

HUMAN RIGHTS

FEATURES

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Mistaking quantity for quality

The UN High Level Panel's recommendations relating to the CHR fall far short of expectations

GARETH SWEENEY

THERE are few who would express satisfaction with the working of the United Nations as a whole, and even fewer who would celebrate the present state of the Commission on Human Rights. The credibility and effectiveness of the Commission has eroded critically over recent years, to the point that it is now the domain of States generally denounced as systematic human rights violators. A Commission that is intended to be the primary body of international human rights protection has become a haven of protection from human rights accountability, all legitimised by the procedural shortcomings of the Commission itself. The election of Sudan to the Commission in 2004 provided the most offensive and publicly embarrassing case yet, allowing the African state to join an illustrious alliance with China, Cuba, Nepal, Pakistan, Zimbabwe and others in aiming, arguably, to derail the Commission by obstructing it from defending human rights.

Following the Security Council fallout over what many

perceived to be impotence in the face of unilateral aggression by the United States against Iraq, the UN Secretary General established a high level panel to assess means of improving the entire UN apparatus. The resulting report, entitled *A More Secure World: Our Shared Responsibility*, published in December 2004, offers what Kofi Annan described as "a unique opportunity to refashion and renew the United Nations [through] far-sighted, yet workable, recommendations." The panel also emphasised, throughout, the responsibility of protecting and promoting human rights as one of the central missions of the UN, and as being indivisible in the task of creating a comprehensive system of collective security.

It is all the more lamentable on these grounds that the Panel did not apply the same rigour as elsewhere in its recommendations for

reforming the Commission on Human Rights, despite the accurate overview that "the Commission on Human Rights suffers from a legitimacy deficit that casts doubts on the overall reputation of the United Nations."

Amongst its recommendations the High Level Panel presents some incontestable facts. Predominating is the contradiction that the Charter obligates the UN to protect and promote human rights as central to its purposes and principles, yet allocates a mere two percent of its regular budget to do so. The incapability of the Office of the High Commissioner (OHCHR) to perform its functions on account of impossibly tight financial strictures therefore needs to be addressed without delay.

The suggestion that the High Commissioner prepare an annual report on the situation of

human rights worldwide would also be useful and would carry sufficient weight. This would be reasonably easy to assemble, given the range of materials that the Office has at its disposal from various sources.

Likewise, there is no reason that the Security Council might not adopt the recommendation of the Panel that the High Commissioner be more actively involved in its deliberations. The High Commissioner has done so in the past, but a formal and direct involvement through reporting on the implementation of human rights related provisions of Security Council resolutions would significantly strengthen internal ties and the mainstreaming of human rights into UN decision-making.

The Panel regrettably failed to apply this reasoning to OHCHR interaction with the Counter Terrorism Executive Directorate. It could have recommended formal interaction between the two, strengthening what is at the moment only an informal "liaison". The Panel's omission in this regard is perplexing, particularly in view

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Rights recognised but gaps remain

GARETH SWEENEY

LAST year's *Human Rights Features* opened its account on the subject of counter-terrorism and the protection of human rights by detailing the collective incapability of the relevant UN monitoring bodies to adequately address the subject. It also accounted for the unprecedented erosion of fundamental and non-derogable rights in the name of counter-terrorism, equally applicable this year, following the events of 11 September 2001.

This occurred primarily because of the Security Council's failure to incorporate an express requirement for adherence to international human rights law within resolution 1373, which otherwise represented an uncharacteristically dynamic response to events. This was subsequently read as an invitation by certain States to suspend the

protection of human rights in the name of countering terrorism, as if a certain polarity existed between the two. In so doing, the Security Council forsook the very rights and freedoms that the UN is obligated to protect under the principles of its own Charter. It also contributed to the terrible irony that, to quote Kalliopi Koufa, "regional or international action that deviates from human rights and humanitarian norms also possibly plays a role in establishing a climate in which acts of terrorism are attractive remedies when legitimate grievances are unanswered or inadequately addressed."

The cumbersome task of rectification is only now beginning to assume any substance. This may be accredited to the welcome turnaround by the Security Council in 2003, under resolution 1456 requiring that "States must ensure that any measure to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance

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Counter-terrorism & Human Rights

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Is the empire striking back?

MR. RAVI NAIR, Executive Director of the South Asia Human Rights Documentation Centre (SAHRDC), which brings out *Human Rights Features*, has been unable to join us in Geneva as planned, as we go to press. On 28 February 2005, Mr. Nair, an Indian passport holder, had applied for an additional passport booklet to replace his used-up booklet. The application was filed under a fast-track scheme ('Tatkal') that allows for early processing.

Mr. Nair was given a written confirmation that he could collect the fresh passport booklet on 4 March 2005. Eight days later, as on 12 March 2005, he has yet to receive it. Numerous communications sent to the Chief Passport Officer of the Government of India have been futile.

A few days' delay is considered normal in India with its notorious record of bureaucratic inefficiency. However, a prolonged delay of this kind may mean more than an innocuous bureaucratic slip-up.

Watch this space.

- HRF Team

from page 1...

Counter terrorism: A permanent monitoring mechanism is required

with international law, in particular international human rights, refugee and humanitarian law." Worthwhile developments have taken place during the past year, but these are incremental. The new High Commissioner and the Executive Director of the Counter Terrorism Executive Directorate (CTED), Mr. Javier Ruperez, held their first meeting in New York on 10 January 2005, whilst the Commission's Independent Expert and Mr. Ruperez will meet this March in Madrid.

Mr. Ruperez has also spoken vociferously of the fact that "human freedom must be respected by those who are combating terrorist groups" and that "every time we stand up for human rights and fundamental freedoms we stand against terrorism", at the UN-sponsored conference on counter-terrorism in Riyadh in February 2005. Yet, meanwhile, the deliberations of certain parties within the Commission on Human Rights (CHR) indicate that a quagmire is the intended outcome amongst those who fear scrutiny. Rumours have already circulated that India proposes to introduce a resolution this year designed to scupper any attempts at advancement on last year's Mexican resolution on counter-terrorism.

It is therefore critical that the Commission this year discard these encroachments, acknowledge the import of its responsibilities, and act upon them.

Developments of the Counter Terrorism Committee in 2004/5 (CTC)

By asserting from the outset that "monitoring performance against other international conventions, including human rights law, is outside the scope of the CTC's mandate", the CTC annulled what should have been a *de rigueur* component of its work. And despite a change of language by the CTED in recent times, evident for instance in the pronouncements of Mr. Ruperez at the recent convention on terrorism in Riyadh, the CTC has been very slow to implement a human rights component.

The establishment of the CTED in March 2004, empowering the CTC to strengthen technical assistance to States and enhance co-operation, did not expressly provide for the requirement of a human rights expert. Rather the proposals of the CTC reiterated that its Assessment and Technical Assistance Office would continue to "liaise" with OHCHR.

It was only in September 2004 that the CTED "advised OHCHR of its decision to proceed with recruitment of a staff expert on human rights, humanitarian law and refugee law, which had been recommended by OHCHR as well as several States and non-governmental organizations." This is a welcome decision. Yet the reason why it has taken this long for the CTC to acknowledge these recommendations, including from members of the Security Council, is not provided. Nor is it yet clear what time-frame one can place on the task of "deciding to proceed with recruitment". It appears that interviews are expected to begin this month, with the post remaining vacant for another 2-3 months. To date, we can only await developments.

Contributions of Other Relevant Bodies

The above-proposed appointment, however, only serves to monitor States' compliance with resolution 1373, and state reporting and co-operation with the CTC as aspects of this compliance. One individual is not sufficiently capable of monitoring the universal impact of counter-terrorism and human rights on his or her own. The contributions of human rights procedures are therefore imperative.

The arguments that existing procedures of treaty- and Charter-based bodies are sufficient to monitor the impact of counter terrorism measures on human rights is redundant and does not warrant detailed analysis here. Treaty monitoring bodies are not universal in their overview, are limited to (often overdue and outdated) State party reports, and may only assess those provi-

sions relative to the content of each individual report. Special Procedures are likewise constrained by the "circumscribed and particularized nature" of their mandates and do not cover every aspect relevant to counter terrorism. And whilst the decision of the Sub-Commission in Resolution 2003/15 to work towards the elaboration of detailed guidelines on counter-terrorism and human rights is commendable, it is limited by the terms of the Sub-Commission's present mandate, which prohibits it from undertaking country-specific monitoring.

These limitations are well known, and have been detailed by the High Commissioner, Secretary General, the joint statements of the Special Procedures and Chairpersons of the treaty monitoring bodies, and the Commission's Independent Expert on counter terrorism. Nonetheless, this has not stopped certain recalcitrant member States' from complaining of a proliferation of mandates and a lack of availability of resources.

Australia, for instance, remains steadfast in its conviction that treaty-monitoring bodies

A permanent international mechanism needs to be established by the CHR to monitor the impact of counter terrorist measures on the protection of human rights. The High Commissioner in her report to the GA has already detailed areas in which deficiencies exist, to which a working group, and not merely an independent expert can apply itself on a permanent basis.

"have sufficient scope within their existing mandates to address the compatibility of national counter-terrorism measures with international human rights obligations."

And yet, at a conference convened in Geneva on the subject on 23-4 October 2003, when Nigel Rodley and Martin Scheinin from the Human Rights Committee, Fernando Mariño Menendez from the Committee against Torture, and Kurt Herndl from the Committee on the Elimination of Racial Discrimination, somewhat more of authorities on the subject than the Australian government, can attest the very opposite, then clearly there is a problem.

The Independent Expert on the Protection of Human Rights While Countering Terrorism

The most promising development in the field has come about through the appointment of an independent expert on counter terrorism and human rights to assist the High Commissioner, established through Mexico's resolution 2004/87 at the 60th session of the CHR. The resolution follows from Mexico's other resolutions on the same subject adopted regularly at the General Assembly and the Commission since the 57th session of the General Assembly in 2002, and was very carefully crafted to deflect from the usual stalling tactics of certain member States. At last year's draft meetings, these countries included China, the United States, India and Australia.

Their arguments against an independent expert revolved around the illusionary obstacles of time, money, inconsistency as to the express role of the expert, and the proliferation of special procedures. Mexico persisted in explaining that this was not a decision in the traditional mould to establish a Special Rapporteur, but to establish an independent expert to assist the High Commissioner, and in so doing strengthen the existing mechanisms already in place. This is only for a preliminary one year, and is subject to review at the 61st session.

The adoption of resolution 2004/87 by consensus, despite the best efforts of India to introduce two oral amendments that were only narrowly defeated, a possible precursor to their alleged attempts this year to formulate a counter-resolution, manifested what the International

Commission of Jurists (ICJ) last year described as a "positive, if very modest, step forward."

The preliminary statements of Mr. Robert Goldman, elected as Independent Expert on Counter-Terrorism in July 2004, attest to the above viewpoint. Mr. Goldman pinpointed the enormity of his task at his address to the General Assembly in October 2004 by explaining that the length restrictions imposed on his report of 29 pages, compared for instance to the Inter-American Commission on Human Rights' (IACHR) report on Terrorism and Human Rights, which amassed over 300 pages, could not possibly encompass the issue, and that the resultant report due before the Commission would be extremely dense and technical. (The contents of this report shall be reviewed in a subsequent issue of *Human Rights Features*).

All of this points toward the requirement that a permanent international mechanism be established by the CHR to monitor the impact of abusive counter terrorist measures on the protection of human rights. The High Commissioner has already detailed the areas in which deficiencies presently exist in her report to the General Assembly, to which a working group, and not merely an independent expert, could apply itself on a permanent basis.

These include: the principle of *nullem crimen sine lege* and the dangers inherent in an overly broad definition of terrorism in national legislation; extraterritorial detention and interstate transfer of persons; aspects of the right to fair trial, including the withholding of information from the accused, the right not to be compelled to testify against oneself, limits on *habeas corpus* and similar remedies, limits on access to counsel, indefinite detention without trial, and disregard for the presumption of innocence; rights to privacy, property, association and assembly; and human rights provisions in emergency situations and during armed conflict. The public knowledge of such transgressions in the last year does not need reiteration here.

Conclusion

The ruling of the British Law Lords on the incompatibility of the United Kingdom's use of indefinite detention without charge with its obligations under the UK Human Rights Act and international human rights law illustrated a very salient point. Despite the ruling of the Law Lords at home, the CTC had at no point commented on this egregious anomaly of UK counter terrorist legislation. Nor were the UN human rights monitoring mechanisms in a position to comment in any concerted manner, even after the fact.

Given that this behavior is not limited to the UK alone, but exists on a near global level in unapologetic contravention of customary international norms, the scale of the crisis becomes more apparent.

Thus, preemptively, any counter-resolutions such as those rumoured to have come from India, require immediate rejection. The Commission should then, at the very least, prepare to extend the mandate of the Independent Expert on Counter Terrorism for an indefinite period. He or she should be elevated to the status of Special Rapporteur, and not be confined to thematic studies but also be entitled to conduct *in situ* visits.

In principle, although this is not a concept the Commission is known to fully embrace, it should come to terms with the recommendations of all experts in the field rather than pretending not to comprehend them. The Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism, submitted by the ICJ to the Commission last year and endorsed by over seventy human rights NGOs worldwide, provides a sound basis.

The task of strengthening the existent resolution shall fall to Mexico. One can only hope that they choose to strengthen it in the way they know it needs to be strengthened, and lobby well accordingly.

Report on the OHCHR Briefing for NGOs - 8 March 2005

A pre-CHR briefing was organised for NGOs by the Office of the High Commissioner for Human Rights on 8 March 2005. The Expanded Bureau of the 61st session of the Commission on Human Rights was present, along with representatives of the OHCHR Secretariat.

The following issues were discussed:

Speaking times:

The Chair noted that the Bureau would continue the practices of last year in relation to NGOs.

On speaking times, the arrangements would be similar to the ones in previous years. The speaking time for NGOs therefore is three minutes. NGOs can deliver six oral statements during the session.

If NGOs make joint statements the following speaking times apply:

- 1-2 NGOs - 3 minutes
- 2-5 NGOs - 4 minutes
- 6-10 NGOs - 5 minutes
- + 10 NGOs - 6 minutes

The Chair noted that the list of speakers would be closed at the end of the debate of each agenda item and that no flexibility would be shown.

High-level segment:

As was the case last year, NGOs cannot participate during the High Level Segment and no parallel events may take place during this segment.

The Secretariat informed the gathering that the draft timetable would be adopted as soon as possible, perhaps on Monday, 14 March 2005. Some 97 dignitaries are already slated to speak during the High Level Segment, although changes are still being made to the timetable. The list of speakers and the timetable will be made available at the end of the week.

Two continuous sessions

It was stated that on Tuesday 15 March and Thursday 17 March, the session would run from 10:00 am to 6:00 pm without interruption.

Special Procedures:

The Secretariat informed the meeting that 24 March, 31 March and 6 April would be reserved for the Special Procedures and that any parallel events on those days must involve the participation of the Special Procedures.

Written statements:

It was noted that NGOs have submitted more than 340 written statements for the 61st session, which is the largest number ever processed.

Orders of the day:

One NGO inquired whether the orders of the day would reflect NGO events and also requested that no restrictions on the title of parallel events be made. It was also requested that the process be as transparent as possible.

The Chair replied that the Bureau would continue the practice of previous years and that the order of the day should be a tool for all stakeholders to be able to know what is taking place. A representative of the Secretariat stated that the expanded order of the day would be used to provide as much information as possible. However, she noted that there were times when restrictions on titles would have to be made.

Agenda item 3:

The Secretariat stated that the expanded Bureau would be discussing the situation in Darfur later in the day as Item 3 had already been opened.

On Item 3 it was stated that NGOs could only speak on Colombia or Sudan.

RIGHTS AND WRONGS

Look hard

"The Bush administration enthusiastically congratulated itself this week for including abuses by Iraqi authorities in its annual report on human rights violations. One State Department official called it proof that "we don't look the other way." But the report did look away - from American involvement in the mistreatment it decried. In the end it was another sad reminder of the heavy price the nation has paid for ignoring fundamental human rights in Iraq, Afghanistan and Guantánamo; in the secret cells where the C.I.A. holds its unaccounted-for prisoners; and at home, where President Bush continues to claim the power to hold Americans in jail indefinitely without the right to trial... The administration's refusal to remedy these abuses - or even acknowledge most of them - leaves the 2004 human rights report heavy with irony and saps its authority."

- Excerpt from an editorial in *The New York Times*, 3 March 2005

Message for the king

"India should not fall into the trap of the king using China or the Maoists as a blackmailing counter. For one thing, the future of Nepal will hinge upon addressing the grievances that have given rise to the Maoists. Defeating them will require a political strategy that incorporates some elements into a political process. But military might alone will not do the job. More important, nothing the king is doing seems to be an effective measure against the Maoists. It is perverted logic to suppose that cracking down on civil liberties, arresting journalists, using the security apparatus to impose martial [law], or violating human rights with impunity, has anything to do with fighting the Maoists. If anything, these measures will only deepen the monarchy's legitimization crisis. They are signs that

the king has no real strategy to deal with the Maoists... [T]he message has to go out that if Gyanendra does not restore democracy immediately, his time will be up."

Excerpt from an editorial in *The Indian Express* (New Delhi), 10 March 2005

IACHR's Special Rapporteur on the rights of persons of African descent

THE Inter-American Commission on Human Rights (IACHR) has announced the creation of a Special Rapporteurship on the rights of persons of African descent and on racial discrimination. The functions of Special Rapporteur were assigned to Commissioner Clare K. Roberts, recently elected President of the IACHR, according to a press release issued by the IACHR on 25 February 2005.

The release added that the Special Rapporteurship would "dedicate itself to activities of stimulating, systematizing, reinforcing and consolidating the action of the Inter-American Commission on the rights of people of African-descendent and racial discrimination."

The core objectives of the Special Rapporteurship would include work with OAS Member States "to generate awareness of the states' duty to respect the human rights of afro-descendants and on the elimination of all forms of racial discrimination; to analyze the current challenges that confront countries of the region in this area, formulate recommendations designed to overcome the obstacles and identifying and sharing best practices in the region with respect to this matter; to monitor, and provide any technical assistance requested by member States in the implementation of the recommendations in national law and practice."

(<http://www.cidh.org/Comunicados/English/2005/3.05eng.htm>)

NEPAL

This emperor has no clothes

The international community must not be taken in by royal blather on imagined deadlines

NEARLY two and a half years ago, in October 2002, Nepal's King Gyanendra rudely kicked aside the democratic ideal that Nepal aspired to, and indeed, had grown to cherish, and dismissed the elected prime minister to impose direct rule by the palace. The stated reason was the failure of the elected government to curb the Maoist insurgency.

In his most recent action in February 2005, in a deftly engineered coup, the king dismissed the same prime minister for the same reason and declared a state of emergency. Meeting the US Ambassador to Nepal some days later, the king reportedly pledged to restore democratic freedoms within 100 days. It is unlikely, however, that the monarch will be found ticking the days off his calendar. If kings gave themselves deadlines, Nepal would have found itself well on the road to substantive democracy long ago. King Gyanendra is more likely to continue playing the favourite game of inveterate despots - that of moving the goal posts.

Rather, the international community would do well to adopt the 100-day time-frame as its own. The struggle to retrieve the gains of democracy will be a long one for Nepal's citizens and democracy activists. The rest of the world, in the meantime, can take some immediate steps to demonstrate that its early rush of outrage at the king's act will not taper off into an aimless, wait-and-watch approach.

Time to act

The belief among certain sections that India supports the king is fallacious. New Delhi's immediate response to the king's action was to describe the coup as "a serious setback" and to restate its support for multi-party democracy and constitutional monarchy. Cynics must instead focus on evolving a comprehensive plan of action that can be propelled onto the policy agendas of governments, including New Delhi's. This must include the suspension of military assistance and of non-essential aid, smart sanctions, forceful statements of condemnation at multilateral fora, and lastly, initiatives to help edge Nepal's polity back towards democracy.

Early into the crisis, India had made some preliminary noises about suspending military assistance, engaging with the international community to initiate moves to help restore democracy in Nepal and opening lines of communication with the Maoists. These were reasonable suggestions. Later, however, New Delhi took to vacillating, finally recalling its ambassador and settling on the unhelpful policy formulation of keeping "the issue of defence supplies constantly under review". Media reports in late February claimed that India had finally halted all military assistance to Nepal.

South Asia's biggest country and the world's largest democracy will, however, have to do better than that.

The other major player, the United States, recalled its ambassador but is yet to describe the king's action as a coup, for this would enable economic and military sanctions to kick in automatically. It is unclear what Washington is waiting for. The UK and the EU have also recalled their ambassadors, and have delivered suitable warnings.

The time for concrete and comprehensive action is now. Part of the king's confidence stems from the ambivalent attitude of China and Russia to the coup. The failure on the part of India, the US and other concerned countries to act quickly and decisively will only embolden

the king and give him the space and time required to reach out to countries and groups that have little interest in the democratic project.

China is unlikely to risk antagonising heavyweights like the US and the EU by fishing in Nepal's troubled waters. However, it would be unwise to leave the king free to seek adventures in the region, however delusive they might be.

These must stay in place until the emergency measures are lifted, fundamental rights restored and concrete steps taken towards the restoration of democracy in Nepal.

To start with, India, the European Union and the US must immediately impose a travel ban on the king, his family and all the ministers and officials of the newly appointed government. In addition, all international assets of the Nepal government must be frozen.

Non-governmental organisations in the US, EU and other countries must lobby for legislation to impose punitive fines on governments that continue to maintain trade links with Nepal on the lines of the Helms-Burton Act in the US. The US Government must initiate a Nepal democracy motion in the US Congress on the lines of the North Korea Human Rights Act, 2004.

The UK has suspended military training for the Royal Nepalese Army following the coup. The US, however, is yet to follow. As with defence supplies, the halting of military training will send a strong signal to the king and to the army, which, for its part, has failed to incorporate the human rights training it receives - as part of US military assistance - into its activities.

The king must also not be given reason to believe that the furore will die down and that the world will overlook his actions in the interest of Nepal's grim humanitarian problems. While essential aid must continue, the next annual meeting of the Nepal Development Forum - the aid consortium on Nepal - must resolve to curtail all non-essential aid to Nepal if by that time the emer-

gency has not been lifted and fundamental rights not restored. From their influential seats on bodies such as the International Monetary Fund (IMF), the World Bank and other international financial institutions, representatives of India, the US and the EU could launch an attack - one that the king will find hard to deflect - by voting against every loan, grant or motion for technical assistance for Nepal. Finally, essential aid should be routed through Nepali non-governmental organisations and international aid organisations. It must not be channelled through the government.

At the CHR

India, the US, the EU and Japan must jointly draft a resolution condemning in the strongest possible terms the action of the king. The resolution must also demand the restoration of fundamental rights, the release of political detainees, and concrete steps towards the restoration of democracy. The world's primary human rights body has, in the past, failed to adequately face up to the situation in Nepal. During its 60th annual session in 2004, the Commission on Human Rights came out with a lame statement that refused to roundly condemn the ongoing human rights abuses. Instead, it welcomed the "commitment" of the government of Nepal to fulfil its human rights obligations and supported UN efforts "aimed at developing technical assistance and advisory services" to facilitate human rights monitoring.

Perhaps, if the Commission had seen it fit to draft a stronger statement in the form of a resolution, the king would have received a clear indication, in advance, of what the world thought was wrong with his country. However, human rights is often furthest from the minds of government representatives at the CHR. Calls for a resolution went unheeded as the US

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Japan: Shortchanging democracy

INDIA, one of the biggest suppliers of arms and assistance to the Nepali military, confirmed that it had stopped all forms of military aid - totaling approximately US \$93 million in the past three years - on 22 February 2005, three weeks after the royal putsch by King Gyanendra. Similarly, Britain suspended a US \$2.5 million military aid package to Nepal in the wake of the coup. Even the United States had to 'warn' Nepal of a potential withdrawal of civil and military aid, although of course no decision has yet been taken to that effect. Most recently, the World Bank has decided to freeze aid to Nepal in the form of the Poverty Reduction Strategy Credit (PRSC), until it is evident that the Nepali administration is capable and willing to undertake 'much-needed reform' and is able to fully implement ongoing projects.

Many countries, in addition to the European Union, have taken a principled and public stand condemning the king's actions in some form or another. On 7 March 2005, however, Japan pledged over US \$31 million in aid to Nepal towards its 'socio-economic development'. It is the first and only country since the royal putsch to provide financial assistance to King Gyanendra's government. When most countries, not to mention the World Bank, have flatly refused to risk even the possibility of their funds being used against the pro-democracy movement, Japan has gone out of its way to fund the royalist dictatorship while shamelessly mouthing the argument that such aid addresses poverty alleviation, supposedly one of the root-causes of the Maoist insurgency.

Does Japan know something the rest of the world doesn't, about the crisis in Nepal? Or are Japan's priorities just devastatingly different from the rest of the world's - a few concerns being the arbitrary arrest, imprisonment and silencing of dissenters by any means necessary? If the international community is closely monitoring the events in Nepal under King Gyanendra, perhaps it should also keep an eye on Japan. Or their efforts at democratic reform in Nepal may well end up being strangled by Japanese purse-strings.

Military assistance

India, the US and the UK are the largest suppliers of military aid to Nepal. The continuation of such assistance will only strengthen the king's hand at a time when he has chosen to invest himself with extraordinary powers. The suspension of fundamental rights has already weakened the capacity of Nepali civil society to monitor and challenge state activities. With the Royal Nepalese Army's record of human rights violations being what it is, any reinforcement of

India must take the lead in convening an international meeting in New Delhi on restoring democracy in Nepal. It must bring together leaders of all political parties in Nepal, including the Maoist leadership. This will send a clear message to the king and also to parties that remain cynical about India's intentions.

these powers will only lead to abuses on a larger scale and stall efforts towards a long and sustained peace. In this context, India must also stop supplying spare parts for military equipment to the Royal Nepalese Army.

Military assistance to Nepal has yielded few results in the war against the rebel Maoists. A strong push for democracy, combined with initiatives to bring all parties, including the Maoists, to the negotiating table, will bring greater dividends in the long run.

Sanctions

There are several other steps that the international community can take as punitive measures.

INTERVIEW

'CHR is more than a forum for condemnation'

HIS EXCELLENCY MR. MIKE SMITH, Ambassador of the Permanent Mission of Australia to the United Nations in Geneva, chaired the 60th session of the Commission on Human Rights in 2004, a task he carried out with exemplary firmness and, it appeared, oodles of patience.

He spoke to *Human Rights Features* about his experience as Chair, his views on the functioning of the Commission, and his unswerving belief in the relevance of the Commission as a reliable mechanism for the protection and promotion of human rights.

Human Rights Features (HRF): What are your views on the report of the High Level Panel on the Reform of the UN, particularly the recommendations relating to membership of the Commission on Human Rights? Do you feel the "minimum criteria" formulation of the late Sergio Vieira de Mello would be more realistic?

H.E. Mr. Mike Smith: I have always thought that setting criteria for membership of the Commission will not work - both because politically it would not be accepted across the spectrum and because the Commission should not be a body that brings together only the 'virtuous'. We need the human rights abusers there to put them on the spot.

I think the idea of universal membership of the Commission as proposed by the High Level Panel is a good one. After all virtually all members of the UN are present at CHR anyway, the only difference being that some get to vote and sit at the front and most do not vote and sit at the back as observers. Universal membership would give the body greater authority and legitimacy without, in my view, any loss of efficiency. And if coupled, as I think it should be, with elimination of the Third Committee, universalisation of CHR would be a contribution towards wider UN reform.

HRF: As Chair of the 60th session, what aspects of the Commission's functioning did you feel needed improvement most urgently?

H.E. Mr. Smith: What most strikes you from the Chair is the extraordinary time pressure that everyone is under at the Commission. Moreover with new mandates being created every year - meaning more interactive dialogues - and more experts, national institutions, NGOs and others accredited each Commission, the pressure on speaking time can only become more intense. In my view the only way out of this is to reduce the size of the agenda by merging some items. That would again allow delegations a reasonable time to deliver their statements and for the Special Procedures to have more measured dialogues with the membership.

The other aspect of the Commission's functioning that has always worried me is the challenge of moving from the rhetorical to the practical - how do we 'operationalise' resolutions? Of course we do have the Special Procedures who can follow-up and report back to the Commission, both in their written reports and in the interactive dialogues, but they do not have the time or resources to tackle properly the worst human rights situations. This is one of the reasons why I am such a strong advocate of the work of the national human rights institutions. They at least are working 365 days a year in a country, understand its political and social culture and can, over time, make a real difference to people's lives.

HRF: As Chair, did you feel there was scope for revision of the rules of procedure to minimise the procedural wrangling that often threatens to overwhelm the substantive debates?

H.E. Mr. Smith: No, I do not see the problem as lying in the rules of procedure. The level of tension and the intensity of the procedural wrangling is a function of the importance that delegations attach to the resolutions. When you look at the lengths delegations will go to in order to avoid being the subject of a resolution you have to consider that perhaps the Commission is getting something right, even if often we cannot be sure at the end of the day what the impact in that country of the resolutions is.

HRF: With regard to NGO participation, how can NGOs play their roles most effectively, particularly when faced with unmistakable hostility from governments? Also, as Chair, did you have any discussions with government delegations regarding Government-Organised NGOs (GONGOs)?

H.E. Mr. Smith: There is inevitably a good deal of variation between the effectiveness of different NGOs in the Commission. The bigger, more prominent and more experienced ones actually do a good job at the Commission. They organize a number of the side events, they seem to network pretty effectively both with each other and with national delegations and they deliver well-crafted statements in the Commission which is probably of most impor-

INTERVIEW

H.E. Mr. Mike Smith

tance to their membership outside Geneva. Some NGOs however, often seem to put all their effort into getting onto the speakers' list when in my view they could use their limited resources more effectively by focusing on 'bilateral diplomacy' with like-minded NGOs, with relevant national human rights institutions, with Mandate holders and with national delegations.

I did not formally, as the Chair, discuss GONGOs with national delegations, though I did do so informally and there is no question that the growth in this phenomenon is a challenge to the system.

HRF: Do you think there is a case for including independent experts in certain key mechanisms such as the Working Groups on Communication and Situations?

H.E. Mr. Smith: The Working Group on Communications is already supposedly made up of independent experts, notably members of the Sub-Commission. The 1503 procedure is a rather unique mechanism which has some serious limitations built into it. I am not sure that adding independent experts to the Working Group on Situations would solve those limitations.

HRF: Do you think the Commission remains relevant as a mechanism for the protection and

promotion of human rights in the world today?

H.E. Mr. Smith: Most certainly! The Commission is the most lively, most intense and most engaged multilateral forum that I know and it effectively draws together, annually, the entire global community of human rights-interested parties. I think we need to recognize that it works on a multitude of levels, not simply as a forum for ritually condemning human rights abuses. Its function as a place for educating people and governments on human rights, for inspiring human rights activists, for enabling groups to swap ideas on best practice and for debate on potential new standards should not be underestimated.

HRF: How do you perceive the need to preserve the CHR's ability to scrutinize the records of all countries and constantly upgrade international human rights standards in a situation where countries tend to vote as blocs? How would you try to arrive at some kind of balance?

H.E. Mr. Smith: At the end of the day the reality of multilateral bodies is that countries do vote as blocs. The trick is to get delegations to identify with the right bloc! Hopefully over time countries will identify and vote more frequently with, for example, a bloc that represents democratic systems or that has a particular attachment to promoting national human rights institutions.

HRF: There is a widespread perception in human rights circles that the Australian Government is retreating from its international human rights obligations. Any comment?

H.E. Mr. Smith: To my mind this is very much an NGO perspective resulting from several factors, including that Australia, in recent years, has opted for a practical, results-oriented, rather than merely rhetorical, approach to the promotion of human rights. We have as a result been prepared to criticize the operation of some international human rights institutions - including on occasion the Special Procedures and the treaty bodies, something that the human rights circles you refer to are often uncomfortable with.

At the same time the Government has put a lot of resources, through its aid program and through regional intervention missions, into improving people's enjoyment of human rights in our own region. I do not think you will find many Solomon Islanders or East Timorese, for example, who would agree with the take of those 'human rights circles' on Australia's approach to international human rights.

I know that some people criticize Australia's policy of detaining undocumented asylum-seekers until their claims have been tested as a retreat from its human rights obligations. This is untrue.

Firstly Australia is scrupulous about assessing and recognizing genuine refugees. Secondly what critics often choose not to acknowledge is that breaking the back of the pernicious trade in people smuggling to our shores has not only delivered human rights dividends to those who otherwise might

have risked their families in leaky boats, but has enabled us to increase our intake of refugee and special humanitarian cases directly from troubled regions. Often these people are in far direr situations than those who have the resources to buy passage with a people smuggler.

'[The Commission] is not simply a forum for ritually condemning human rights abuses. Its function as a place for educating people and government on human rights, for inspiring activists, for enabling groups to swap ideas and for debate on potential new standards should not be underestimated.'

'The procedural wrangling indicates the importance delegations attach to resolutions. When you look at the lengths delegations go to in order to avoid being the subject of a resolution, you have to consider that perhaps the Commission is getting something right, even if often we cannot be sure what the impact of the resolution is.'

External standards vs internal realities

Obasanjo's support for human rights outside Nigeria not matched by concern for rights inside his country

ADAM M. SMITH

THE six years of Nigeria's fourth republic have seen President Olusegun Obasanjo increasingly use his bully pulpit to become one of Africa's most vocal proponents of human rights and democratic reforms. In his various roles in regional groupings such as ECOWAS, Africa-wide initiatives such as NEPAD and the AU, and multilateral organisations such as the Commonwealth, Obasanjo has used his position to volubly criticize the human rights abuses of others (such as Robert Mugabe), while attempting to promote wider respect for human rights and democracy throughout the continent.

Unfortunately, Obasanjo's concerns with the human rights situation in Nigeria itself does not seem to match his external exhortations. Since his election in 2003, in response to increasing violence and mounting regionalism, Obasanjo's government has simultaneously instituted limitations on fundamental rights while proving impotent to curb human rights abuses furthered by the country's 36 states.

These two classes of human rights abuses - those resulting from central government actions, and those resulting from state governments' policies (the latter exacerbated by the inability of the central government to rein in the periphery's powers) - imperil the human rights of Africa's most populous country, while greatly weakening the moral force of Obasanjo's external proclamations on the issue.

Central Government Action

A key marker for the country's lapse in human rights protections can be seen in its continued limits on freedom of expression. Though Nigeria has made great strides in press freedom - the country has more than 100 national newspapers and magazines, and more than 30 private radio stations - there are still cases of harassment and state-mandated censorship. For example, September 2003 saw the arrest of four journalists and the closure of a magazine critical of the central government. Moreover, other rights of expression - including peaceful protest - remain severely constrained.

Brutal measures have been used both to repress demonstrations concerning Abuja's use and misuse of Nigeria's oil wealth, and in support of various political policies; most infamous in this regard were government actions in response to a protest held prior to the visit of the US President.

In extreme cases, the government's responses have resulted in extrajudicial killings with victims including journalists, human rights activists, supporters of opposition parties, and peaceful demonstrators. The Executive Secretary of the Nigerian National Human Rights Commission, Alhaji Bukhari Bello, has bemoaned the fact that "extra-judicial killing of innocent Nigerians by security agents under the guise of crisis management or crime prevention has become an unacknowledged state policy."

Obasanjo's weakness regarding human rights extends from his government's current acts regarding free expression, to the past abuses of Nigeria's regimes. His government has refused to release, let alone act upon, the recommendations of the Human Rights Violations Investigation and Reconciliation Commission (the "Opota Panel") which indicted all of Nigeria's past military regimes for treason, gross abuse of human rights and subversion of the rule of law.

The report of the Panel was subsequently released in January 2005 by the Civil Society Forum in Nigeria following a fruitless two and a half-year wait for the government to act. In particular, the Panel recommended that the cases of Dele Giwa, Chief Abiola, General Shehu

Yar'adua and other politically motivated assassinations be re-opened for investigation and prosecution of those who perpetrated these crimes.

Apart from the establishment of a Presidential Fund to compensate victims of such violations, the Panel made other far-reaching recommendations to end the culture of impunity in Nigeria. The Federal Government has categorically stated that the report will not be released and has provided little sound rationale for its refusal.

Nigeria's States' Abuses

Though both limitations on freedom of expression and an unwillingness to confront the abuses of the past are condemnable, Nigerians' human rights are arguably most imperiled

Unconstitutional

CONTRARY to constitutional provisions prohibiting state-mandated religions, several governors in the North have unilaterally extended Sharia law to criminal offenses, making it applicable to all individuals within the state's jurisdiction. On its face, this violates the secular constitution, which prohibits the imposition of the code's provisions in criminal cases.

According to the Nigerian Constitution, a person may not be convicted for any Sharia offense unless that offense and its punishment are enacted by the National Assembly or State House of Assembly (usually in accord with secular principles). Where Sharia penal codes are instituted without such codification by the National Assembly or State House of Assembly, they are unconstitutional. The vast majority of the Sharia penal codes extant in the northern states have not been ratified by any body of the central government.

because of what Obasanjo's government has not been able to do, rather than what it has done.

In short, Obasanjo has proven powerless in the face of acts by leaders of the country's 36 states, many of which have proven disastrous to human rights.

The frenetic implementation of Sharia by twelve northern states is the most cited example of both the centre's weakness and the impact certain states' policies have had on human rights (see box). The contradictory and illogical nature of states' rights in Nigeria is illustrated by President Obasanjo's vociferous condemnation of Sharia, on the grounds that it is unconstitutional, yet his equally vociferous claim that he cannot intervene because the country's federal system provides states the autonomy to enact law.

Additionally, various federal ministers have condemned some of the Sharia verdicts - in particular the infamous decisions to stone accused adulterers and the issuance of fatwas against journalists - and has said that such punishments must not happen in Nigeria. The Minister of Justice has even supported accused's appeals, but has also refrained from directly circumventing state authority with federal mandate.

Another set of local initiatives in direct conflict with Abuja's proclamations addresses the manner in which some states have chosen to address the rampant criminality that marks so much of the country-vigilantism. Due to federal police corruption, underinvestment and/or incompetence, most state governors have at least implicitly agreed to the need of such extrajudicial legal enforcement, signing onto an official declaration to that effect.

The result has been that groups such as the Egbesu Boys, Oodua People's Congress, Arewa People's Congress, and most notoriously the Bakassi Boys, have become *de facto*

enforcers of civil order.

Some states have gone even further than passive acceptance of these groups. Some have officially welcomed vigilantes, providing them impunity to engage in legally dubious acts, including extrajudicial killings. States have also increasingly attempted to formalize vigilantism; the Anambra State Government passed a bill to legitimize vigilante activities and even guarantee payment of their salaries as part of the State public service; the governor of Niger State recently directed local councils to establish "Neighborhood Security Committees," akin to official vigilantes; and, the governor of Edo State proposed legislation seeking the establishment of an Edo State Vigilante Service and the registration of vigilante groups in neighborhood communities.

All of these state actions have taken place against a backdrop of Federal Government condemnation and criminalization of vigilantism. Abuja views the groups as unconstitutional and inimical to the respect for human rights, and the peace and stability of the country. However, the center has done little to wrest policing powers back from these entities.

Real Reform needs Real anti-Corruption

Obasanjo's government is mired in an unfortunate bind, having enough powers to limit human rights in various ways, but not enough to rein in the abuses perpetrated by the states. Though these two problems are distinct, they are joined by the fact that both rely on the culture of impunity bred by the country's endemic corruption. It was corruption and the search for political patronage that first allowed the states to take so much power from the centre, and it is corruption that, at least in part, drives continued abuses by both the centre and the periphery.

For the past several years Transparency International has found Nigeria to be the most (or nearly so) corrupt nation in the world. The effect of having such an unfortunate distinction on economic development is critical, and its impact on human rights is equally so. Many aspects of the central and state governments' actions and inactions that impact human rights are at least catalyzed, if not directly caused, by corrupt practices.

For instance, despite Obasanjo's voluble demand for anti-corruption reforms, there is as of yet no Freedom of Information guarantees in the country, with legislation providing for it still-stalled in the parliament or struck down in the courts.

Moreover, even positive actions have proven impotent: it is instructive that since its founding in September 2004, Nigeria's federal anti-corruption commission has consistently failed to bring cases against senior government officials. Such a culture of impunity makes human rights protections that much more difficult.

Almost one in ten Africans lives in Nigeria, and its combination of mineral wealth and heterogeneous citizenry could make the country a model for many others on the continent. However, Obasanjo's weak record in providing protections for his own citizens - based in large measure on corruption - cannot help but to weaken the force of his pronouncements. Obasanjo's government must look inward to devote as much effort to ameliorating domestic difficulties as it has in militating for human rights abuses abroad.

In so doing, the human rights of those in Nigeria would prove more robust, and the moral power of Obasanjo's laudable efforts at improving human rights in other African states would be greatly boosted.

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The EU at the CHR: Time for an enlarged role

Improved internal coordination and astute external diplomacy can help the Union achieve its objectives

PIOTR MACIEJ KACZYNSKI

THE proclaimed central objective of the European Union's human rights foreign policy is the direct improvement of human rights worldwide. The EU's presence in the Commission on Human Rights (CHR) is devoted not only to the adoption of various resolutions, but also to developing its human rights dialogue with various states. In certain instances, tabling a resolution serves as a means to this end. Yet conversely, the non-tabling of a resolution as in the case of Colombia in 1997 - whereby it was agreed that in return for not passing a resolution condemning Colombia for human rights abuses, the Office of the High Commissioner for Human Rights (OHCHR) would be permitted to open an office in Bogota - can equally result in the development of dialogue. This wish not to be mentioned can therefore also be utilized.

This illustrates that the goal is human rights, not merely human rights resolutions. This is something many NGOs, governments and observers tend to overlook. To decide, therefore, whether the EU human rights foreign policy in the CHR is successful, the following questions need to be addressed: is the EU truly devoted to protecting human rights worldwide, and what is the price the EU is ready to pay? What is the role of the UN Commission in the EU's human rights foreign policy? And, is the Union successful in achieving its objectives in the CHR?

The EU has declared that it takes the CHR extremely seriously and "is determined to continue to play a major role at the CHR". (see box) It is also one of the most visibly active members of the Commission. In 2002 the Presidency took the floor on behalf of the European Union one hundred times in order to present its view on a specific problem or to explain its position regarding voting. The EU expressed its view on each agenda item and on every country situation concerned. Each year the EU initiates a number of resolutions, often controversial, such as a draft resolution on the situation in Chechnya. There is less coordination among states regarding thematic issues, when individual states take the floor and present draft resolutions in an individual capacity. However, even in these cases, EU Member States are inclined to vote unanimously.

There are hindrances to the EU's objectives, the result of the collision of CHR "realpolitik" with the optimistic views expressed in European Parliament recommendations and Council conclusions. The EU Annual Report on Human Rights adopted by the Council after the 58th session of the CHR stated that "the unwelcome trends that had manifested themselves at the 57th session became even more pronounced at the 58th session. Some members formed increasingly solid coalitions, reluctant to negotiate or compromise, which succeeded in imposing their automatic majority on many occasions without necessarily having regard to human rights considerations". And further on, "increasing hostility towards country initiatives placed the EU in a difficult position, given its role as the main promoter of these resolutions". This has not improved since 2002. Thus, the EU is cognizant of the problem but is at a loss to prevent it.

The EU's position is being hampered by the increasing North vs. South divisions that occur in every major international meeting. In the case of the CHR, this visible geographic division also takes place. In most cases, African and Asian states vote together, irrespective of the issue discussed or differences among states. Problems arise when the African, Asian and some other states from Latin American and Eastern European groups consolidate in opposition to proposals aimed at strengthening human rights mechanisms and human rights protection. With 27 votes in the Commission, the African and Asian states hold the balance of power.

Then, of course, there is the 'Like Minded Group', or LMG, whose significant

characteristic is to vote consistently in opposition to progressive resolutions. According to one NGO, in 2003 the LMG could be considered to comprise 19 members of the Commission. Moreover, the African group as a whole seems to have clear objectives: to get rid of all the Special Rapporteurs of the Commission from the African continent, and to have as few African country resolutions as possible. This is why the entire African group supports every

Growing membership

THE EU's special role in the Commission is underlined by the voting power of the block. The number of EU Member States who are full members of the CHR varies. Between 2001 and 2005, seven to nine of the 15 EU countries (or eight to 11 out of the 25 states) were full members of the Commission. This means that 32-44 percent of the EU's 25 members have voting powers in the CHR. Furthermore, 15-20 percent of the CHR members are EU Member States. The EU/CHR states always have a majority in the 'Western European and Others Group' (WEOG). In 2001 the future members of the EU also had a majority in the Eastern European group. A situation in which the EU would dominate two regional groups will occur more often with the accession of Croatia, Romania and Bulgaria.

A situation when the EU controls two out of five regional groups would be very favourable to the EU, since theoretically about 20 percent of CHR members could have a control over 40 percent of regional groups. Furthermore, up to 40 percent of the members of both of the CHR's Bureau or Extended Bureau could be EU citizens.

year the "no action motion" in the case of Zimbabwe.

The emergence of a group like the LMG strengthens the common perception that the recent sessions of the Commission on Human Rights were sessions of a Commission on Anything But Human Rights. Western countries lost resolution after resolution, with only a handful of successes. There are clear reasons for this.

First of all, the Western states, including the EU states, do not have perfect human rights records and often selectively protect human rights. This is a source of criticism from NGOs and civil societies back home. NGOs at the same time criticize the European Union and the US for not going far enough in condemning human rights violations.

Secondly, those States that exhibit antipathy towards human rights, whilst at the same time occupying seats in the CHR, increasingly question the very universality of human rights. They often underline the supremacy of national sovereignty at the cost of international human rights mechanisms. The CHR's consideration of country situations is questioned. Conveniently ignoring that "all human rights are universal, indivisible, interdependent and inter-related," those rights considered useful for political advantage are trumpeted. Such States are also not averse to playing Western states against each other.

In order for the EU to be more effective, better coordination of both its internal and external actions is required. Even though EU countries voted by consensus in over 90 percent of the voting on human rights issues in the UN General Assembly and in the CHR in 2003, splits still occurred.

On the external front, different key players have different approaches to the UN Commission and human rights in general, including towards the United States. This, however, should not prevent the EU from looking more actively for allies, possibly among the African Union states or the South and Southeast Asian countries.

It is surprising how inefficient EU diplomacy is at the CHR. It is easier for Russia to convince Muslim states to vote against or

abstain from the resolution on Chechnya, than it is for the EU to convince them to protect their fellow Muslims. Taking into consideration the economic and diplomatic means of pressure the EU has at its disposal, this is puzzling. However, those who have witnessed EU performance at the Commission are often less surprised. According to *Human Rights Features* in 2003: "EU delegations failed to work the corridors. Any attempt to defeat the Like Minded nexus would need strong support from other groups and the fence-sitters. But, as we know, the EU watched miserably as the resolutions faltered and died".

Last year the EU applied a partially new strategy which was more complex and difficult. The European Parliament called upon the EU to sponsor a large number of resolutions, including country specific resolutions in over 25 states. In previous years the EU, although more outspoken than any other bloc, was still selective in its country specific resolutions. This time, the EU Parliament called on the Union to sponsor resolutions in all countries where systematic human rights abuses existed. Yet a draft resolution does not automatically translate into an adopted resolution. For this to happen, effective and efficient diplomacy is required on the part of the EU. However, coordination among 25 states within the EU is not an easy task.

The EU should also strive to avoid bargaining and trade-off situations. It should defend the universality of human rights. Only if Europe stands united with one voice, only when the other member states can be convinced, can the EU achieve its objectives.

Given that the EU claims to be truly devoted to spreading human rights protection worldwide, a lot remains to be done to improve the efficiency of EU human rights foreign policy. Internally, the EU requires deeper cooperation among Member States and among EU institutions. Externally, the EU needs to be more courageous and persuasive. The EU should encourage cooperation with those States that are not traditionally close allies. It should also seek to advance its human rights dialogue beyond those States whose record is markedly poor, such as Iran and China, and toward the African Union and its Member States, South and South-Eastern Asian states. These states should be encouraged not only to ensure human rights observance in their own countries, but to speak out on human rights problems in the international fora as well. On the other hand, those states should not feel oppressed by the EU human rights agenda. The Europeans can learn about human rights from other countries as much as others can learn from the Europeans.

Moreover, good relations with other Western and Latin American states should be maintained. The EU should also remind its close allies about human rights if they appear to neglect them, as has been the case in recent years with the US and Australia.

The EU is also expertly placed to contribute to the process of UN Reform. It should become one of the EU's top priorities to move the CHR to a primary position within the UN, as recommended by the report of the Secretary General's High Level Panel.

Yet, all this remains to be done, provided that the EU really cares for human rights and wants them not only to be respected worldwide, but places them as the primary goal of its foreign policy. There are reasonable grounds for doubting these proclamations. Javier Solana, the EU High Representative for Common Foreign and Security Policy, last visited the UN Commission on Human Rights in 2002. He missed the next two sessions. Are human rights high on the High Representative's agenda? Kofi Annan, the Secretary General of the UN visits the CHR sessions each year. Human rights are high on the UN agenda.

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CUBA

No postcards from Cuba

WHEN Cuban authorities arrested and imprisoned 75 dissidents in March 2003, it was not merely an attempt to incarcerate and punish 75 people for contradicting government-disseminated views, but an attempt to imprison 75 different stories about Cuba. Each of the dissidents - journalists, lawyers, librarians, economists, trade-unionists, poets and other peaceful protestors - had a story to tell about the repression they have faced in Cuba.

The imprisonment of these political dissidents is not simply about restrictions placed upon freedom of expression, but about the right of Cubans to let the world know about the most flagrant human rights violations that have been committed with impunity, under the 'anti-imperialist' posture of the Castro regime.

The denial of the freedoms of expression, association, assembly, movement, and fair trial; its failure to meet the minimum requirements for prison conditions; and its continued imposition of the death penalty are just some of the violations that should make Cuba the immediate focus of international attention and pressure. The actions of the Cuban government violate Articles 9 (arbitrary arrest), 10 (fair trial), 11 (innocent until proven guilty), 13 (freedom of movement), 18 (thought, conscience, religion), 19 (freedom of expression), 20 (peaceful assembly and association), and 21 (right to take part in government) of the Universal Declaration of Human Rights (UDHR).

Despite being a founding member of the Organization of American States (OAS), the actions of the Government of Cuba go against the democratic spirit of the OAS Charter, and several of the fundamental rights provided by the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

Its failure to ratify both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), while reprehensible in itself, does not make it any less accountable to its people or the international community for upholding and ensuring international standards of human rights and respecting the spirit of the Charter of the United Nations (UN) and the Universal Declaration of Human Rights.

Institutionalised Repression

According to the Cuban Commission for Human Rights and National Reconciliation (CCHRNR), as of January 2005, there are a total of 294 political prisoners in Cuban jails, with 21 arrested in 2004 alone, in addition to the 75 dissidents in 2003. The repression of freedom of expression is strongly institutionalised in Cuban law, which criminalises the spread of any information contrary to government-sponsored views. This includes "insults to patriotic symbols", the dissemination of "unauthorised news" and even "disrespecting authority".

The two most infamous laws curtailing freedom of expression are Act. No. 88 (better known as Law 88) and Article 91 of the Cuban Criminal Code. Law 88, which was passed by the National Assembly in 1999 in response to the U.S. Helms-Burton law (that further strengthened the economic embargo on Cuba), purportedly protects Cuba's independence and economy, and punishes "subversive activities" that further US imperialist interests, a crime that conveniently includes working for the foreign news media. Article 91 penalises "actions against Cuba's independence and territorial integrity", and sentences under this charge may amount to 10-20 years, life-imprisonment or even the death penalty.

Under the guise of defending national security, the Cuban government may conduct the surveillance of individuals and preventa-

tively detain them, thereby not only directly contravening international standards of due process, but debilitating what limited judicial safeguards to fair trials are available to Cubans under their own domestic law.

The World's Second Largest Prison for Journalists

Reporters Without Borders (RSF) ranked Cuba at 166 on a list of 167 countries in its Third World Press Freedom Index 2004, North Korea being the only country in the world even worse

The international non-response

"WE have chosen to let the world defend us", wrote dissident Cuban journalist Manuel Vazquez Portal, from the confines of Boniato prison on 22 May 2003. On the one hand is the US economic embargo on Cuba, an unjustified and unproductive action that has only cyclically reproduced the very repressions it purportedly attempts to rectify. At the other extreme is the attitude of the UN Commission on Human Rights itself - its resolution on Cuba in 2004, initially condemning Cuba's treatment and incarceration of the dissidents in March 2003 has been followed this year by Cuba's election to the Working Group on Situations, empowering it to decide which complaints are worthy of international attention.

Does the international community only have two lines of defense in its dealings with Cuba - either complete exclusion or unquestioning acceptance, without engaging in a dialogue about how best to address the serious violations of civil liberties and human rights that are taking place? Perhaps this is a question for the European Union to ponder with its resumption of diplomatic relations with Cuba, which while expressing a willingness to engage in a more constructive dialogue with Cuba, must be made contingent on Cuba's respect for international standards of human rights. And for the rest of Latin America, which chooses to look the other way when it comes to the human rights record of one of their group.

than Cuba for press freedom. Out of the nearly 80 dissidents jailed in 2003 who received sentences ranging from six to 28 years following blatantly unfair trials, at least 27 were journalists - one-third of the island's independent press. They were subsequently incarcerated at locations that were great distances from their homes and families, either in solitary confinement or with common criminals, and under conditions unanimously condemned by several non-governmental organisations as inhumane. In addition, the Working Group on Arbitrary Detention declared in its report before the Commission on Human Rights in 2004 that 79 of the dissidents were arbitrarily detained, in contravention of Articles 19 (freedom of expression), 20 (freedom of assembly and association) and 21 (right to take part in government) of the UDHR. Human Rights Watch (HRW) reports that as of 31 January 2005, around 61 dissidents still remain in prisons under these conditions, 22 of whom are journalists. The journalists arrested were those who had contributed articles on a regular basis to the foreign press (primarily American) due to the proscription on the independent media in Cuba. They were also responsible for overcoming great odds to publish the only independent magazines, *De Cuba* and *Luz Cubana*, in nearly half a century of Castro's rule in Cuba.

RSF has also reported that Cuba ranks among the top ten countries for the repression of online free expression. In addition to confiscating and banning the sale of printers, computers, photocopiers and any other electronic media that could be used towards facilitating mass distribution of political material, "official permission" and a "valid reason" for using the

Internet are required. The expenses enforced upon Internet users, surveillance and interception of emails, in addition to the dearth of phone lines (six lines for every 100 persons) and the ban on accessing the Internet from a private phone line, have severely curtailed the freedom and access of Cuban Internet users. The Cuban government accused the "subversive" website Cubanet of being a tool for "promoting counter-revolutionary interests", as it carried the articles of several independent journalists who apparently threatened to "destabilize" Cuban society by publishing work that "distorted Cuban reality".

Summary Trials and Charges

The Personal Representative to the High Commissioner for Human Rights on the situation of human rights in Cuba, Christine Chanet, confirmed in her 2004 report that the trials of the dissidents were held within a few days of their arrest, thus providing insufficient time for the preparation of their defence, in addition to which neither independent counsel nor foreign diplomats were permitted to attend the trials. The first major political trial since the March 2003 crackdown was held a year later in Ciego de Avila, Cuba. The charges levied against the ten defendants, one of whom was the president of the Cuban Foundation for Human Rights (Fundacion Cubana de Derechos Humanos) Juan Carlos Gonzalez Leiva, included public disorder, disobedience, and resisting arrest while engaging in a political protest in March 2002. Rene Montes de Oca Martija, who heads the Pro Human Rights Party of Cuba (Partido Pro Derechos Humanos de Cuba), was sentenced to eight months for "contempt of authority".

Omar Rodriguez Saludes, the editor of the Nueva Prensa Cubana news agency, has the dubious distinction of having received the heaviest sentence - 27 years - among the journalists arrested in March 2003. In addition to constituting the usual threat to national security, Cuban courts also found him guilty of "distorting" information about Cuba's reality to "illegal" and "hostile" publications, "with the manifest intention of attacking the Cuban revolution". In the case of Ricardo Gonzalez Alfonso, head of the Manuel Marquez Sterling Journalists Association, RSF correspondent and editor of *De Cuba*, the prosecution called for life imprisonment under Article 91 of the Cuban Criminal Code. He was awarded a sentence of 20 years for "undermining the territorial integrity and the national independence of Cuba".

It is worth noting that former US President Carter, in his report in May 2002 after his visit to Cuba, drew attention to the fact that most of the dissidents who have been described by the Government of Cuba as "mercenaries working for foreign interests" and "lackeys of Washington", were in fact quite the opposite. He said that they were "unanimous in opposing the strengthening of a very hard United States line towards Cuba as well as funding any of their activities", something that individual statements from these individuals have corroborated.

Prison Conditions

Cuba is one of the only countries in the world to prevent the International Committee of the Red Cross from entering its prisons. The Personal Representative of the High Commissioner for Human Rights on the situation of human rights in Cuba, Christine Chanet, delivered a damning report on the treatment of political prisoners in Cuban jails in January 2004. Due to the fact that Cuban authorities refused to recognise her mandate, Chanet drew on reports of other thematic special rapporteurs who had been able to conduct country visits to Cuba.

CONTINUED ON PAGE 9

How Laos profits from silence

Part I of a two-part analysis of Laos' diplomatic conduct in response to accusations of human rights violations

THE representatives of the Lao People's Democratic Republic are studied masters of poor cousin international diplomacy. Laos rarely speaks at the United Nations, except on issues concerning development and the receiving of economic aid. And whilst there is no doubt that Laos is a poor country, ranked 135 out of 177 countries according to the 2004 Human Development Report, a look at the debates of the UN also provides ample evidence that Laos is comfortable with taking everything and contributing nothing; a big fan of the UNDP but not so keen on the General Assembly.

If there existed a study for scholars on the subject of whether the ratification of international instruments for purely nefarious purposes may be said to exist, teachers could do worse than to choose Laos as a suitable case study.

Whilst blasé when it comes to international peace and security, Laos is even worse on the subject of human rights, where it has maintained a tradition of intentional muteness. The State is party to ICERD, CEDAW and the CRC, but its tardiness in reporting to the respective Committees of these Conventions is truly remarkable. Never having contributed to the debates of the Commission on Human Rights, and only on one known occasion having publicly responded to criticisms of its abysmal human rights record, the Lao authorities prefer to stick their head in the sand and wait for the storm to blow over. Most worryingly, gauging by international and bilateral developments in the last year, it seems to work.

A Brief Introduction to Systematic Abuse in Laos

Laos is commonly referred to as "an authoritarian, Communist, one-party state" and has existed unchanged under this regime since 1975. The ruling Lao People's Revolutionary Party (LPRP), or Pathet Lao, is the constitutionally proclaimed "leading nucleus" of the State and only permitted political party.

The accounts of grave and systematic human rights abuses are well documented, despite the regime's best efforts to bury them. These include: restrictions on the right to freedom of expression and media freedom, freedom of assembly and association; restrictions on religious freedom, and persecution of religious minorities; arbitrary arrest and detention; torture of detainees, prisoners, and others; violations of all international standards of due process and fair trial; "life-threatening" prison conditions; and the sustained State-led persecution of factions of the Hmong and other ethnic minorities.

In 1962, Hmong leaders joined forces with the United States' Central Intelligence Agency (CIA) operatives to conduct a 'secret war' against the communist Pathet Lao. Many of these fled to the Xaysomboune, Bolikhamsay, Xieng Khouang and Luang Prabang provinces in 1975 - two years after the departure of the US - when the Pathet Lao declared that it would hunt down the "American collaborators" and their families "to the last root."

These 'secret war' collaborators also include ethnic Mein and Khmer, and are believed to number between 12,000 and 17,000. They remain forcibly isolated by jungle from the Lao population. All access to the rebels, now encircled by LPRP troops according to sources, is prohibited. The Hmong are forced to live on what they can forage, and suffer from poor health, including chronic malnutrition and respiratory problems. This, in the words of Amnesty International, amounts to the "use of starvation as a weapon of war against civilians". Likewise, the insurgents have no access to education and can be forced to relocate their dwellings over a dozen times a year.

The regime's traditional reaction to such well-established statements of fact is that they are "deliberately fabricated for political ends

with the mere aim of discrediting the image of the Lao Government" or "part of a misinformation campaign that seeks to discredit and tarnish the image of the Lao People's Democratic Republic." If the LPRP ever does choose to entertain any direct correspondence with concerned parties, a rare phenomenon, it is usually delivered in this disdainful manner.

Dramatic U-Turns: The United States and the European Parliament

In May 2004, the United States Senate passed a near unanimous resolution (there was one dis-

Whilst blasé when it comes to international peace and security, Laos is even worse on the subject of human rights, where it has maintained a tradition of international muteness.

sender) concentrating solely on and roundly condemning Laos' human rights record, and recognizing "the urgent need for freedom, democratic reform, and international monitoring of elections, human rights, and religious liberty in the Lao People's Democratic Republic". It was seen at the time as "a first step toward engaging the Pathet Lao regime, United Nations and the State Department more seriously, honestly and effectively regarding the horrific plight of the jailed Laotian students, political and religious dissidents and Hmong civilians and rebels now under brutal siege in closed military zones".

The Pathet Lao ignored it. Seven months later, on 3 December 2004, the US revoked its categorization of least favored nation status to Laos, an embargo shared with North Korea and Cuba, almost solely on the basis of Laos' human rights record. The Bush administration changed tack, without debate or consultation, on the means by which Laos should be sanctioned. Snuck through by Republicans as a "miscellaneous provision" in the Miscellaneous Trade and Technical Corrections Act of 2004 - so as to "avoid emotional public hearings, open debate and a stand-alone vote in Congress", as a press report put it - the normalisation of trade relations reduces the tariff on Lao imports from 45 percent to three percent, with an expected sizeable increase on averages of a mere \$8 million in trade between the two nations.

Whilst the Act cited Laos' co-operation "in the global war on terror" and argued that expanding bi-lateral trade relations "may promote further progress by the Lao People's Democratic Republic on human rights, religious tolerance, democratic rule, and transparency", there is no evidence of this in the short term. Reactions among Hmong refugees are mixed at the very least, with many fearful that a strengthened economy will merely be utilized to strengthen the military means to destroy Laos' Hmong insurgents.

More generally, suspicion remains that the Pathet Lao's resolute disregard for the repeated condemnations of the US has finally paid off. This is quite an achievement for a regime whose Stalinist stranglehold on its own people is surpassed only by North Korea, and quite contrary to the proclamations of the Bush regime that its allies are committed to the furtherance of democratic governance.

Europe has been more consistent in its treatment of Laos' human rights record, although not entirely. It has not spoken out on the persecution of the Hmong. Rather, following the arrest and detention of European Parliament Minister Olivier Dupuis and four others for what the European Parliament deemed to be "non-violent demonstration in favor of democracy and reconciliation in Laos" in October 2001, the Parliament issued a resolution condemning not only the arbitrary arrests of the five activists, but

also the general political situation in Laos.

The Parliament found Laos to be in defiance of the Convention on Consular Relations of 24 April 1963 and to be acting "manifestly contrary to the Universal Declaration of Human Rights and to the constitution of the Lao PDR itself." Their treatment of the five activists was seen as "a clear and visible case of violation of the democratic principles of the Universal Declaration on Human Rights, and must therefore be considered a case of non-respect of the EC/Laos cooperation agreement".

Regarding the political situation in Laos, the resolution expressed deep concern at "the plight of one of the world's poorest populations subsisting without democracy and bereft of the rule of law". It noted that "the Laotian authorities appear to be ignoring the relevant clauses of the cooperation agreement with the EC, and therefore calls on the Commission and Council to issue a strong protest to the Laotian authorities on the matter". It requested that the LPRP "guarantee respect for the civil and political rights recognised by the Universal Declaration of Human Rights and will accept the demands of the resolution adopted by the European Parliament on 15 February 2001, including the repeal of Article 59 of the Laotian penal code, which lays down a prison sentence of one to five years for 'anti-government propaganda'. The LPRP sat tight. Time passed. Nothing happened.

The diplomatic mission of the European Commission continues to provide technical and financial assistance to Laos on the secure notion that its bilateral co-operation agreement provides the legal ground for human rights dialogue, or as they prefer to term it: "all over the world, we call the respect for, and the implementation of, human rights 'work in progress'". More recently, the UNDP implemented a Euro 1,349,150 project, with a European Union contribution of Euro 991,628, for the promotion of good governance. As with "assistance" from the UN and the US, money from UNDP and the EU goes into Laos with little to show by way of results.

NEXT WEEK: The Response of the UN

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Her recommendations - which include the release of detainees who had not committed acts of violence against individuals or property, upholding the moratorium on the death penalty, revising laws that restrict freedom of expression and modifying them to comply with the standards established by the UDHR, and authorising the entry of NGO monitors into Cuba, to name a few - have yet to even be considered by the Cuban administration.

Human Rights Watch reported on prison conditions through the testimonies of former prisoners of 24 of Cuba's prisons in 1999. Its report concluded that Cuban prisons fell severely short of the United Nations Standard Minimum Rules for the Treatment of Prisoners in many respects - overcrowding of prisons, unhygienic cells, rotten food and lack of medical attention, and physical, psychological and sexual abuse perpetrated by prison authorities upon prisoners.

Additionally, the Inter-American Press Association (IAPA) in its October 2004 report on Cuba highlighted the fact that despite the release of several high-profile prisoners in the past six months, there have been more than ten cases of physical brutality against journalists and dissidents in police custody, threats and harassment of family members, and complete disregard for the serious medical illnesses afflicting those still in prison. The individual testimonies of dissidents who have been released or who have otherwise surreptitiously managed to publish their accounts of their incarceration corroborate these descriptions.

PRIVATISATION OF SECURITY-PART I

Towards a more insecure world?

This is the first of a series of four articles. Part 2 will address the political implications of the privatization of security, Part 3 will review national efforts at regulating the new providers of security and finally, part 4 will critique the proposed amendments to the 1989 Convention on the Recruitment, Use, Financing and Training of Mercenaries.

JENNIFER LANGLAIS

IN the last decade, the age-old phenomenon of mercenarism has resurfaced in many parts of the world under new and refined forms. Unlike the renegades of war who fought movements of liberation on the African continent thirty years ago, modern-day mercenaries are hired by a palette of social actors to provide security in places where the state structures are weak or simply non-existent. Dethroning the state as the main provider of security, these recycled mercenaries take on different forms, ranging from private militias guarding the ranches of rich South Africans to highly sophisticated private military companies assisting the Coalition Forces in Iraq.

Like their disreputable predecessors, these modern-day mercenaries jeopardize the well-being of peoples. Some of the new providers of security have committed gross human rights violations during their operations. Others have become the privileged tool with which fragile governments suppress internal rebellions with total impunity.

Given this unimpressive record, there is a pressing need to ensure that these new mercenaries do not go unpunished for their actions. Yet, as it stands, the current legal apparatus is poorly equipped to address the situation. Further, as arguments of efficiency and costs have found echo with those Western countries increasingly reluctant to intervene in the South, the means to bring these new providers of security under clear lines of accountability are far from obvious.

The New Providers of Security - who are they?

Although there is no established terminology, new providers of security are generally classified in three categories: private military companies, private security companies and the other types of private armed groups that perform security functions on behalf of governments or other social actors. Even if there is considerable overlap between them, these categories are generally useful in conceptualizing the modern incarnations of the phenomenon of mercenarism.

Unlike traditional mercenaries, who are generally clandestinely recruited to conduct covert operations, private military companies are registered legal entities openly marketing battlefield skills on the international market. The services they provide include military advice and training, logistic support, intelligence gathering and combat and operational support. The twin sisters of private military companies are private security companies. Instead of furnishing military assistance, private security companies sell the services of qualified security agents to protect the personnel, assets and infrastructure of companies or organizations operating in hostile regions. Clients of private security companies are usually multinational companies with mining or oil interests and humanitarian agencies or governments with inadequate security forces.

In addition to private military and security companies, there is a myriad of private military groups selling their services to states, corporations and private individuals. Because these groups do not fall within the traditional understanding of mercenaries and do not fit the model of private military companies, they are generally said to form a third category.

The latter comprises all the groups that perform security functions normally incumbent on the state and who are motivated by the promise of financial reward as opposed to political or ideological goals (as in the case of rebels and insurgent groups). They include vigilantes, private and state militias and irregular armed forces.

A Threat to Human Rights

Mercenaries have traditionally been perceived as posing a threat to the liberation of peoples under colonial domination. Yet, as modern-day mercenaries have found in nascent and fragile states a new clientele for their services, this threat has taken on new dimensions no longer uniquely tied to the right of people to self-determination. In fact, as private military companies are now hired by governments to suppress rebellions within their own territory, the danger is rather that severe human rights violations be committed with total impunity. Attacks on civilian populations, summary executions, torture and the use of certain prohibited weapons have already been observed in regions where private military and security companies have been active. Unfortunately, as they operate in regions far from public oversight, there is little documentation on the extent and nature of their human rights abuses.

The use of private military companies has been shown to contribute to the militarization of unstable regions and the escalation in the type of violence used during the conduct of hostilities. Military companies also foster demand for weapons through the training of armies.

Private military and security companies further impede stability in volatile areas by dispensing governments from finding negotiated solutions to conflicts. Because private military companies are perceived as illegitimate interveners, the peace agreements that they impose by force are extremely fragile and often doomed to repudiation upon their departure. In the end, states with unconsolidated bases become increasingly dependent on private providers of security. Inevitably, this dependency entails exorbitant costs. As failed states do not hesitate to pay private military companies with mining or oil concessions, their hiring often implies the long-term mortgaging of a state's natural resources at the expense of the right to development.

Last but not least, the use of private military companies has been shown to contribute to the militarization of unstable regions and the escalation in the type of violence used during the conduct of hostilities. In addition to exporting large amounts of weaponry in the regions they operate, private military companies foster the demand for weapons through the training of armies. Thus, in 1995, after the Virginia-based company Military Professional Resources Incorporated (MPRI) obtained a license from the US State Department to train the Croatian army, the Croatian government reportedly spent more than US\$1 billion on equipment and weapons to complement the training, despite a UN arms embargo.

Lack of Accountability

Given the threat they represent, there is an urgent need for the new providers of security to be made accountable for their actions. Contrary to soldiers of regular armed forces who are accountable before national courts for their violations of human rights and humanitarian law, the new providers of security enjoy almost complete impunity for their crimes due to loopholes in international instruments and the incapacity or unwillingness of governments to prosecute them. In particular, modern-day mercenaries escape the international legal definition of mercenary and cannot therefore be prosecuted for

being mercenaries. Similarly, states that use, finance or recruit mercenaries cannot be held responsible for engaging in the practice of mercenarism given their "legal" status under international instruments.

Under the international definition, which appears with minor variations in the 1977 Additional Protocol to the Geneva Conventions and the 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries, a mercenary is any person who is specially recruited to fight in armed conflict; does in fact take part in the hostilities; is motivated essentially by monetary reward; is neither a national or a member of the armed forces of a party to the conflict; and has not been sent on official duty by a state. The set of conditions that have to be met makes it almost impossible for a mercenary not to escape the definition. In particular, the intent requirement allows mercenaries to circumvent the definition by pretending that they were not essentially motivated by private gain but by religious, ideological or political reasons. For hiring governments, an obvious way to camouflage their use of mercenaries is to enrol them in their armies or grant them nationality.

The end result is that victims of human rights violations committed by modern mercenaries are entirely dependent on the capacity and willingness of states to prosecute them under national laws provided that they exist. Unfortunately, given that mercenaries operate predominantly in regions characterized by a collapse of the state structures, it may prove extremely difficult to gather the evidence required to buttress prosecutions. More importantly, however, states are highly unlikely to prosecute mercenaries they have themselves hired to suppress internal rebellions. The situation is particularly worrisome given that mercenaries hired by governments to restore order in situations that do not qualify as an "armed conflict" escape all forms of criminal responsibility under the 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries.

The Role of the International Community

Given the state of the legal apparatus, it is imperative that the international community investigate the means of bringing mercenaries under greater control and supervision. It may well be that private military and security companies have a role to play in the resolution of armed conflicts and the reform of the security sector of failed states. Yet, the legitimate uses for which they can be called upon to act need to be clearly delineated. Even if they would not gather wide international support at this stage, amendments to the international definition of mercenary should be contemplated as well as the elaboration of standard national legislation.

In the end, however, these endeavors should not detract attention from the root causes of the resurgence of mercenary activities. Bad governance, important social cleavages and political exclusion of minority groups in developing countries foster the demand for mercenaries. As long as the international community complacently delegates to private military companies and humanitarian organizations the resolution of armed conflicts, it will fail to lay the basis for lasting peace in war-torn regions. What is needed is greater engagement from developed countries to finance the economic rehabilitation of failed states and the development of efficient and democratically responsible security structures on which political stability depends.

Jennifer Langlais is 2004-2005 Henigson Human Rights Fellow, Harvard University

REFUGEES

Canada-US pact thwarts refugee rights

The Safe Third Country Agreement allows Ottawa to turn back asylum-seekers crossing over from the US, and vice versa. But is the US a safe third country?

TRUPATI PATEL

CANADA and the United States recently entered into an agreement that threatens to undermine fundamental principles and norms that protect asylum-seekers. Canada sought the Safe Third Country Agreement (the "Agreement"), which took effect on 29 December 2004, in order to substantially reduce the number of asylum claimants in Canada. The Agreement is part of the Smart Border Action Plan undertaken with the US. According to a number of refugee aid groups, the Agreement is a quid pro quo for Canada's acquiescence on other aspects of the plan, which address US security concerns. The bilateral agreement is troubling because its application will result in a large number of refugees being returned to the US, where their rights will be curtailed.

Although the 1951 Convention does not require refugees to seek asylum in their first country of arrival, under the Agreement Canada will refuse entry to refugee claimants arriving via a US land border, and vice versa. The US is also required to re-accept any asylum-seeker attempting to enter Canada via the US. Likewise, Canada is obligated to re-accept any asylum-seeker attempting entry into the US via Canada. The Agreement's preamble reaffirms the parties' "mutual obligations to promote and protect human rights and fundamental freedoms." It makes specific reference to the 1951 Convention, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the 1967 Protocol Relating to the Status of Refugees.

This declared commitment to human rights notwithstanding, the very purpose of the treaty is to create a mechanism whereby Canada can more easily deny asylum-seekers' fundamental rights. If Canada is sincere in its pledge to fulfill its international commitments to protect refugees, the US would in fact have to be a safe third country. This, unfortunately, is not the case. For instance, the US has a policy of automatic detention for refugee claimants from certain countries. The detention policy is permissible under the Agreement despite the fundamental human right to be free from arbitrary detention, enshrined in the International Covenant on Civil and Political Rights.

Further, since the 11 September 2001 terrorist attacks, the US has breached the 1951 Convention's due process of law requirements and its prohibition of discriminatory treatment by targeting Muslim and Arab non-citizens for preventive detention. Indeed, in 2002 US authorities returned Canadian citizen Maher Arar to Syria, where he was detained and tortured for about a year. He has since launched lawsuits against both US and Canadian authorities, and a public inquiry into his ordeal is underway in Canada. If a Canadian citizen can be subject to such treatment, how can non-Canadian refugee claimants expect fair treatment in the US?

Moreover, the US imposes a one-year filing deadline for asylum claims. Despite exceptions to the rule, refugee rights advocates fear the deadline arbitrarily excludes persons in need of protection. Further, some claimants may understandably go underground given the widespread practice of refugee detention in the US. These same persons, however, would be barred from seeking asylum after one year and would face deportation.

The US has also criminally charged asylum-seekers on arrival with the offence of entering the state with false documents. Article 31 of the 1951 Convention expressly bars Contracting States from imposing on refugees "penalties, on account of their illegal entry or presence..." As Amnesty International concludes, refugee claimants refused access to Canada can be expected to suffer human rights abuses in the

US, such as arbitrary and protracted detention/imprisonment, often alongside criminal detainees in remote institutions; a cursory process for those lacking proper identity documents, denial of access to counsel as well as incongruous determination of claims of women who fear gender-based persecution such as domestic violence.

Notwithstanding UNHCR Executive Committee Conclusion 15 (XXX) of 1995, which states that asylum-seekers' preferred destination should be taken into consideration "as far as possible", the Agreement operates on the premise that asylum seekers must solicit protection in the first country (as between Canada and the US) of arrival.

In 2002, US authorities returned Canadian citizen Maher Arar to Syria where he was detained and tortured for about a year. If a Canadian citizen can be subject to such treatment, how can non-Canadian refugee claimants expect fair treatment in the US?

However, refugee claimants may have many bona fide reasons for seeking refugee status in one country over another, including presence of kin and better treatment pending status determination (language training, physical liberty, health care, access to legal aid, freedom from discriminatory treatment by government authorities based on national origin, etc.)

Article 4(2) of the Agreement recognizes some of these factors, exempting the following claimants from being returned to the country of last presence upon arrival at a land border point of entry: (a) those with at least one family member (defined in Article 1(B) as "spouse, sons, daughters, parents, legal guardians, siblings, grandparents grandchildren, aunts, uncles, nieces and nephews") who has been granted refugee or other lawful status other than as a visitor; (b) those with at least one family member aged 18 or older not ineligible to seek refugee status in the receiving nation's refugee status determination system and who has a pending refugee claim; (c) unaccompanied minors; and (d) those arriving with valid visas or other legitimate admission documents, other than for transit, issued by the receiving country (i.e. Canada or the US). The exception for unaccompanied minors represents an important protection for this vulnerable group. Canada, in contrast to the US, engages in the detention of minors only as a last resort, "taking in account other applicable grounds and criteria including the best interests of the child."

On the other hand, the Agreement is wholly inadequate in respect of another highly vulnerable group of asylum-seekers: women pursuing gender-based claims, particularly victims of domestic violence. Gender-based guidelines for the adjudication of gender-related claims in the US pale in comparison to Canada's progressive Guidelines on Gender-Related Persecution and Refugee Status. Contrastingly, US courts' practice with respect to gender-based asylum claims is inconsistent and unnecessarily restrictive in interpreting gender-based forms of persecution, such as domestic violence. Such concerns led to a recommendation by the Standing Committee on Citizenship and Immigration to exempt females with gender-based asylum claims from the Agreement. The Canadian government rejected the suggestion.

Overall, such considerations raise serious concerns about the ability of asylum-seekers returned by Canada to the US under the Agreement to access a "full and fair refugee status determination procedure."

The Agreement's true intent is to curb the numbers of refugees seeking asylum in Canada. Between 1995 and 2001, refugee claimants entering Canada at the US border comprised close to one-third of all refugee claimants in

Canada. In 2001, approximately 14,700 asylum seekers, nearly one-third of all claimants entering Canada, did so via the US land border. The US, on the other hand, received some 200 refugee-claimants from Canada during this period. Some maintain that fewer asylum-seekers entering Canada may result in more efficient processing of asylum-seekers who are admitted. It would do so, however, at the price of less efficient processing on the US side, where the larger numbers will be absorbed.

In addition, many predict an increase in trafficking and smuggling activity as large volumes of claimants who would otherwise have presented themselves at the Canadian border will attempt to enter Canada clandestinely and go underground or make their refugee claims inland since the Agreement only applies to land border points of entry.

The House of Commons Standing Committee on Citizenship and Immigration has also conceded that the Agreement may result in increased people smuggling activity. If that were the case, the Committee stated, "claimants would be put in harm's way and the only real beneficiaries would be the smugglers and people traffickers." Even if one accepts a security justification for the Agreement, the expected increase in the underground migrant population will actually undermine security, as Audrey Macklin has argued. Moreover, Human Rights First (formerly Lawyers Committee for Human Rights) posits that any security concerns can be addressed through information sharing between Canada and the US.

As Macklin points out, in judging Canada's practice in protecting refugee rights, it cannot be forgotten that Canada "pushed for this Agreement, given that it offers (hypothetically) the opportunity to deflect thousands of asylum-seekers into the US. If the US system does not secure full and fair treatment for asylum-seekers, the blame ultimately falls on Canada for insisting on an Agreement that will subject asylum-seekers to an unjust system."

Trupati Patel is a Toronto-based lawyer

EVENTS

NGO INFORMATION AND ORIENTATION SESSION for the 61st session of the UN Commission on Human Rights organised by Conference of NGOs in consultative relationship with the United Nations (CONGO) & CONGO Special Committee of NGOs on Human Rights (Geneva).

Wednesday, 16 March 2005, 8:30-12:00, 14:00-16:30, Venue: Room XXI, Palais des Nations.

HUMAN RIGHTS IN PAPUA

Panel discussion on 31 March 2005, 18.00-20.00 hrs. Venue: Varembe Centre, Geneva.

Meeting sponsors: Geneva-based Franciscans International, the World Council of Churches and Geneva for Human Rights.

Speakers: H.E. Msg Leo Laba Ladjar ofm (Bishop of Jayapura), Husein Zubeir Hussein (Chairman, Indonesian Ulema Council of Papua) and Rev. Herman Saud (Evangelical Christian Church in Papua).

THE DOGS OF WAR

Meeting on Mercenaries and Human Rights, 15 April 2005, 13.00-15.00 hrs. Venue: To be advised

Speakers: Ms. Shaista Shameem, UN Special Rapporteur on the use of mercenaries; Mr. Ravi Nair, Executive Director, South Asia Human Rights Documentation Centre (SAHRDC), and others.

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Mistaking quantity for quality...

of the fact that it does, in fact, discuss the serious impact of ill-conceived and corrosive counter terrorist legislation on the enjoyment of human rights worldwide. (See article on counter terrorism and human rights on Page 1).

Finally, the Panel makes a very useful and far-reaching recommendation of elevating the Commission on Human Rights to a "Human Rights Council", independent of and equal to the Economic and Social Council and the Security Council as Charter bodies, "reflecting in the process the weight given to human rights...in the Preamble of the Charter." This would require ECOSOC approval, an outcome not inconceivable given the fact that the same was made for the Permanent Forum on Indigenous Peoples; yet optimistic in the eyes of many, who look on the composition of ECOSOC with even more suspicion than that of the Commission.

Core Concern

The above suggestion of independence from ECOSOC, however, would amount to nothing in terms of elevating the position of human rights in the UN without first resolving the "most difficult and sensitive issue relating to the Commission", the issue of membership. And it is here that the Panel falls far short of expectation. Whilst it rightly notes that the tension surrounding the election of members has had "no positive impact on the work of the Commission", it proposes that membership be expanded to universal membership because "proposals for membership criteria have little chance of changing these dynamics and indeed risk further politicizing the issue". Aside from the fact that the Commission is, by its very nature, a political body and is not expected to be any different, the Panel gives no explanation as to why it thinks a criteria model for membership would have "little chance" of success.

This is unfairly dismissive, given the groundswell of opinion evident in the recent recommendations by the UN Secretary General, Kofi Annan, by the late UN Commissioner for Human Rights, Sergio Vieira de Mello, as presented to the Commission at the 59th session, and other prominent human rights groups who assume the position that, to quote Human Rights

Watch's Loubna Freih, "Commission membership should be earned rather than assumed as a right, and it should be awarded only to countries that have shown a genuine commitment to human rights."

Rather, the recommendation of the Panel appears to be the model that would have least chance of success. The reasoning provided is that it would "underscore that all members are committed by the Charter to the promotion of human rights, and might help to focus attention back on to substantive issues rather than who is debating and voting on them". How this would have any substantive meaning is not evident, given that membership to the Commission as it now exists *should* signify a commitment to human rights via the UN Charter, but does not

A workable approach may be to instigate minimum requirements following admission to membership. At that point, standing invitations should be mandatory, and statements on intentions to ratify core human rights treaties within a set time frame might be required. Cooperation with human rights bodies may become a benchmark for continued membership.

necessarily do so. Universal membership would operate in the same manner or even worse, giving *carte blanche* recognition to all member States irrespective of any scrutiny of their human rights record. Additionally, it would provide an open floor for further obfuscation, widening the net of those clamouring to disrupt the process of defending human rights.

The Call for a Minimum Standards Approach

It was Mr. de Mello himself, in a report presented to the Commission, who suggested that the time had come for "the Commission to develop a code of guidelines for access to membership of the Commission and a code of conduct for members while they serve on the Commission." This would signify a departure from the general UN protocol of automatic admittance of UN member States to political bodies, bar the permanent seats of the Security Council, yet nowhere is such a departure prohibited.

Given the particularised nature of the work of the Commission, set criteria would in fact seem a logical basis for inclusion. In an

interview with *Human Rights Features*, Mr. de Mello had expressed that, "membership entails responsibilities [...] therefore aspiring to membership or becoming a member entails, as a minimum, in my opinion [...] ratifying all core human rights conventions, translating those into national legislation and extending a standing invitation to all special procedures, which after all, are the creation of the very Commission."

This is a high bar, and considering the need for proportionality in representation, might result in a dearth of eligible candidates. A disposal of any principle of geographic proportionality would play into the hands of belligerents all too likely to claim that the Commission has degenerated into a forum for Western condemnation of developing States. In any case, it is not a desirable constitution for an international body and is protected as such by UN protocol. Inclusiveness should therefore be maintained.

The threshold should be set at a basic commitment to human rights. This may be staggered according to regions, or ranking within regions, although the means of determination here would be difficult to quantify and likely to be extremely sensitive and controversial.

Another, perhaps more workable, approach may be the instigation of minimum requirements at the stage following admission to membership. At this point, standing invitations should be mandatory, and statements on intentions to ratify core human rights treaties within a set time frame might be required. General cooperation with human rights bodies, including the submission of State reports, may become a benchmark for continued membership, perhaps re-assessed after two years.

These are only preliminary suggestions that *Human Rights Features* believes indicates the direction in which the discussion of reform should be steered, sensitive of course to the geopolitical realities of the Commission. Whilst the High Level Panel's report should thus be commended on many levels as a thorough critical analysis of the United Nations, it is regrettable that it has fallen far short of providing a detailed and workable solution for the core problem of membership in the CHR, the very body of the UN which the same Panel, to reiterate, described as "suffer[ing] from a legitimacy deficit that casts doubts on the overall reputation of the United Nations."

Gareth Sweeney is Legal Officer with the Asia Pacific Human Rights Network (APHRN).

from page 4...

This emperor...

refused to look beyond the threat posed by the Maoists to justify its military assistance to Nepal. Asian countries closed ranks and refused to support any criticism of a member of their group.

This unfortunate lack of foresight must be corrected at the present session of the Commission. The Commission must demand the full restoration of fundamental rights, the release of detainees and a return to efforts to bring about multiparty democracy in Nepal. It must unequivocally demand that Nepal fulfil its obli-

India, the US, the EU and Japan must jointly draft a resolution condemning in the strongest possible terms the action of the king. The resolution must also demand the restoration of fundamental rights, the release of political detainees, and concrete steps towards the restoration of democracy.

gations under international human rights law and humanitarian law. It must insist on the removal of restrictions on the National Human Rights Commission of Nepal (NHRC) and urge both the government and the rebel Maoists to

sign the peace agreement drafted by the NHRC.

Finally, the international community owes it to the people of Nepal to assist in the evolution of a functional democratic order. India must take the lead in convening an international meeting in New Delhi on restoring democracy in Nepal. It must bring together leaders of all political parties in Nepal, including the Maoist leadership, as was suggested at the meeting of India's cabinet of ministers in early February.

This will send a clear message to the king and also to parties that remain cynical about India's intentions. It will enable the community of democracies to make its case in an effective, yet non-intrusive manner. It may also lay the foundation for lasting peace in the Himalayan kingdom.

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