

# HUMAN RIGHTS

# FEATURES

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Weekly series for the 59th CHR session

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## Holding the line on the Paris Principles

*The Principles are the lowest common denominator, not benchmarks, for NHRIs*

THIS week will see the arrival of National Human Rights Institutions (NHRIs) at the 59th session of the CHR. As in previous years the Australians are proposing a resolution on NHRIs.

However, it is evident that this year's Australian draft resolution is making too many concessions that will not enhance the application of the Paris Principles to NHRIs.

In the draft the Australians state, "Recognizing that it is the prerogative of each State to choose for the establishment of a national institution, the legal framework that is best suited to its particular needs..." The Paris Principles hold that NHRIs are best when established as constitutional bodies or through legislation. Clearly, bodies set up by executive fiat are not considered appropriate.

The Australian draft further holds, "...the continued importance of the Paris Principles, recognizes the value of further strengthening their application..." In fact even this is a marked retreat from last

year's Australian formulation which reads as, "...Recognises, ten years after their formulation, the potential value of further clarification of the application of these Principles." Clearly the bugles are sounding the retreat.

The General Assembly in its resolution 48/134 of 20 December 1993 adopted the Paris Principles Relating to the Status of National Institutions. The Paris Principles spelt out the minimum guidelines on the competence and responsibilities, composition and guarantees of independence and pluralism, methods of operation and additional principles concerning the status of commissions with quasi-jurisdictional competence.

It is evident that the slip-page in Canberra is also creating international fallout.

This development come in the wake of the abolition of the post of the Special Advisor to the High Commissioner for Human Rights on National Human Rights Institutions. It is unclear at present whether NHRIs will be given the attention at the OHCHR that they earlier enjoyed.

In the conclusions of the eleventh workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific region held in Islamabad, Pakistan in February 2003, a new emphasis was placed on national protection systems, "taking note of the report

of the Secretary-General on: 'Strengthening the United Nations: an agenda for further change', in which he states that the emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should be a principle objective of the organization; "

However, the OHCHR made a major concession when it refused to contest "Encouraging United Nations Country Teams to support the implementation of activities at country level under the Tehran Framework and the strengthening of national human rights capacities, at the request of Member States; (our emphasis) Evidently states were clawing back the ground they had lost to norms of international accountability.

The International Co-ordinating Committee Of National Institutions (ICCNI) can offer little help in assessing NHRI compliance with the Paris Principles.

The ICCNI is composed of institutions such as the Moroccan

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### Commission on Human Rights 59th Session

#### Related stories:

**P8: NHRC 'anti-national', says Thai government**

**P9: Philippines NHRI - Yet to get off the mark**

**P10: Fewer teeth for Australia's HREOC?**

## New countries in the dock?

*Draft resolutions are circulating on Belarus, Turkmenistan and North Korea*

ADRIEN-CLAUDE ZOLLER

UNTIL the last moment one is never sure that a draft resolution on massive human rights violations in a country will be effectively tabled by the governmental delegations, even when their diplomats have formally announced it.

During the current 59th session, the growing opposition to country resolutions (see *Human Rights Features*, 31 March-6 April) complicates matters. Hard negotiations are taking place in the corridors and few observers are aware of what exactly is going on.

A list of four countries under confidential examination (the 1503 Procedure) is circulating in press circles: Chad, Djibouti, Liberia and Uzbekistan.

As for the public procedure, it seems clear that China and Iran shall escape further scrutiny. Most delegations speak of these two situations in terms of "critical dialogue". However, we all know what that means - it means that realpolitik rules.

At the end of this fourth week of the session, talks are nevertheless focusing on countries which would appear for the first time on the list. Draft resolutions are circulating on Belarus, Turkmenistan, and North Korea.

Besides this, there will be Chairperson's Statements on Colombia, Haiti, West Sahara and, hopefully, East Timor, despite fierce resistance from Indonesia. Resolutions will be submitted to renew existing mandates on Congo-DRC, parts of former Yugoslavia, Burundi, Sudan, Palestine (as well as other resolutions on the Arab Occupied Territories), Burma (Myanmar), Afghanistan, Iraq Cambodia and Somalia.

Most likely new attempts will be made this year on resolutions on Chechnya and Zimbabwe.

In view of the composition of the Commission, many debates could result in a tight vote. As reported in last week's issue of *Human Rights Features*, the vote on Sudan requires the most attention to avoid losing the one existing country mandate.

Lunchtime seminar organised by the Government of Australia, the South Asia Human Rights Documentation Centre (SAHRDC) and the Office of the High Commissioner for Human Rights on

### THE PARIS PRINCIPLES

#### SPEAKERS

**Mr. Bertrand Ramcharan:** UN Deputy High Commissioner for Human Rights

**Mr. Ravi Nair:** Executive Director, South Asia Human Rights Documentation Centre

**Dr. Shaista Shameem:** Director, Fiji Human Rights Commission

**Mr. Jody Kollapen:** Chairperson, South African Human Rights Commission

**Ambassador Mike Smith:** Permanent Representative of Australia to the United Nations Office at Geneva

PALAIS DES NATIONS

ROOM XXIII

Monday 14 April 2003 - 13.00 hrs to 15.00 hrs

## SPECIAL PROCEDURES

# Torture: Closing Pandora's Box

*Can torture and other forms of ill-treatment ever be justified?*

DEBRA LONG

SINCE 11 September 2001, fundamental rights that had once been cherished, perhaps taken for granted by many, are being questioned. Through the knee-jerk reaction to threats of terrorism, some governments, the media and the public have alarming queried the once universally accepted principle of the absolute prohibition of torture, cruel, inhuman and degrading treatment or punishment. This debate opens up a Pandora's box of legal and moral dilemmas.

Throughout the past century, as a response to atrocities that had occurred, all States have expressly agreed, under international humanitarian and human rights law, to prohibit torture and other cruel, inhuman and degrading treatment or punishment.

This has led to a plethora of international instruments that reflect this universal condemnation. Accordingly, common Article 3 of the Geneva Conventions, Article 5 of the Universal Declaration of Human Rights, Article 7 of the UN International Covenant for Civil and Political Rights, Articles 2 and 5 of the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Article 3 of the European Convention for Human Rights, Article 5 of the Inter-American Convention on Human Rights and Article 5 of the African Charter, all categorically prohibit the use of torture and other forms of

ill-treatment.

Under international humanitarian and human rights law, this prohibition is a non-derogable norm. No exceptional circumstances whatsoever, whether a state of war, internal political instability or any other public emergency, may be invoked as a justification for these prohibited acts.

Furthermore, this right to be free from torture and other forms of ill-treatment must be afforded to everyone, regardless of what they may have done.

Whilst, regrettably, torture and other forms of ill-treatment still occur throughout the world, the legal basis of the prohibition of torture has not yet been called into question directly by States. Rather, there is a growing trend to try and re-examine the definition of torture.

This discourse is driving a wedge between the status of the prohibition of torture on the one hand and cruel, inhuman and degrading treatment or punishment on the other. There have been attempts to try and categorise certain acts, in particular interrogation techniques, as not amounting to torture.

This dangerously implies that acts not amounting to torture, but which are nevertheless inhuman or degrading, may be permissible under certain circumstances.

Many judicial bodies and international experts have warned against trying to establish a precise distinction and exhaustive list of different types of treatment. In its general comment on Article 7 of the International Covenant for Civil

and Political Rights, the Human Rights Committee has considered that it is not desirable to draw up a list of prohibited acts or a precise distinction between them. Furthermore, Sir Nigel Rodley, when he was the UN Special Rapporteur on Torture, considered that it is extremely difficult and indeed dangerous to establish a threshold to distinguish acts of torture from cruel, inhuman or degrading treatment on the other.

Therefore, it is essential in this current political climate to reiterate and reaffirm that the prohibition of inhuman and degrading treatment or punishment must be defended as vigorously as that of torture. Such acts can never be justified under any circumstances.

Yet, aside from this legal debate, there is also the moral dimension that must be addressed and in so doing recall why torture and other forms of ill-treatment are prohibited, at all times, under international humanitarian and human rights law. Recent events have resurrected the "ticking bomb" scenario and arguments have been advanced as to the "moral" justification for using these prohibited acts. Can torture or other forms of ill-treatment ever be "morally justifiable", for example in order to save lives?

In answer to this dilemma, there are three reasons as to why torture and other forms of ill-treatment can never be justified. The first reason is the pragmatic argument that information extracted using the prohibited treatments has been proven to be unreliable.

The second reason is based upon the fundamental principle of respect for human dignity. This is a universally accepted principle and cornerstone of civilised society. This right is to be afforded to everyone and progressive societies should be judged not only on the way they treat innocent individuals but also, perhaps more so, on how those possibly guilty of something are treated.

The third reason is the danger of a creating a "slippery slope". Once an exception is permitted on the grounds of necessity, this would open the door to arguments being advanced on the basis of expediency. Any justification for using torture or other forms of ill-treatment would be arbitrary and subjective. Who is to make that "moral judgement" as to when such acts are to be justified and against whom they can be applied?

It is for these reasons that the use of torture and other forms of ill-treatment or punishment have been prohibited. Unfortunately, such acts are a 21st century reality.

Therefore, we must resist the circumstantial pressure to open up a debate that should never happen. We are in danger of forgetting the painful lessons learnt in the past: that legally and morally there can never be a justification for torture and other cruel, inhuman or degrading treatment or punishment.

*Debra Long is UN & Legal Programme Officer at the Association for the Prevention of Torture (APT), Geneva*

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## *Holding the line on the Paris Principles...*

and Algerian NHRI which barely exemplify independence.

Existing NHRIs in Europe are little better. National institutions like the Danish Centre for Human Rights are essentially policy institutes and not mandated to intervene in individual cases. Regardless, the Danish Centre for Human Rights was found to be prickly by the new government in Copenhagen. That the German government followed the model of the Danish Centre for Human Rights is disturbing. These fears were reinforced when the first director was eased out when he started to look at Germany's domestic human rights record.

Since the adoption of the Paris Principles, a number of governments all over the world have established NHRIs. The minimal guarantees contained in the Paris Principles have been glorified as high standards. Critical evaluations of national institutions by NGOs in the last decade have uncovered the inadequacies of the institutions and by implication, the principles that govern them. It is time that the relevance of the Paris Principles is reexamined. The gaps in the Paris Principles are only too apparent.

One of the responsibilities enumerated in the Paris Principles is: "To promote and ensure the harmonisation of national legislation, regulations and practices with international human rights instruments to which the State is a party, and their effective implementation".

### *Paris Principles The four pillars*

**Independence through legal and operational autonomy**

**Independence through financial autonomy**

**Independence through appointment and dismissal procedures**

**Independence through composition**

Such a restrictive mandate for NHRIs is regressive from the perspective of international customary law. For example, Malaysia, which has established a National Human Rights Commission, has not ratified key human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The mandates of NHRIs should not be limited to monitoring compliance with treaty

obligations; the corpus of international human rights law should be considered.

The Paris Principles are also not sufficiently clear regarding the "quasi-judicial competence" of NHRIs.

While the Paris Principles recommend, "a national institution may be authorized to hear and consider complaints and petitions concerning individual situations", it is silent on the powers of such national institutions. Although NHRIs cannot be a substitute for - nor should they diminish the value of - the existing constitutional and other safeguards for the protection of human rights, some NHRIs like the Indian Commission have been given the powers of a civil court.

Moreover, the Paris Principles do not contain any non-derogable standards. Some NHRIs, according to their statute/ordinance, are barred from inquiring into abuses by armed forces. The Paris Principles are silent on these issues. Moreover, some NHRIs cannot take *suo motu* action.

An examination of NHRIs and their compliance with the Paris Principles could form part of the report of the Secretary General and could be an effective way of complementing the work of national institutions.

Unless the Paris Principles are revisited and strengthened in the light of these experiences, national human rights institutions will not achieve their objectives.

## SPECIAL PROCEDURES

# Disappearances: Where have all the pledges gone?

*Two Working Group members have not attended any session during the past year; thousands of cases are on hold, and hundreds of decisions remain to be conveyed to states*

ADRIEN-CLAUDE ZOLLER

STATES are not the only negative factors behind the weakening of essential procedures of the CHR. The 2003 report of the Working Group on enforced disappearances (WG) offers a sad illustration of this fact.

Since 1980, five experts appointed by the Commission report to this body on a yearly basis on cases of enforced or involuntary disappearances received from all over the world. This oldest thematic procedure of the CHR was created to act as a channel of communication between families of disappeared persons and the governments concerned. During this 59th session, many groups of relatives from Latin America, Middle East and Asia complain in the Serpentine Bar that the cases they submitted were not even dealt with. Their dismay has serious grounds.

In its 2003 report, the WG explains that two of its five members (those from Malaysia and Nigeria) did not attend any of last year's three sessions. Moreover, a third member "strongly objects" to the report (without explaining why). Thus, the document was approved by two members only, namely the new Western expert and the Chairman, who is a former minister and still engaged in the politics of his country, Peru. The latter, the report notes, did not participate in the decisions relating to the more than 3,000 cases concerning his country. In the practice, therefore, the Secretariat is conducting the entire procedure.

Only 120 new cases were transmitted to governments in 2002 and 16 of these cases occurred before the 1990s. Therefore, reading the report, an observer ignorant of patterns of human rights abuses worldwide might wrongly conclude that the horrendous practice of enforced disappearances will soon be a thing of the past. The contrary is true: organisations of relatives present in Geneva protest and claim they submitted hundreds of new cases to the OHCHR last year. Most of these cases were not even mentioned in the report.

The official replies to these protests focus on the lack of administrative support the WG receives from the UN Secretariat. This is too superficial an answer.

Over the last few years, staff resources have indeed diminished. But thousands of new

cases were not examined at all and therefore not transmitted to the WG.

The report states that "the existing backlog of information that must be processed prior to its consideration by the Working Group relates to over 15,750 cases".

### Preventive measures

In its 2003 report, the Working Group on enforced disappearances pleads for effective preventive measures and highlights the following elements :

- accessible and updated registries on detainees;
- guaranteed access to appropriate information and to places of detention for relatives and lawyers;
- ensuring that persons are brought before a judicial authority promptly following detention;
- bringing to justice all persons accused of having committed acts of enforced disappearances;
- guaranteeing their trial only by competent civilian courts, and
- ensuring that they do not benefit from any special amnesty law or other similar measures.

The WG concludes: "ending impunity for the perpetrators ... is a circumstance pivotal, not only to the pursuit of justice, but to effective prevention".

Furthermore, hundreds of decisions taken in 2001 "remain to be conveyed to the respective Governments". As the experience of the last 20 years shows, hundreds of lives were rescued thanks to urgent reaction by the UN. The current situation is shameful. Bureaucratic explanations to the backlog show no concern whatsoever for the fate of the victims. This is no longer acceptable.

To perform its task, the WG needs more commitment, both from its members and from the UN Secretariat. For several years now, the WG has taken several restrictive measures to reduce its backlog. Relatives were abruptly told that cases should be submitted first to national authorities, a requirement which is in contradiction to the original mandate of the Working

Group.

It was further decided to authorise relatives to withdraw their complaints, even when the cases of disappearances were not clarified, and in some countries this exposed the sources of complaints to undue pressure from the authorities.

Increasingly, the Secretariat requested sources of information to provide evidence that the "arrest" had been made by agents of the state while, clearly, the conduct of investigations lies in the hands of the government (and not the victim). Several countries were urged to find a collective solution to cases of disappearances, in particular in the field of financial compensation, so that these cases could be closed. Finally, country-specific observations in the report were limited to those countries with more than 100 alleged cases of disappearances.

Another discrepancy lies in the twofold function of the WG. Its 2003 report emphasises that the WG's "role ends when the fate and whereabouts of the missing person has been clearly established as a result of investigations". At the same time, the WG is to monitor states' compliance with their obligations deriving from the UN Declaration on the Protection of All Persons from Enforced Disappearance, and this instrument defines the crime of enforced disappearance as a continuous crime.

Many paragraphs of the 2003 report are identical to those in last year's report. The CHR is again informed of the 1997 invitation of the Government of Iran for the WG to visit the country, with the additional information that "a mutually convenient date is being sought".

On Colombia, it is reported that the government "reiterated its invitation of 30 March 1995 ... the Working Group accepted the invitation and a mutually convenient date is being sought".

No reply was received from the governments of Algeria and Iraq to the WG's request to visit to the country. And, while the budget contained provisions for country visits, no visits took place in 2002.

It is time that human rights NGOs and organisations of relatives of victims seriously considered joint action to obtain drastic changes in the working methods of the Working Group in order to improve the UN's response to the fate of thousands of disappearances.

## SUMMARY EXECUTIONS

*This year, the Commission received the fifth annual report of Ms. Asma Jahangir, the Special Rapporteur on extrajudicial, summary or arbitrary executions. In 2002, Ms. Jahangir sent 188 urgent appeals to 54 governments and the Palestinian Authority. She also addressed 56 communications to 42 governments. Her report also contains country reports on Honduras, Afghanistan and Congo-DRC.*

### IMPUNITY

"Impunity for grave human rights violations which could constitute crimes against humanity continues to challenge the international community. There is a growing tendency to prioritise peace over justice... it does undermine the rule of law and the sustainability of the peace process itself. Peace and justice go hand in hand and mutually support one another in the process of nation-building. Peace cannot be simply equated with the absence of conflict, but must contain the essential element of justice" (al.73).

"The key institution to address impunity is the judiciary, which must be supported by an independent investigative machinery and a fair legal system based upon universal principles of humans rights" (al. 75).

### CONCLUSIONS AND RECOMMENDATIONS

"Resorting to extrajudicial killings in order to fight terrorism is a worrying precedent and an issue of serious concern".

"There are growing reports of threats and extrajudicial killings

of journalists".

"Special forces, intelligence services and the military accused of extrajudicial killings often enjoy impunity and are rarely held accountable for their acts".

"Extrajudicial, summary or arbitrary executions often occur during the period leading up to a conflict and in many cases spill over into the post-conflict period. A greater focus and effort need to be concentrated on preventive actions".

"Regrettably, these warnings have not been responded to

effectively. A stronger system of response to early warnings must be conceptualised and made effective".

"The military should be used for internal security demands as a last resort, if at all. Special forces and intelligence agencies must be constantly kept in check and made accountable to a high committee or institution".

"Governments must end systematic and institutional impunity for those who kill women in the name of honour and so-called morality".

# Building Cooperation

COMMISSION on Human Rights (CHR) Resolution 2000/9 established the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (SR). The SR is charged with reporting on the situation of the right to adequate housing, promoting cooperation among and assistance for governments, applying the gender perspective to housing rights, fostering dialogue, identifying different types and sources of financing, facilitating the role of the UN with respect to the right to adequate housing, and reporting to the Commission on Human Rights. This mandate was subsequently reaffirmed and augmented in 2001 and 2002.

## The right to adequate housing within the UN framework

The strongest articulations of the right to adequate housing are in Article 25 of the Universal Declaration of Human Rights and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). They define the right to adequate housing, as does the mandate of the special rapporteur, as a component of the right to an adequate standard of living. Several other international covenants contain references to the right to adequate housing, including the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Migrant Workers' Convention, the Refugee International Convention, and ILO Conventions No. 115 and No. 169.

Yet exactly how does this right to an "adequate standard of living" translate into clear obligations for states with respect to "adequate housing"? The General Comments (GC) of the Committee on Economic, Social and Cultural Rights provide guidance. They also clarify that the right to adequate housing interpreted as a component of the right to an adequate standard of living does not preclude the right to housing from being a basic human right unto itself.

GC 4 on the right to adequate housing (1991) provides what many consider to be the most authoritative legal interpretation. Significantly, the Committee states that the right

to housing should be seen as the right to live somewhere in security, peace and dignity, rather than as a narrow provision that requires having a "roof over one's head" or that views shelter only as a commodity. In addition to identifying seven aspects that form the integral components to the right, GC 4 also sets out precise legal steps that governments must take in order to comply with their housing right obligations.

GC 7 (1997) reaffirms that forced evictions are *prima facie* violations of the right to adequate housing and outlines a series of procedural steps that must be taken in any instance where eviction is unavoidable.

More recently, GC 14 on the right to health elaborates what the Special Rapporteur refers to as the "holistic approach" to the right to adequate housing, referring to it in the context of "the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions ...".

Cross-references to the right to adequate housing can be found in other GCs, and other human rights treaty-monitoring bodies such as the Committees on CERD, the CRC and CEDAW have also taken note of it.

## The work of the Special Rapporteur

In his first report in 2001, the SR proposed the following holistic working definition of the right to adequate housing: "The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity". This definition does not, however, imply that states have an obligation to build housing for their entire population or provide it free of charge.

Much of the SR's to date work centres around the need to determine how this enabling environment can be measured and created. The most recent report, for example, contains a substantial section on developing rights-sensitive indicators and monitoring tools for realising the right to adequate housing. Two major studies are currently being developed, one on local responses to globalization in cities in the Southern Common Market (MERCOSUR) region, the other on women and adequate housing.

The SR has emphasised a cooperative

approach with states, based on dialogue rather than "naming and shaming." [see **interview below**]. Dialogue, however, does not imply a lack of criticism. During the interactive dialogue, the SR gave a scathing evaluation of the Israeli Government's policy with respect to housing in the occupied Palestinian territories. While considerable energy was devoted to discussing the SR's visit to the Occupied Palestinian Territories, dialogue resulting on his other two country visits, to Mexico and Romania, were more substantive than controversial.

## Moving ahead

There are two draft resolutions on the right to adequate housing this year: adequate housing as a component of the right to an adequate standard of living (sponsored by Germany) and women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing (sponsored by Mexico).

Regarding the former, the emphasis on the rights of disabled persons is particularly welcome, given recent developments on the creation of a draft convention on the rights of disabled persons. The resolution on women and adequate housing will show that the Commission supports and understands new initiatives which take a contemporary, integrated approach to applying the gender perspective to human rights.

Although some states still oppose the use of rights-based language in reference to adequate housing, many others have accepted the definition provided by the Committee on Economic, Social and Cultural Rights and other human rights mechanisms. Rather than reiterating the problems implicit in being obligated to respect, protect, promote and fulfill a right "to gain and sustain a secure home and community", they have begun the constructive task of understanding how the articulation of a "right to adequate housing" can provide a platform for enabling their poorest citizens to achieve an adequate standard of living.

In this critical period of refining methods for fulfilling this right, member states must consider whether they want to enable or hinder developments that can have a lasting impact on what are often the least empowered segments of their populations.

## 'My approach has a strong legal basis'

**Human Rights Features (HRF):** How has the insistence by the US that the "right to adequate housing" must be viewed as a "component of the right to an adequate standard of living", rather than a right on its own, affected your work?

**Miloon Kothari (MK):** The title of the resolution [containing my mandate] has of course not stopped me... My approach is still very much the right to housing approach which I have detailed in the first report. It has a very strong legal basis. And all the treaty bodies are using the right to adequate housing language. It has been used by other UN bodies. The Sub-Commission. Even the Commission in its resolution on adequate housing says rights. But I do think that it is unfortunate that this issue has not been resolved... It creates a kind of discrimination against housing...

**HRF:** How does this affect your work? You don't think your work is any different from that of the special rapporteur on arbitrary detention, for example.

**MK:** It doesn't. I've just ignored it. And I've received a lot of support from all the treaty bodies, civil society, UN agencies, other parts of the UN human rights system, the High

Commissioner's Office. And you know, we keep talking about the indivisibility of rights.

Whenever anybody talks about economic, social and cultural rights, it's always all of these rights. I suppose they wanted to get an entry point into the Commission. To challenge the whole set of rights. Which I think they want to do... Somewhere in the resolution it says rights related to adequate housing. So in the first line in the report we say "right to adequate housing."

What has helped is that because there is this

### INTERVIEW

Miloon Kothari

language of the adequate standard of living and the right to non-discrimination, it has supported my interpretation of the mandate, that it includes much more than housing. So for example, you cannot have the right to adequate standard of living without having access to water, sanitation, electricity and protection against occupation.

We have in fact been able to turn that around and use it to our advantage. It would still be nice to have a resolution that says the right to adequate housing.

**HRF:** What do you think of the draft resolution being circulated on adequate housing this year?

**MK:** It's OK. It was done in very close consultation with us. I would have liked to have a recommendation on holding an expert seminar and a few other recommendations to report to the General Assembly... The other new aspect is on this issue of disability.

**HRF:** Your visit to the Occupied Palestinian Territories was your first country visit. What prompted you to choose such a controversial issue for your first visit?

**MK:** It wasn't my choice. The CHR had a special session in October 2000. In the resolution it asks seven rapporteurs to visit the territories and to report back to the Commission.

So I was just following the Commission's [instructions].

**HRF:** How do you think the loss matrix in your study on gender will impact legal mechanisms involving housing rights?

**MK:** It in fact helps the mechanisms. Because what has happened so far in the work on

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# 'Dialogue doesn't preclude criticism'

## FROM PAGE 4

economic, social and cultural rights is that there has not been enough attention to monitoring and assessing the impact of violations on these rights. So what we are proposing in the housing area is that you have to look at the non-material and the material impacts: the psychological damage. The idea of coming up with the matrix was to be able to do that. So the matrix is now relevant. It has already been tested in a few places. Not only civil society of course has done it but also UN agencies. We will also be using it for the work on women and housing.

**HRF:** Do you think states realize that this matrix will effectively be adding "teeth" to existing mechanisms on the right to adequate housing?

**MK:** I have found in these discussions on the loss matrix and in the general discussion of indicators [that] we have actually got much further at the country level when we do the missions. When we meet with ministers at various levels and we share this methodology. We have got a very positive response... They tell us: OK, we want to implement the General Comments of the Committee on Economic Social and Cultural Rights but how do we do it? And here are some benchmarks that can essentially be used to assess the right to adequate housing. I think there's progress with this. There has been a very positive response from Mexico and Romania.

**HRF:** You mentioned in your statement that Romania is the exception in terms of its good use of a rights-based approach to adequate housing.

**MK:** They are the exception in that their national strategy on the Roma integrates the CERD dimension... But there also a number of other positive practices that we have come across in our country missions. It would be good if you could point them out.

**HRF:** Do you ever make the argument to states that in many ways housing as a negative right? The provision against forced evictions, for example, seems to lend itself best to being enforced in the courts?

**MK:** I don't see any need to limit the right. I really do think that we need to take the indivisibility approach. I do think that the most valuable aspect of economic, social and cultural rights is the positive aspect because of the realisation and drawing in civil society and looking for alternatives. The violations approach... could be one aspect but it should not be isolated. Because then you get other problems: states refusing to have a dialogue, other issues. But I don't think it should be an exclusive or a single approach.

I think the way to clarify states' obligations is through elaborating those indicators.

**HRF:** How do you think your view of housing has changed from being on the NGO side of things to being on the UN side of things?

**MK:** I think that this opportunity to be rapporteur... I have really decided to take a constructive approach. And that is very much what I have learned: that it may not be a good policy, which is often this knee-jerk NGO reaction, to always stress violations, to say our government is not doing anything, the UN is not doing anything.

I think that in this I am convinced that if you take a constructive approach and you are able to show governments-even governments that are against human rights-if you are able to show that it doesn't threaten their existence if they commit to human rights. And if you're able to show it through one right, or through certain aspects, then it can have benefits. This is what we've found...

It's been a sort of revelation, in a sense. [I]n the country missions, in the press conferences, in the meetings, I have been very very critical of their housing policies. Because that criticism is framed within the human rights commitment of the country and because the fact that they have invited me to visit indicates that there is a willingness to change, a willingness to share their problems, it has created a climate where all these governments have responded very positively to the criticisms, [and] to the

**If you take a constructive approach and you are able to show government - even governments that are against human rights - that it doesn't threaten their existence if they commit to human rights... if you are able to show it through one right, then it can have benefits.**

recommendations. And maybe that's the lesson: that we have to at times hold back, we have to try to draw people in instead of alienating them, we have to find a way to keep the dialogue going. Otherwise what happens very often in the NGO work is that... you don't really find a meeting point.

And I think that what the special procedures allow... is that it does in a way become a media-inner circle. We are in between. We are the creation of an intergovernmental system but we are independent. Many of us come from civil society backgrounds. And we work equally with civil society, UN agencies, and governments. There's no bias. And this comes up very sharply in the country missions. Just the fact that we go there creates opportunity for everybody to meet, and the dialogue continues.

This happened in Peru, for example, where there was a real problem of communication between civil society and government and

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because of the mission that has worked effectively. And civil society recognizes that that is the important part of the mandates.

And what is sometimes difficult but what we have to continue to strive to do as special rapporteurs and independent experts is to maintain the independence. I think that is really key. In a sense, if we're biased then the bias has to be to the human rights instruments, and to nothing else. And not to be swayed by other arguments, whether they're from civil society or government.

**HRF:** So do you find it equally hard to prevent yourself from being biased either towards the governments or to the NGOs?

**MK:** It depends on the situation. Obviously, the kind of work we do... In a way there is instinctive affinity with, I wouldn't say civil society but I will say people on the ground.

And very often in many countries, most countries, the main contact with people on the ground, essentially the grassroots work, is from civil society. But part of the role for us is to actually then bring the government to that reality.

**HRF:** Do you think the idea of constructive dialogue would work with all rights?

**MK:** Sure. Because if you draw the countries into their obligations under the instruments... it significantly changes the way they act...

I should say that constructive dialogue doesn't preclude criticism. We are very critical.

**HRF:** What would your advice be to NGOs then?

**MK:** I think that if NGOs come to the Commission or to treaty bodies with the sole purpose of criticising or raising violations, that of course has a role to play. But I think that NGOs should also attempt to have a dialogue with the concerned governments. But of course a climate has to be created first... Many governments will just say, "Oh, you're an NGO so I don't have to talk to you." But I think it may be possible. I think there should be more dialogue. There should be more stress in NGO statements on solutions.

And I also think that NGOs can use the special procedures more. I don't think they're used as much as they should be. Of course part of the responsibility is ours to contact NGOs. But I think that each of the special rapporteurs would definitely have more active connections with NGOs. And also I think that the other aspect that would help would be if there were more organised lobbies... For there to be coordination among NGOs to have an active advocacy campaign....

But I should say that the advocacy campaign and the lobbying should begin at home. Sometimes it's too late when groups come here. As you've seen, many governments come with quite a well-prepared position. And it's difficult to sway them... It would be very good if they could raise the issue at home, begin at home...

And the point I was making about constructive dialogue, providing solutions in the oral statement, that can also be done through distribution of materials. A lot of materials have just violation, violation, violation, which in circumstances may be justified but...

The part that I'm not able to come to terms with, that many of us have difficulty with, is how do you cut through the politics at the commission? The only thing I could say about that is... you must take an issue-based approach. You must be willing to have a strategy. You must say look, we're not here for results immediately but we're going to pursue this for some time.

And since you're asking about NGOs, I think that one of the other things that is probably lacking in the NGO work is that there hasn't been much of a focus on treaty bodies. A lot of people just show up at the commission, but some of the real work in terms of standard setting, in terms of holding states accountable, in terms of getting key issues and getting a response is in the treaty bodies. All treaty bodies have processes which NGOs can attract.

I think there has to be a wider strategy of engagement. And in that NGOs that have a wider array of experience obviously have a role to play with regards to training.

**HRF:** What do you see for the future of your work as special rapporteur?

**MK:** The next countries will be Philippines, Kenya. Brazil is a very strong possibility. But I would also like to visit a northern country. We have requested Canada. We are going to be focusing on children's rights to adequate housing on forced evictions.

And then of course I'm very keen that this resolution on women and housing is drafted so that we can continue the study on women and housing. Because that has become a strong part of the mandate, as it should be. And I think it has helped me to also focus in my mandate in general. And then we'll continue to follow the globalisation debate. We are considering joint statements with the WTO. Of course I'll continue to work on the privatisation issue and also with the treaty bodies.

## SR on VIOLENCE AGAINST WOMEN

**'SRs must be made part of mainstream'**

**A** 'VOICE of conscience' (de Mello) on issues of women's rights, Radhika Coomaraswamy of Sri Lanka has been Special Rapporteur on violence against women (VAW), its causes and consequences, since 1994. Her reports address domestic violence, VAW in the community and perpetrated by the state, trafficking, VAW in the context of armed conflict, and cultural practices constituting VAW; country missions covered military sexual slavery (North and South Korea), trafficking (Poland, Bangladesh, Nepal, India), domestic violence (Brazil), rape in the community (South Africa), (internal) armed conflict (Rwanda, Colombia) and post-conflict situations (Sierra Leone), VAW in prisons (USA), Afghan women, and response mechanisms (Haiti), intersectional discrimination (WCAR), and model legislation on VAW. Her final report, submitted to the CHR this year, outlines the 'state of the world' on VAW and the fight against it and reviews international, regional and national developments and best practices. Ms Coomaraswamy will now go on to chair the Sri Lankan Human Rights Commission.

**Human Rights Features (HRF):** In this year's report you find that the next decade must see compliance with and monitoring of the standards that evolved on VAW that you have helped evolve over the past decade. What support can local actors seek from the UN human rights mechanisms?

**Radhika Coomaraswamy (RC):** I think that now you have an international framework for monitoring. So I think to some extent working with the CEDAW Committee and the Special Rapporteurs by giving them information so that they can monitor at the international level. And maybe the agencies of the UN, of course, to some extent have to make this a priority because it has become one of the important issues for many of them. So if we could use that as well and try to get funding for women's programmes through some of the UN agencies and women's focal points.

**HRF:** How do you assess the level of awareness of women's rights issues across the UN human rights systems more than ten years after Vienna's mainstreaming push?

**RC:** I think we have to say that there have been a lot of activities if you look at the UN resolutions of the General Assembly, on migrant workers and trafficking, the CHR, UNICEF, ILO - this issue has come up in a big way. WHO has just done a study; there are two chapters on VAW. So there has been - at the level of standard-setting and awareness raising - some level of awareness that this is an important issue that has to be tackled. The question is: how do they operationalise it? I think that, in the field, the UN is not as active as some of the bilateral donors on issues of VAW. Maybe that can be more proactive in the next decade. And also in the Millennium Goals I don't think it is articulated enough.

**HRF:** How would you assess the system of the special procedures in terms of support received, cooperation, effectiveness and output? In which direction do you see the special procedures developing?

**RC:** I think the special procedures have to move beyond an *ad hoc* adjunct of the UN and become part of the mainstream structure. As you know we don't have passports. Even at the UN in New York we have to come in through the visitors entrance. There is a certain status issue as well on trying to mainstream us within the UN because we are seen too much as independent experts. And I think to do effective work perhaps the special rapporteurs would be made more full-time, some kind of support that allows

them to dedicate more time to the position. And, of course, more resources to the CHR so that they can do that. At the moment they just cannot afford to do that. So I think that is the most important thing. Governments complain that we do not do our work thoroughly but we do as much as we can.

**The Special Procedures have to... become part of the mainstream UN structure. As you know, we don't have passports. Even at the UN in New York, we have to come in through the visitors' entrance. I think [that] to do effective work, perhaps the special rapporteurs would be made more full-time... [receive] some kind of support that allows them to dedicate more time to the position.**

**HRF:** You locate "the greatest challenge to women's rights" in the doctrine of cultural relativism - yet the conservative backlash against women's rights comes also from those who disavow this doctrine. How do you think this curtails the universal progress achieved?

**RC:** I think that - as Charlotte Bunch said in the discussion - the problem of culture is something universal and that the women's movement is attempting to transform culture in every society so that it is less patriarchal. But I think there is one problem in that in certain societies culture is used by the governments to deny the universality of human rights. In some cultures the universality is accepted but people have a backlash. So I think it is those societies that I am addressing, those that deny the universality of human rights, towards which we perhaps need to develop sensitive strategies so that we don't create a backlash and that we work hard with.

**In certain societies, culture is used by governments to deny the universality of human rights. In some cultures, the universality is accepted, but people have a backlash. It is those societies I am addressing.**

**HRF:** At the Commission on the Status of Women, Iran, backed by Egypt and Sudan, opposed a yearly draft conclusion under which countries would agree to "condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination". The draft was not adopted - an ominous sign for the fight against VAW?

**RC:** I think there are two challenges to VAW, one coming from the Western countries and one coming from culture. The Western countries are challenging the framework that we evolved over the last decade to deal with women's human rights, which is violence by private actors and the due diligence standards that combats impunity of private actors and puts states under a duty to prevent and punish those commit violence.

There is this belief by some people in Western societies that this is criminal justice issue and not a human rights issue because the state is not the direct source of violence. Now of course we have to direct this framework on impunity. Otherwise we will have impunity, we don't have some way of holding states accountable for violence by private actors.

The other challenge comes from societies with different cultural frameworks than the Enlightenment that produced the human rights. This is the notion that culture trumps women's human rights. So these that the two big challenges, strangely coming from two different parts of the world.

**HRF:** It is surprising though that the CSW conclusions were not adopted.

**RC:** I think they are making a point the past approaches to this issue are something they want to challenge.

**HRF:** Brazil is tabling a draft resolution on 'Human rights and sexual orientation' at this session. Has the time now come for the UN to tackle this controversial area?

**RC:** I think so. I think it is an important issue, and I think that in time we can have a special rapporteur on sexual orientation.

**HRF:** In your opinion "the articulation of sexual rights is the final frontier for the women's movement" - how do you think it can be tackled?

**RC:** We have the Cairo language on sexual health and safe and satisfying sex life which perhaps creates the framework for some notion of sexual rights. As I do my research I find that a lot of the violence against women, whether it is honour killings, FGM or domestic violence, is to do with the regulation of female sexuality. So I think that the recognition of the sexual autonomy of women would go a long way in fighting violence.

**HRF:** What will be your priorities as the Chairperson of the new Sri Lankan Human Rights Commission?

**RC:** I think the priority for anyone working on Sri Lanka at the moment is how to ensure human rights in the peace process and also to some extent perhaps work on the new areas such as economic and social rights and develop problems in the post-conflict situation in Sri Lanka.

**HRF:** In your opinion, which of your country visits best illustrates the positive developments that your mandate has brought with it?

**RC:** I think for example in Poland, they have come up with a lot of the recommendations we have mentioned. This is true also to some extent of India, Nepal and Bangladesh with actions taken on trafficking.

**HRF:** You point at the ICC as a forum for progressive developments on violence against women, on issues such as consent - how do you see these influencing measures on violence against women at the national level?

**RC:** The ICC has now made sexual violence war crimes and crimes against humanity. So I think that the interpretation of these will be taken into consideration in national laws. But there are also the International Tribunals in the former Yugoslavia and Rwanda there is judicial construction of what is rape, what is enslavement, torture - interesting jurisprudential developments. Perhaps those interpretations will also affect national level jurisprudence.

**HRF:** The Office of the previous High Commissioner gave great impetus to addressing the issue of trafficking and sexual exploitation. In 2000, you expressed your worries with regard to the Protocol on Trafficking to the International Convention on Transnational Organised Crime. Have these been assuaged?

**RC:** To some extent: yes: Because the Protocol has come forward with a definition that, I think, tries to bridge the gap between all the different approaches to trafficking. It is not a definition that all sides are happy with but I think it is a minimum definition that all sides can live. Therefore I think it is very uniting. I have spoken to women on both sides of the debate - they are quite happy to work with the Convention.

So I think in the end it turned out to be a success.

EDUCATION

# Resolution drafters need to study harder

*The draft resolution circulated among delegations last week fails to follow up on the SR's recommendations*

MANOJ MITTA

ON the face of it, Portugal's proposed resolution on the right to education seems unexceptionable. But closer scrutiny reveals that, despite all its homilies and rousing rhetoric, the draft resolution does precious little to help fulfil the UN Millennium Declaration's goal of attaining universal primary education by 2015. It is indeed disappointing that the five-page draft resolution circulated last week among the delegations fails to follow up meaningfully on the recommendations made by the Special Rapporteur on education, Katarina Tomasevski.

This lapse is unacceptable given that the world has already suffered the ignominy of being nowhere close to meeting the 2000 deadline set with much hope and fanfare a decade earlier at a UN conference in Jomtien (Thailand).

The deadline was since extended to 2015 at the World Education Forum held in Dakar (Senegal) in April 2000. The need of the hour is to spare no effort to implement the Dakar Framework for Action. As Tomasevski put it, "It has not been possible to take any action in response to this betrayal because no mechanism had been provided to hold to account those who had formulated this pledge to deliver. There was no substantial improvement in 2000. The final document adopted in Dakar once again set noble objectives but avoided mentioning the means necessary to achieve them as well as the mechanisms necessary to address their non-achievement."

Portugal's draft resolution shares the failings of the Dakar document: a surfeit of noble objectives but no attempt to provide a mechanism to enforce the various measures needing to be taken around the world to meet the 2015 deadline. The rather anaemic draft suggests that Portugal is not too bothered about the fact that no serious effort has been mounted to make the Dakar vision a reality. The compromises it made in leaving out the tough steps that are called for gives the impression that Portugal has come up with the resolution not so much out of concern over the persistence of illiteracy as out of a desire to get credit for sponsoring a res-

olution on the subject. True, the draft does incorporate elements from Tomasevski's report. For instance, borrowing language from one of her reports, the resolution calls upon all states to adopt the necessary measures "to close the gap between the school-leaving age and the minimum age for employment."

In some cases, it even seems to go beyond Tomasevski's recommendations. Take the laudable clause urging states to use innovative approaches such as providing a minimum monthly income to the family of poor children attending school on a regular basis or free meals for school-going children. But any such pious sentiments are condemned to remain on paper because it lacks recommendations for accountability mechanisms. More importantly, the draft fails to lend support in any substantive manner to Tomasevski in the battle she has been waging so valiantly against all odds.

## **Here's a quick take on the various omissions and commissions in Portugal's draft which undermine its efficacy:**

Many states recognise the right to education but do not acknowledge the corresponding governmental obligation to secure that primary education is available to all school-age children, compulsorily and free of charge. The resolution does not dare bell the cat. While it provides for free education at the primary level, it skirts the all-important issue of casting an obligation on the states to do so.

Though the World Bank claims to be the "the single largest source of finance for education," it has failed to give due priority to primary education, which has received barely 30 per cent of education lending. Yet, the resolution makes no comment on the World Bank's education strategy nor on its role in the introduction of school fees in Africa in the 1980s.

The World Bank has espoused human rights criteria for school textbooks. "It is expected that book provision programmes financed by the Bank subscribe to the principles expressed in the UN's Universal Declaration of Human Rights. The Bank reserves the right to withdraw funding for books which can be shown to breach some provisions of that declaration." Endorsing

this World Bank policy, Tomasevski highlighted controversies that school textbooks raise for instigating, for instance, xenophobia as a mode of state-building.

In her latest report, the Special Rapporteur therefore recommended that "the process of preparing, using and assessing school textbooks be subsumed under the rule of law." Portugal nevertheless did not think it worthwhile to address the serious issue raised by textbooks.

One of the key aspects of the 2001 report was Tomasevski's exhortation to the World Bank to review its approach to education using human rights as the yardstick. She recommended "an internal review of all bank lending operations in order to identify departures from international legal requirements and undertake corrective action." As the first step, she suggested that an in-house review be carried out to check countries from charging fees for primary education. Subsequently, the World Bank submitted a draft study on school fees in June 2002 confirming their "detrimental impact" on the rule of law. Portugal did not deem it necessary to redress this situation.

The draft resolution has glossed over the growing impact of the trade law on the human rights law ever since education came under the ambit of the 1994 General Agreement of Trade in Services (GATS). Though the number of commitments on education received from various countries by the World Trade Organisation is the lowest of all service sectors, the Special Rapporteur noted that this development has established education as an internationally traded service, thereby eroding the human rights concept of primary education as a free public service. As she put it, "The question is whether we are heading towards progressive liberalisation of trade in educational services or progressive realisation of the right to education."

If the CHR adopts Portugal's draft without departing much from its current form it will only add to the growing number of redundant resolutions.

Given its critical importance for the state of human rights in the world, the mission to provide education to all deserves better support from the CHR.

## *Palais Intrigue*

### **Swiss roll-over**

The global 'war' against terrorism launched in the wake of September 11 seems to have engulfed even the traditionally 'neutral' Switzerland. This is evident from an order passed last month by the Swiss Asylum Appeal Commission directing four Sikh activists who have been staying peacefully in Switzerland for eight years to leave the country by 8 May 2003. Jasvir Singh, Karan Singh, Dalip Singh Khalsa and Harminder Singh Khalsa had taken refuge in Switzerland in 1995 after having served their sentences in Pakistan on the charge of hijacking an Indian aircraft in 1984. In their defence, the activists claimed to have engaged in hijacking purely to make a political statement about the Indian authorities' excesses in Punjab. The sudden decision by the Swiss Government to deport them after all these years is surprising especially because it has not been able to come forward with any evidence to support its conclusion that they constitute a threat to national security.

### **Letting it slip**

Diplomats of several countries conferred last week thrice to fine-tune a resolution proposed by Mexico to check the abuse of human rights in the course of the ongoing drive against terrorism. Given the sensitivity of the matter for all the countries concerned, the diplomats have been working on the draft with greater care than usual. But even after all those consultations, there is one surprising and rather serious omission in both the preamble and operative part of the proposed resolution. While it repeatedly refers to a General Assembly resolution passed in this regard in November 2002 (57/219), the draft makes no mention of the equally significant resolution passed subsequently by the Security Council on the very same subject of human rights and counter terrorism measures. When Human Rights Features brought this omission to the notice of the Mexican delegation, they reacted incredulously and asked for the number of the resolution. So, for the sake of the diplomats who have not done their homework properly, here are the details. The Security Council adopted Resolution 1456 of 20 January 2003 saying: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, in particular human rights, refugee and humanitarian law."

### **No longer too hot to handle?**

Judging by the number of mentions made on sexual orientation, this topic does not appear to be a taboo subject any longer. Supporters of a Brazilian draft resolution on 'Human Rights and Sexual Orientation' a first at the Commission can point to the acceptance of the term in last year's resolution on extrajudicial executions (Res 2002/36), sponsored by Sweden. The draft resolution itself calls for all UDHR rights with the exception of the right to marry (Article 16) to be ensured to "everyone without any discrimination as to her or his sexual orientation". Featuring "no new rights" (Brazil), it should in theory be entirely uncontroversial. Things are, of course, never so easy. But the resolution is apparently acceptable to the Holy See, a likely opponent, which worries only about the "risk of fragmentation and weakening of universal categories of discrimination" that could be a consequence of addressing violations against a particular social group.

## Thailand's 'anti-national' human rights commission

THE National Human Rights Commission (NHRC) of Thailand was constituted in July 2001, under the Human Rights Protection Act 1999. Two years into its existence, the NHRC has yet to develop the capacity to address the human rights situation in Thailand. The Thai government's criticism and unwillingness to grant the NHRC the independence that the Paris Principles deem imperative has raised serious questions about the body's efficacy and credibility.

The NHRC is largely a response to domestic criticism of the May 1992 military crackdown on massive pro-democracy demonstrations in the capital, Bangkok. In September 1992, the Cabinet of then Prime Minister Anand Panyarachun passed a resolution which committed the government to the setting up of a national mechanism for the protection and promotion of human rights. After two years of uncertainty and rigorous lobbying by NGOs, the establishment of a national human rights commission was finally mandated in Articles 199 and 200 of the new Constitution adopted by the government in October 1997.

Article 199 of the Constitution stipulates that the NHRC consist of a Chairperson and ten other members appointed by the King on the advice of the Senate from among persons having knowledge and experience in the field of human rights protection, and taking into consideration the inclusion of representatives of non-governmental human rights organisations. According to the Act, each member holds office for a term of six years from the date of their appointment by the King and serves only one term.

In the first two years of its existence, though beset by governmental attempts to cripple its effectiveness, the NHRC has shown signs of independence from the government by issuing statements critical of government policies. In 2002, the NHRC adopted a strong stand on the violent clashes between police officers and protestors against the Thai Malaysian Gas Pipeline Project in Hat Yai, Sangkhla province on 20 December 2002. In 2003, the NHRC expressed concern over the killings of more than 1,000 suspected drug dealers as part of a three-month 'war on drugs' launched by Prime Minister Thaksin Shinawatra in February 2003. The Nation newspaper reported that on the first day of the "war", four suspects were shot dead, 264 were taken into custody and 727,742 methamphetamine tablets locally known as 'yaa baa' or crazy medicine were seized. On 4 March 2003, nearly a month after the anti-drug operations began; the death toll had exceeded 1,100. Among those killed were an eight-month pregnant woman, a nine-year-old boy and a 75-year-old woman - all of whom had been unarmed.

Although Section 15 of the National Human Rights Commission Act in accordance with Article 200(1) of the Constitution empowers the NHRC "to examine the commission or omission of acts which violate human rights or which do not comply with obligations under international treatment to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts for action", the Commission has met with strong resistance.

The prime minister has made explicit remarks belittling the Commission and its members. Commissioner Dr. Pradit Chareonthaitawee has been labelled a "non-patriot" and a "whistleblower" and accused of "giving away Thailand's independence" ostensibly for expressing concern at a UN conference in Pakistan in March 2003 about the continuing drug war, the extrajudicial killings of drug suspects and the failure of the police to bring the suspects to courts. On 9 March 2003, in his weekly national radio address, the prime minister branded Dr. Pradit's comments "sickening".

Dr. Pradit has also been accused of "helping" the drug dealers. In March 2003, he

received anonymous death threats over the phone, in an attempt to prevent him from "communicating with the UN." The threats have included that of a "bomb being put under his car, methamphetamine tablets being sent to his house and of his house being burnt down."

In February Dr. Pradit was threatened with impeachment for comparing the prime minister to former strongman and dictator Field Marshal Sarit Tanarat, who garnered popular support for his regime with his shoot-to-kill policy against criminal suspects. According to the ruling Thai Rak Thai Party's legal adviser,

### 'The UN is not my father...'

PRIME Minister Thaksin Shinawatra has police working seven days a week and has threatened to punish ineffective officers with firings and demotions. In March he appealed to the public to understand the nature of the killings. "Human rights activists should care more about police lives, rather than the lives of traffickers". Although he has announced a willingness to accept the Special Rapporteur's visit, Prime Minister Thaksin nevertheless has stressed that rights concerns will not change his hard-line stance on drugs. "We don't think drug dealers' lives are more important than police lives," he said. "The government is firm in this (war on drugs) policy."

On 4 March 2003, *The Nation* newspaper quoted the prime minister as saying that the United Nations "is not my father. I'm not worried about any UN visit to Thailand on this issue. A UN envoy can come any time to make observations... don't worry, whoever wants to criticize, let them [continue to] criticize," he told reporters. Thai Interior Minister Wan Muhammad Nor Matha, who heads the anti-drug operation has endorsed the disappearances and deaths and has said that "it is better for the traffickers/dealers to die... They (drug dealers) should be put behind bars or even vanish without a trace... Who cares? They are destroying our country".

Wichit Plungsisakul: "Pradit's actions were biased and against national interests. Accusing the prime minister of being a dictator is an attempt to create political repercussions," Wichit said.

While Mr Pradit has challenged the move, saying it would show Thailand as being under "dark influences" of dictatorship, the NHRC has condemned the government's decision. According to Commissioner Charan Dithapichai, "such threats have rendered the jobs of independent agencies impossible to perform." He further added that "such a move is an indication of the government's hostile stance towards critics and independent authorities. If someone criticises the government, it orders MPs to sign an impeachment petition against that person," he said. NHRC Chairman Mr. Sanek Chamarik has strongly supported Mr. Pradit by saying that "monitoring and reporting on the anti-drug campaign independently was a duty of the Commission. Dr. Pradit had thus acted in his capacity as a Human Rights Commissioner and had rightly given the information about the anti-drug campaign to the UN."

Even as the NHRC unequivocally condemned the killings, and Amnesty International echoed this criticism, Prime Minister Thaksin has remained intransigent in his hostility to both domestic and international human rights concerns. (see box)

Police chief Sant Sarutanond, who as chief of the police force leads the frontline battle against drug trafficking, dutifully echoed Thaksin's new dictum by declaring during a TV interview that "people should stop worrying about what happens to drug traffickers." His blunt statement was supposed to be a rebuttal of the concern voiced by the NHRC. Though he assured the public that there was no policy of eliminating drug traffickers, police officers in the past two months have echoed their chief's tough talk. Surrender or die, said one. Pichai Sunthornsajjabun, a regional police commander, said he favoured a campaign to shorten the lives of drug traders.

On 14 February 2003, the prime minister admitted that 350 people had been killed in the

war on drugs, but fiercely defended the campaign against traffickers. Though the figure amounts to 25 deaths per day as per official estimates, Prime Minister Thaksin attempted to downplay the role of police in the killings, saying that only 13 suspects were shot dead by authorities.

The NHRC meanwhile has urged an immediate policy review and called for transparent and impartial police investigations "into every violent death." While Sections 22-26 of the Act gives the NHRC clear powers to investigate, mediate, secure cooperation, and propose remedies, but it is not clear whether the remedies will be enforced.

Commissioner Surasee Kosolnavin has stated that "all deaths should be investigated to avoid wrongful use of force and abuse of the law. The police investigators must look into these killings and tell the people what really happened." The NHRC urged the prime minister to investigate errors made in compiling the blacklists of suspected drug sellers or users. It remains to be seen whether or not the government will comply. At present, only three Thai police officers have been arrested on murder charges. In March the Interior Ministry banned the release of statistics on drug-related deaths, which has further raised concerns about extrajudicial execution and human rights violations. As constant and reliable information is the mainstay of any human rights commission, the government's reticence does not bode well for the NHRC's effectiveness.

The most crucial problem facing the NHRC is a lack of adequate resources. Article 75 of Thailand's Human Rights Act states that the government shall allocate an "adequate budget" for the "independent administration" of the National Human Rights Commission. The Act however does not specify how such adequacy will be measured, leaving its determination open to arbitrary government manipulation, depending upon who has the authority to decide what funds are sufficient. It is unclear as to how much say the NHRC has in determining how much money it will be allocated each year. The government-appointed NHRC secretary-general, who holds the purse strings, has done little to help overcome these obstacles. If the brief period for which it has been in existence is anything to go by, the commission has remained under funded and hindered by bureaucratic red tape.

Further, although section 23 of the Act provides that a complaint may be made orally or in writing and submitted at the Office of the NHRC, through registered mail, to a commissioner, through a human rights NGO to be referred to the Office, or by any other methods prescribed by the NHRC, there are no provisions in the Act for the establishment of branch offices around the country.

Among the other limitations of the Act are constraints on the NHRC's jurisdiction to investigate - the NHRC does not have the authority to pass judgment or impose penalties on anybody. The NHRC also has no power to compel persons and institutions to take action, for although it can report its findings and make suggestions on the issue, its only recourse if they fail to comply is to report to parliament and leave it to the public to exert pressure.

Despite these problems, there is cautious hope among many NGOs that the NHRC will check human rights abuses in the country. The Commission's willingness to confront the government indicates that the NHRC is taking its role seriously. If the NHRC can secure the cooperation and resources it needs to independently and thoroughly conduct investigations, it may prove to be a positive force for human rights in Thailand. With its first annual report due later in the year what the report chooses to state, examine or leave out will serve as a barometer of how the NHRC views or treats human rights issues in the Thai context.

National Institutions

# Philippines HRC: Yet to get off the mark

THE Philippine Commission on Human Rights is supported by executive orders and constitutional provisions. The Commission's budget is allocated by Congress and the Commission receives funding on an annual basis. Regional Commission offices are established throughout the provinces and neighborhood offices are being established at the grass roots level. Avenues of communication are open between these outlying offices and the national center.

The Paris Principles require a national human rights institution to be vested with the power to both protect and promote human rights. The Paris Principles further indicate that national human rights institutions should have as broad of a mandate as possible. This mandate must be clearly set forth in a constitution, or other legislative text, which specifies the institution's competence

The Commission's mandate is clearly expressed in the 1987 Constitution of the Republic of the Philippines, Article XIII, Section 17. In addition, further clarification and organisation is provided in Executive Order 163 and Commission Resolution No. A96-005. While the Commission is vested with the power to both protect and promote human rights, its mandate is restricted to civil and political rights.

Clearly, the list of powers granted by the Constitution to the Commission includes both the protection and promotion of human rights. The Commission's ability to protect human rights is found in the fact that Commission can investigate human rights violations on either its own initiative or on the complaint of any party.

In addition, the Commission must provide for legal services to the under-privileged. Also, the Commission has visitorial powers over jails, prisons, and detention centers. The promotion of human rights is found in Commission's mandate regarding human rights education. The Commission must promote human rights through recommendations to Congress regarding pertinent legislation and through monitoring the Philippine government's compliance with international treaty obligations.

From a procedural standpoint, the Constitution grants the Commission the ability to establish necessary operational guidelines and appoint officers/employees as needed. The Commission may also grant immunity from prosecution to those people who possess testimony or evidence needed to further an investigation.

On its face, the Commission's mandate is robust. The fact that the mandate is clearly set forth in the Constitution and backed by other supporting acts is an asset. The very existence of instruments which set out the organisation and mandate of Commission serves as national recognition of the Commission's role in the protection and promotion of human rights. However, only civil or political rights fall under the Commission's mandate. The Constitution makes no mention of economic, social, or cultural rights.

This restriction is in violation of the Paris Principles requirement that the Commission's mandate be as broad as possible. The last enumerated power, the ability to perform "such other duties and functions as may be provided by law," could be perceived as a back door through which the legislature could insert the protection and promotion of economic, social, and cultural rights. However, there is no indication that economic, social, or cultural rights will be added to the Commission's mandate.

The restriction of the Commission's mandate to political and civil rights was a deliberate choice made by the drafters of the Constitution. The Commission was instituted in

## Need to get clued in...

THE Paris Principles indicate that the individuals who compose a national human rights institution may be appointed by election or otherwise. The procedures by which members of the national human rights institution are chosen must ensure the pluralist representation of civil society involved in the promotion and protection of human rights. Specific groups that should be represented include non-governmental organisations involved in the promotion and protection of human rights, trade unions, concerned social and professional organisations (such as associations of lawyers, doctors, journalists, or scientists), representatives of trends in philosophical or religious thought, qualified experts and universities, and government departments.

In July 2002, Purificacion Valera-Quisumbing was appointed chairperson of Commission. She has some experience in human rights. However, she is the exception. Many Commissioners are lacking in a basic human rights background. In addition, the appointment process is a power of the President. NGOs perceive such appointments as political rewards which lead to dependence upon the executive. The appointment process should be re-evaluated to alleviate this fear. Congressional input, clear selection criteria, and compliance with existing appointment requirements will help Commission gain more independence in this area.

1987 and the International Covenant on Economic, Social and Cultural Rights entered into force for the Philippines in 1976. It seems unlikely that economic, social, and cultural rights were simply overlooked when the Commission's mandate was being drafted.

The Paris Principles require that national human rights institutions have an infrastructure which supports the smooth conduct of its activities. The Philippine Constitution sets out the Commission's basic organisational infrastructure. The Commission is hierarchical in nature, with the chairperson and Commissioners at the head of the organisation. Special projects and organisations within the Commission include the Child Rights Center, Barangay Human Rights Action Offices, and Regional Offices.

Philippine civil society is very supportive of the Child Rights Center. The Child Rights Center is recognised as a high functioning and effective organisation. While the Barangay Human Rights Action Offices are conceptually sound, civil society finds them to be poorly executed, trained, and supported. Regional Offices are recognised as an important entity in human rights protection, but they are perceived to be overworked, understaffed, and under-funded.

The Commission should examine the Child Rights Center and consider allocating more staff, funds, and other resources to support them in what is obviously well-respected and effective work. The Barangay Human Rights Action Offices program requires re-evaluation with an eye toward training of officers and support from Philippine civil society. Regional Offices are operating with much zeal and dedication for the protection and promotion of human rights. The Commission should communicate with Regional Offices to tailor their operations toward fulfilling the mandate handed down in the Philippine Constitution.

The Paris Principles require that a national human rights institution have funding sufficient to ensure the smooth conduct of its activities. In addition, the institution should have its own staff and premises. The purpose of this funding is to ensure that the institution is independent from government and is not subject to financial control which could affect its independence. Section 17(4), Article XIII of the Philippine Constitution requires that the Commission's approved annual appropriations be automatically and regularly released. This provision is repeated in E.O. 163, Section 5.

There are no review mechanisms in place to evaluate the Commission's performance. In place of these mechanisms, Congress seems to have turned to expenditure controls. The General Appropriations Act imposes restrictions on the Commission's decision making authority regarding specific monetary allocations within its budget. In addition, these expenditure controls are in violation of the

Philippine Constitution, Article XIII, Section 7(4). This section explicitly states that the Commission's approved annual appropriations must be "automatically and regularly released."

The Paris Principles indicate that a national human rights institution should submit to the government proposals and recommendations regarding legislative and administrative provisions relating to the protection and promotion of human rights. In addition, the institution should ensure that national legislation, regulations, and practices are in harmony with international human rights instruments to which the State is a party. The Philippine Constitution requires the Commission to recommend to Congress effective measures to promote human rights. The Commission is also required to monitor the Philippine government's compliance with international treaty obligations regarding human rights.

While the Commission has specific offices which participate in the national policy process, there is little outside awareness of the Commission's work in this area. Documents which are released have a limited circulation and impact. The Commission should seek to increase awareness among civil society of its current participation in the national policy process. After feedback has been gathered regarding current operations, the Commission should gradually increase participation to include reviewing Congressional bills on its own initiative.

The Paris Principles indicate a national human rights institution should investigate and report upon potential human rights violations at the request of government or an interested party. Also, the institution may investigate a potential violation on its own initiative, with no need for a referral. The Philippine Constitution and E.O. 163 mandate that the Commission investigate potential human rights violations on its own initiative or by referral from another interested party. The Commission has not been granted the authority to prosecute those cases which it investigates by either the Philippine Constitution or E.O. 163. Currently, prosecutorial powers are granted by the Department of Justice to lawyers within the Commission on an individual basis.

At this time, the Commission should focus on increasing the efficiency of current procedures. Expanding the current mandate to include prosecutorial powers would not be prudent. The Commission must resolve internal and external issues before seeking to take on more duties.

The Paris Principles indicate that a national human rights institution shall assist in the formulation of human rights education programs. In addition, the institution shall take steps to increase public awareness of all forms of discrimination. The Philippine Constitution and E.O. 163 echo the Paris Principles. While discrimination is not explicitly mentioned by either the Philippine Constitution or E.O. 163, it seems clear that such activities fall within the auspices of human rights education. A variety of Executive Orders support the Commission's activities in the area of human rights education.

While the Commission has implemented many human rights education programs, there are currently no evaluation procedures that gauge the impact of human rights education programs upon participants.

The Commission should begin testing the retention of concepts covered by participants during human rights education programs. NGOs, such as Amnesty International, have such evaluation programs in place. The Commission should turn to NGOs for assistance in this area.

# Fewer teeth for Australia's HREOC?

On 27 March 2003, the Australian Government introduced the Australian Human Rights Legislation Bill 2003 (hereafter the Bill) into the Senate which proposes to amend the legislation under which the Human Rights and Equal Opportunity Commission (HREOC) performs its functions. The provisions of the Bill have been referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 29 May 2003.

The HREOC is an independent national statutory body, established in 1986 by an Act of Parliament which investigates discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment, marital status, pregnancy or disability. The HREOC plays a central role in contributing to the maintenance and improvement of a tolerant, equitable and democratic society through its public awareness and other educational programs aimed at the community, government and business sectors. These programs provide information and strategies to promote the enjoyment of human rights in Australia. The HREOC strongly objects to the Bill which it believes will have a detrimental impact upon its ability to carry out this mandate.

First, HREOC's key point of contention is that the Bill would significantly undermine its independence in the exercise of its intervention powers as it requires the Commission to obtain the Attorney-General's consent before exercising its power to seek leave to intervene in court proceedings. This would apply unless the President of the HREOC was a federal judge immediately prior to appointment, in which case the Attorney General must only be notified and except in cases relating to the Federal Discrimination Act where the Commission is allowed to act as *amicus curiae* without seeking approval.

To date the intervention powers of the HREOC have permitted it, with the leave of the court, to present written and oral arguments in legal proceedings involving human rights and discrimination issues. The Commission

has used the function sparingly, seeking to intervene only where it considered a case raised a significant human rights or anti-discrimination issue that the parties would not present to the Court adequately, or at all.

In total the HREOC has used these powers in approximately 35 cases before Australian courts and tribunals and has never been refused leave to intervene. In a number of these intervention cases the Commonwealth has been a party to the litigation, for example in the recent Full Family Court case regarding the rights of transgender people to marry. The HREOC objects to the amendment on the grounds that, in such cases, it is inappropriate that a party to the litigation should also have a "gatekeeper function" in relation to potential interveners. It usurps the authority of the Court to determine whether it should grant leave to an intervener and create problems of conflict of interest by preventing the Commission approaching the Court directly. It may deny it the opportunity to argue human rights issues before the Courts in cases where the Commonwealth takes a different view to the HREOC and there is the possibility of the Commission being controlled politically.

Moreover, the Bill overlooks situations where the Commission may have a very real contribution to make in terms of its expertise and specialisation in human rights, even while the Commonwealth may be intervening in the matter.

The amendment is fundamentally at odds with the Commission's role as an inde-

pendent body with unfettered power in the realm of monitoring and promoting Australia's compliance with its human rights obligations.

The placing of conditions on the Commission's ability to intervene is contrary to the Paris Principles, which Australia played a key role in developing, and which provide that a national institution vested with competence to promote and protect human rights shall "freely

## ...more concerns

There are grave concerns about the proposal to abolish the role of the Aboriginal and Torres Strait Islander Social Justice Commissioner who is required to report annually on progress in recognition of Indigenous Rights and the latest reports to federal Parliament make some pretty extensive criticism of the government's approach. These make for pretty interesting reading when compared to the proposal to abolish the opposition, and to dispense with the need for a new deputy president to be indigenous or have any expertise in indigenous issues.

consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or any petitioner".

It was for this reason that the Senate Legal and Constitutional Committee recommended that a similar provision be removed from the Human Rights Legislation Amendment Bills 1 and 2, introduced by the Government in 1996 and 1998 respectively.

Second, the bill provides for the restructuring of the HREOC and its renaming as the Australian Human Rights Commission. The existing portfolio of Commissioners who are responsible for the areas of human rights, sex discrimination and the rights of indigenous people are to be replaced by three Human Rights Commissioners and headed by the newly-created role of President. The three Commissioners are to have overlapping responsibilities, which have yet to be identified. HREOC views this change as unproductive and unnecessary as its current structure provides a strong education and advocacy role for individual Commissioners and has received considerable community support since 1986. (see box)

Third, the Commission's power to recommend the payment of damages or compensation following inquiries into certain types of complaints is also to be removed.

Fourth, education and dissemination of information are proposed as the central functions of the revised HREOC, with the proposed intention of emphasising the message that human rights are everybody's responsibility, in an attempt to prevent discriminatory behaviour rather than reacting after it has occurred. Accordingly, a new slogan has been devised for the Commission: "Human Rights-Everyone's Responsibility".

Fifth, the Bill removes provisions for establishing a Community Relations Council and advisory committees and for other statutory consultative mechanisms which it believes are no longer required.

The Australian Government claims that

the Bill is the result of a detailed examination by the Government of the structure of the HREOC and past efforts at reform and that the changes will maintain and enhance anti-discrimination laws. It suggests that the revised structure will provide a more flexible framework to accommodate new areas of responsibility such as age discrimination, and manage the increasing incidence of issues which cross existing portfolio boundaries such as matters relating to women with disabilities. Those functions that are currently legislatively allocated to individual commissioners will be retained and will come under the general umbrella of HREOC responsibilities.

On the controversial subject of the reduction of intervention powers the Government claims that this will ensure that the wider interests of the Australian community are taken into account in the exercise of the intervention function as the Bill provides the Attorney-General with a broad list of criteria when considering whether to grant intervention.

On the matter of the removal of the HREOC's power to recommend the payment of compensation and damages the Government emphasises that the HREOC will retain its right to make practical recommendations to remedy or reduce loss or damage suffered by a person as a result of an act of discrimination.

The Government claims that this clause "will improve the balance between choices and remedies by encouraging parties to find practical and genuine solutions to their disputes rather than focussing on financial compensation". It suggests that non-financial remedies, such as apologies, can be equally if not more effective than financial ones.

However, the denial of financial powers removes this as an option which may offer the most appropriate form of relief to victims of discrimination who have lost their income as a consequence. At the least it denies the commission's discretionary powers to exercise and award the most appropriate form of compensation in each case.

Human rights lawyers and opposition parties have also reacted angrily to the proposed bill. They see it as shearing the powers of the HREOC and making its work more generalised, with themes such as education replacing its more concrete and practical powers of intervention and financial compensation. As Australia's pre-eminent body on human rights this is a worrying development. HREOC has, for 17 years, effectively fulfilled its mandate through its existing powers and structure and views these changes as restricting its ability to continue to do so.

The essence of the Paris Principles is that a national human rights institution should maintain, and be permitted to maintain, the independence and mandate that is essential for it to operate in an uncompromised manner. If any human rights body becomes subject to the direction and control by a government its effectiveness, integrity and impartiality are compromised and it will have no credibility in the eyes of those whose rights are to be protected.

The Bill amends five acts including the Human Rights and Equal Opportunity Act of 1986 and makes consequential amendments to 13 other acts. The alterations must be seen as at best unnecessary and at worst sinister.

The HREOC has rebuffed earlier attempts to limit its powers and a vocal lobby is forming to ensure that it does so again.

Interested parties are encouraged to make submissions to this effect to the Senate Legal and Constitutional Committee at [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au).

***The Australian Human Rights Legislation Bill 2003 seeks to amend five acts including the Human Rights and Equal Opportunity Act and make consequential amendments to 13 other acts. The alterations must be seen as unnecessary at best; at worst, sinister.***

***The HREOC has, for 17 years, effectively fulfilled its mandate through its existing powers and structure and views these changes as restricting its ability to continue to do so. It has rebuffed earlier attempts to limit its powers and a vocal lobby is forming to ensure that it does not do so again.***

IMPUNITY

# Truth Commissions: Peddling impunity?

RICHARD MOSIER

ON 7 April 2003, participants at a workshop on universal jurisdiction at the CHR asserted that universal jurisdiction should apply and prosecutions commence in all instances of torture and gross violations of human rights. A few participants, however, added the proviso echoed in the past by many in the human rights field: "prosecutions should commence unless the individual has been provided amnesty by a truth commission."

Basing universal jurisdiction and prosecution on whether an individual has been granted amnesty via transitional government or truth commission (an official body set up to investigate past human rights abuses) is a proposition that must be seriously questioned. Grants of amnesty and concomitant impunity (exemption or protection from penalty or punishment) will generally result in the violation of the victims' rights and may well be in violation of international law.

While the issue of truth commissions and particularised grants of amnesty is complex and properly reviewed only in a given context, it bears re-emphasizing what many in the human rights field have recently come to emphasize: amnesty for those who commit gross violations of human rights should rarely, if ever, be granted.

The reasons for questioning amnesty grants, whether issued by a truth commission or by the fiat of a ruling regime, are manifold. First, granting amnesty (read "impunity") to a human rights perpetrator is the victim's ultimate injury. As Dr. Jens Modvig pointed out at the CHR workshop, prosecution of those responsible for a victim's suffering is, for many victims, of central importance, and thus dispensing with prosecution is an irreparable injury.

Second, a grant of amnesty is likely to reinforce a culture of impunity because those with power realize that they need not incur punishment for the crimes they commit.

Third, granting amnesty via truth commission has led to a trend of sham "truth" commissions springing up wherever the powerful fear that the truth may lead to their reconciliation with a prison cell.

Fourth, even where truth commissions have been undertaken in earnest and have promised amnesty in only narrow circumstances, as in the case of South Africa, many perpetrators were never brought to justice and of those that were, some are now being granted amnesty, along with others who never deigned to testify.

This is not to say that all truth commissions are without benefit; some may be useful tools for salving national wounds and compiling evidence for future prosecutions. It is the trend that a truth commission will result in a grant of amnesty and impunity which is objectionable, as well as the myopic view of truth commissions that focus on past abuses while ignoring ongoing crimes. Finally, the granting of amnesty to a perpetrator of human rights violations may well be a violation of international law.

**Amnesty as Assault on Victims' Rights**

While not necessarily taking away the preferred form of reparation (though often prosecution is the preferred reparation), the inability to criminally prosecute a perpetrator may result in the ultimate injury to the victim.

As Dr. Modvig of the International Rehabilitation Centre for Torture Victims explained, a "truism that is often forgotten, not only by governments, but also sometimes by human rights workers, is that all victims are individuals."

Theo van Boven, UN Special Rapporteur against Torture, advocates that reparation should respond to the needs and wishes of the victims. The UN Human Rights Committee, the authoritative interpreter of the International Covenant on Civil and Political Rights (ICCPR), stated that blanket amnesty laws and pardons are inconsistent with the ICCPR because they create a climate of impunity and deny the victims their right to a remedy. In addition, impunity that is granted by or extends into a period of transitional democracy may be perceived as a profound blow by the victims because the decision to grant it is no longer in the hands of a dictatorial regime but is taken by a democratic government.

**Grants of amnesty, except in the most narrow circumstances and with the victims' consent, are violations of the spirit, if not the letter, of international law. As Jose Zalaquett has argued, "...it is not the prerogative of the many to forgive the commission of crimes against the few".**

## Amnesty Fosters a Culture of Impunity...

The granting of amnesty via truth commission or transitional government risks sending the wrong message: for those who

are dangerous and powerful enough, impunity awaits. When the powerful see that impunity may be acquired via state amnesty particularly a kind of impunity that has the semblance of legitimacy via truth commission they may be more likely to insist on such arrangements before ceding power.

## ... Which Fosters Sham Truth Commissions

To illustrate the above point in light of the much-touted success of the truth commission in South Africa, a commission that merits respect as the most earnestly designed arrangement short of justice spelled out as prosecution a spate of amnesty-for-truth commissions has sprung up to grant a good deal of amnesty while finding relatively little truth.

Some argue that where a fledgling democracy is shaky and prosecution threatens to provoke additional conflict, the best that can be done is to gather up the truth and release the perpetrators. But where the perpetrators are powerful enough to evade justice, can it seriously be considered that the truth, the whole truth, and nothing but the truth will emerge? In such cases, the official report of a truth commission may merely be 'truth omission'. The result is a history of partial truths, half-lies, and wholesale revisionism.

Furthermore, with the advent of the International Criminal Court (ICC), prosecutions are more likely than ever before. ICTY history serves as an indication of the future. Thus there were some who wanted to offer Mr. Milosevic a grant of amnesty in exchange for his resignation and peaceful departure into the night. Yet the hand-out of impunity was resisted, and Mr. Milosevic is now behind bars.

Where an amnesty grant may be a substitute to justice rather than a constitutive part of it, justice may well be better served by foregoing the "amnesty-for" clause of the "amnesty-for-truth" or "amnesty-for-departure" process and simply demand the truth and/or departure.

Of course, given that prosecutions are now a likelier option than ever, some argue that a country should feel freer to grant amnesty since prosecution will take place (sooner or later) regardless of an amnesty grant.

Not only is this a disingenuous position that is morally adrift - though perhaps anchored to realpolitik. It is also not yet clear how the International Criminal Court or other courts will weigh a grant of immunity-determinately, persuasively, or not at all.

## South Africa Doesn't Look So Good in the Morning

As Amnesty International has recently illustrated, there have been several problems with the South African experience, such as the delay in publishing the truth commission's report and political grants of amnesty. While the commission achieved some success in the form of investigation and revelation, early decisions to look the other way on abuses committed by those in power (in both the ANC and National Party) and by those who maintained their code of silence (the army, in contrast to the security forces) have led to impunity for many and injustice for the victims. And, of course, questions remain with regard to truth-and-amnesty commissions that do not leave the choice of prosecuting or forgiving to the victim.

## Grants of Amnesty Are Violations of International Law

Grants of amnesty, except perhaps in the most narrow circumstances and with the victim's consent, are violations of the spirit, if not the letter, of international law. As Jose Zalaquett cogently argued, the state's "obligation to hold the perpetrators of gross abuses accountable for their deeds cannot be ignored even if the majority wishes to do so.... It is not the prerogative of the many to forgive the commission of crimes against the few." Customary law and international covenants direct that crimes must be punished.

## Customary Law

The Restatement of the Foreign Relations Law of the United States suggests that a state is obligated to respect the human rights it has accepted under treaty or "that states generally are bound to respect as a matter of customary international law." As many jurists and scholars have argued, certain actions such as torture and gross violations of human rights are punishable regardless of state consent.

## International Law and Principles

According to the Nuremberg Tribunal, crimes against international law and humanity are committed by men and women, not by abstract entities. And

therefore only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The UN Human Rights Committee requires that a state which has engaged in human rights violations investigate the facts, take appropriate action, and bring those found responsible to justice, as well as treat and financially compensate the victim.

The UN General Assembly Declaration on Enforced Disappearances provides that persons who have or are alleged to have made people forcibly disappear "shall not benefit from any special amnesty law or similar measures that might exempt them from any criminal proceedings or sanction."

The Inter-American Court has declared that the state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

Article 26 of the Vienna Convention states that a states party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

The Genocide Convention and the  
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## Truth 'omissions'?

Convention against Torture contain explicit obligations to punish violators. The later also contains explicit obligations to punish violators and provides that "each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities."

The ICCPR provides that the right to an effective remedy for a human rights violation shall be "determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State."

The American Convention guarantees a right to judicial recourse to a competent Court or tribunal for protection against acts that violate human rights and specifies that the right to judi-

cial recourse exists, "even though such violation may have been committed by persons acting in the course of their official duties," and that any person claiming a remedy "shall have his rights provided for by the competent authority in the legal system of the State." The rights protected by the American Convention, however, may be restricted "in accordance with laws enacted for reasons of general interest..."

Amnesty via truth commission or state fiat should be resisted in all instances. Truth in exchange for amnesty may be the ultimate injury to a victim who has suffered unspeakable crimes. Further, resort to truth commissions may not be sufficient to discharge a state's duties under various instruments of international law. Only accountability via prosecution truly exemplifies respect for and adherence to customary and international law.

As the chairman of the Inter-American Commission stated in 1989: "A compact by which a whole nation is called upon to suspend its memories of torture, murder, forcible 'disappearances' of loved ones, a compact which

would have citizens pretend that the tragic losses and suffering which they have undergone never occurred, that ... is no bargain. This is not amnesty; it is forcible amnesia." Theo van Boven railed against forgetting and impunity, concluding "it is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators."

An apathetic and indifferent civil society inclined toward forgetting and expediency will condone by its inaction impunity for gross human rights violations and will wake from its stupor to find little support for its pleas that individual human rights offences should be appropriately sanctioned.

If we do not remain vigilant and determined in our rejection of truth-for-amnesty regimes in almost all circumstances, the human rights community will lose its suasive voice, and human rights law will lose its moral superiority, as states are likely to stand strong against impunity only when it is convenient for them to do so.

## 'TRC does not provide a forum to escape prosecution'

THE Truth and Reconciliation Commission established as required by article XXVI of the Lomé Peace Agreement of July 1999 that ended the armed conflict in Sierra Leone is set up to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement. The Commission is also required to address impunity, respond to the needs of the victims, promote healing and reconciliation and work to prevent a repetition of the violations and abuses suffered.

**Human Rights Features (HRF):** After a long and difficult journey, the TRC finally started its historic process in December 2002. Will the TRC be able to complete its operations and fulfil its mandate knowing that it has only a year to accomplish its mission ending in October 2003?

**William Schabas (WS):** The TRC is well advanced in its work and should be able to complete the mandate as proposed. The "statement-taking phase", which was scheduled to last three or four months, is nearly completed, and it has been highly successful. People throughout the country from all walks of life have come forward to talk about their experiences, both as victims and perpetrators. The statements are comprehensive and provide the TRC with a very strong data base from which to work. International consultants familiar with TRCs have told us that these statements are as good as anything that they have seen elsewhere, including South Africa, Guatemala, and so on.

The "hearings phase", which should have begun in February, will actually begin in mid-April so it is about ten weeks behind schedule. However, the final phase of the work of the Commission, which involves writing the report, can probably be done more quickly than the original four months that were allotted for this. In any case, if there are any delays towards the end, the TRC Act provides for an extension of six months, so some flexibility here was already considered when the whole project was initially conceived.

**HRF:** In 2001, the Commission started a large

public campaign to publicise its work across the country. Has this campaign succeeded in creating the public awareness necessary for the eventual success of the TRC mandate? How much is civil society contributing to the TRC process?

**WS:** This is one of those areas where there has been good and productive work, but where one can always do better. A lot of energy was devoted to public awareness, including village meetings, at which all of the Commissioners participated. Civil society is participating in a variety of ways. The seventy-five statement-takers of the Commission are drawn principally from NGOs that are well-implanted with the local populations.

**HRF:** The Special Court is in charge of the 'big fish'. However, the TRC mandate embraces the vast majority of Sierra Leonean perpetrators. In

the Special Court and the TRC. Because the TRC counts on voluntary testimony by perpetrators (although it has the power to compel testimony by subpoena), some may be concerned that self-incriminating evidence they might give could be used against them subsequently in a prosecution. Prosecutor Crane has indicated that he is not interested in using testimony or other information gathered by the TRC, and this has gone a long way to reassuring those who are unsure about whether or not they will talk with the TRC. It might be good for the Special Court to adopt a rule by which testimony given to the TRC could not be used to incriminate the person who gives it.

**HRF:** Since transparency is a necessary element of accountability, will the TRC provide information relating to the names of alleged perpetrators?

**WS:** This question has not been decided. Personally, I think it is probably a good idea. This is especially important in Sierra Leone, because the amnesty means that the vast bulk of the perpetrators will not be prosecuted. Yet surely this should not mean they will not be stigmatised.

**HRF:** How will the TRC address the issue of reparation for victims? What approach will the TRC have on the form of reparations? Did the TRC recommend guidelines to the government for reparations?

**WS:** The TRC does not have the resources to provide reparations. It has been quite clear about this from the beginning. Of course, it can make recommendations to the government on this, and the TRC Act obliges the government to implement the TRC's recommendations. It may be interesting to note that in the statements to the TRC that I have read victims did not seem to be focussed on reparations.

Rather, they answered with requests like: "I want my children to be educated", "I want materials to build a house", and so on. In other words, they did not see the way forward as being one of reparations in a legal sense, but rather one of better respect for the economic and social rights.

*this regard the TRC still deals with perpetrators of gross violations of human rights. How does the TRC concretely reconcile the objective of addressing impunity with that of providing perpetrators a forum to escape prosecution?*

**WS:** The TRC doesn't provide perpetrators with a forum to escape prosecution. Amnesty was granted in the 1999 Lomé Agreement, and it is the starting point of the TRC's work. The TRC counts on voluntary testimony from perpetrators, including the "big fish", and it has already found considerable willingness from those involved to come forward and talk about what they have done. But there is inevitable resistance. This may have more to do with the difficulty people encounter in speaking publicly about terrible things they have done, rather than fear of prosecution. Whether or not to prosecute before the Special Court is a discretionary decision that lies totally with the Court's prosecutor, David Crane.

There is an issue that is still somewhat unresolved concerning the relationship between

### INTERVIEW

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**Comments, suggestions  
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