picture of how regional groups responded to the EU draft resolutions can be found by analysing how countries actually used their votes.

Of the 14 draft resolutions: four country resolutions were adopted with a vote (Iraq, Sudan, Cuba, and Israel), six were adopted without a vote (Burundi, S.E. Europe, DRC, Afghanistan, Myanmar, and Sierra Leone), four proposed country resolutions were rejected with a vote (Chechnya, Iran, Equatorial Guinea and Zimbabwe). The rejected resolutions were all done so by way of vote. In other words, there was always a fight over the rejection of proposed country resolutions. By contrast, states on six occasions were able to adopt country resolutions by consensus. When a proposed resolution was put to a vote, however, an equal number were accepted as those rejected (28.5% adopted and 28.5% rejected). Therefore, where draft country resolutions were forced to a vote, the 'for' and 'against' Item 9 lobbies had an equal number of successes and failures. Overall, however, 71.5% of proposed country resolutions were adopted by vote or by consensus. On the basis of last year's voting, this shows more support for Item 9 than against it. Moreover, it shows inconsistency on the part of the regional groups that have expressed opposition to Item 9. In particular, the African Group on three occasions (Burundi, DRC and Sierra

Leone) and the Asian Group on two occasions (Myanmar and Afghanistan) were prepared to adopt by consensus resolutions on states within their own groups.

An analysis of the voting margins for the 8 draft resolutions that were put to a vote gives some insight into the allegiances of states within their regional groups. The voting margins on the four resolutions rejected and the 4 adopted were as follows: rejections - Zimbabwe (2), Iran (1), Chechnya (1) and Equatorial Guinea (31); adopted - Cuba (2), Israel (32), Iraq (7) and Sudan (1). The voting margins in relation to Equatorial Guinea, Israel and Iraq show no genuine opposition to the draft resolutions. Equatorial Guinea was the only country mandate the Western Group appeared content to lose. The vast majority of states appeared to support, or were resigned to, the continuing mandates in respect of Israel and Iraq. The remaining five draft resolution votes were decided on narrow margins of only one or two votes. These highly marginal votes were on more regionally sensitive Item 9 countries and show regional group allegiances more clearly.

The African Group and the Asian Group were able to successfully combine three times (Zimbabwe, Iran and Chechnya), by voting together or by the use of abstentions, to defeat Western Group draft resolutions. The Western Group succeeded in adopting two resolutions by marginal votes (Cuba and Sudan) by combining with GRULAC, and with the support of disloyal members of the African Group (South Africa and Uganda) and the Asian Group (Republic of Korea and Thailand). Two votes were particularly close, as they had very few abstentions; Sudan (Armenia, South Africa, Thailand, Venezuela) and Zimbabwe (Brazil, Cameroon and Venezuela). These abstaining countries, all of which are again members of the CHR, may hold the balance on this year's Item 9 draft resolutions on Sudan and Zimbabwe.

Overall, the Western Group was the only regional group to show solidarity on all country votes and invariably voted to support Item 9 resolutions, with the exception of the vote on Equatorial Guinea, where they abstained. The Asian Group members were mostly loyal to their group's opposition to the Item 9 resolutions that actually went to a vote, while the African Group showed loyalty on some issues but was split on others. Members of GRULAC and the Eastern Group mostly did not show strong group loyalty, and members appeared to vote fairly autonomously either for or against Item 9 resolutions.

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Sudan...

on Sudan, Mr Gàspar Birò referred to reports of extrajudicial killings and summary executions of civilians and army officers by the Sudan People's Liberation Army (SPLA) and of aerial bombardments by government forces of civilian targets. He also documented reports of widespread torture and ill-treatment, disappearances, and arbitrary arrests and detention.

Ten years later, Sudan is still in turmoil, the conditions that so worried the 48th session of the CHR still prevail. Human rights organisations have documented violations taking place even as the National Islamic Front government and the Sudanese Peoples' Liberation Movement (SPLM) convene peace talks aimed at ending Africa's longest running civil war. Early this year, the Brussels-based International Crisis Group (ICG) called on the international community - in particular, the United States, Britain and Norway, all supporters of the peace talks - to pay close attention to pro-government militias which, at the end of 2002, carried out an offensive against communities in the oil-producing regions of southern Sudan where European, Asian and Canadian companies generate revenues of approximately US\$500 million a year. This was also borne out by a report of the Civilian Protection Monitoring Team (CPMT), which is composed of US military personnel and some civilian experts.

According to ICG, "the offensive from late December [2002] until the beginning of February [2003] was an extension of the government's long-time strategy of depopulating oil-rich areas through indiscriminate attacks on civilians in order to clear the way for further development of infrastructure. Eyewitness accounts confirm that the tactics included the abduction of women and children, gang rapes, ground assaults supported by helicopter gunships, destruction of humanitarian relief sites, and burning of villages. A senior Sudanese civil society member concluded: "The Nuer militias are the most potent threat to human security and stability in the South, regardless of whether peace is concluded or not".

The attacks "reflected a calculated decision to violate the cessation of hostilities agreement signed on 15 October 2002. The signing of new agreements, therefore, does not guarantee their implementation," the ICG report said.

Meanwhile, the violations continue.

According to the Sudan Organisation Against Torture (SOAT), in November 2002, Mohamed Awad Abdalla, 21, and Hussam Aldin Yousif, 23, both agriculture students at Khartoum University, were arrested by a branch of security officers concerned specifically with students. The men were first taken to offices belonging to the political section of the security forces and were later transferred to the Executive Security offices at the Army General Command Headquarters. They were beaten with water hoses and whipped with 'soots' or leather whips. Hussam was detained there until 26 November 2002 after he signed a pledge not to get involved in future demonstrations against the regime. Mohamed was transferred to Kober prison where he remains in detention without trial, SOAT adds.

Last month, Amnesty International reported the incommunicado detention of a trainee advocate by members of the security forces. Adam Abdel Hamid Adam was taken to the offices of the National Security Agency in Khartoum for interrogation. Amnesty said that detainees held in the National Security Agency offices have been known to be tortured and then transferred to a secret political wing of Kober prison in Khartoum. Mr Adam is a member of the Abdelmajeed Imam Centre which carries out activities related to peace and human rights. The Special Rapporteur, in his report, also mentions Mr Adam as one of several students in incommunicado detention.

Human Rights Watch (HRW) further reports that the government continues to impose controls on political activity. "Security forces break up demonstrations and meetings, arbitrarily detain human rights advocates and political activists including students, and hold them without trial, sometimes torturing them," according to an HRW briefing paper.

The rebel SPLM/A is also responsible for violations, having "engaged in abuses against southern populations, on at least two occasions in 2002 killing or abducting scores of civilians in two villages, Tuhubak and Today. It has often impeded the rights of assembly and expression of persons living in SPLM-controlled areas. During its capture of Torit in August 2002, the SPLM/A reportedly summarily executed scores of captured government soldier combatants."

In view of the serious and widespread nature of human right abuses by all parties, it is surprising that the Special Rapporteur's report shies away from using stronger - and more specific - language to comment on the situation in

Sudan.

The report mentions, for example, that in areas controlled by the SPLM/A, there are virtually no guarantees for the respect of human rights and fundamental freedoms. However, there is no reference in the report of the August 2000 incident. The term 'extrajudicial executions' does not occur anywhere throughout the text.

Furthermore, referring to his previous reports, the Special Rapporteur points out that he had repeatedly stated that oil was exacerbating the conflict, insofar as the war in the Sudan is mainly the result of a fight for the control of power and resources. The current report however makes no mention of the November 2002 onslaught by government forces on communities in the Western Upper Nile oilfields.

While the peace process must be bolstered by words of support and encouragement, this must not preclude the exposure and criticism of events as they occur. Well-intentioned as Mr Baum might be, his diplomatic instincts are clearly in place. If and when the Commission gets over its perception of Special Procedures as being a general nuisance, it might want to rethink the idea of appointing a former diplomat as an Expert.

Nevertheless, to his credit, the Special Rapporteur, in 2002, sent 10 joint urgent appeals concerning 177 individuals, and expressed "concern at the number of cases concerning students reportedly arrested, detained and at times allegedly tortured" following student demonstrations at the University of Khartoum. In his latest report to the CHR (E/CN.4/2003/42), he admits that "[i]n general, in spite of the commitments made, the overall human rights situation has not improved. While the civil society has become more pro-active and better organized, the security apparatus continues to operate in impunity."

The recent decree ordering the appointment of a committee to bring Sudanese laws in line with international humanitarian law and to set up implementation mechanisms shows that international pressure may be having some effect. The fragile peace process nevertheless needs to be monitored constantly, and the Special Rapporteur can make a significant difference in this regard.

The world has paid a high price for having disregarded warning signals in the past. The Rwandan genocide is only one example. The international community must not turn away from Sudan when the country is at its most vulnerable. Extending the mandate of the Special Rapporteur is only the first step.

GUANTANAMO BAY

Shining a ray of light into legal black hole

ON 7 October 2001 the United States launched a military attack on Afghanistan in response to the attacks on the US on 9 September 2001. As a result of the conflict several hundred 'fighters' were detained by the US military in Afghanistan. On 10 January 2002 the US began the transportation of alleged members of the Taliban and Al Qaida to the US Naval Station at Guantanamo Bay, Cuba. There are no exact figures in the public domain as to how many people are currently detained at Guantanamo Bay; reported figures vary from 384 to 660 detainees from more than 40 different countries.

Human rights violations

There are a number of legal concerns relating to the circumstances in which the detainees are held. There is uncertainty with regard to the legal basis of detention and the exact legal status of individual prisoners. The detainees have been called "enemy combatants", but it is unclear whether this means they are detained as quasi 'prisoners of war', 'war criminals', 'terrorists', under administrative detention, or something else. To date, none of the detainees held at Guantanamo Bay have been formally charged with any crime and it is still uncertain if and when the US authorities intend to do so and on what legal basis. The length of their detention is therefore at the moment indefinite.

There are also concerns over potential violations of international human rights norms and articles of the International Covenant on Civil and Political Rights (ICCPR); such as, Article 7 (prohibition against torture), Article 9 (right to liberty), Article 10 (right to humane treatment), Article 14 (right to a fair trial) and Article 26 (equality before the law). In March 2003, 18 detainees were released and returned to Afghanistan, in addition to three prisoners released in October 2002. The released detainees allege that they were sometimes hooded and handcuffed, and held during their detention in "two-metre by two-metre cages". The ICRC has been given access, but as usual their findings are confidential.

Right to habeas corpus

In the circumstances the protection of Article 9(4) of the ICCPR is crucial; that is, the writ of *habeas corpus* or *amparo*. The remedy which permits a detained individual to take proceedings before a court to determine the lawfulness or otherwise of detention, and to order release if detention is not lawful. This is also the legal vehicle by which alleged breaches of international human rights law can be aired and tested. The US courts have so far, however, denied the remedy of habeas corpus to the Guantanamo Bay detainees.

THE US COURTS

A handful of cases have come before the US District Courts on this issue. The leading case is that of the US Court of Appeal (District of Columbia) in the case of *Odah* (March 2003). In *Odah* the relatives of a number of detainees brought claims relating to the lawfulness of detention. In rejecting the claims the Court upheld a 1950 US Supreme Court ruling that the US courts do not have jurisdiction to issue writs of *habeas corpus* for alien nationals detained outside the "sovereign territory" of the US. The status of Guantanamo Bay in international law is unusual - although by no means unique - in that it was leased from Cuba by the US in 1903. The Lease provides that Cuba keeps "sovereignty" over the territory, but that the US has "complete jurisdiction and control". The US Courts have interpreted this to mean that they have no jurisdiction over aliens held at Guantanamo Bay because whilst the US authorities have "jurisdiction and control" under international law the territory belongs to Cuba. A technical point,

maybe, but, unless there is a successful appeal to the US Supreme Court, under US Constitutional law the detainees do not have access to any US court or tribunal to review the lawfulness of their detention.

International human rights law

The approach of the US courts, to providing access to habeas corpus to foreign nationals under their control on foreign territory, differs from well established principles of international human rights law; in particular, the practice of the UN Human Rights Committee (HRC), the

also shared by the IACHR. Most recently in the case of *Ocalan v Turkey* (March 2003), the ECHR found a violation of the European Convention on Human Rights because of the lack of a remedy for the applicant to have the lawfulness of his detention decided and the failure to bring the applicant before a judge within at least seven days of arrest. By way of contrast, the Guantanamo Bay detainees have been held for up to 450 days without access to a court to determine the lawfulness of their detention.

Thus, if the US Courts were to apply international human rights law, rather than exclusively relying on US Constitutional law, the detainees at Guantanamo Bay should have the right of access to habeas corpus, regardless of the existence of a declared state of emergency in the US.

The legal 'black hole'

But, if the US Courts are unable to act, what other court or tribunal can hear the detainees' allegations of human rights violations? The answer is, apparently, none.

First, the US has not ratified the First Optional Protocol to the ICCPR, thus, the detainees have no basis on which to submit a complaint to the HRC. Secondly, on 13 March 2002, the IACHR ordered the US to "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal. The US, however, rejected the IACHR's decision, arguing that the IACHR does not have jurisdiction to make such an order.

Thirdly, the relatives of some detainees have tried to bring cases in other jurisdictions to put pressure on foreign governments to use diplomatic channels to invoke their rights. For example, in the English Court of Appeal case of *Abassi* (Nov 2002), *Feroz ali Abassi*, a British national caught by US forces in Afghanistan and held at Guantanamo Bay, sought judicial review to compel the UK Secretary of State to make representations on his behalf to the US government. The Court of Appeal rejected Mr Abassi's case, although it was not unsympathetic to his cause, saying: "We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."

None of these alternatives works. Thus, as one commentator has put it, the detainees at Guantanamo Bay are in a "legal black hole".

The CHR context

In response to the decision of the US Court of Appeal in *Odah*, the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, said: "By such conduct, the Government of the United States, in this case, will be seen as systematically evading application of domestic and international law so as to deny these suspects their legal rights. Detention without trial offends the first principle of the rule of law" and he added, "can set a dangerous precedent". He further added: "The war on terrorism cannot possibly be won by denial of legal rights, including fundamental principles of due process of those merely suspected of terrorism". He called on the US Government to comply with the General Assembly Resolution on Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (A/RES/57/219, 16 December 2002). A resolution that affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international human rights law.

In its last report to the HRC (CCPR/C/81/Add.4, August 1994), the US stated that "the fundamental rights and freedoms

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Issue of jurisdiction

ACCORDING to the HRC, Article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State" (Lopez Burgos, No. 52/1979). The regional human rights bodies have taken a similar approach. For example, in *Cyprus v Turkey* (1975) the European Commission found that because Cypriot nationals were under the "actual authority and responsibility" of Turkey the protections of the European Convention on Human Rights applied, in spite of the alleged human rights violations occurring in Cyprus and not Turkey. So, for the ECHR, jurisdiction to hear a case is based on the detainee being under the 'actual authority and responsibility' of the relevant state (e.g. the US), regardless of whether the victim is detained on that state's sovereign territory or not (e.g. Guantanamo Bay).

Inter-American Commission on Human Rights (IACHR), the European Commission on Human Rights (the European Commission), and the European Court of Human Rights (ECHR).

On the issue of jurisdiction, Article 2(1) of ICCPR provides that each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in the Covenant. (see box)

With regard to the writ of *habeas corpus* itself, even if the US Courts found jurisdiction it is likely to be argued that the President's Military Order of 13 November 2001 (Military Order) has suspended the prisoners' right to seek *habeas corpus*. Article 7(b)(2) of the Military Order provides that "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States...". However, the US Constitution states that: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." And it is worth noting that the writ of habeas corpus has been suspended only twice in US history; first, by Lincoln during the American Civil War and, second, in Hawaii during the Second World War. Thus, there may be doubts whether the gravity of the existing threat to US security permits a suspension of *habeas corpus* under US Constitutional law.

In the context of international human rights law, the HRC have confirmed that the right to *habeas corpus* "applies to all persons deprived of their liberty by arrest or detention" (General Comment 8/16, 1982) and that this includes proceedings before a military court (*Vuolanne v Finland*, HRC Doc A/44/40). Individuals are entitled to this right "without delay" regardless of the reasons for their detention. Moreover, the HRC has stated that: "The Committee is satisfied that States parties generally understand that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency." (General Comment 29/1950, 2001). In particular, the right to *habeas corpus* cannot be derogated from in states of emergency in respect of those rights that are non-derogable (e.g. the prohibition of torture). This is a view

HONG KONG

Art 23: No white paper, just whitewash

ON December 24, 2002, the Hong Kong Government ended a three-month public consultation period regarding proposed legislation for Article 23 of the Basic Law, Hong Kong's mini-constitution. In the following three months, the government received 90,000 written submissions. Thousands of people were drawn to the streets; between 12,000 and 90,000 protested the proposed legislation and between 20,000 and 40,000 marched in favour.

The Legislative Council (Leg Co) has since revised its proposals for security legislation and a new proposed bill (the National Security (Legislative Provisions) Bill) that would amend the Crimes Ordinance, Official Secrets Ordinance, and the Societies Ordinance is currently being considered. Although the new proposal has incorporated several of the changes suggested by consultation documents, it still contains provisions that are problematic from the perspective of international human rights law.

Article 23, which was contentious even at the time of Hong Kong's 1997 handover from Britain to China, states: "The Hong Kong Special Administrative Region (HKSAR) shall enact laws on its own to prohibit any act of treason, secession, sedition, or subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

According to the proposed ordinance, a police officer of or above the rank of chief superintendent of police has the power to authorise the search of any place without a search warrant. This power is granted if, inter alia, the officer "reasonably believes" that the offence of handling a seditious publication is being committed and that the evidence of the crime will be lost if immediate action is not taken. The proposed suspension of the warrant requirement appears to contradict the common law understanding of the security of the individual as stated, for example, in the 4th Amendment to the United States Constitution. The Hong Kong Human Rights Monitor assessed the provision as follows: "It is hard to see what legitimate state interest is served by such a power. It should be removed from the bill".

The Hong Kong Human Rights Monitor also notes that the provisions relating to disclosure of official information are complicated and will create difficulties for the press and others who receive information that may have been unlawfully obtained and relates to national security. The Human Rights Monitor suggests that if the Government does not delete the provision, it should at the least include a "whistleblower" defence that would allow the publisher of such material to claim that s/he reasonably believed the act was in the best interest of the public.

Labour rights groups have emphasised that subversion, which is defined as "disestablish[ing]", "overthrow[ing]", or "intimidat[ing]" the People's Republic of China (PRC) Government by using force or "serious criminal means," includes any act which "seriously interferes with or disrupts an electronic system or an essential service, facility or system (whether public or private)." Given the fact that that in China the charge of subversion has often been levied against labour activists, this clause is undeniably vulnerable to biased manipulation.

Perhaps the greatest number of critics have focused on Clause 15 of the proposed legislation, which outlines additions to the Societies Ordinance. The amended Section

8A(1)(c) would proscribe any local organisation "which is subordinate to a mainland organization."

A "mainland organization" is defined as any body of persons that is either organized and established or has its headquarters in any part of the PRC other than Taiwan, Hong Kong or Macao. A local organisation is "subordinate" to a mainland organisation if there is substantial financial contribution or loans from the mainland organisation, if the mainland organisation either "directly or indirectly" controls it, or if "the policies of the [local organisation] or any of such policies are determined, directly or indirectly, by the [mainland organisation]."

Falun Gong practitioners, for example, have correctly pointed out that this clause could

another counsel may be assigned to him. As pointed out by Martin Lee, founder of Hong Kong's Democratic Party, in his submission to the House of Commons, this violates Article 35 of the Basic Law which guarantees the right of "choice of lawyers".

By repealing Sections 4 and 11 of the Crimes Ordinance, the proposed legislation effectively removes the time limits for prosecution of treason and sedition. As one critic notes: "If you combine the dropping of time limits with the dropping of warrant requirements and the imposition of severe punishment one can only imagine the powerful weapon to be placed in the hands of a public official who may want to silence dissent."

Lastly, one of the most ominous aspects of the proposed legislation with respect to the "One Country, Two Systems" principle of governing the Hong Kong Special Administrative Region is the frequent confusion and lack of definition of the terms "the state," "PRC Government," and "HKSAR."

In its comment on the consultation document, the Hong Kong Bar Association noted that the Basic Law provides only dubious grounds for assuming that the HKSAR can be equated with "the state." However, the proposed legislation would amend the Crimes Ordinance to criminalise acts that would constitute "Endangering Security of the State."

The crime of sedition, the first act listed in the new section, is defined, inter alia, as inciting other to engage in "violent public disorder that would seriously endanger the stability of the People's Republic of China." In turn, a seditious publication is one that is likely to cause someone to commit the offense of treason, subversion, or secession, all of which are defined in terms of the Central People's Government of

Article 23 and the PRC

NEITHER the LegCo nor the Hong Kong courts are required by law to refer to or inquire with China in enacting security legislation such as the proposed laws under Article 23. However, the Standing Committee of the National People's Congress does have the power to invalidate any law passed by the LegCo that it deems inconsistent with Basic Law. With respect to implementing Article 23, the Hong Kong Government has stated that it must "consult" with the central government before enacting any new laws under 23.

This decision is significant: the Chinese Constitution, though revised from its original form, still retains provisions that allow for many human rights abuses under the guise of prohibiting a person from "infring[ing] upon the interests of the state, of society or of the collective." Although the Standing Committee cannot interpret the laws made by the SAR under Article 23, it can invalidate those laws if they are interpreted as being inconsistent with Basic Law. In addition, the Standing Committee can interpret the Basic Law that courts would rely on in their interpretation of the Article 23 legislation. For example, if "a court relied on the free speech protections found in Article 27 of the Basic Law in reading such legislation narrowly, the Standing Committee could issue an interpretation of Article 27 protections which decreed that the protections did not extend to a particular type of speech."

China has been referred to as the "world's leader in jailing journalists," and there are currently 36 journalists imprisoned in China. Most of these journalists are imprisoned on subversion or state secrets charges. For example, in 1993 there was a case involving a Hong Kong journalist who was charged with divulging state secrets and held in a Chinese jail for four years because he wrote that the government was going to raise interest rates.

have dire consequences for their practitioners in Hong Kong.

According to the proposed changes in the Societies Ordinance, before an organisation is proscribed, the Secretary for Security must allow the organisation to be heard or to make a presentation in writing. However, this obligation "does not apply where the Secretary...reasonably believes that affording the organization an opportunity to be heard or to make representations in writing would not be practicable in the circumstances of the case". As the Canadian Chamber of Commerce pointed out to Hon James To Kun-sun in a letter of 7 March 2003, "'practicable' " represents too low a threshold to deny such a basic right since it implies convenience as a potential excuse."

Some critics, again in reference to proposed changes in the Societies Ordinance, have expressed alarm at the prospect of so-called "secret courts." The proposed ordinance would allow the Secretary for Justice to exclude the public from any hearing of an appeal against a proscription if "the publication of any evidence to be given or any statement to be made in the course of the proceedings might prejudice national security."

Although such potential threats to the security of the HKSAR are a legitimate concern, there are four problematic aspects of this proposed system. First, the Secretary of Justice is alone in determining the extent of the risk to national security. Second, the operative phrase, "might prejudice", is open-ended and largely subjective. And third, it is not clear whether "national security" refers to the HKSAR or the Peoples' Republic of China Government. Fourth, and perhaps most disturbingly, both the appellant and his counsel can be excluded from the court during the appeals hearing, although

China.

Some have noted that it is doubtful whether any sedition law should be enacted in the first place, and that if such a law is enacted it should be more narrowly defined so that it conforms to the Johannesburg Principles. More generally, however, the confluence of national security as articulated by the PRC and national security as articulated by the HKSAR is extremely worrisome, given China's abysmal record of abuse of civil and political rights.

The Secretive History of Article 23

China and the United Kingdom signed the Joint Declaration in 1985, and soon thereafter began to draft a legal framework for Hong Kong. In its initial version, Article 23 (Article 22 in the first draft) read: "The Hong Kong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government." The drafting committee received over 73,000 submissions when it made the initial call for comments. In lamentable foreshadowing of objections that were voiced in the most recent consultation period, many submissions emphasised that the word "subversion" is absent from the common law, subject to misuse in many jurisdictions and, as such, should be removed from the language of the Basic Law.

The second draft of the Basic Law, finalised in 1989, partially addressed these concerns by removing the word "subversion" from the Draft Article 23. Yet the November 1989 Report of the Consultative Committee for the Basic Law of the Hong Kong SAR noted, "Who will be responsible for giving a definition to such an act? Will speech, publication and

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Zimbabwe: It's just not cricket

MANOJ MITTA

WHEN the European Union first tried in 2002 to bring a resolution against Zimbabwe, it was scuttled by a procedural no-action motion with a margin of just two votes. Following the re-induction of the United States in the CHR, there is a renewed effort this year to make amends for the debacle in the previous session. The first salvo was fired last week by Australia as it engaged in acrimonious exchanges with Zimbabwe in the course of the prolonged debate under Item 9 of the Agenda. On its part, Zimbabwe has come up with a five-page aide memoire urging member states to vote in favour of the no-action motion it again proposes to initiate on the EU's draft resolution.

What has added to the build-up to the voting is the US State Department's robust attack on Zimbabwe on 31 March 2003 in its annual country reports on human rights practices. In fact, the US has upped the ante by clubbing Zimbabwe with rogue states such as Iraq and North Korea. It accused Zimbabwe's security forces of extrajudicial executions of government opponents. Though the US report does not give statistics of how many extrajudicial executions had taken place, it contains details of several cases of people who were either abducted, tortured or murdered allegedly by state forces, especially the secretive Central Intelligence Organisation.

These recent developments have come on top of the economic sanctions already imposed upon Zimbabwe by the European Union and the ban it clamped upon President Robert Mugabe and other leaders of his regime from travelling to any of its countries. Zimbabwe has also been suspended from the Commonwealth on charges of violating democratic norms during its 2002 presidential election, which was widely reported to have been marred by violence and intimidation. The Commonwealth took action against Zimbabwe on the decision taken by a three-member team, significantly comprising the leaders Australia, South Africa and Nigeria.

The composition of the team that suspended Zimbabwe from the Commonwealth is significant because the three countries are ranged on opposite sides in the CHR. While Australia has been all through an aggressive proponent of the EU's draft resolution, Nigeria and South Africa, despite their involvement in the suspension decision, very much voted in favour of Zimbabwe's no-action motion in the 58th session of the CHR.

Thus, the very countries that transcended extraneous considerations on the Commonwealth platform seem to have succumbed to African solidarity at the CHR. The Nigerian delegation, which took the floor on

behalf of the African group, sought to justify its opposition to the resolution by calling it an example of the selective 'naming and shaming' that goes on in the CHR.

Much to Mugabe's luck, the Nigerian position found takers in many countries - not only in the African group but also in the Asian group and Russia. While the rest of the groups voted against the no-action motion, Zimbabwe escaped by the skin of its teeth because of the abstention by two Latin American countries, Brazil and Venezuela, and one African country,

What has added to the build-up to the voting on the proposed no-action motion is the US State Department's robust attack on Zimbabwe on 31 March 2003 in its annual country report on human rights practices.

Cameroon.

The balance is very precariously poised and it may tilt on either side when the Zimbabwe issue is put to vote again in the current session. The western group has been speaking to many nations in Africa and Asia, requesting them to look beyond the rhetoric unleashed by Mugabe regarding land reform and to look at the Commonwealth Expert Group's report regarding the human rights situation. The fact that the majority of countries in the Commonwealth are non-Western invalidates Mugabe's use of racial rhetoric to sidestep human rights issues. By drawing states' attention to the report of the Commonwealth Expert Group, the Western Group hopes that member states will be able to perceive the reality of the situation and vote accordingly.

As far as the substance of the resolution is concerned, it derives strength from the fact that the Mugabe administration has done little to address the human rights situation despite the respite given to it last year. Only last month, the security forces in Zimbabwe are alleged to have arrested and beaten hundreds of people who participated in a strike organised by the opposition party, Movement for Democratic Change. The Government has been frequently in the news for the manner in which it has reportedly cracked down on political opponents, human rights defenders and journalists, while enforcing draconian laws called the Public Order and Security Act and Access to Information and Protection of Privacy Act. Worse, it is also reported to have been vindictive with inconvenient judges, to the point of even arresting them on trumped up charges.

It is apparent that land reforms, or lack thereof, have been a factor in the escalating human rights crisis in Zimbabwe. But the west-

ern countries have been wary of focusing on the land reforms issue in the CHR, lest they play into the hands of Mugabe who has projected it as a white vs black dispute. Although the resolution on Zimbabwe that was drafted by the EU at the 58th CHR noted "the importance of fair, just and sustainable land reform" in a preambular paragraph, it failed to recommend any concrete measures to address the issue of land reform in the operative paragraphs. Mugabe's strategy throughout the two-year crisis has been to blame the country's collapsing economy and escalating law and order problem on a sinister alliance of Britain, white farmers and assorted 'traitors' who are conspiring to reverse the country's independence and prevent his tackling of injustices of Zimbabwe's highly unequal land holding.

Zimbabwe's justice minister, Patrick Chinamasa, echoed this strategy when he dismissed the recent US report on his country's human rights violations as an attempt by Washington to wield the human rights card on behalf of British Prime Minister Tony Blair. 'Everybody knows that the US is writing these baseless reports about Zimbabwe in a bid to scare us to retreat from our land reform programme,' Chinamasa said to the press in Harare. 'It is payback time to Blair for the support he has given the US in its war against Iraq.'

Many of the developing countries that have supported Zimbabwe in the CHR give credence to Mugabe's claim of being a victim of an Anglo-Saxon conspiracy to prevent him from divesting white farmers of their vast holdings. Land reforms have been fraught with controversies everywhere. But Zimbabwe alone has been highlighted in this controversy because South Africa has not so far embarked on such an ambitious land reforms programme. Which is why the Nigerian delegation asserted last year in the CHR that the land reforms programme, which underlies the various problems in Zimbabwe, was a political issue and not one of human rights violations.

While there can be no denial of the political aspect of the land reforms programme, Mugabe cannot be allowed use it as a cover to unleash a reign of terror in the way he did against white minorities (who constitute less than one per cent of Zimbabwe's population) and those blacks who did not agree with him.

Indeed, the political aspect may be inextricably linked to the land reforms issue but that is no valid argument for suggesting that the CHR should condone the growing incidence of human rights violations in Zimbabwe. The cause of the problem does not detract from its adverse effect on human rights. If the CHR is again swayed by political arguments on the Zimbabwe, it will set a dangerous precedent for other developing countries.

Feedback

This is with reference to the interview of Senior Foreign Minister of East Timor Jose Ramos Horta (*Human Rights Features*, 31 March-6 April 2003). Mr Horta's remarks reflected the views of the Government of East Timor as well as his own, but not those of civil society (of which Mr Horta himself was part, not too long ago). It is therefore imperative that the demands of civil society be placed on record - among them -

1. A final evaluation of the proceedings of the ad hoc tribunal for East Timor in Jakarta;

2. Support for the work of the Serious Crime Unit and the Special Panel in East Timor, and the extension of its mandate beyond 2004 in order to finalise their work, and/or explore avenues for another international tribunal, in particular, to follow up on the indictment of top Indonesian military commanders who are alleged to have committed crimes against humanity and breached international humanitarian law.

3. Reject any ideas, at the international level, that propose an end to efforts to seek justice for the victims, and seek to jeopardise the work of the Serious Crimes Unit.

Rosentino Amado Hei
Perkumpulan HAK, Dili, East Timor

I want to congratulate you on the paper. It is really a great tool. I am a one person NGO and it is the perfect way to help me "cover" the Commission!

Kirsten Young

Thank you for informing me of the online newspaper you are producing on the UN Commission on Human Rights. This will be very helpful and I will secure access to it.

With best wishes,

Sincerely,

Justice Michael Kirby
Judge of the High Court of Australia

TURKMENISTAN

In the iron fist of Niyazov

TURKMENISTAN continues to find itself under the crushing grip of the only leader it has known since independence, President Saparmurat Niyazov. Niyazov, self-declared "Turkmenbashi," meaning, "Father of the Turkmen," has suppressed opposition political parties, independent media outlets and religious expression throughout the country. UN documents reveal a long silence on the part of Turkmen civil society, punctuated only by occasional urgent appeals by special rapporteurs. Based on the information they receive, human rights NGOs are in agreement that the situation is dire: in June 2002 the International Helsinki Federation for Human Rights, for example, referred to Turkmenistan as "one of the most repressive countries in the world."

Niyazov took control of the Turkmen Communist Party in 1985, and was elected president of Turkmenistan when it gained independence in 1991. The Turkmen Communist Party was renamed the Democratic Party in 1992. Since independence, Niyazov has continuously worked against political opposition groups. In the early years of independence, opposition groups Agzybirlik and Paikhas conducted protests against Niyazov's government. Niyazov responded by having the KNB (National Security Committee), the successor to the Soviet Union's KGB, repeatedly take dissidents into custody and subject them to questioning. Many opposition leaders left the country, and the remnants of these early opposition parties was effectively silenced by 1993.

Political opposition to Niyazov's rule also took root in exile communities via the formation of the United Democratic Opposition of Turkmenistan (UDOT) 1991, led by Advi Kuliev, and the People's Democratic Movement of Turkmenistan in 2001, led by Boris Shikhmuradov, former Turkmenistan Ambassador to China.

On 25 November 2002, there was an assassination attempt upon Niyazov. Niyazov alleged that the organizers of the attack were Shikhmuradov and several other former government officials. In retaliation, Niyazov engaged in tactics that showed little regard for human rights or due process of law. Dozens of relatives of the alleged conspirators were subsequently arrested and schools in the nation's capital, Ashgabat, were ordered to provide information about attending students to the Ministry for National Security. In total, the Turkmenistan authorities arrested over 100 people.

On 26 December 2002 Shikhmuradov was arrested and charged with the attempted assassination of Niyazov. Shikhmuradov was subsequently sentenced to life in prison and was forced to confess to the charges on state television, though observers have questioned the truthfulness of the confession and have likened the process to the show trials conducted by Stalin. Shikhmuradov initially received a sentence of 25 years from the Turkmenistan Supreme Court, but received a life sentence after Turkmenistan's People's Council saw his confession. Giving Shikhmuradov a life sentence actually required Niyazov to change Turkmenistan's legal code. On the website of the People's Democratic Movement of Turkmenistan, Shikhmuradov claims that the assassination attempt was constructed by Turkmen legal authorities to create an environment conducive to the repression of opposition political movements. Shikhmuradov claims he was in Turkmenistan only to foment demonstrations and that he turned himself in to "stop the massive arrests and torture of innocent people."

In total, 46 people were convicted of being involved in the assassination attempt. Six of those convicted, including to Shikhmuradov,

had their confessions broadcast on state television.

Much of this is outlined in the most recent report of the Special Rapporteur on the question of torture. In 2002, the Special Rapporteur sent urgent appeals to the Turkmen government on behalf of "scores" of detainees. Among them were Mukhametkuli Aymuradov, Khosali Garayev, Aili Yklymov, Esenaman Yklymov, and Davlatgeldi Annannyyazov. It is believed that Aymuradov and Garayev were arrested solely because of their connections with exiled political opponents. Yklymov, Yklymov

ference. This type of action by the Turkmenistan government may amount to a violation of the due process of law, and is evidence of Niyazov's desire to use the assassination attempt as an excuse to target other members of civil society that he does not favour.

Niyazov has helped ensure the strong grip of his rule by suppressing independent media outlets and generally restricting freedom of expression. While there are roughly 10 Turkmen-language newspapers, and one Russian-language newspaper, the government provides almost all of their funding and heavily censors them. No criticism of the government in general, and of Niyazov in particular, is allowed in these publications.

The only available internet service provider is state-owned Turkmen Telecom, and there are concerns that the government monitors internet activity and email. The Committee to Protect Journalists reported that in 2002 the Turkmenistan government "tightened control of the Internet and other outside sources of information, blocking Web sites of an Azerbaijani daily, the Turkmen opposition in exile, several Russian dailies and the Moscow-based Information Analytical Center Eurasia, an independent research organization."

Freedom of expression has been further eroded by legislation enacted in the wake of the purported assassination attempt on Niyazov. On 30 December 2002, the Council of Elders approved Niyazov's new draft law regarding treason. Under the new law, a Turkmen citizen can be charged as a traitor for "encroachments on the life and health of the president," "attempting to sow doubt among people about the internal and foreign policies conducted by the first and permanent president of Turkmenistan, the Great Saparmurat" as well as "encouraging opposition to the state". Such an ambiguously worded law makes writers or speakers of even tangentially critical statements about the state and its President subject to life imprisonment that conviction under the law carries. The broad wording of the statute allows for the government to easily enforce it in a discriminatory manner against those it views as political enemies.

The situation of the press in Turkmenistan led Reporters sans Frontières to conclude before the 55th Session of the Commission on Human Rights, "The information blackout in Turkmenistan, a veritable bastion of authoritarianism, is total".

While Turkmenistan law theoretically provides for the free exercise of religion the reality under Niyazov is that many religious denominations are oppressed. Under the Law on Freedom of Conscience and Religious Organizations congregations are required to register with the government. According to the International Helsinki Federation for Human rights, only two religious denominations are allowed, Sunni Islam and Russian Orthodox Christianity; all others are effectively banned, as are non-Turkmen cultural organizations.

For example, on 15 November 2001, the KNB detained more than forty people who had gathered for a service of the Word of Life Church, a Protestant congregation. All forty people were later released, but to obtain such release each person was forced to pay, on average, a fine of approximately one month's wages. In recent years the Turkmenistan police have also dispersed gatherings of Adventist and Baptist congregations. One of the most notorious victims of Turkmenistan religious oppression is Kurban Zakirov, a Jehovah's Witness who is serving an eight-year sentence in a labour camp on what some have seen as trumped-up charges.

A President and a megalomaniac

NIYAZOV has also engaged in megalomaniacal activity that saps resources from Turkmenistan's weak economy. The capital city Ashgabat contains a gold statue of Niyazov that sits atop a 246-foot arch, rotating throughout the day so that the arms continually point toward the sun. A large golden dome sits atop Niyazov's new palace, and many older homes in Ashgabat are being torn down to make room for expensive high-rise apartments. Meanwhile, the average monthly income in Turkmenistan is only US\$50 and people are largely dependent on government subsidies. Consequently, many of the high-rise apartments sit empty when finished because few citizens can afford to live in them.

Niyazov has also renamed the months of the year, changing the name of January to "Turkmenbashi," after himself. Niyazov has forced Turkmenistan schoolchildren to study almost exclusively from a text he authored. The book, entitled *Ruhnama*, contains Niyazov's views on how to live a moral life, rules for governing, as well as some of his own poetry. Such excesses, viewed in isolation, seem comical, but viewed in the context of Niyazov's larger actions these measure form part of a larger web of repression against the Turkmenistan population.

and Annannyyazov were arrested, like many others, in connection with the assassination attempt. Aili Yklymov was allegedly beaten up so severely that he is unable to walk. Esenaman Yklymov was reportedly ill-treated while in custody following his first arrest on 25 November. He was released after one day, but re-arrested only three days later. Davlatgeldi Annannyyazov was ill-treated by agents of the Security Service in order to extract a confession implicating one of his brothers, a political opponent currently living in Norway.

Also, according to the Report of the Special Rapporteur, Saparmurat Yklymov's 75-year old mother was evicted from her house in the capital Ashgabat shortly before midnight on 27 November and her property was confiscated.

A recent report by the Organization for Security and Cooperation in Europe (OSCE), in addition to questioning the credibility of Niyazov's account of the assassination attempt, also expresses grave concern for the manner in which these convictions were obtained. According to the OSCE, foreign observers were denied access to the tribunals and prisoners were denied access to counsel and held incommunicado. These practices are violations of OSCE commitments and the Turkmenistan Constitution. Article 105 of the Turkmenistan Constitution states that "[i]n all courts, trials are open. Closed hearings for a case are only allowed when anticipated by law and with adherence to all rules of legal procedure."

Furthermore, the OSCE has noted that "[i]t seems obvious that the accused were tortured. Images of stereotyped public confessions read in a monotone way evoke moral and physical mistreatments during the questioning." Acts of torture are also clear violations of the Turkmenistan Constitution as well as recognized human rights norms. Article 21 § 2 of the Turkmenistan Constitution provides that "[n]o one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment, or, likewise, be subjected without her or his consent to medical or other experiments."

The crackdown following the assassination attempt also targeted other members of civil society. Farid Tukhbatullin, head of the Dashaauz Ecological Club, was tried, convicted and sentenced in a mere four hours on 4 March 2003 of charges related to his involvement in an international human rights and democracy con-

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A legacy of diligent, thoughtful work

But the CHR has shown great reluctance to follow up on Mr Param Cumaraswamy's recommendations

FOR his ninth and final year, the Malaysian Special Rapporteur, Mr Param Cumaraswamy, has submitted his annual report on the independence of judges and lawyers. This special procedure of the Commission was created in 1994, when the Commission adopted a resolution noting "both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights". Whilst this mantra has been adopted in each year's resolution since, this is not due to any failing by Mr Cumaraswamy as his work has been outstanding.

Mandate

Mr Cumaraswamy's mandate, contained in Commission resolution 1994/41, was threefold: (1) to inquire into and report on any substantial allegations received; (2) to identify and record attacks on the independence of the judiciary, lawyers and court officials, but also to report on progress achieved in protecting and enhancing their independence, and to make concrete recommendations including the provision of advisory services or technical assistance when requested; and, (3) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers. He has used this broad mandate wisely and to good effect.

Methods of work

He started in his first report (1995) by outlining his working methods. He observed that the requirements of independent and impartial justice were universal and rooted in both natural and positive law. Based on the provisions of the Universal Declaration and the International Covenant on Civil and Political Rights, he identified basic standards, and noted that the broad interpretation of the concept of independence and impartiality of the judiciary has prevailed in the standard-setting work of the United Nations. He did not, therefore, intend to reinvent the wheel, but to try to help fix it and to improve it.

In doing so Mr Cumaraswamy has followed a genuine human rights approach. In his first speech to the Commission, on 10 February 1995, speaking on his future working methods, he said: "the right to an independent and impartial judiciary and an independent legal profession is not the right nor the prerogative of judges and lawyers. It is the right of the consumers of justice".

His 1995 report further stressed the unquestionable character of the principle of separation of powers, the need to clarify the criterion for independence (in particular with regards to military courts and revolutionary tribunals) and to specify the restrictions authorised (e.g. in periods of emergency) in order to prevent abuses of powers against the judiciary. Besides the examination of complaints and the urgent appeal mechanisms, the Rapporteur emphasised the importance of the UN programme for advisory services and technical assistance, and his work has worked towards providing the substance to strengthen these programmes.

Issues

Mr Cumaraswamy's first report focused principally on issues of the separation of powers and on judicial review. In addition, however, he noted a wide range of areas of concern that are as relevant today as they were in 1995 - in some cases more so. Issues such as the relative lack of independence in military courts, the negative effects of states of emergency on the independ-

ence of the judiciary, the use of anti-terrorism measures leading to the creation of special courts, and the relationship between the media and the judiciary. In his subsequent reports, he addressed frankly and in detail a vast array of issues from both a country and a technical perspective. Most recently, on the 'war on terror', Mr Cumaraswamy expressed his concern "at its impact on the principles of due process, and urges the Commission to remind member States of their obligations under international law, in particular international human rights, refugee

In his first speech to the Commission in 1995, Mr Cumaraswamy said: "[T]he right to an independent, impartial judiciary and an independent legal profession is not the right nor the prerogative of judges and lawyers. It is the right of the consumers of justice."

and humanitarian law".

It should also not be forgotten that Mr Cumaraswamy was a vocal supporter of the International Criminal Court (ICC) and paid close attention to the drafting of its procedures. In particular, he strongly criticised the deferral of investigation or prosecution provision in article 16, which provides that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council has adopted a resolution to that effect. In his 5th report (1999) to the Commission he said: "The political role of the Security Council in triggering the Court's investigation and pros-

If the Special Rapporteur's work is to have a lasting impact, it will perhaps be in disseminating awareness about the minimum standards and principles. The submission of the Bangalore Principles is one such attempt and deserves serious consideration by the Commission

ecution powers, may, depending on how this role is played, substantially undermine the judicial independence of the Court by precluding judicial review of situations politically sensitive to one or other of the permanent members of the Council, who, of course, wield the power of veto." His concerns have already proved to be well founded, as the Security Council has brought article 16 into effect. In his latest report he notes "deep concern" at the US "unsigned" of the Rome Statute and attempting to obtain bilateral agreements with member States to prevent the ICC from proceeding against US personnel present in such States.

Standard-setting

Mr Cumaraswamy has closely monitored the standard-setting at regional and international levels which has attempted to address the problem issues facing the independence of judges and lawyers. His 2003 report states that the main source of concern is the increasing allegations of judicial corruption and calls for greater judicial accountability.

In his reports, he has shown concern over the proliferation of standards, and the need to bring together information on existing principles and standards to ensure that standards are uniform and consistent in order to avoid confusion. The culmination of his work on standards is therefore the submission of the 'Bangalore Principles of Judicial Conduct', prepared by eight Chief Justices from Africa and Asia.

In his first report he included a recommendation that the Centre for Human Rights publish a "fact sheet" on judicial independence

and impartiality and the independence of the legal profession. In his 4th report (1998) he called for the drafting of a manual to assist in human rights training for judges and lawyers. This was one of the few incentives which the Commission has embraced by way of inclusion in a resolution. He "urges" the Commission to endorse the Bangalore Principles in this year's resolution.

Country visits, urgent appeals, communications

The Special Rapporteur has shown an enlightened approach in his focus on specific countries. The number of countries reported on during the past nine years is highly commendable. He has visited all continents, and has been careful not to discriminate between North and South or industrialised and developing states.

In 2002 he addressed 13 urgent appeals to Bangladesh, Central African Republic (2), Egypt, Italy (2), Nepal, Pakistan(2), South Africa, Syria and the UK (2). He transmitted 46 joint urgent appeals with other Special Rapporteurs and experts to Algeria, Argentina (2), Brazil (2), Colombia (2), Congo-DRC (4), Guatemala, Honduras, Iran (5), Israël (4), Liberia, Mexico (3), Nepal (3), Nicaragua, Nigeria (2), Sri Lanka, Sudan (2) Syria (2), Tunisia (2), Turkey, Uruguay, USA (4) and Uzbekistan.

He also transmitted 24 interventions to the governments of the following countries: Argentina, Belarus, Ecuador, Egypt, Equatorial Guinea, Guatemala, Iran, Italy, Libya, Mauritania, Nicaragua, Nigeria (3), Pakistan, Peru, Saudi Arabia, Spain (2), Sudan, Tunisia (2), Turkey and Zimbabwe. Joint interventions were also sent to Chad, the UK and the USA.

His comments with regard to specific countries have been appropriate to the context. The countries focused on in his latest report are typical of his approach. In 2002 Mr Cumaraswamy made country visits to Indonesia, Saudi Arabia and Italy. And at the initiative of the Ministry of Foreign Affairs, he also visited Timor-Leste to mediate between the government and the judges. Usually he has not pulled any punches, but he has also shown measured diplomacy and restraint to good effect. With regard to Indonesia, he reports that "corruption is not limited to the judiciary, instead it spreads like a cancer in the entire system" and urges drastic and urgent measures. Whereas with regard to Saudi Arabia, he considered more temperate language to be timely and appropriate. Whilst noting that the independence of the judiciary is given high priority, he reports that "certain structural conditions exist that could potentially undermine that independence".

Inevitably over the past nine years he has focused considerable attention on legal systems where judicial independence is threatened. This year the Rapporteur would have also liked to visit Cuba, Egypt, Pakistan, Sri Lanka, Turkey, Tunisia, Kenya and Equatorial Guinea, but he reports that no positive responses were received from those governments. However, in accordance with the second part of his mandate, he has also visited countries where positive attempts are being made to improve judicial independence, so that progress, as well as criticism, can be reported to the Commission to provide a fuller picture.

Let down by the Commission?

But has Mr Cumaraswamy's diligent work been let down by the Commission? NGOs have criticised the text of resolutions as lacking in substance and not embracing the issues or recommendations raised by the SR. It is often a

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General attack on Special Procedures

ADRIEN-CLAUDE ZOLLER

THE annual reports thematic rapporteurs constitute the central cornerstone of the Commission's debates under Item 10 (economic, social and cultural rights) and Item 11 (civil and political rights).

On 24-25 May 1994, the Commission on Human Rights met in an emergency session to discuss the ongoing genocide and massacres in Rwanda. This special session was convened when 500,000 deaths were already on the record. Both the Commission's members and the UN Centre for Human Rights had received an intimation of what was hatching in Rwanda one year earlier in the report of Mr. Bacre Waly Ndiaye, the Special Rapporteur of the Commission on summary executions, who had visited the country in April 1993.

During the 49th session (1 February - 12 March 1993), the Commission (with Rwanda a member!) had decided to keep Rwanda under its confidential procedure. Available since June 1993, Mr. Waly Ndiaye's report described in detail preparations for the impending genocide. Notwithstanding this reliable and distressful information, the members of the Commission decided in March 1994 to continue discussing the Rwandan situation under the confidential procedure.

During the third week of the current 59th session, many member States with often deplorable human rights records have argued that finger-pointing is counterproductive and that country resolutions are politicising the Commission's debate. Instead, they argued, the Commission should focus on prevention and promotion. The historic failure of the Commission to extend assistance to the Rwandan people is a case in point for examining the soundness of their claim.

Origins of the thematic procedures

It cannot be repeated often enough that the Commission's special procedures have their roots in initiatives taken by the Non-Aligned Countries who during the 60s and 70s insisted on establishing procedures to investigate the human rights situation in Southern Africa and the Arab Occupied Territories. Since no majority was found in the Commission, they successfully turned to the UN General Assembly which set up groups of independent experts on these two situations, charged with collecting information from reliable sources, including witnesses and victims. The special procedures therefore in no way constitute a Western invention.

Chile (1975) marked the third exception the UN allowed to the holy principles of non-interference and State sovereignty after a "push" from the General Assembly. Appointing a Special Rapporteur on Equatorial Guinea, the Commission found the next exception in Sub-Saharan Africa. The record now marked four exceptions from four different regions, which together constituted a landmark in the evolution of the U.N. human rights programme, the basis for a pattern beyond exceptions.

Argentina

The end of the 70s was dominated by the awful crimes committed by the military junta in Argentina. Despite a campaign by Amnesty and initiatives by Pax Romana, Pax Christi, and the International Commission of Jurists, who brought Argentine victims and relatives before it, the Commission did not manage to overcome its political divisions to set up a similar investigative procedure for Argentina. In 1980, a compromise was found: instead of a rapporteur on Argentina, the Commission appointed a working group of five experts (one per region) to report on the foremost crime committed by

the military junta, that of enforced or involuntary disappearances.

Since then, year after year the Commission has added further thematic procedures. Most of them take the form of a mandate given to a single expert, rather than a more expensive working group. Each mandate and title is established by a specific resolution of the Commission which has to be confirmed by the Economic and Social Council (ECOSOC). From the very beginning, the experts have been appointed by the Chair of the Commission.

An impressive list

Currently the Commission has the following special thematic procedures:

- enforced disappearances (working group),
- extrajudicial, summary and arbitrary executions,
- mercenary activities,
- religious intolerance,
- sale of children,
- arbitrary detention (working group),
- displaced persons (Representative of the Secretary General),
- toxic and hazardous waste,
- racism, racial discrimination and xenophobia,
- freedom of expression and opinion,
- children and armed conflicts (Representative of the Secretary General),
- violence against women,
- independence of the judiciary,
- rights of migrants,
- extreme poverty (independent expert),
- human rights defenders (Representative of the Secretary General)
- right to education,
- right to food,
- right to adequate housing,
- rights of indigenous people,
- right of everyone to the enjoyment of health,
- African descent (working group)

Thematic Rapporteurs

Called Special Rapporteurs, Special Representatives or Experts (their title determined by their mandate), the experts are not based in Geneva. They are unpaid and often do not even have the support of a full-time civil servant at the United Nations. The quality of their work depends both on the information they receive and on the competence and commitment of the experts themselves. NGOs with consultative status, witnesses, victims and their families can lodge complaints and submit communications to the procedure concerned at its Secretariat in the Office of the High Commissioner for Human Rights in Geneva.

The primary objective of each procedure is to study a human rights theme, to analyse the pattern of the specific human rights abuses referred to in the mandate (e.g. circumstances leading to torture), in order to submit to the Commission a yearly report containing recommendations on measures to be taken in the field of standard-setting and implementation, both at the international and national level. Most of the information on which reports are based comes from non-governmental sources, with NGOs, victims, defendants and witnesses submitting information on concrete cases of human rights violations.

Procedures

Each rapporteur, expert or working group adopts its own working methods which are summarized at the beginning of each report. The thematic procedures have two options for transmitting complaints. If immediate measures to protect victims are required, most of the thematic rapporteurs have the Commission's permission to send urgent appeals to the governments concerned. These interventions are of a humanitarian nature and require the government to take urgent measures to protect the physical integrity

of the alleged victim. The second mechanism consists in communications: once information has been considered reliable by the mandate holder, cases are transmitted to the government concerned which is then free to present its own version of the events.

When the number of cases received from one particular country reveals a consistent pattern of abuses or when the rapporteur feels that the situation in a country might usefully warrant in-depth study, he/she can address a request to the government concerned for visiting the country. Reports on country visits are generally appended to the main report. They cast an invaluable spotlight on country situations. Many rapporteurs also follow-up on their recommendations to specific countries, so for instance Mr. Cumaraswamy (Rapporteur on the independence of the judiciary) on Italy this year.

Although different in nature, four other working groups should be added to this list, namely three inter-governmental (and open-ended) working groups on the right to development, on foreign debt and the effects of structural adjustment policies, and on racism (follow-up to the Durban Conference), and a group of five eminent experts on racism (appointed by the Secretary General). Finally, the Special Rapporteur on disability (appointed by the Commission for Social Development) also reports to the CHR.

Problems with the thematic procedures

Undoubtedly conditions for the thematic procedures have improved over the years: for instance, rapporteurs are now allowed to issue press statements and the Commission now extends most mandates for terms of three years (rather than annually).

However, the special procedures system is facing serious difficulties. Financial resources are lacking as are, quite often, full-time assistants. Moreover, the staff assigned to the mandates is rotated frequently; the Office of the High Commissioner lacks coordination; a huge backlog on cases submitted for examination is piling up, especially with the Working Group on enforced disappearances. Furthermore, the constant creation of new mechanisms had a negative impact on the support for existing mandates; reports by the special rapporteurs have not been always disseminated adequately.

The UN Secretariat has undertaken a series of reforms to address these problems, for instance by creating a quick response desk. The rapporteurs themselves take things in their own hands: they undertake more and more joint initiatives, sending urgent appeals and communications and coordinating field visits.

Challenged by the States

The main problems are of a political nature. Obviously many States bring an unfavourable attitude to the system. Experts increasingly find themselves targeted by brutal comments during the deliberations of the Commission. One special rapporteur was even subjected to legal prosecution in his own country, Malaysia; the case was dropped only after the International Court of Justice adopted a clear advisory opinion on the issue. A look at this year's thematic reports shows that many rapporteurs were denied access to countries that they intended to visit, even where the visit had been called for by a resolution of the UN Commission. A campaign initiated by the Quakers which aims at having U.N. member States extend an open invitation to all mechanisms of the UN Commission should receive more support.

Another strong limitation was introduced in 2000 during the last review of the Commission's mechanisms when the member

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Colombia: The file's getting thicker

THE name of this relatively small Latin American country has been popping up a disproportionately large number of times in the reports of different special rapporteurs. And consider the wide range of reasons for which Colombia has been recurring in those reports: disappearances, extra-judicial killings, torture, subversion of the independence of the judiciary, attacks of human rights defenders and the plight of the internally displaced.

All this despite the existence of an office of the High Commissioner of Human Rights in Bogota since November 1996 under an agreement between the Colombian Government and Mr Ayala Lasso.

In the special debate on Colombia on 4 April 2003 under Item 3 of the CHR's Agenda, many human rights organisations and state delegations expressed disappointment over the deterioration of the situation since the 58th session.

For all the work done by the High Commissioner's office in Colombia, the speakers complained that there has been little follow-up to the numerous recommendations made by the CHR, the thematic mechanisms and the Inter-American system. It is obvious that the Government is lacking in political will.

Besides the crimes committed by the Army and the guerrillas, the operations of the para-military groups constitute again the main source of human rights violations. Not surprisingly, in its chairman's speech, the CHR deplored the numerous attacks against human rights defenders, trade union leaders and teachers, and strongly condemned all assassinations, violations of the freedom of opinion and expression and of political rights. It condemned the persistence of impunity in the country and expressed deep concern at the violations of the right to fair trial, the abuse of pre-trial detention and the corruption in the penitentiary system. The Commission also urged the Government to maintain a dialogue with NGOs and to adopt efficient measures guaranteeing the life and personal safety of their members.

In recent years, the Commission addressed the internal armed conflict in Colombia. The 2002 statement acknowledged President Pastrana's compulsion in putting an end to the process of dialogue and negotiation as the guerrilla organisations, FARC and EP, had demonstrated their unwillingness to make serious progress in fulfilling their commitments.

But the Commission stressed that it believed "that a negotiated political solution is necessary in order to end the conflict."

Work of the OHCHR

OVER the last six years, the Office of the High Commissioner in Colombia has made some difference in the country. Reacting rapidly and often publicly to initiatives of the Government, the Parliament and the judiciary, as well as to human rights abuses; assisting the authorities in the law-making process; training officials at all levels, including in prisons conditions, helping and protecting NGOs and other civil society organisations; the Office has been both a useful albeit incremental tool for change and monitoring.

Efforts should be made to strengthen this unique tool of the UN further. There should be more professional staff and more branches in the Departments of Colombia. All the reports prepared by the Office should be made available publicly, and not merely the annual reports. And, most important of all, the High Commissioner should be requested to submit the Office's reports to the UN General Assembly. UN bodies in New York are already dealing with the Colombian file, but not from its human rights and humanitarian law perspectives. This has to be changed. This is the major challenge in the preparation of this year's Chairperson's Statement on the situation in Colombia.

Decree 128

One of the best illustrations of the problem is given by the recent adoption of a decree for amnesty and legalisation of the paramilitaries. The Colombian Government has taken steps towards a possible peace process with the paramilitary groups, which shall be based on impunity for war crimes and crimes against humanity. In an interview published in *El Tiempo* on 12 January 2003, the Minister of Interior bluntly explained: "the Government is prepared to leave the past behind. There are various judicial limits, which will be studied, and we will have to overcome them using much imagination".

This is blatantly inconsistent with the rule of law. Despite many protests in the country, the Government issued on 22 January Decree 128 (2003). The Decree provides that

demobilised members of armed groups "will be entitled to an amnesty" as long as a governmental body called the Operating Committee for Giving Up Arms (CODA) certifies that the person concerned belonged to an illegal organisation and willingly deserted. Composed of six States officials, CODA is chaired by a representative from the Minister of Interior and Justice.

The Decree indeed contains a section that guarantees the right to justice, but, as the Colombian Commission of Jurists explains in reality this "does not constitute an effective safeguard. Article 21 authorises the prosecutor or judge to limit or impede the exoneration of the person if that person has previously been either processed or sentenced for crimes which cannot be subject to a pardon or amnesty according to the Law, the Constitution or the international treaties ratified", but, the Commission adds, "given the existing impunity in the country, those sentenced or processed for such crimes can be counted on the fingers of one hand".

The Colombian Commission of Jurists also pointed out that the Colombian Government had decided to advance confidential discussions with the paramilitary groups, which facilitated negotiations behind closed doors. In a statement to the 59th. session of the Commission, the Colombian group of jurists concluded: "a pardon issued in a clandestine manner and without judicial control, which is what Decree 128 authorises, creates further real dangers in what is already a deteriorating human rights crisis in Colombia. The international community and the Colombian people should do what is necessary to prevent this policy of impunity being implemented and ensure that a genuine reconciliation process occurs which is based on truth, justice and reparation".

Many NGOs in Colombia would like to obtain a Special Rapporteur of the Commission. This strong request is no doubt genuine and illustrates the seriousness of the situation. But one should be realistic at the same time and appreciate that all indications are that the Commission, with its current composition, will never endorse such a proposal. Anyhow, a Special Rapporteur on Colombia would probably visit the country once a year, whilst the UN office has a permanent presence and programme. (Work of the OCHCR: See box)

- ACZ

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Turkmenistan...

During 2002, Turkmenistan was one of the 24 states to receive an urgent appeal from the Special Rapporteur on freedom of religion or belief.

This year's report of the Special Rapporteur notes, "Religious minorities are affected primarily by the threat to their very existence as special communities, as exemplified by...the arrest of Protestants and Adventists in Turkmenistan".

The repression of political dissidents following the alleged assassination attempt indicates that Niyazov is worried about the activity of opposition political parties.

While he has effectively silenced these groups in the short-term, there is modest hope that his strong-arm tactics will backfire in the long-run, fomenting internal political opposition and increasing the political pressure from international human rights organisations as well as diplomatic pressure from other countries.

Such pressure is essential if the citizens of Turkmenistan are to truly enjoy the independence they gained in 1991.

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Judiciary...

forensic exercise tracking the subtle changes of wording in Commission resolutions from one year to the next. But this has been particularly the case for this special procedure, for which the Commission has shown great reluctance to convert the "concrete recommendations" proposed, in accordance with the mandate, into the commitment of resolution wordings. Last year it was encouraging to see resolution 2002/37 on the 'integrity of the judicial system' incorporated into the existing mandate - although the 19 abstentions are of some concern, in particular as resolutions on the existing mandate have in the past nine years all been by consensus.

It should, however, be uncontroversial to suggest that the mandate for this special procedure will be renewed. Mr Cumaraswamy has fulfilled his mandate. He has inquired and reported with integrity, thoroughness and timeliness on the allegations he has received. He has reported on progress, and made "concrete recommendations" and proposals to protect and enhance

the independence of judges and lawyers. However, worldwide the independence of the judiciary and lawyers is as threatened as ever and there are challenging times ahead. His final report highlights some specific problem areas. Judicial accountability and increasing allegations of judicial corruption, measures taken in response to 9/11, the problems of countries in transition, and the needs for more resources to fulfil the mandate, are all areas that the outgoing Special Rapporteur considers merit close attention. Resolving these problems is, however, the role of states. Mr Cumaraswamy has fulfilled his role in leaving behind a sound legacy of work for his replacement to inherit, whoever that may be.

If Mr Cumaraswamy's admirable work is to have a lasting impact it will perhaps be in disseminating the greater awareness of minimum standards and principles. The submission of the Bangalore Principles is his final attempt to do this and deserves serious consideration by the Commission. Mr Cumaraswamy has done his very best to fulfil his mandate in good faith, and it is to be hoped that the Commission this year will follow suit by endorsing his recommendations, in particular the Bangalore Principles, in a resolution.

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Special Procedures...

States decided to limit to two terms the mandate of each individual expert. Last year a group of States even succeeded in imposing a change of mandate holder (on racism) by way of a resolution.

The challenge to the Commission's special procedures generally comes from states with bad human rights records. In their statements, these states no longer speak about prevention and promotion. The trend at the CHR over the last five years indicates that the current offensive against country resolutions and mandates only constitutes the first stage of another major attack which could soon affect the thematic procedures.

In the upcoming review of the Commission's mechanisms, it is crucial to recall that the aim of the process is to improve effectiveness and not to weaken the mechanisms. The Commission should primarily protect the special rapporteurs and NGOs cooperating with them. The High Commissioner must establish a special unit for the protection of those who cooperate with the special mechanisms.

Violence Against Women

Cultural relativism: An enduring challenge

CATHERINE MOLLER
& FANNY BENEDITTI

IN 1994, the Office of the High Commission for Human Rights (OHCHR) appointed, for the first time, a Special Rapporteur on violence against women, its causes and consequences, as defined in the United Nations Declaration on the Elimination of Violence against Women. Dr. Radhika Coomaraswamy (Sri Lanka) was tasked to analyze data and make recommendations at the international, regional, and national levels concerning all forms of physical, sexual and psychological violence against women, such as battering, sexual abuse, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, violence related to exploitation, sexual harassment and intimidation, trafficking, and forced prostitution.

As she prepares to step down from her position as Special Rapporteur this month, Dr. Coomaraswamy has issued a report reviewing the progress since the 1994 creation of the mandate on violence against women. An overarching theme of the report, "Integration of the Human Rights of Women and the Gender Perspective," is that while great strides have been made in setting standards and elaborating a legal framework, the challenge that lies ahead is the fulfillment of such rights. She applauds recent development in the prosecution of violators of women's rights, given that this empowers more victims to come forward, punishes wrongdoers, and provides a deterrent to would-be abusers. However, women need equal access to the criminal justice system which will allow them to bring their violators to justice and find the protection promised to them under the law. And, the reality remains that in many states, communities, and families, violence against women, in all its forms, continues - at times with utter impunity in the hands of state authorities.

Cultural Relativism

A key assertion of the Special Rapporteur's report, and the source of endless debates in many practical discussions of human rights implementation, concerns cultural relativism. Dr. Coomaraswamy calls it "the greatest challenge to women's rights." Culturally and locally appropriate strategies are essential, and the Special Rapporteur makes particular mention of working with local women's groups to implement rights. However, at its very core women's rights makes the assertion that women's subjugation has universal characteristics - ranging from issues in reproductive health to economic opportunity - reflecting that the very basis of human rights asserts that all people are naturally endowed at birth with rights that protect their freedom and dignity. The argument of cultural relativism, at its extreme, negates this

very notion of fundamental rights for women, and it is interesting to note that it is most often in the area of women's rights that it is applied.

In the keynote address at a March 2003 meeting at the World Bank, "Laws, Institutions, and Gender Equality," in which she discussed her recent report, the Special Rapporteur pointed out that women are often assigned the role of cultural producers, or repositories of "traditional culture," in the context of rapidly changing societies. Sexual discrimination is often justified as being in accordance with religion and culture. Arguments are made to protect such notions from state scrutiny through the relegation of women to the private realm of the home and the protection of men's privacy in personal and family matters.

Women have thus been particularly vulnerable to human rights abuse in the private sphere, with respect to such issues as sexuality, marriage, reproduction, inheritance, and the custody of children. Cultural ideology can also be used as a means to control and police female sexuality, such as in the phenomenon of honor killings and forced marriages. Sometimes these efforts of control are even crafted in terms of women's best interests: as the Special Rapporteur pointed out, the Taliban argued that their fear of violence against women was precisely why they wanted to keep them home - and prevent them from leaving their houses, seeking medical care, or providing services to their communities.

One key piece of advice from the Special Rapporteur for the next decade is to resist these specious arguments of cultural relativism while retaining open-mindedness about the perspectives of other peoples. In approaching sensitive issues such as harmful traditional practices, for instance, we must place emphasis on the involvement of men and women in solutions to women's rights abuses in their communities.

We must also be mindful to approach problems without arrogance. Violence against women remains an integral part of every society in every part of the world. There is no one group, no matter their culture, class, religion or geographical location that is immune to this violence, as illustrated by the recent WHO study, World Report on Violence and Health. This is because violence against women, as the Nobel-prize winner Amartya Sen has so eloquently reminded us, is one of the many faces of gender inequality, or the unequal power relations between men and women.

Calling the International Community to Account

Dishearteningly, and in stark illustration of the pervasiveness of violence against women, is its prevalence within the UN system itself, among peacekeepers and even at times aid workers. The West Africa sexual exploitation crisis in early 2002 was just the latest of many scandals.

A report by the UNHCR and Save the Children UK revealed that relief workers and peacekeepers in Guinea, Liberia, and Sierra Leone had been sexually exploiting women and girls in refugee camps and offering food and medicine in return for sexual favors.

Although Ms. Coomaraswamy did not include a specific chapter on this issue in her report, her recommendations speak for themselves: no less than 13 are to the international community, mostly to the UN system itself. Violence against women committed by UN personnel is shocking and unacceptable on its own terms, even before considering that it has remained, until very recently, unaddressed. Even with new codes of conduct, it is still not clear that prosecution and accountability will follow, let alone redress to the victims.

The international community must take violence against women seriously, fully and systematically incorporate a gender perspective into its policies, programs, funding criteria, etc. The past decade of focusing on women's advocacy and development has not led to a dramatic change in the UN system and donor community to reflect progress made on paper.

In spite of the UN commitment to promoting gender equality and mainstreaming a gender perspective in all policies and programs, there has been lip-service in many instances and Dr. Coomaraswamy's comprehensive set of recommendations illustrate this.

The general practice still is to target women as a vulnerable and separate category - rather than addressing what makes them vulnerable - and highlighting women's "protection needs" - rather than looking at the varied criminal activities and threats to security that they face.

For instance, in the Special Rapporteur's comments regarding the increasing trafficking of women for prostitution in areas where UN peacekeepers are stationed, she noted that, "the UN code of conduct for peacekeepers is not enough. Awareness training for peacekeepers should be an integral part of their training before being deployed. It is essential that all UN forces are held to the same standards of international human rights law as are nation states - to do otherwise creates a climate of impunity in which offenses proliferate."

Beyond a Rights Approach

In her conclusions, the Special Rapporteur emphasizes the need to address women's lesser economic, social, and political status which limits their practical ability to escape situations of violence and knowledge of their rights and protections. Dr. Coomaraswamy emphasized the economic, social, and political underpinnings of gender-based violence - aspects which cannot be improved through a human rights approach alone and require the efforts of development partners and the international community as a whole.

In detailing some of her field-based work on trafficking, she noted a correlation with economic and social marginalization. Women who are trafficked are overwhelmingly poor, with little formal education, and are often from groups that face ethnic discrimination. Women who voluntarily migrate into exploitative and/or sexual work - sometimes seeking escape from sexual violence in their communities or homes - are similarly marginalized. Both groups of women are often exploited or trafficked by the men of their own communities, who face similar marginalization.

Dr. Coomaraswamy also noted recent studies on patterns of domestic violence in various countries around the world, in which the level of economic independence of women was found as the main factor in determining violence against women. However, economic and social marginalization is not only a contributing factor of gender-based violence, but also an outcome: it limits women's participation in development, is an obstacle to equitable development, and imposes costs on the individual, household, and state.

Towards Implementation

If we are to meet the Special Rapporteur's call to make the coming decade one of implementation of women's rights, we must remind ourselves that radical change is possible in our lifetime and of the great accomplishments of the past decade, aided by Dr. Coomaraswamy's work.

In addition to setting standards, there are numerous good practices and success stories that have been documented in the past decade, and many of these inspiring stories can be found in the addendum to Dr. Coomaraswamy's report. Our challenge is to continue forward with these efforts so that such success stories continue and eventually become the norm.

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Fanny Benedetti worked with UNHCR from 1998 to 2002, where she focused on the protection of refugee and displaced women.

An overarching theme of Radhika Coomaraswamy's report reviewing the progress since the 1994 creation of the mandate is that while great strides have been made in setting standards, the challenge lies in the fulfillment of these rights

PAKISTAN

One step forward, two steps back

BLASPHEMY laws in Pakistan are among the harshest in the world and are frequently used to discriminate against, isolate or otherwise harm minority groups. According to the Special Rapporteur on Freedom of Religion, in 2001, 40 Muslims, 23 Ahmadis, 10 Christians, and 2 Hindus were charged with blasphemy. (E/CN.4/2003/66)

Amended in 1996 with the insertion of section 295C in the Penal Code, blasphemy laws now entail: "Use of derogatory remarks ... [respecting] the Holy Prophet. Whoever by words, either spoken or written or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Mohammed shall be punished with death, or imprisonment for life, and shall also be liable to fine". Since 1992, the death sentence has been mandatory.

The definition of blasphemy under section 295C is relatively open-ended, and the arrest of a person reported to have committed blasphemy requires no warrant. No preliminary investigation is required before the filing of the First Information Report (FIR) by a local police officer. Once "the testimony of a reliable man" has been registered, the FIR is filed and the person arrested.

President Musharraf had announced that he would amend the blasphemy laws to lessen their abuse by providing for a preliminary investigation by the Deputy Commissioner prior to filing an FIR. This would have guaranteed a non-trivial protection against arbitrary arrest and greater independence from local authorities who are often subject to local, religious and political pressures. However, Musharraf abandoned the reforms a month later "at the unanimous demand of the ulema [Islamic clerics] and the people".

The absence of an impartial inquest system opens the door to the use of blasphemy laws to settle personal quarrels, business disputes, and land rights issues. For instance, Ayub Masih, who was imprisoned since 1996 for allegedly suggesting to a Muslim that he should read Salman Rushdie's *Satanic Verses*, was acquitted of blasphemy charges by the Supreme Court in August 2002. The Court determined the real basis for the allegation was a private land dispute. Amnesty International said that the case demonstrates that the blasphemy laws are frequently abused and are "an easy tool to have people imprisoned" for ulterior motives. The Special Rapporteur on Freedom of Religion noted that despite Masih's acquittal he remained "concerned that death sentences continue to be handed down for apostasy". (E/CN.4/2003/66)

These laws also serve as a destructive tool in the hands of religious extremists. In July 2002, Zahid Mahmood Akhtar was stoned to death after a cleric used a loud hailer to issue a fatwa ordering his execution. Mr Akhtar was detained in 1994 on charges of blasphemy, but was released three years later after a court determined he was mentally ill. Since release, he had been living in another city, but returned to his village a week before being killed.

Details of offences are rarely, if ever, made public, since under Pakistani law, the reiteration of the words that constitute the offence can, in itself, be a legal offence.

Although no blasphemy detainees were executed in the past year, a cleric convicted of blasphemy was shot and killed by another prisoner, under circumstances that Amnesty International considers to indicate that the prison guards were in complicity with the plot.

THE CASE OF THE AHMADIS

The Pakistan Ahmadi community is a

principal subject of religious discrimination. The Ahmadis consider themselves Muslims but disagree with the majority Sunni Muslims on the finality of the word of Prophet Mohammed. In 1974, a constitutional amendment declared the Ahmadis a non-Muslim minority. Under the separate electorate system, therefore, the community was effectively excluded from the political process.

Since 1984, the legal apparatus in Pakistan has actively criminalised the Ahmadi faith. Ahmadis suffer from numerous restrictions on religious freedom and widespread societal discrimination, including violation of their places of worship, banning of burial in Muslim graveyards, denial of freedom of faith, speech, and assembly, and restrictions on their press.

In 1993, the Supreme Court ruled constitutional Section 298(c), which forbids Ahmadis from professing to be Muslims and from using Muslim practices in any practice of their faith. The Court held that Islamic phrases are in essence a copyright of the Islamic religion. The use of Islamic phrases by Ahmadis was deemed equivalent to copyright infringement, an offence under the Trademark Act of 1940. Also, under the ruling, use of Islamic phrases by Ahmadis was held to be blasphemy; therefore, an Ahmadi claiming to be Muslim is in per se violation of the blasphemy laws.

Following the US invasion of Afghanistan, Pakistani Christians have increasingly been the subject of private party violence. In April 2002, a Christian church was attacked by Islamic extremists with automatic weapons. Reportedly, the government has been reluctant to open a case on the incident.

PRESS FREEDOM

Pakistan has a somewhat mixed record in its protection of press freedom. After September 2001, the Minister of Information directed the media not to criticise the United States; however, according to Reporters Without Borders, the Urdu-language press was relatively free to publish criticism of the war in Afghanistan, and more recently both English-language and Urdu-language press has been critical of the US invasion in Iraq.

In September 2002, the government enacted the Defamation Ordinance, which places the burden of proof on journalists charged with defamation. The measure also provides that, a journalist's failure to show proof at trial would result in a fine or prison term, and it was widely criticised by members of the national press. In October 2002, the government estab-

lished a press oversight board to monitor the quality of journalism in the country. Although composed of senior editors and journalists and allegedly "autonomous and independent" of the government, there are concerns that the Council is designed to dampen dissenting viewpoints.

During the past year, the Special Rapporteur communicated several concerns regarding press freedoms to the government. (E/CN.4/2003/67) In March 2002, the government was pressuring the publisher of the paper *The News* to fire the editor and three reporters for reporting on the abduction of the American reporter Daniel Pearl. In May 2002, a British investigative editor and his two Pakistani guides were arrested for suspicion of espionage at the Afghan-Pakistan border, despite being credentialed members of the press. In July 2002, the Special Rapporteur sent an urgent appeal on behalf of a journalist for the local daily newspapers *Bachabar* and *Lashkar* who was arrested on criminal charges for criticism of police efficacy. In July 2002, the managing editor of the daily *Jasarat* was abducted by Pakistani intelligence agents (ISI) and interrogated and eventually released after publishing an article about an ISI officer. Following his refusal to disclose the author of the article the editor was threatened with kidnapping and murder, and followed by suspected ISI members. In April 2002, 23 journalists were allegedly assaulted by baton-wielding police in Faisalabad after the journalists walked out of a rally for President Musharraf. In April 2002, a television cameraman was assaulted and nearly killed by Musharraf's henchmen at a polling station in Abbottabad for his alleged failure to film Musharraf's sympathisers. In July and August 2002, the offices of the *Evening Special* and *Morning Special* newspapers were sealed for a month by the government of the province of Sindh because of the alleged publication of vulgar language and obscene pictures. The government of Pakistan has not responded to any of the above communications.

In October 2002, President Musharraf enacted the Freedom of Information Ordinance intended to expand on a 1993 Supreme Court decision that interpreted the Pakistani Constitution to confer the right to receive information. According to the British freedom of expression watchdog Article XIX, "The Ordinance includes a number of positive features, such as the inclusion of an interpretation clause, the right of appeal ... a clear time frame for the release of information, and the inclusion of courts and tribunals in the definition of public office. At the same time, the Ordinance has a number of weaknesses, including an excessively broad regime of exceptions and a restrictive approach to the definition of 'public record'. In addition, the Ordinance does not include obligations on public bodies to maintain their records in good condition and to publish key categories of information, a system for promoting freedom information and educating civil servants, or the granting of specific investigative powers to the [reviewing courts]".

Problems in the NWFP

The tribal region on the border between Afghanistan and Pakistan is ruled by the fundamentalist Islamist coalition Muttahida Majlis-e-Amal or United Council of Action, which made significant gains in the October 2002 parliamentary elections. Upon gaining power, the Islamists have taken several actions that clamp down on the freedom of expression and religion. One of first actions of the new local government was to remove from some public places advertisements

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Sham referendum

The Presidential referendum of the past year has been widely criticised as a sham, not least because of voter coercion, voting fraud, and because a legitimate democratic presidential election cannot be held as a referendum vote. Additionally, selective enforcement of a ban on political assembly during the time leading up to the referendum ensured political opposition was silenced.

Public political gatherings have been banned under Presidential edict since March 2000, and the measure was used during the election year to stifle the efforts of dissident movements. The government selectively enforces the ban on public political rallies so that large pro-government rallies tend to be approved, whereas demonstrations "likely to result in violence" are banned. Occasionally, preventive detention is used to quash political dissent. On the positive side, the government lifted the ban on political rallies in September 2002, in time for parliamentary elections in October. Shortly after the April 2002 referendum, President Musharraf announced a controversial package of constitutional amendments, the Legislative Framework Order (LFO), which amended the suspended Constitution to allow, inter alia: the President to dismiss the Prime Minister and dissolve the Parliament; the creation of a National Security Council (NSC) as a constitutional body; and the insertion of a number of qualification requirements for candidates for Parliament. One effect of the amendments was to concentrate executive power in the presidency at the expense of the legislature and prime minister. Opposition politicians, lawyers, civil society groups, and many in the international community expressed concern about the amendment package and its constitutional legitimacy. In July 2002, police arrested nine dissenting leaders after their attempt to hold a rally against the constitutional amendments.

...from page 4

Hong Kong's Article 23...

artistic creation within this realm be prohibited? ... [S]ome people hold that...the implementation of Article 23 may...undermine freedom of the press and freedom of speech in the HKSAR."

The Drafting Committee ignored these comments and produced a text that was more conservative than either of the first two versions of Article 23. The Hong Kong Human Rights Monitor notes, "[T]he Drafting Committee's decision to ignore the substantial input on Article 23 [] received from the public in the second round was due in large part to a stiffening of backs inside the Central Government in the wake of Tiananmen Square. Support for the protestors in Beijing was strong in Hong Kong...the criticism from Hong Kong of Beijing's decision to use force likely further solidified Beijing's fears that Hong Kong would become a centre for what it considered anti-government subversive activity."

The Guardian speculated that the LegCo's reason for enacting laws under Article 23 at this particular time stem are due to a "convergence of fears": Beijing worries that the SAR will become a base for subversive activity, and in turn the individuals who run the SAR worry that their power, which is not based on a democratic mandate, may soon begin to erode. Another journalist, writing for *Time Asia*, suggested that the current developments are related to Hong Kong's economic slump and that Hong Kong bureaucrats hope to take advantage of China's comparative economic strength by politically placating the Chinese government. Martin Lee put it more bluntly in a submission the House of Commons: "The general belief is

that [the proposed legislation] is there because Beijing wants it."

Whatever their motives for Article 23, Hong Kong legislators must remember to consider Article 27 of the Basic Law, which guarantees freedom of speech, of the press and of publication, freedom of association, of assembly, of procession and of demonstration, and the right and freedom to form and join trade unions, and to strike.

In addition, Article 29 of the Basic Law states: "The provision of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall...be implemented through the laws of the Hong Kong Special Administrative Region."

Whatever their motives for Article 23, Hong Kong legislators must bear in mind Article 27 of the Basic Law which guarantees freedom of speech, of the press, freedom of association, of assembly, the right to form and join trade unions and to strike.

According to this article, restrictions by shall not contravene the provisions of these international instruments.

Even from the first weeks' proceedings of the Commission, it is clear that national security legislation that gives short change to human rights has become a near-global phenomenon since the events of 11 September 2003.

Although the concerns addressed in such legislation are legitimate, it is hoped that Hong Kong will avoid following the example of some of its Asian neighbours and will instead set a positive precedent for transparency and respect for genuine democracy in its enactment of legislation under Article 23. Legislators can begin by reviewing and amending the proposed security ordinance with an eye towards Articles 23 and 27 or their own Constitution, and then look to international guidelines for security legislation such as the Johannesburg Principles on National Security, Freedom of Expression and Access to Information and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

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Pakistan's two-step...

it deemed offensive to Islam. The police have now launched a campaign against musicians, including beating up a local singer in January 2003.

Also in January 2003, a local political writer, Fazale Wahab, was murdered because of his criticism of the local religious leadership and politics. The assailants have not been apprehended.

In a theme that resonates through Pakistan, India, the Middle East and the US, it can be seen that local government officials try, in the absence of meaningful policies, to garner popularity by appealing to deeply held religious convictions. Civil and political rights will be in jeopardy in this region in the coming year and the Commission should closely monitor the situation.

The Commission should urge the UN Special Rapporteur on religious intolerance to visit South Asia and report on the rise of religious fundamentalism and its effects on the enjoyment of human rights by minorities. The Pakistani government must realise that the surest way to gain the legitimacy it tried to manufacture through a sham election is to steadfastly protect the civil and political rights of its citizens.

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Guantanamo Bay: Shining a ray of light into legal black hole...

protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system". In the case of the detainees at Guantanamo Bay, however, this is clearly not the case.

In the High Level Segment of the 59th session, Jeanne J. Kirkpatrick on behalf of the US, quoting from the preamble to the Universal Declaration of Human Rights, said that "human rights should be protected by the rule of law" and that "human rights can be realised only through good faith compliance and enforcement by governments".

A "good faith" application of the provisions of Article 9 does require the provision of security to US citizens, but equally it requires the State to respect and ensure the human rights and fundamental freedoms of detainees as provided in international law, which includes the remedy of *habeas corpus*. The international law dimension was

recognised by the US District Court of Columbia and the US government in the case of Rasul et al (2002) when the Court expressed its "serious concern" that the court's decision would leave the prisoners without any rights, and recorded the government's recognition that "these aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the claims raised by these aliens". The US government therefore appears to be aware of its obligations, but reluctant to act upon them.

Filling the 'black hole'?

In the case of the detainees at Guantanamo Bay there is a gap between the application of US Constitutional law by US Courts and the applicable international human rights law in relation to access to *habeas corpus* for alien detainees under the control of the US authorities on foreign territory.

This gap is unlikely to be bridged until either the US fully

implements the ICCPR, by making it 'self-executing' and therefore making its provisions directly enforceable in its domestic law, or ratifies the complaints mechanism contained in the First Optional Protocol.

The US is by no means alone in having failed to take these two measures, but it is not unreasonable to suggest that such steps are an integral part of good faith compliance and the protection of human rights in accordance with the rule of law.

Moreover, states that wish to hold themselves out as leaders of civil and political rights, but wish to avoid accusations of "double standards", must be prepared to consistently, and not selectively, apply international human rights obligations.

In the meantime, several hundred prisoners - no doubt some guilty, but some innocent - remain detained at Guantanamo Bay, and also in Afghanistan, where they have been for over one year without any immediate hope of release or access to legal review.

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