

HUMAN RIGHTS FEATURES

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'There is merit in the idea of criteria'

...and this idea implies that as members of the Commission on Human Rights, States have responsibilities, says H.E. Dr. Makarim Wibisono, Chair of the 61st session of the CHR

HRF: How do you perceive the High Level Panel's report on the reform of the UN, particularly the aspects referring to the CHR?

H.E. Dr. Makarim Wibisono: First, I would like to express my appreciation and express our thanks for the initiative. This is the 60th anniversary of the United Nations, so it is a good time for the issues and activities of the UN in all its aspects, including human rights, to be reviewed. And secondly, we must also consider the fact that right now people are questioning the merit of multilateralism in general, as well as multilateralism in areas such as human rights.

I consider that the observations of the High Level Panel provide a good input for all the delegations, particularly on the issue of the question of the credibility as well as the effectiveness of the CHR. I hope all delegations will utilize this as an input that can provoke ideas in order to address how we can improve and strengthen the Commission on Human Rights. Of course, with regard to the Commission on Human Rights, there are a number of ideas that may provoke a number of comments. I observe, at this particular stage, that there is a divergence of views within the Commission. But if we have the opportunity to have an exchange of views on it and try to clarify the purpose or address the hesitation of some of the members, maybe a new horizon will be shared by all member countries.

This will be a seeking of consensus. I also express my appreciation for the courage of the High Level Panel in tabling ideas that are forward looking. Of course this has provoked comments, but any courageous initiative always invites comments.

HRF: In terms of the membership of the Commission, which the High Level Panel has also addressed, would you go with the idea of there being some criteria for membership, or

INTERVIEW

H.E. Dr. Makarim Wibisono

would you rather go with a "minimum standards approach" that Mr. Sergio Vieira de Mello had proposed, and which he had felt would be more acceptable to States?

H.E. Dr. M. Wibisono: As the Chairman of the CHR, of course, I cannot, speak on behalf of the Commission on particular issues because there is no collective view on this. However as an individual representative of my country I can say that, based on my experience in the UN - of more than 20 years - the issue of multilateralism always involves a specific debate: one is a point of view with regard to exclusivism, and the

other is the idea of inclusivism. The concept held by those who are in favour of exclusivism is that the smaller the membership the more efficient the decision-making. This is the argument. But the school of thought I favour, of inclusivism, believes that if we are interested in the implementation of the decisions taken by the UN or the Commission, we have to adopt an inclusive approach.

On this particular issue, we have also had some experience - when, for example, we lost the election for membership of ECOSOC in 1996. We were ready to contribute to the work of ECOSOC and we are ready also to dedicate ourselves to the work of ECOSOC at the time, but because of the dynamic and the politics of elections, we were not successful. The feeling of being an outsider, felt at that time, is very strong in my mind. It is actually very bad for a country or a people who are not involved in the process of decision-making.

So the argument of exclusivism - that smaller is better - is not the best. We experience the problem right here - even with 53 members it is not easy to have a decision here because the issue is political, it is very controversial. From the podium I saw that the member states are sitting in front, but the back seats are also filled by states: so what is the difference? The reality is there. The problem is how to formalise the

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Of Cabbages and Kings

A WEEK is a long time in politics. Two weeks into the Commission on Human Rights (CHR), one is still reading the tea leaves on how the CHR will react to Nepal's abominable human rights situation.

Three days before the start of the CHR, the brass hats in Islamabad shamelessly embraced the only Hindu ruler in the world by proclaiming that Pakistan would offer arms to Nepal. Shades of a Punch and Judy show on democratic accountability they are, Kathmandu and Islamabad.

Pakistan is obviously fishing in troubled waters. It hopes to add to the stress that New Delhi is feeling over the situation in Kathmandu and in the process boost its flagging arm sales.

On the other hand, the People's Republic of China is being

devilishly astute as always. The Chinese Prime Minister has chosen not to touch down at Kathmandu airport on his South Asian trip. However, as a consolation, the Chinese Foreign Minister is expected to visit Kathmandu on 31 March 2005.

While China initially called the royal coup an internal matter, on reflection, Beijing, for the moment, wants to be seen as

not taking overt sides in Nepal. After the announcement that the Chinese Prime Minister would not be visiting Kathmandu, the Nepal Foreign Ministry went into overdrive. They issued a statement extending Nepal's support to the Beijing warning on Taiwan against secession. Nepal had earlier closed down the office of the Dalai Lama

in Kathmandu. Clearly, the Mandarin interest lies elsewhere. They are seeking Nepal's support to be associated with the South Asia Association for Regional Cooperation (SAARC). The great push southwards.

Meanwhile, the first draft of a Swiss resolution has started

making the rounds of delegations. It could be a stronger draft. The Swiss are looking at New Delhi and

the European Union for stronger signals. The other Asian governments are also waiting to see the language New Delhi suggests.

The United States, running with the hare and hunting with the hounds, while promoting the inherent link between democracy and human rights at the CHR as elsewhere, is yet to

classify the royal takeover as a coup. This would immediately kick into motion a range of US sanctions against the Nepalese Government.

In the EU, it is learnt that the French are also eyeing arms sales to Nepal. Yet, they are aware of their greater stakes in arms sales to India. The United Kingdom has taken a more principled position. The Nordics, well intentioned but clueless, are flapping their Penguin wings. Others like the Asian Development bank, taking the cue from Tokyo have recently extended US \$30 million in aid to Nepal.

The CHR needs to lay down the law for the King. Many of his advisors are fossils from the

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NEPAL In the dock

HUMAN RIGHTS FEATURES on the Web at: www.hrhc.net/sahrdc/hrfchr60/index.htm

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'The idea of criteria...'

reality. The difference between members and observers up to now is only one of time allocation, and of course with regard to voting rights.

But I consider that there is merit in the idea of criteria; this idea suggests that in becoming members of the Commission, we also have responsibilities. So the concept of responsibility as a member of the Commission, I think, is a very good idea. But it does not necessarily mean that if membership is universalised, we cannot do something about putting an element of responsibility in it. We have to be able to do it, because if you are not interested in carrying out the responsibility and obligations, you cannot participate in it in a very productive manner.

In short I can say that I am in favour of inclusivism, but an inclusivism which is productive, efficient and also with a strong sense of responsibility and obligation.

HRF: How would you define this responsibility?

H.E. Dr. M. Wibisono: Since there is a democratic process in the Commission, we are able to decide something. So we have also the responsibility to implement it. If there is a discrepancy between the decision and implementation, it will affect the credibility and also the image of the Commission.

HRF: Regional groups, on most issues, tend to vote as a bloc. In that context, do you think individual delegations are able to effectively define their position at the Commission? Or do you think sometimes countries' positions get diluted, simply because they have to go with the entire group?

H.E. Dr. M. Wibisono: This regional grouping system is found not only at the Commission but also in the General Assembly, in the ECOSOC. It is also in the Security Council, although not exactly the same groupings like the ones here. The merit of the grouping is - if they speak as one single country, their voice is less influential than when they speak on behalf of a number of countries. So they easily attract attention in the Commission or by the international community if they speak collectively.

However it does not necessarily mean, that as individual countries, we have to stick together all the time. Because we have also our national platform. The national platforms represent the efforts of every delegation, and therefore you can see that often there is a "regional grouping minus XYZ"... That happens! Therefore I think that in a situation like this, we must run with it, but of course we also have to encourage a democratic process. It should be preserved. Also every individual country has the right to express its own views. And I would try to manage this in such a way that every country has the opportunity to express its views.

HRF: What is your view on no-action motions?

H.E. Dr. M. Wibisono: As Chairman, I dedicated more than a week to studying the rules of procedures. I was also reminded by a number of colleagues, particularly my predecessors as well as people from the OHCHR Secretariat, that my work should be based on the rules of procedure. In Article 65 (b) there is a paragraph on no action motions. Now this is a given situation in the rules of procedure. I met with a number of other NGOs who have reservations about this because the provision effectively means that we cannot discuss the issues; we avoid the issues, although the Commission is supposed to be the one dealing with all issues with regard to human rights!

So what I said to my colleagues from the NGOs is: "Why don't you talk with the delegations in ECOSOC?" Because they are the ones who have capacity to contribute something to the improvement of the rules of procedure. But

as Chairman of the Commission on Human Rights and as also as the Ambassador of Indonesia here, I am not in position to contribute anything on the rules of procedure. Our colleagues with membership of the ECOSOC are the ones who can contribute on that.

HRF: How do you perceive the role of the Special Procedures? Do you think they have received adequate support and encouragement?

H.E. Dr. M. Wibisono: That is correct. I feel right now that I am actually in a phase of reality. The reality is that the Commission itself is supposed to be dealing with standard setting but at the same time must also deal with the monitoring aspect of it and also capacity building through technical cooperation.

Regarding standard setting, we have actually been very successful. We have all instruments related to human rights in place. I am trying myself to ensure that my country will be party to all international human rights conventions. I am very sure it will happen, because I have utilised my position as Chair to talk to them. But at the

same time I see that the technical cooperation in a number of places has stopped working and I myself am eager to see that this will increase, because we consider that technical cooperation is the right way to improve capacity-building. And I see that the Special Procedures are the reflection of the responsibilities of monitoring. If we are committed to the work of the Commission on Human Rights, we have to see that the three aspects of it work in parallel, harmoniously and progressively.

In this kind of situation we also see that the numbers of the mandate holders is increasing. This year I have to allocate time for an additional ten mandate holders to speak at the Commission. At the same time, I have just returned from New York and I got the impression that the budget allocated to human rights activities hardly ever exceeds two percent. When you talk about the effectiveness of the work of the Commission, the Special Procedures are in fact the mechanisms that continue working after the session is over - we fall silent and go to sleep after six weeks, but they are still working!

At the same time their resources are very limited and the Office of the High Commissioner also has a limited capacity to support them. So if we are sincere in ensuring that all the functions of the Commission progress harmoniously, we have to be also able to address the means of implementation. How we will do it, I don't know exactly, but I do need support from the media, I need the support of NGOs, I do need the support of all stakeholders and we must try our best to address this.

HRF: With regard to the efficiency of the CHR, what is your view on Government-organised NGOs (GONGOs)? We are particularly concerned about that, as NGOs. We often face criticism that NGOs are taking up a lot of time of the Commission, and then you have GONGOs who clearly eat into legitimate NGOs space.

H.E. Dr. M. Wibisono: Of course, my government does not have these GONGOs! I too, as Chairman, realised that the number of NGOs was truly beyond my imagination. I thought they would number 20 or 10 but it is very much beyond that. I consider that in order to be able to work effectively we have to be able to engage all stakeholders in our work. Even though this is an inter-governmental body, in order to deal with human rights issues, it is not possible to limit the implementation to governments. NGOs are partners. However, if this kind of superfluous number of NGOs are taking part in it... I doubt

whether the best results of the work or the commitment of NGO can be demonstrated only through statements in the Commission.

I have seen a lot of NGOs - I was also working on the issue of environment - that have dedicated themselves to working in the field and the success of their work is dictated by their achievements in the field. If you see how they went to Johannesburg, this grouping of NGOs, they sent their message to a number of representatives, and as long as their concerns were being flagged at the Johannesburg meeting, they said, "Ok, my concerns are being reflected here." But it does not necessarily mean that every NGO should take time to speak. Because the issue is the substantive part; the substantive demand is important.

Because, to be honest with you, we have a six-week session here, and I feel that to extend this to more than six weeks is not a good idea, because no one supports the idea. At the same time, we also have 21 agenda items. I checked with my colleagues here who have been following this Commission, and found that for years and years this has not changed! I have to talk to the NGOs about this. This is our common responsibility - how to make the Commission effective. Therefore the idea of having joint statements is a good way out.

HRF: But do you see a way out of the GONGO problem? I realise it is up to ECOSOC to accredit NGOs, but here, it is usually the countries bringing GONGOs that blame NGOs for taking up too much time at the Commission...

H.E. Dr. M. Wibisono: Are there any ideas on how to deal with this?

HRF: Within the NGO community, we figure out which are the GONGOs and try to socially ostracise them. We cannot do much else as they have ECOSOC status.

H.E. Dr. M. Wibisono: Yes, I can see from the rules of procedure... there have been some questions on this issue... I have given open access to NGOs and I meet them from time to time to try to resolve issues. There is no leeway for the Chairman to isolate this problem. Up to now, I don't know how to manage that. If you have friends among NGOs who have advice for me, I am going to listen and try to address this. My reference is always the rules of procedure.

So, if you have ideas or your colleagues do, don't hesitate to call me or to come here; I would be willing to listen.

HRF: The human rights situation in your own country, Indonesia, has also been a matter of concern for activists and others - do you believe that your election as Chair will somehow help push the human rights agenda on the domestic level? How is your election being perceived in your country?

H.E. Dr. M. Wibisono: I think my election as a chairman is a good opportunity for Indonesia to also contribute to the further improvement of human rights inside the country. As Chairman I was able easily to meet with the President, I was able easily to meet with the Speaker of the House, and to the Commander in Chief of the armed forces. When I asked him, I said that right now human rights is in the mainstream of international relations, and there is no way for us not to support this. And the Commander-in-Chief said: "I am committed to supporting you. I have already given instructions to all the troops to respect human rights." And I asked him: "Then, if you are committed, how is it that incidents happen in the field?". He said, "This is a problem because I have 350,000 troops spread all over the country." So I asked him: "If for instance, I had technical cooperation, i.e. if I got an expert like a general from a country that is very advanced in human rights and have him

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'If membership is universalised, it does not mean that we cannot put an element of responsibility in it. If you are not interested in carrying out your responsibility and obligations, you cannot participate in it productively.'

'The Special Procedures are in fact the mechanisms that continue working after the CHR session is over. At the same time, their resources are limited and OHCHR has a limited capacity to support them.'

GUIDING PRINCIPLES FOR THE 61ST SESSION OF THE COMMISSION ON HUMAN RIGHTS

AS the 61st session of the UN Commission on Human Rights begins its substantive debates, the International Service for Human Rights proposes some principles to guide the deliberations, procedures and conduct of member and observer states and non-government organisations. These proposed principles are not a reform proposal or a comment on reform proposals under discussion. They are presented as principles that should guide the deliberations of the Commission on Human Rights however structured. They have been developed in consultation with the Geneva offices of a number of international human rights non-government organisations but they reflect ISHR's views alone. ISHR invites government and non-government delegations to consider and comment on its proposed principles. It also invites comments from the Office of the High Commissioner for Human Rights, the Special Procedures of the Commission on Human Rights and human rights treaty monitoring bodies.

The Commission on Human Rights is the primary forum through which the United Nations seeks to fulfil its Charter purpose of promoting and protecting human rights and fundamental freedoms. To implement this mandate the Commission must hear, acknowledge and respond to the actual experiences of those who aspire to enjoy all their human rights and fundamental freedoms to their full potential, especially those whose human rights are being violated or are at risk of being violated.

In recent years human rights non-government organisations have seen how procedural ploys have been used to prevent debate and appropriate action and how international political considerations have assumed greater prominence than fundamental principles of human rights. Increasingly states use the Commission to shield themselves from justifiable criticism and to advance their own interests

Charged with the responsibility for protecting and promoting human rights, states, whether or not members of the Commission, and non-government organisations must approach the 61st session committed to ensuring its effectiveness. This requires, at a minimum, a commitment to certain guiding principles for the work of the Commission:

1. The work of the Commission should be built upon and guided at all times by the principles and provisions of the Charter of the United Nations, international human rights treaties, international customary law and the Vienna Declaration and Programme of Action.
2. Through the Commission, all states should submit to being called to account for their actions and practices that affect human rights. Every state, no matter how powerful or influential, should accept scrutiny by the Commission.

3. States and non-government organisations should lend their support to the discussion of any issue or situation falling within the scope of the agenda of the Commission.

4. Procedural motions and processes, including no-action motions, should not be used to prevent the Commission debating any human rights matter or situation, whether thematic or country specific.

5. To enhance the effectiveness of Commission's mandate to protect and promote human rights, all states and non-government organisations should respect the independence of Special Procedures of the Commission, cooperate fully with them and work to implement their recommendations. States should also commit to strengthening and enhancing the independence, expertise and effectiveness of the Special Procedures. They should issue standing invitations to Special Procedures.

6. The Commission should be responsive to the work of the human rights treaty monitoring bodies. States and non-government organisations should give due weight and careful consideration to their interpretations of and comments on treaties, their analyses of state reports and their findings and recommendations.

7. The Commission should ensure effective access to its proceedings for non-government organisations accredited by the Economic and Social Council and their registered representatives.

International Service for Human Rights
21 March 2005

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give lectures or training or workshops and also help improve the standard operating procedures within the armed forces, would you be willing to host them?" And he said, he's willing, to have these workshops, these trainings inside the Headquarters. So, there is a good opportunity for people who are sincere in making this happen, because sometimes the problem, the abuse of human rights does not necessarily come from criminal ideas, but often from ignorance, the lack of awareness of the concept of human rights.

To be honest with you there is a gap of perception in a number of countries. First, take a country whose people are familiar with John Locke and the Social Contract. For them, the issues of government, governance, are very familiar. In other cultures, other countries, sometimes, they believe the concept of power, the concept of government, comes from God, that they can do anything, and that as long as they protect territorial integrity, it is alright. But we have to address this, and also, the most important thing for the military and the police forces is to try to help them to set up standard operating procedures within their system. If you have information, this kind of resources, a General willing to do that, I guarantee you that they can speak in the Headquarters of the Indonesian armed forces, and people will listen. Now, this is possible because I am the Chairman of the Commission on Human Rights. If I was not the Chairman, I could not speak like that!

HRF: Was Komnas-HAM also involved in the consultation process you had following your election as Chair?

H.E. Dr. M. Wibisono: Yes, there were consultations. Komnas-HAM is a group of very dedicated persons but they have a limited budget. The chairman, Mr. Garuda Nusantara, and a number of members are dedicated persons. I have talked to the High Commissioner also, asking her to give attention to this situation in terms of providing technical assistance. I am sure the National Commission is doing its best. The Commission on Human Rights just works for six weeks, and the Office of the High

Commissioner gets information about when the special mechanisms are going there... but the people who work in the country 24 hours a day, seven days a week, are the National Commission. They are really dedicated persons. There is no difference between the National Commissions and the people who are active in Amnesty International, Human Rights Watch... they are all the same people, they are dedicated to the objective and ideal of human rights. If you empower them, they work. They are also ready to take risks.

'Many countries still feel the pinch of colonialism in their minds. They feel that their former colonial masters should not be lecturing them... But I feel the issue of human rights is not an issue of colonialism, it is an issue of humanity. And all countries should accept this.'

HRF: Coming to technical assistance, the Asian Group's perception is that naming and shaming does not really work, as you also said in your statement. But in situations where you have gross violations of human rights, how far would mere technical assistance be useful? For example Sudan has been receiving technical assistance since 2001 but we saw what happened last year. In a situation like that, would you consider taking this forward and being more forthright?

H.E. Dr. M. Wibisono: What I meant with the need of having technical cooperation instead of condemnation, is that we need to improve the credibility and effectiveness of the Commission. So how can the Commission be credible if its decisions are not respected by the country concerned? Therefore we would like to change the situation. We have to engage the countries concerned into our collective work. If there are differences, these must be worked out, divergent opinions should be ironed out. We need consistent resolutions that are implementable. We don't need action that will make headlines for one day and then will be forgotten. We need decisions that can be implemented.

We should carefully choose the ones who engage with the countries. When I was in the ASEAN Senior Officials Meeting (SOM)

meeting of the ASEAN security community and pointed to the need to have a human rights perspective in a patronising way, some countries questioned the merit of it. But when I changed my approach, by asking for advice, giving suggestions, I found they were more inclined to cooperate. And it worked. The country concerned - I won't name it - actually agreed to the idea of a human rights element. So, the way you present it matters.

Many countries also still feel the pinch of colonialism in their minds. They feel that their former colonial masters should not be lecturing them about what they should do and not do. But I feel the issue of human rights is not the issue of colonialism, it is an issue of humanity. And all countries should accept this.

HRF: Is the Commission on Human Rights still relevant as a mechanism for the protection and promotion of human rights worldwide?

H.E. Dr. M. Wibisono: Of course it has been, is and will be. In this kind of forum, all stakeholders are treated the same way. Of course, it is not perfect. But it is our responsibility to improve it.

HRF: While it is commendable that Indonesia has drawn up National Action Plans (NAPs) for Human Rights, there seems to be a disjoint between declarations and action. For example, the NAP for 1998-2004 specifically mentioned that Indonesia would ratify the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). But that has not happened. Any comments?

H.E. Dr. M. Wibisono: I shortly expect it to happen. I have talked to senior government officials, to the President, the Senate, and emphasised what needs to be done. But as I said, often it has to do with ignorance about the importance of these things. But I have written to the Speaker of the House; I have set the ball rolling. The Minister for Human Rights is coming here. The President has asked him to ratify the instrument in front of me. And, if in a month, nothing happens, I will follow it up myself. Because sometimes it is just the technical details that are not followed up, again mainly because of the lack of awareness on the part of the legislative bodies. But I will see that it happens.

AUSTRALIA

Empty anniversary: Australia & ICERD

BENJAMIN LEE

IT'S been 30 years, 14 State party reports and nine periodic appearances before the Committee on the Elimination of Racial Discrimination (the Committee) since Australia ratified the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention).

These three decades have witnessed significant progress: the end of the White Australia Policy; a refugee intake that peaked in 1980/1981 at 22,000; judicial activism in the *Mabo* and *Wik* decisions, and the enactment of the 1993 *Native Title Act* which upheld the right of Indigenous Australians to claim ownership of traditional lands; the enactment of progressive anti-discrimination legislation; and the development of a national human rights commission that bore promise.

Since the 1996 accession of the Howard (Liberal/National Coalition) Government, much of this progress came undone:

- The 1998 amendments to the *Native Title Act* have curtailed the capacity of Indigenous Australians to claim native land

- A reservation against article 4(a) of the Convention demonstrates the Government's reluctance to criminalise certain forms of racial discrimination, as does the absence of an entrenched legal guarantee against racial discrimination superior to state and national laws (per Committee General Recommendation No.7: Legislation to Eradicate Racial Discrimination per article 4)

- The Government continues to refuse to make a formal apology to Indigenous Australians for their abhorrent treatment since white settlement for, in part, fear of compensation and reparation payments (per Article 2.2 of the Convention)

- Aboriginal deaths in police custody continue to occur, and recommendations are yet to be implemented some 14 years after the Royal Commission into Aboriginal Deaths in Custody

- Mandatory sentencing laws disproportionately affecting Indigenous youth remain active in Australia's West

- Continuing legislative campaigns to remodel and reduce the Australian Human Rights and Equal Opportunity Commission (HREOC) have demeaned and diminished an institution that once bore promise

- The Pacific Solution and the mandatory detention of undocumented asylum seekers constitute, some would argue, a protectionist approach to immigration reminiscent of, if not a contemporary incarnation of, the White Australia Policy

- Xenophobia, conditioned by an apprehension of terrorism fuelled by the media and evidenced in anti-terrorism legislation, has impacted upon Islamic Australians.

The Committee documents each of these examples of retrogression in its recent concluding recommendations to Australia's combined Thirteenth and Fourteenth State party reports. These recommendations resemble the Committee's closing words in 2000, which, in turn, appeared amongst the recommendations articulated by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Maurice Glèlè-Ahanhanzo back in 2001.

Australia's periodic report

The Australian Government's recent submission to the Committee is a brief 37 pages that represents two reports and covers five years.

The Australian Human Rights and Equal Opportunity Commission (HREOC)

The Government invests a large part of the seven pages it devotes to 'General Measures of

Implementation' to a discussion of HREOC. Since 1996, HREOC has been subjected to substantial sanitisation, most recently through the *Human Rights Legislation Amendment Act 1999* (Cth) which statutorily removed the Commission's ability to make binding decisions in racial discrimination cases.

This programme of reform, unsuccessfully attempted through the *Human Rights Legislation Amendment Bill (No 2) 1999*, plans to merge HREOC's current specialist portfolios into three general portfolios. Since 1998 one Commissioner has been responsible for both Aboriginal and Torres Strait Islander Social Justice and Race Discrimination. To Australian non-governmental organisations, such mergers have severely affected HREOC's ability to 'effectively handle individual complaints, education, public inquiry and policy work.' To Australian delegation member Mr. Matt Minogue of the Human Rights Department of

Th eradication of the Aboriginal and Torres Strait Islander Commission (ATSIC) without the introduction of a replacement body would remove an important source of Indigenous political representation and thus further inhibit the capacity of Indigenous Australians to participate in the making of decisions affecting themselves. How, questioned CERD Country Rapporteur Mr. Raghavan Vasudevan Pillai during Australia's recent CERD Committee appearance, "can such a non-representative arrangement be expected to instill confidence among Aboriginals?"

the Attorney-General's office, such restructure intends "nothing insidious".

The Government plans to reduce HREOC to a human rights education-orientated mandate. To Racial Discrimination Committee member Mr. Morten Kjaerum, the core of a national commission must maintain "a very careful balance between monitoring, advising, dealing with complaints, and on the other hand, education". Extinguishing HREOC's representative capacity would debilitate HREOC, an institution described by Mr. Kjaerum as, historically, "an icon amongst the national human rights commissions" and acknowledged by the Australian Government as "the principal agency responsible both for monitoring compliance with CERD within Australia, and for investigating and conciliating complaints, including complaints of alleged human rights violations by or on behalf of the Federal Government..."

The Aboriginal and Torres Strait Islander Commission (ATSIC)

The Government, addressing Indigenous issues, maintains that it is "working closely with the States and Territories and the Aboriginal and Torres Strait Islander Commission (ATSIC) to find lasting, well-coordinated and practical responses to the very serious problem of family violence in Indigenous communities." The Government also describes ATSIC as a key agency "...for negotiating and determining native title" and "represent[ing] the interests of Indigenous people in the native title process."

The Government has since announced that ATSIC will be dismantled.

Australians for Native Title and Reconciliation (ANTaR), in their 2005 Alternative Report, describe the planned scrapping of ATSIC as "the clearest evidence of the Australian Government's withdrawal from its commitments under ICERD".

The eradication of ATSIC without the introduction of a replacement body would remove an important source of Indigenous polit-

ical representation and thus further inhibit the capacity of Indigenous Australians to participate in the making of decisions affecting themselves. How, questioned Country Rapporteur Mr. Raghavan Vasudevan Pillai during Australia's recent Committee appearance, "can such a non-representative arrangement be expected to instill confidence amongst Aboriginals?"

Native Title

The controversial changes to the *Native Title Act 1996* introduced through the 1998 *Native Title Amendment Act* are, the Government maintains, "...delivering real outcomes to Indigenous communities." To the Government, the *Native Title Amendment Act 1998* "maintains an appropriate balance between the rights of native title holders and the rights of others".

In the same breath, however, the Government concedes that in Decision 2(54) of 1999 "the CERD Committee considered that the amended NTA could not be considered a 'special measure' under CERD and called on Australia to suspend implementation of the 1998 amendments."

It is worth recalling that the Government's 2000 appearance before the Committee was at the activation of the Committee's *Early Warning Procedure* on account of the *Native Title Amendment Act*, judged by the Committee to be discriminatory against Indigenous Australians. The obstinacy with which the Government fronted the Committee was met with the following Committee reprimand: "[c]oncern is expressed at the unsatisfactory response to decisions 2 (54) (March 1999) and 2 (55) (August 1999) of the Committee and at the continuing risk of further impairment of the rights of Australia's Indigenous communities", and was subsequently supported by Commission on Human Rights resolution 2001/5, which mandated Special Rapporteur Mr. Glèlè-Ahanhanzo's 2001 visit to Australia.

Asylum Seekers

The mandatory detention of undocumented asylum seekers and "unlawful non-citizens" has placed Australian domestic policy under international scrutiny. At the time of Australia's 2005 Committee appearance, 1039 persons remained in immigration detention; 187 of these persons having been in detention for more than three years. On this issue the Australian government has little to remark. Asylum seekers appear nowhere in Australia's latest periodic submission.

Current Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) Minister Senator Amanda Vanstone has recently been forced to announce immediate changes to DIMIA following an inquest into the placement of an Australian national in immigration detention for six months. While it is unfortunate that the detention of an Australian national is necessary to evoke reform, there also exists a sad irony, as Committee Member Mr. Ralph F. Boyd Jr. observed, that the treatment that asylum seekers receive is juxtaposed against "the sound sense of democracy" that makes Australia such an attractive destination for asylum seekers.

The breadth of Australia's Department of Immigration, Multiculturalism and Indigenous Affairs, (DIMIA) mandate is also problematic. Committee Member Mr. Boyd was captured by the audacious amalgamation of original Australians (Indigenous) new Australians (migrants), and potential Australians (Asylum seekers) within a single portfolio.

Taking responsibility

The potential for political reform under Senator Vanstone is thin. To consider precedent, Mr. Phillip Ruddock MP (who led the Australian

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The Road Towards Abu Ghraib

...and emerging lessons, the most important being that only the law can guarantee humane treatment

PERHAPS the most important lesson to be learned about the torture and other abuse of internees at Abu Ghraib is the lesson it teaches us about what happens when individuals lack international legal personality, including the capacity to hold and assert rights at the international level. The lesson is that enemy prisoners cannot rely on our compassion; only the law can provide credible guarantees of humane treatment. Seen from this perspective, the inhumane treatment of detainees at Guantanamo and Abu Ghraib is an inevitable result of policy decisions to place an ever-growing number of detainees ever farther beyond the protection of the law.

International law provides a number of protections for prisoners of war (POW) and other detainees. Significantly, the Geneva Convention relative to the Treatment of Prisoners of War (Articles 13 and 17) state that prisoners of war "must at all times be humanely treated" and "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) expressly states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

International legal instruments that outlaw torture also make the obligation non-derogable, which means that they cannot be suspended for any reason, including war or any other emergency situation.

The US has several domestic statutes that criminalize the commission of torture by a US national outside the US, and make it a criminal offence for US nationals to commit war crimes. Additionally, a 1987 US Army Field Manual states that the "use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government."

Torture of detainees at Abu Ghraib and Guantanamo is the result of policy decisions to deny these legal protections to detainees and prevent detainees from asserting their legal rights. It is widely considered that the origins of these policies can be traced to a set of legal memorandum prepared within the US administration which discuss the status of detainees in the so-called "war on terrorism" and their rights under US and international law.

On 22 January 2002 the Department of Justice (DOJ) provided advice to the Department of Defence (DOD) in a memorandum from Assistant Attorney General Jay Bybee to White House Counsel Alberto Gonzales and the DOD General Counsel Haynes. The memorandum concluded "that customary international law (the Geneva Convention) does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners" because according to the memoranda the President has the unilateral power to suspend all or parts of treaty obligations at his discretion, although under international law the memoranda concluded that the legality of suspending the Geneva Conventions was a "close question".

Pursuant to the memorandum, Defence Secretary Donald Rumsfeld instructed the "combatant commanders" that Al Qaeda and Taliban individuals were not entitled

to POW status but they should be treated humanely and "to the extent appropriate and consistent with military necessity in a manner consistent with those Conventions".

In August 2002, in response to the request of then Counsel to the President Alberto Gonzales, the Office of Legal Counsel of the DOJ provided its opinion on what interrogation methods would violate prohibitions on torture under international or US law. The memorandum concluded that the president, as commander-in-chief, is above international and domestic law and so, too, are those who act under his authority. Therefore, any interrogations conducted pursuant to the president's authority could be exempted from the prohibitions against torture. Notably, the opinion ignored US Supreme Court decisions rejecting this interpretation of executive power, and perhaps more disturbingly, it reflects an ignorance of, or sheer contempt for, international law.

It would be difficult to construct legal arguments that could be more exquisitely anti-ethical to and utterly destructive of the underlying object and purpose of CAT than those contained in the Office of Legal Counsel's opinion. By virtually sanctioning conduct equivalent to torture under the treaty and effectively laying out a road-map of evasion from criminal prosecution for the perpetrators of torture, the legal opinion renders almost meaningless the US adherence to CAT.

Further, in April 2003, a US DOD working group completed a report on legal constraints on intelligence gathering. The memorandum states that US obligations regarding the prohibition on torture are limited to US Constitutional restraints on torture, and that these can be circumvented by the president during periods of military necessity due to his powers as Commander-in-Chief. In light of this legal analysis, on 16 April 2003 Secretary Rumsfeld approved 24 interrogation techniques for use at Guantanamo Bay.

Although these memoranda discussed the legal status and permissible means of interrogating Al Qaeda suspects who were captured in Afghanistan or elsewhere, news reports show that these practices "migrated" to Iraq, resulting in wrongful treatment of Iraqi detainees even though they were clearly entitled to protection under the Geneva Conventions. Specifically, when Major General Geoffrey Miller visited Abu Ghraib in August 2003, he told military officials that Abu Ghraib should be "Gitmoized." The permissiveness of these memos is

frequently linked to the abuses that unfolded in late 2003 with respect to Iraqi detainees.

The US Administration's Response

In US federal court filings, the US administration has submitted that these prisoners have no legal right to complain even if subjected to torture or summary execution. The US government has thus virtually suspended the legal personality of detainees for over two years. Rather than providing the detainees with rights under the law, the US administration pledged that the abuses were "un-American" and that they would not continue - leaving detainees to rely on the compassion of American soldiers for their humane treatment. To date, the American response has been meager.

Initially, reports of abuse of Iraqi detainees led General Sanchez to request that the US Central Command appoint an officer to investigate the conduct of the police brigade at Abu Ghraib. Major General Antonio Taguba was appointed on 31 January 2004 to lead a month-long investigation. Taguba submitted his findings in the so-called "Taguba Report" in February 2004; it labeled the conduct as "sadistic, blatant, and wanton criminal abuse" and concluded that US Army Soldiers had committed "grave breaches of international law".

On 6 May 2004 President Bush stated that the "wrongdoers will be brought to justice", "that the actions of those folks in Iraq do not represent the values of the United States of America" and that he was "sorry for the humiliation suffered by the Iraqi prisoners, and the humiliation suffered by their families." However, the US Army has only charged eight military officers, none above the rank of staff sergeant, with physical and sexual abuse of 20 prisoners at Abu Ghraib, and two authors of the so-called torture memos have been promoted - one to a life-time appointment on the federal judiciary and another to the position of US Attorney General.

Response from Congress has been similarly meek. During the summer of 2004, the US Congress considered passing a measure that would have expressly required humane treatment of detained foreign persons, and would have provided that all US officials are bound at all times by the legal prohibition against torture, but this measure was defeated by Republican legislators.

The US Supreme Court has finally intervened to restore some procedural capacity to the detainees, at least to those detained at Guantanamo, by holding that the habeas corpus jurisdiction of US federal courts extends to detainees held at Guantanamo Bay. However, the Supreme Court expressly declined to address the nature of "what further proceedings might become necessary."

Lastly, on 9 March 2005, more than one year after learning of the abuses perpetrated in Abu Ghraib, the military commander in Iraq has issued definitive rules on the treatment of captives in American prisons. These derive from the latest Pentagon report on prisoner abuse, and remain classified. The report allegedly concludes that only the lowest ranking soldiers are to be held accountable. It ignores any reference to Bush's declaration that terrorists have no protection under the Geneva Conventions and entirely overlooks Rumsfeld's approval of interrogation techniques for Guantanamo in April 2003.

It is, to quote the *New York Times*, another "whitewash" over Abu Ghraib and the institutional sanctioning of torture.

Just don't expect the Attorney General to intervene.

Early warning and findings

THERE were many early warning signals that the law was being violated in Iraq and elsewhere. In May and July of 2003, the Special Representative of the UN Secretary-General disclosed concerns about the treatment of Iraqi detainees to the Coalition Provisional Authority, and to the UN Security Council on 17 July 2003.

In July 2003, Amnesty International publicly accused the US of subjecting detainees to conditions that amounted to torture and cruel and inhumane treatment. Also in July 2003, the ICRC submitted a "working paper" to the US that documented numerous instances of abuse at detention centers in Iraq. According to a leaked ICRC report, when ICRC monitors visited Abu Ghraib in October 2003 they became so alarmed by the number of nude detainees that they interrupted their visit and requested an immediate explanation.

The full ICRC memorandum sent to the Coalition Forces in February 2004 detailed "serious violations" of international humanitarian law committed by the Coalition Forces against "protected persons during their capture, arrest, transfer, internment, and interrogation." Some of the more serious violations detailed in the ICRC report included "brutality ... sometimes causing death or serious injury", failure to notify families of those arrested, physical and psychological coercion during interrogation to secure information, prolonged solitary confinement in dark cells and excessive and disproportionate use of force resulting in death or injury during internment.

Methods of coercion and ill-treatment at Abu Ghraib included: hooding for up to four days; beating with hard objects (including guns); kicking the groin; standing on the detainee's face; threats of imminent execution; naked, solitary confinement in a completely dark cell; sleep, food and water deprivation; and sexual humiliation. And the report concluded that abuse of detainees by US personnel was widespread, harsh, and brutal and in some cases "tantamount to torture".

Colombia: Cycle of impunity

MATTHEW STROMQUIST

THE Colombian government would be wise to take heed of the comments of the UN High Commissioner on Human Rights in her opening statements at the 61st Commission on Human Rights. Stating that there is "as much redemption in the process of justice, as there is in the outcome," and that "[Justice] vindicates truth over lies and deception," it is unfortunate that this is not the same process of justice currently being contemplated by the government of Colombia as they continue with the process of demobilizing paramilitary groups.

Unfortunately, the government views justice and peace as existing in a kind of dialectical relationship, rather than as part and parcel of the same process, with the same attendant goals. In addition, the release of the High Commissioner's report on Colombia at the 61st Commission shows how far the Colombian government still has to go in implementing the many recommendations made by the High Commissioner in previous reports.

The High Commissioner's report paints a dire picture of the continuing conflict in Colombia. Continued violations of the right to life and personal integrity, including an increase in reports in 2004 of extra-judicial executions, as well as the lack of any real and lasting progress on economic, social and cultural rights leaves the government in the position of defending an indefensible record.

Recent indications from the Colombian government, led by President Alvaro Uribe, show that they would prefer to sweep away the long list of atrocities committed by government and loosely-aligned paramilitary forces, going back decades and touching almost all aspects of daily life in Colombia, by granting immunity to some of the people who are most responsible. While the goal of demobilizing the paramilitary forces is indeed a necessary and vital part of ending the cycles of violence, such demobilization, in order to have any real credibility and support both inside and outside of Colombia, must include real and stringent procedures for acknowledging and prosecuting the many crimes that were committed over the years.

It is a hopeful sign that President Uribe was forced to withdraw his original proposals for demobilization which would have essentially granted the government power to turn the other way in the face of clear evidence of atrocities. NGOs from around the world, as well as governmental and inter-governmental agencies, played a crucial role in making sure that this proposal was shelved.

But now, with the Congress in Colombia debating the contours of a new demobilization scheme, it is imperative that Colombia take the concerns of its own citizens and the international community seriously. While the initial agreement to end their role in the conflict was reached in December 2002, the International Commission of Jurists (ICJ) report that in the intervening period paramilitaries have been responsible for close to 2000 deaths, and the climate of impunity surrounding these deaths has continued. While there have been significant numbers of Autodefensas Unidas de Colombia (AUC) paramilitaries who have turned in their weapons, they have been able to do so with only the most brief of background checks, and with no public guarantees that the government will investigate and prosecute any of their crimes.

The proposed draft of a legal framework being debated in Congress does acknowledge the need for truth in investigations of atrocities by paramilitary groups, invoking the language of inalienability of rights and the duty of the government to arrest and prosecute those responsible.

However, there are still significant loopholes in the bill that the Congress will hopefully remedy. The latest proposal of the bill currently being debated in Congress, which would grant lenient sentences of 10 years for members and leaders of paramilitary groups found to have committed the gravest of human rights and international humanitarian law abuses, amounts to very little in a conflict that has lasted decades

and cost thousands and thousands of lives. There is little doubt that the promulgation of a strong, secure, and independent legal framework for demobilization is a crucial step towards opening up other avenues for peace in the continuing conflict in Colombia.

It should come as no surprise that there has been little movement towards instituting a culture of human rights in Colombia when the leaders of the country publicly ridicule and disparage the substantive guarantees that a real human rights regime would include. After the adoption of the London Declaration in July 2003, in which representatives from 24 countries met with Colombian government representatives to establish conditions on the donation of aid, President Uribe chided human rights activists as being "at the service of terrorism." While the President's comments were condemned around the world, they do provide an insight into the workings of the Colombian government over the last few years. And while the recent series of meetings by international donors in early February 2005 was a good first step in holding the government accountable and tying the disbursement of aid to a real process of paramilitary demobilization, the international human rights community must remain vigilant in its efforts to insist on an institutionalized legal framework that ensures that the atrocities committed over the years will be dealt with through a fair and just process. Demobilization must be seen as a real step towards a peace in Colombia, not just another charade.

It is a sincere hope that the Congress of Colombia will see the need for a more formalized tribunal to deal with the legal problems surrounding the demobilization process. Again, in the hands of the government, and the Attorney General specifically, too many perpetrators have been able to simply walk away from their crimes. The case of Attorney General Osorio's announcement in 2004 that he would not seek to prosecute General Rito Alejo del Rio, whose crimes and ties to paramilitaries were well documented, constitutes a particularly glaring example of the inability, or lack of political fortitude, to prosecute key figures in the paramilitary.

Unfortunately, behind the talk of government negotiations and international pressure for a legal framework, the violence and deaths in Colombia have continued to rise. Both sides of the conflict have been guilty of serious crimes, and the months of February and early March have seen a spate of new attacks and counter-attacks. The two main armed opposition groups, Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejercito de Liberacion Nacional (ELN) seem to have escalated their attacks, and no doubt their practices of child soldiering and the killing of innocent civilians have been part and parcel of their operation. The toll that such violence has taken on the civilian populations, which make up much of the terrain on which the battles are fought, is almost incalculable.

And these are not only incidental deaths. The practice of deliberate killings, disappearances, and kidnappings has long been a part of how both the paramilitaries and the guerrilla groups have operated. As Amnesty International has reported, the spate of civilian deaths, many by live fire and the use of landmines, have also been accompanied by over 220,000 people being forced to leave their homes last year because of the conflict, and there have been numerous accounts of ongoing governmental practices of arbitrary arrest and torture. It is estimated that close to 80 percent of all victims in the conflict are civilians.

The kidnapping and use of children in the armed conflict has been one of the most persistent and intransigent abuses committed by both sides. The High Commissioner's report confirms that this is still an on-going practice, as well as the continued sexual and labor exploitation of children. There is no question that the AUC and FARC recruit and use children in direct combat operations, and the apparent lack of a real commitment from either side to end the practice completely is a crime that will affect the future of Colombia for generations. Human

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Counter-terrorism & Human Rights

Time to act

NICHOLAS HOWEN

TERRORISM is creating victims and we face today an acute sense of global insecurity. But many counter-terrorism measures are creating new victims. One of the sharpest questions at this year's Commission on Human Rights is whether, after three years of avoiding the problem, its members are now ready to set up a mechanism to deal with counter-terrorism and human rights.

Not long ago in Pakistan I met with two refugee families from Algeria. They were the wives and children of men who had fallen into the legal black hole of Guantanamo Bay and Bagram airbase. The women were in tears. They did not know why their husbands had been arrested or taken across borders without due process more than one year earlier, whether they would ever be charged or tried, whether they would be released and how they were being treated. These families' lives were on hold, indefinitely, in a foreign country.

Global rule of law crisis

A few years ago I did not think we would again be hearing governments trying to justify the use of torture against terror suspects. Governments have tried to redefine torture to exclude psychological pain. Prominent lawyers have even proposed that torture could be somehow regularised through a form of judicial torture warrant. It is not by chance that the international community has said that torture can never be justified - and never means never.

Many new or long-standing counter-terrorism measures in all regions have become a critical threat to the rule of law. We have seen people suspected of terrorist offences removed beyond the protective reach of the courts, held without judicial review, without habeas corpus. Incommunicado detention is now more widespread and in more countries government ministers put terror suspects in administrative detention for long periods without charge or trial. We have seen basic fair trial guarantees ignored, rights of defence cut down and rights of appeal removed. We have seen vague definitions of terrorism used to suppress legitimate dissent.

Whilst many countries have adopted new counter-terrorism laws and policies in the last three years, the post September 11th environment has also given new life to old laws that have violated human rights in the name of national security for decades. This is a problem that now touches all regions of the world.

It sometimes seems that governments have collectively declared a global state of emergency. If so, it should be noted that any state of emergency must be an extension of the rule of law not an abrogation of it. States themselves drafted our human rights standards and they already strike a well-tested balance between national security and individual rights.

But the "war against terrorism" is not just restricted to a set of specific laws. It is a way of thinking. We have seen the return of a disturbing rhetoric. It is a security-dominated discourse that is becoming part of our daily lives. It pushes aside laws and norms that governments think unduly constrain their discretion to act in any way they think necessary. Yet we have seen how ignoring the moral compass of the law opens the door to abuse that in no way helps to end terrorism.

It is an undisputed fact that groups that use terrorism indiscriminately kill and maim. They destroy families and communities. Human rights law says that governments have a duty to protect people from terrorism - and also from abusive acts by the state. The political legitimacy of counter-terrorism measures

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should flow from a respect for the rule of law.

Learning the lessons of the past

We only need listen to many of the human rights defenders in Geneva for the Commission - and indeed many diplomats - who have witnessed groups indiscriminately killing civilians to further their cause and governments who responded with anti-terrorism laws that themselves led to extrajudicial executions, enforced disappearances, torture, secret detentions and other human rights violations. Many of these policies have been scrutinized by the Commission. The voice of the past should teach us and persuade the Commission to act: Peru, Sri Lanka, Turkey, Israel, Colombia, Northern Ireland, Spain, India, Algeria and many others.

We know from history in many countries that abusing rights does not help eradicate terrorism. The US military in Iraq last year admitted that they have obtained far more "high value intelligence" since they ended cruel, inhuman or degrading treatment in Abu Ghraib prison. We hold states to human rights standards that they themselves drafted and which already build in a balance between national security and individual rights.

Upholding human rights and the rule of law

In August last year the ICJ brought 160 jurists from all regions of the world to Berlin - the city where we were founded 52 years ago - to consider the challenges of counter-terrorism and human rights. They adopted the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (*see http://icj.org/news.php3?id_article=3503?=-en*)

The Berlin Declaration sets out 11 principles that governments should respect in their counter-terrorism measures. The Declaration signalled the commitment of judges and lawyers around the world to take a global leadership role in showing how the rule of law can and must be respected in addressing terrorism.

One of the law lords in the recent House of Lords ruling that found the UK anti-terror law allowing for indefinite administrative detention unlawful, warned: "the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism, but from laws such as these. That is the true measure of what terrorism may achieve."

Towards an effective UN response

The United Nations' principal human rights body has been reluctant to respond to counter-terrorism measures. Last year the Commission on Human Rights finally agreed in a compromise resolution to entrust an independent expert, Professor Robert Goldman, to advise "on ways and means" to strengthen the protection of human rights and fundamental freedoms while countering terrorism. In his report before this year's Commission Professor Goldman recommends that: "Given the gaps in coverage of the monitoring systems of the special procedures and treaty bodies and the pressing need to strengthen human rights protections while countering terrorism, the Commission should consider the creation of a special procedure (...) to monitor States counter-terrorism measures and their compatibility with international human rights law."

The recommendation is clear and unequivocal. It is based on a thorough analysis of the responses of the existing UN human rights system. Human Rights treaty bodies and special procedures have worked hard to try to fill gaps, but their coverage has been too dispersed and fragmented.

The 12 months since the last Commission have only reaffirmed the need for the Commission to act. In a recent fact-finding mission to Colombia the ICJ found that Government's democratic security policy justified as a response to terrorism has led to serious human rights violations, including torture, arbitrary detention and enforced disappearances. The King of Nepal recently justified the declaration of a state of emergency and a series of repressive measures as necessary in his fight against terrorism. Prosecutors in Chile have used anti-terror laws to prosecute Mapuche community leaders for political protest. The Russian Prosecutor General has suggested publicly that a state might take relatives of terror suspects as counter-hostages. In the US, the administration continues to find ways to circumvent the Supreme Court ruling that detainees in Guantanamo Bay have a right to challenge in a US Court the legality of their detention.

A monitoring mechanism of the Commission should be able to visit countries and examine and make recommendations about governmental policies. The world does not expect any further studies but finally a decisive step by the Commission on Human Rights at this fourth session since the attacks on 9/11/01.

Nicholas Howen is Secretary-General of the Geneva-based International Commission of Jurists (ICJ)

CHECHNYA

A forgotten conflict

WHILE the Russia government continues to deny the existence of armed conflict in Chechnya, the international community continues to tolerate the ongoing violations of international human rights law and international humanitarian law by Russian forces in the region. Considering the current deterioration in the situation, a resolution on the conflict at the 61st session of the Commission on Human Rights is badly needed. It is clear from the recent hardening of the Russian government's position that international intervention is now more than ever necessary to secure a settlement and bring some measure of justice for the victims of the conflict.

Since the initiation of hostilities in 1999, violations of international human rights and humanitarian law by Russian forces in Chechnya have been well documented. With the conflict now in its sixth year there appears to be a consistent disregard for the norms of international humanitarian law by the Russian Federation. Although clearly bound by its treaty obligations under international humanitarian law, in particular Article 3 common to the four Geneva Conventions of 1949 and Additional Protocol II of 1977, Russia continues to conduct its campaign in Chechnya as if no such body of law exists.

Violations perpetrated by Russian forces in Chechnya over the past twelve months are evidenced in the most recent report of the US State Department, released on 28 February 2005. The report confirms that in the past year "federal forces and pro Moscow Chechen forces engaged in human rights violations, including torture, summary executions, disappearances, and arbitrary detentions."

The US State Department report also verifies the use of indiscriminate force by Russian forces stating that "the indiscriminate use of force by government troops in the conflict in the Chechen Republic has resulted in widespread civilian casualties and the displacement of hundreds of thousands of persons". This practice is in clear contravention of the protected status afforded to civilians under international humanitarian law. The report further states: "In addition to casualties attributable to indiscriminate use of force by the federal armed forces, individual federal servicemen or units committed many abuses. In June, for example, federal forces were believed to be responsible for the killing of Umar Zabiyeu, a civilian, near the Ingush village of Galashki. Heavy machinegun fire hit the car in which Zabiyeu, his brother, and his mother were riding. The gunfire was believed to have come from a nearby column of armored vehicles. Umar Zabiyeu stayed with his injured mother and sent his brother to bring help. When villagers arrived a short time later, Umar was missing. His body was found the next morning bearing clear marks of torture and gunshot wounds."

Numerous such reports of unlawful killings and abuse of civilians by Russian forces have been cited by the US Department of State's assessment of the human rights situation in Chechnya.

In clear view of the litany of human rights abuse that has been perpetrated in Chechnya since 1999, the international community has stood idly by while the security forces of the Russian Federation have run amok in the republic. The European Union may be singled out for criticism in this regard for failing

to prioritize the issue of adherence to international human rights and humanitarian law in its relations with the Russian Federation. There appears to be little or nothing in the human rights consultations launched recently in Luxembourg between the EU and Russia that would compel the latter to change the policies currently pursued in Chechnya. According to a press release issued by the Russian Foreign Ministry on 2 March 2005, the EU was reminded at the first round of consultations of the 'futility and counterproductive nature of attempts to exploit the theme of the human rights situation in Chechnya.'

A recent resolution of the Council of Europe Parliamentary Assembly has gone so far as to state that the member states of the Council 'must not remain inactive when people are dying every day in Chechnya'. The call for action, however, has not been heeded and the death toll in the Chechen republic continues to rise with human rights abuses continuing to be perpetrated with impunity.

Accountability for such violations has been impeded by the Russian authorities limiting the access of journalists wishing to report on the situation in Chechnya. According to the US Department of State, "Federal authorities both military and civilian have limited journalists' access to war zones since the beginning of the second war in Chechnya in October 1999... These restrictions made independent observation of conditions and verification of reports very difficult and limited the available sources of information concerning the conflict. However, human rights groups with staff in the region continued to release credible reports of human rights abuses and atrocities committed by federal forces during the year."

In limiting the access of journalists to the Chechen republic, the Russian Federation also follows a policy, albeit an unofficial one, of limiting international attention to ongoing violations of international humanitarian law. Another tactic that is used in avoiding such attention is one of denying completely the existence of armed conflict in the region. Despite the clear consensus among legal experts on the existence of a *de facto* armed conflict in Chechnya since 1999, the Russian Government continues to hold a position that its campaign in the Republic is confined to combating terrorism. In doing so, the very basis for the application of international humanitarian law - the existence of armed conflict - is circumvented. Given the appalling human rights record of the Russian Federation, this is not surprising. What is remarkable, however, is the degree of tolerance shown by the international community, and in particular the lack of condemnation by the European Union.

Conceiving its campaign in Chechnya as a form of counter-terrorism, the government of the Russian Federation maintains that the hostilities in the Republic do not constitute an armed conflict *per se*. Ironically, this policy has been referred to by the Russian government as one of 'normalisation'. The fact that the current situation is not recognized by the Russian Federation as constituting an armed conflict does not detract from the objective characterization of the situation as such.

The applicability of international humanitarian law to the situation in Chechnya is not a matter to be decided at the discretion of either the state

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Israel's Wall & the ICJ Ruling

When will human rights gain ground?

MICHAEL KEARNEY

IN June 2002, the Israeli authorities began constructing what the UN Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories (OPTs) has termed "the Annexation Wall." Israel's claims that the Annexation Wall is being built to prevent the uncontrolled entry into Israel of West Bank Palestinians are directly contradicted by the fact that the route which the Wall has taken thus far is not along the 1949 Armistice Line, commonly known as the Green Line. Instead, the Wall has followed a circuitous path deep into the occupied West Bank, skirting around Palestinian villages and illegal Israeli settlements. Plans envisage the extension of construction to the Jordan Valley near the Jordanian border with the OPTs.

The UN Office for the Coordination of Humanitarian Affairs (OCHA) estimates that over 500,000 Palestinians will be trapped between the Wall and the Green Line. Another 250,000 Palestinians in the vicinity of the "Jerusalem Envelope" will find themselves trapped between the Green Line and the Wall in a series of disconnected and isolated enclaves. This land between the Green Line and the Wall includes an extensive amount of natural resources; the Palestinian Hydrology Group estimates that nearly 18 percent of the Palestinian share of the Western Groundwater Basin alone will be lost.

Given the immense military and economic superiority of Israel, the occupying power, the international human rights law framework established under the aegis of the United Nations remains the only viable option for Palestinians and the international community who wish to see an end to the suffering and destruction resulting from the "violence of construction" perpetuated by the Wall.

Israel, supported by the US and others, claims that the issues arising from the Wall's construction are not a matter of law, but rather should be left for the negotiations between the recognized representatives of the peoples involved. To do otherwise, this argument asserts, would constitute an undue risk of "politicizing" international law. The decision of the UN General Assembly to refer the question of the legality of the construction of the Wall to the International Court of Justice at The Hague (ICJ) however, provided the necessary objective platform to determine the issues at hand, in a forum where each party had an equality of arms which has proven impossible to replicate in political negotiations.

UN Proceedings

The UN General Assembly passed its first resolution regarding the Wall on 21 October 2003. Therein the UNGA demanded that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem.

As construction of the Wall continued unabated, the tenth emergency special session on illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory unanimously adopted a resolution requesting the ICJ's opinion concerning the legality of the wall. The UNGA had decided, in accordance with Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The Court - the world's highest judicial body - handed down its non-binding ruling on 9 July 2004 declaring that the wall was illegal, that Israel must dismantle its standing portions, and that Israel must provide reparations for damages caused by the construction. It also suggested that the UN General Assembly and the UN Security Council might consider further action. The Court further stated that "Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life", and that "in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973)."

Israel had refused to participate in the ICJ hearing on the grounds that it was "politically motivated" and rejected its findings, stating that the Israeli High Court alone has the capacity to fully address all aspects of this matter.

The UNGA's response to the ICJ decision and to Israel's refusal to respect its obligations under international law were stated in its Resolution of 2 August 2004, which demanded inter alia that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion and furthermore called upon all Members states of the United Nations to comply with their legal obligations as mentioned in the advisory opinion.

Facts on the ground

To date, despite the clarity of the ruling of the ICJ and the pronouncements of various General Assembly Resolutions on the matter, Israel continues to destroy Palestinian land, divide communities and annex West Bank territory to Israel though the extension of the Wall. International human rights law has once again been sidelined by the major powers in favour of the hollow political posturing of the Israeli and Palestinian elites and their regional and international backers.

If Annexation represents the primary threat to the peaceful resolution of the Israeli-Palestinian conflict then ongoing land confiscations in the West Bank must cease immediately. Even during the recent Sharm-al-Sheik negotiations the Israeli army continued to expropriate Palestinian land. A confiscation order, numbered 16/05/t and signed by the commander of Israeli forces on the West Bank, decreed that a parcel of land belonging to the Palestinian village of Twane in the South Hebron Hills on the southern edge of the West Bank, would henceforward become the property of the Israeli army, with all rights over this land to be vested in "The Real Estate Officer at the IDF Central Command Headquarters". Gush Shalom, in a report on this incident, stated that when asked to comment on this expropriation of land by Yossi Gurevitz of the Nana News website, the Israeli army Spokesman answered: "Such a village does not exist". Whilst no specific reasons were given for this act the expropriation was justified as being necessary "for military needs, due to the special security circumstances prevailing in the region and the need to take unavoidable steps in order to prevent terrorist attacks". Adv. Shlomo Leker of Jerusalem, who represented the people of Twane during numerous previous attempts to expel them or confiscate their land, believes that the order is aimed at extending the nearby Israeli settlement of Ma'on.

That the Israeli authorities intend to annex further Palestinian land near Hebron has been demonstrated by the Israeli government's approval of a revised route of the Wall on 20 February 2005. This newly approved route includes the Gush Etzion settlement bloc, the Ma'aleh Adumim Settlement and parts of the southern Hebron hills region. *Haaretz* reports that it includes about seven percent of West

Bank land on the 'Israeli' side of the Wall. The website of the Israeli Ministry of Defence claims that the new route "reflects the proportionality between Security requirements and humanitarian needs". However, given the unambiguous ruling of the ICJ regarding the illegality of building the Wall anywhere in the Occupied West Bank, by merely tinkering with the route rather than ruling that the construction itself is illegal, the Israeli courts are failing in their obligations to respect international law.

The characteristic handshakes following yet another Israeli-Palestinian Summit provide few assurances that the human rights for all in the region will be respected by all parties to the conflict. It is incumbent upon the United Nations to ensure that the recommendations of the ICJ are fully implemented and furthermore that Israel complies with the various Security Council resolutions calling for an end to the Occupation. Until then it must be recalled that individuals and communities on the ground retain a hope that human rights, as enunciated in international law, will someday soon become a reality in Israel and Palestine. However, the longer the international community, as represented by the UN Commission on Human Rights, prevaricates on effectively halting the violation of Palestinians' human rights by the occupying power, the more the likelihood that international relations will be governed solely by the use of force and the imposition of walls to facilitate division and conquest.

Michael Kearney is a Government of Ireland scholar and PhD candidate at the Irish Centre for Human Rights. He is also a member of the Ireland-based NGO, Human Rights for Change.

EVENTS

The International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), in collaboration with Al Haq and Save The Children

Briefing on the World Court Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territories: Legality and Realities
Thursday 24 March 2005
Venue: Room XXI, Palais des Nations, 13.00-15.00 hrs.

Children's Human Rights Caucus at the 61st session of the CHR

Morning briefing on: Children's situation in the Occupied Palestinian Territories
24 March 2005
Venue: Room E-3025, 9-10 am

NGO Caucus - Business and Human Rights

Will meet every Thursday at 2.00 pm at the Serpentine Lounge.
Contact: Nils Rosemann (ESCR-Net Coordinator) at 076-479 -6112 or human-rights@rosemann-online.de

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.

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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CERD's solitary voice; UN's deaf ears

Part 2 of a two-part analysis of Laos' diplomatic conduct in response to accusations of human rights violations

GARETH SWEENEY

THE UN, collectively, has failed in holding Laos accountable under international law. Only the UN Committee On the Elimination of Racial Discrimination (CERD) has taken a concerted stand on the situation of egregious human rights violations in Laos. In August 2003, in light of the "particularly disturbing information that it had received concerning the human rights situation in the Lao People's Democratic Republic", CERD was prompted to issue an urgent action procedure against Laos, constituting the most authoritative condemnation by any UN body of Laos' human rights record to date.

CERD expressed grave concern at "serious and repeated human rights violations, particularly violations of the rights to life, physical integrity and security, and of the freedoms of expression, association and religion, together with reports of economic, social and cultural discrimination against members of the Hmong minority." Acts of "severe brutality", according to the CERD Committee, include "bombing of villages, use of chemical weapons and landmines and extrajudicial killings and torture." The Committee also "deplores the measures taken by the Lao authorities to prevent the reporting of any information concerning the situation of Hmong people who have taken refuge in the jungle or the mountains", and the arbitrary arrest and detention of those who have attempted to do so.

CERD urged the immediate cessation of the above and urged the Secretary-General of the United Nations "[t]o draw the attention of the competent United Nations bodies to the particularly worrisome human rights situation in the Lao People's Democratic Republic and to request them to take all appropriate measures in this regard, including the dispatch of a mission to the Lao People's Democratic Republic with a view to helping the State party to fulfil its obligation to respect human rights and eliminate all forms of racial discrimination."

The recommendations of CERD have elicited no public response from the Secretary General or any organs of the UN, despite the protestations of those such as Andrew Perrin, the Time magazine journalist who managed to gain access to the Hmong in May 2003, that "unless ...the international community steps in, it will just continue to go on and on until all the Hmong are dead."

CERD did however manage to elicit two public responses from the Lao authorities. Yet both are astute exercises in evasion. Regarding the Hmong, the Lao Minister for Foreign Affairs, in a letter to CERD, alleged that "under the old regime" the Hmong suffered discrimination, but since 1975 "have enjoyed independence and freedom and have become the true rulers of the country [alongside all other ethnic groups]." No reference is made to the insurgents. The Minister concluded by insisting that the Hmong, as an entire ethnic group, "are able to live a life of peace and quiet." The Committee, according to the Minister, was misled. The information received "by certain non-governmental organizations are merely divisive manoeuvres intended to serve those entities' political interests."

Its second supposed response to CERD was the eventual submission of its periodic report to the Committee in March 2004, some 19 years late. This also entirely fails to address, and appears not even to understand, the core provisions of the Convention. Providing no specific examples of measures undertaken to comply with the precise obligations of ICERD, the report does not even admit to even the remotest possibility of racial or ethnic discrimination existing in Laos. It ignores the requests of CERD to detail all efforts undertaken to cease violence against the Hmong. In fact, it makes no

direct reference to the persecuted Hmong whatsoever. Rather, it offers a tangential account of a country where "the ties between...various ethnic groups, who have long lived side by side in harmony and traditionally mutual solidarity, have been further strengthened" and "where the people's unwavering solidarity has been a determining factor in the very existence of the nation and its development."

Unsurprisingly perhaps, the report also takes the opportunity to dedicate a sizeable portion to the 'development sphere' and national poverty reduction strategies, a subject that bears no relevance whatsoever to the provisions of the Convention.

Meanwhile, by way of illustrating the gaping holes in the UN's purported commitment

Laos pays no heed to international or unilateral pressure and does not suffer on account of this. Instead, it has remained steadfast in its quest for economic stability whilst maintaining absolute political control, at the expense of the human rights it professes to respect under international law.

to mainstreaming human rights amongst its relevant bodies, the UNDP operates uncritically in Laos "to help the government strengthen Lao human resources and raise money so it can better manage the poverty faced by its people." In so doing, UNDP is "helping the Lao government become more efficient, accountable, transparent, fair, and better placed to recognise the human rights of its citizens [as] one way to ensure that poor people are receiving the best possible assistance and services."

Based on a comprehensive legal sector evaluation in 2003, UNDP is said to be working closely with the Ministry of Justice, Office of the Public Prosecutor and the People's Supreme Court "to help develop a long-term sector strategy, with attention to continuing capacity development, law enforcement coordination, and judicial strengthening". All of this would be laudable, of course, except that nothing has come of it. There is no evident improvement in Laos on any level that the UNDP can actually point to outside of poverty alleviation. In fact, UNDP even claims to be aiding the Ministry of Foreign Affairs in "improving understanding and implementation of Laos' international obligations, including participation in human rights legal instruments." Upon reading their submission to CERD, this is not something the UNDP should be proud of.

Instead, a cynical observer might comment that all this serves to do is legitimise the Lao dictatorship whilst it shores up international aid for poverty alleviation, which its own corruption has played a considerable part in creating and sustaining to begin with.

In the meantime...

In the same month that the LPRP submitted its report to CERD, it was reported that: "Laos continues to detail the horrific plight of hundreds of captured and surrendering Hmong and Laotian civilians and rebels who are being summarily executed, brutally tortured, raped, or are simply disappearing at the hands of Pathet Lao and Vietnamese military and security forces as a result of a recent series of ongoing military offensives directed in at least three provinces in the country".

According to documentary film maker Ruhi Hamid, who managed to gain secret access to the villages of Hmong insurgents in March 2004, the Hmong "simply ask to be left alone with a piece of land to farm and education for their children." It is believed that the Hmong fear surrender, given reports that have surfaced

following those that had done so in the hope of amnesty. According to Philip Smith of the Centre of Public Policy Analysis in Washington D.C., satellite communications detail that these people "have been starved to death, shot, tortured or have disappeared after capture or surrender".

In October 2004, Va Cha Yang, a guide who had accompanied the arrested foreign reporters Thierry Falise and Vincent Reynaud and was "beaten unconscious [by two military officers] and held for two days, then released on 7 June 2003" because of this, escaped Laos with a videotape of a massacre that occurred at the foot of the Me Nam Muak Mountain in the Xaysomboune province. The four victims, aged between 14 and 16, were raped and killed in an ambush by a Lao military unit of 30 to 40 soldiers in the early hours of 19 May, which Yang himself witnessed. Excerpts from the video were aired on CNN, resulting in Yang being labeled Laos "most wanted man" and being forced to seek political asylum in the US.

On the basis of the video evidence and witness testimony Amnesty International responded to the massacre as "war crimes [that] violate the most fundamental principles of international human rights and humanitarian law." Lao Foreign Ministry spokesman Yong Chanthalangsy responded: "We don't need to listen to any foreign organizations that know nothing about our country. I believe the People's Republic of Laos has treated the Hmong better than others."

Lao official media quoted Lao army investigators as saying the alleged massacre was fabricated. According to Colonel Bouaxieng Champaphan, deputy director of the Lao People's Army general staff department, "hostile news reporting and footage presented in foreign press were created for the purpose of slandering the Lao government and dividing the state of solidarity among people within the country." There has been no investigation by the Lao authorities into the incident.

Conclusion

As much as Laos strives to evade scrutiny of its track record, and as much as its cowers away from confrontation for fear of shining a light on these abuses and on its policy of ignoring technical advisers and unassuming donors, there are certain facts for all concerned which no-one can disguise. Laos' human rights record is, in every respect, abysmal. There is no concerted effort to redress this. Despite the calls of CERD for the UN to act accordingly, it has not done so. The EU and US, despite historic and continual condemnations of the Lao regime's human rights record, has failed to display any conviction in following words with action. In fact, their actions tend more to contradict their noble proclamations.

In any case, Laos pays no heed to international or unilateral pressure and does not suffer on account of this. Instead, a pattern appears to be emerging, clearest in the case of the normalization of Lao-US trade relations, that the LPRP has capitalized by remaining steadfast in its quest for economic stability whilst maintaining absolute political control, at the expense of all human rights that it professes to respect under international law.

There is no evidence that any initiatives have served to improve certain very easily improvable human rights conditions in the country, nor is there any evidence to support the argument that economic liberalisation might herald a liberalisation of other sorts. This evinces the image of a regime that really does not care about human rights but is willing to pay lip service to the concept in order to join the club. It has the tacit support of the international community by virtue of its collective silence, or even worse, by its sponsorship.

The new apartheid?

South Africa's treatment of migrants is not consistent with the protection of human rights

SOUTH Africa's Constitution is designed to establish "a society based on democratic values, social justice, and fundamental human rights." These principles have profound significance in the context of South African history, which witnessed the codification and application of viciously discriminatory laws during the Apartheid era. The architects of Apartheid sought to legitimize the unequal treatment of human beings but ultimately failed. Although South Africa has in principle afforded primacy to fundamental human rights, its discriminatory treatment of migrants in recent years is more consistent with Apartheid than with the protection of human rights.

There are several classes of documented migrants in South Africa, including refugees, asylum seekers and individuals with temporary and permanent residence, all of whom enjoy the legal right to reside in South Africa for a defined period. There are also many undocumented migrants in South Africa. Undocumented migrants do not have legal permission to reside in South Africa and are accordingly "under some degree of command to leave the country, either by force or voluntarily."

It is difficult to know the exact number of undocumented migrants in South Africa, but some estimates have placed the number between two million and eight million. Though speculative, such estimates have been exploited by some South African politicians, who bemoan the strain on social services being borne by South Africa on account of its absorption of illegal migrants. (There are reasons to discount claims of strain: most illegal migrants-80 percent, according to one survey by the South African Migration Project-do not wish to stay in South Africa permanently, and most leave their families and dependents behind in their native countries, where they cannot place demands on South African schools and hospitals.) South African media have likened migration to floods and tidal waves. Cast in terms of strain and calamities, migration into South Africa is popularly perceived not as a manageable issue but as a threat to be resisted.

Xenophobia among South Africans found statistical expression in comprehensive public opinion surveys published in 2001 by the South African Migration Project. Sixty-six percent of survey respondents favored the reactivation of electric border fences to deter illegal migration. Support for such a deadly measure is hugely ironic because electric border fences were built by the Apartheid government and used against African National Congress (ANC) guerrillas and Mozambican refugees. Eighty-two percent of survey respondents favored the

detention of "suspected" illegal migrants. Support for such an open-ended measure endangers the rights of legal migrants in theory and impairs them in practice.

Documented migrants have been incorrectly perceived *a priori* as being illegally in South Africa and treated as such. In December 2002, at least one South African national, Sizakele Sukazi, found himself detained at the notorious Lindela Repatriation Centre after returning from work; overzealous police had arrested him on the ground that he lacked identity documentation on his person. The South African Human Rights Commission publicized

That helpless feeling...

THE following excerpt from the *Mail and Guardian* is a first-hand account of conditions at Lindela, told by an asylum-seeker who was detained at the Centre for one week in September 2004 after police officials mistook him for an illegal migrant:

"I knew that I could not live in this place for two or three weeks, having two meals a day, being beaten up, sleeping in a cell with blocked toilets. On Saturday and Sunday the electricity was cut and when there is no electricity there is no water ... You are left alone most of the time unless you piss-off security guards, as did one of the foreigners who lost his identity tag (which we all had to carry). They beat him with sjamboks until he bled from his mouth. It was a lesson that made us feel powerless ... We knew that there was no one here who cared whether we lived or died. No high commissioner from our country fighting for our release, no lawyers to sue the security guards for torture or abuse ... Most of the foreigners who are sick are left to rot on bunks until it is too late to save their lives."

Sukazi's case and noted that it was not the first time "people have been apprehended, arrested and detained despite having valid documentation" attesting to their South African nationality. In February 2004, the *Mail and Guardian* newspaper reported on the five-day detention at Lindela of a South African of Malawian extraction, who had attained permanent residence status in South Africa in 1997. In its 2005 World Report, Human Rights Watch noted the unlawful arrest a few months earlier of a South African woman, who was "too dark" and was prepared for deportation on that ground. Ironically, in January 2002, the South African Ministry of Home Affairs issued guidelines requiring police officers to have "reasonable grounds" for arresting someone suspected of being an illegal migrant. At the time, Lawyers for Human Rights in South Africa welcomed the

new policy, as it promised to "prevent the police from arresting and detaining foreigners, simply for having a particular physical appearance ... or for not carrying identity documents." That promise stands broken. The ongoing arrest of South African residents on flimsy grounds violates the Constitution, which affords "everyone" in that country the right "not to be deprived of freedom arbitrarily or without just cause."

Judging by the precarious position of documented migrants in South Africa, one might suspect that undocumented migrants fare much worse. In theory, despite their illegal presence in South Africa, undocumented migrants enjoy certain legal safeguards. As a comprehensive overhaul of South African immigration law, the Immigration Act of 2002 was purportedly enacted to ensure that "immigration control is performed within the highest applicable standards of human rights protection," and that "xenophobia is prevented within Government and civil society."

The highest applicable standards of human rights protection are enshrined in the South African Constitution and in the International Covenant on Civil and Political Rights ratified by South Africa in 1998. According to the South African Human Rights Commission, South African constitutional law and international human rights law guarantee undocumented migrants rights against arbitrary arrest and detention, the right to dignity, the right to just administrative action, the right to be recognized everywhere as a person before the law, and the right to life, among others.

In practice, the rights of undocumented migrants have not been honored in accordance with law. Take the case of the Lindela Repatriation Centre. Lindela is the largest detention centre for undocumented migrants in South Africa and serves as the main holding point for such migrants prior to deportation. In December 2000, the South African Human Rights Commission found evidence of inhumane treatment of detainees at Lindela, including "lack of adequate nutrition, irregular or inadequate medical care and systematic, forced interruption of sleep, inadequate living conditions, limited access to information, assault and unsatisfactory treatment of minors." Instead of heeding calls by human rights organizations to humanize conditions at Lindela-in other words, instead of honoring the law-the South African government appears to have done little or nothing (see box).

South Africa does not honor the memory of those who sacrificed their liberty and lives in the fight against Apartheid by dishonoring the human rights of migrants and creating a new Apartheid thereby.

NOTES from the NGO Gallery

Dark tales

Bill Rammell, Minister for International Human Rights of the United Kingdom made an eloquent plea on behalf of the "voiceless, those who are hungry, weak or oppressed". "Our job is to reassure them that though they may be out of sight, locked away in some dark prison, they are not out of our minds," he declared. One can only hope that London will make a similarly compelling case before the European Union and other key countries, including the United States and India, for a strong resolution on Nepal, where scores of people have been rounded up and locked away. It could perhaps also nudge its ally, the US, in the direction of the plight of the luckless men locked away in Abu Ghraib. Finally, the prisons at Belmarsh, we hope, allow plenty of light.

Time to relocate?

One of the most interesting ideas emerging from the High Level Segment this year - as opposed to the menacing, the ominous and the simply outrageous - came from the dignitaries from Timor Leste and Indonesia. They proposed, separately, that the UN move some of its activities to developing countries, the Indonesian Minister of Foreign Affairs suggesting that the CHR hold alternate sessions in places other than Geneva. His counterpart from Timor Leste was more specific, proposing that "annual sessions of ECOSOC, CHR and other human rights bodies should be held in developing countries in order to maximize contact and access by the peoples in need." Furthermore, he said, "the UN agencies like UNHCR, UNICEF, UNDP and WHO should be relocated to

developing countries where services rival with those in the West and in many cases are even far better and more economical."

This was undoubtedly music to the ears of NGOs with limited budgets struggling to bring their concerns to the attention of the Commission, based in one of the most expensive cities in the world. Small states would similarly have an easier time in Jakarta, Colombo or Nairobi when compared with the penny-pinching they would have to do in Geneva or New York.

We do hope Mr. Ramos-Horta's suggestion is taken seriously by the upper echelons at the UN. For the GONGOs unwilling to change their annual paid Swiss holiday plans, their governments could perhaps entice them with the prospect of unlimited supplies of Asian cuisine. GONGOs need a break from sandwiches too. Even if they're free.

Getting better all the time

One of the few speeches to sound sincere and substantive was the one by the Foreign Minister of Sri Lanka. He alluded to Colombo's relatively open engagement with the UN human rights system, including its regular invitations to the Special Procedures, and its ratification of the Convention Against Torture as well as the Optional Protocol - acts that clearly rise above the traditional hostility and obfuscation demonstrated by the rest of South Asia towards the international human rights machinery. Perhaps, Sri Lanka should consider improving its record by issuing standing invitations to the Special Procedures. That would place it in a class of its own in South Asia and would, it is hoped, prompt its neighbours to take a fresh look at their own, much-touted credentials.

TURKMENISTAN

Human rights freeze under Turkmen sun

President Niyazov's \$43 million ice palace is an indication of where his priorities lie

TURKMENISTAN'S lack of respect for human rights has resulted in four United Nations resolutions over the past two years, to which the Turkmen government expressed "its bewilderment and concern." Despite significant international support for all of the resolutions, the Turkmenistan government still believes that it has "consistently taken concrete steps towards the fulfillment of its international obligations in the sphere of human rights." Well - 2004 was another year for Turkmenistan to prove it.

As the international community attempts to balance short versus long-term stability within Central Asia, the President of Turkmenistan, Saparmurat Niyazov, builds \$43 million dollar ice palaces in the Turkmen desert. Niyazov's cult of personality is pervasive, and as soon as the igloo melts the country is headed towards a crisis.

A Thaw in Relations

Superficial or not, over the past year the government of Turkmenistan has taken numerous steps to further engage with the United Nations and the international community. At the start of last year's Commission a delegation from the Office of the High Commissioner for Human Rights (OHCHR), headed by the OHCHR's Central Asian regional advisor - Rein Müllerson, arrived in Ashgabat "to assess human rights assistance needs and to explore the feasibility of a project of cooperation in the field of human rights."

In addition, over the past year, Turkmenistan submitted its first periodic report to a United Nations human rights treaty monitoring body, the Committee on the Elimination of all forms of Racial Discrimination (CERD). All five of Turkmenistan's outstanding reports for CERD, the earliest due in 1995, were compiled and submitted to CERD in one document. Although an official date has yet to be announced, Turkmenistan's reports will be reviewed by CERD at its 67th session in August 2005.

In 2004, the government of Turkmenistan also: 1) held preliminary discussions with the International Committee of the Red Cross (ICRC); 2) officially registered four previously unregistered religious groups (Baha'is, Seventh-day Adventists, Hare Krishnas and Baptists); 3) released six Jehovah's Witnesses formerly imprisoned for their beliefs; 4) granted amnesty to 9,000 prisoners; and 5) reportedly decreased their harassment of minority religious groups in general.

Given this recent thaw one must wonder whether Turkmenistan has slowly started to turn the page, or whether Niyazov's focused attempts to address the country's human rights problems have only been employed to further placate and appease the international community. Unfortunately, in 2005, it is the latter once again.

The Deep Freeze

Despite Niyazov's positive steps, the citizens of Turkmenistan remain oppressed: their fundamental rights subjected to Niyazov's restrictions on politics, culture and education - almost all facets of Turkmen life.

Two years and four resolutions later, the International Committee of the Red Cross (ICRC) has still not been granted full access to prisons and individuals detained within the country. Similarly, the government of Turkmenistan failed to provide adequate information regarding those arrested in connection with an alleged assassination attempt on President Niyazov in November 2002. According to the US State Department's latest report on the country, the Turkmenistan government also did not renew the accreditation of the country director of the Organisation for Security

and Cooperation in Europe (OSCE) in Turkmenistan in 2004, accusing her of focusing on 'negative' information.

The government of Turkmenistan defends itself and deflects international criticism by stating that countries don't have access to reliable information about the status of human rights within the country, despite multiple resolutions calling for unfettered access by UN Special Rapporteurs. To date, the Special Rapporteurs for torture; extrajudicial, summary and arbitrary executions; religion or belief; human rights defenders; independence of judges and lawyers; and freedom of opinion and expression all have outstanding requests to visit the country. Hypocritically, none have been invited.

Moreover, any analysis of

The government of Turkmenistan defends itself and deflects criticism by stating that countries don't have access to reliable information about the status of human rights in the country. This, after multiple resolutions have been passed calling for access by UN Special Rapporteurs to the country.

Turkmenistan's recent actions to protect human rights will reveal that it is all about timing. On 11 March 2004, Niyazov also announced two important decrees: one repealing the country's exit visa requirement, the other removing barriers that prohibited minority religious groups from official registration. Coincidentally, on 15 March 2004, the exact start date of the 60th CHR, Niyazov allowed the OHCHR to conduct their first needs-assessment within Turkmenistan. Furthermore, before the 59th Session of the General Assembly in November 2004 Niyazov repealed Turkmenistan's repressive 'Law on Public Associations'.

Of fundamental concern to regional stability and the future health of Turkmen society is the state of the country's education system. Instead of promoting or furthering the growth of education within the country, Niyazov released the second volume of the *Ruhnama*, or Niyazov's 'book of the soul', which is a mandatory component of Turkmen education. Continuing the "brain drain" in 2004, the number of years of university classroom education remained reduced from four years to two. Secondary schools were also downsized and the number of teachers further reduced. It has also been reported that there are "no special qualifications designed to assist doctors, lawyers and teachers within the country." Moreover, on the first of June 2004 Niyazov implemented a decree that invalidated the majority of foreign diplomas earned after 1993. As one individual interviewed by the Institute for War and Peace Reporting put it: "we are hurtling towards an abyss of ignorance and no one wants to save us."

This past year Turkmenistan also narrowly avoided being designated a 'Country of Particular Concern' (CPC) by the US State Department. The CPC designation recognizes countries "whose governments are responsible for or have tolerated systematic, ongoing, and egregious violations of religious freedom" and requires the United States to take various actions against the CPC designate country, which possibly include targeted trade sanctions. Even though the United States Commission on International Religious Freedom, (USCIRF) recommended in September 2004 that the State Department designate Turkmenistan as a CPC - Turkmenistan avoided the designation.

As the 2004 International Religious Freedom and other reports suggest, Niyazov's

suppression of minority religious groups remained a significant problem throughout the year. In March 2004, Turkmenistan's former chief mufti, Nasrullah ibn Ibadullah, "was sentenced to 22 years in prison for his alleged role in the November 2002 election" and other reasons that remain unclear. Various observers also believe that Ibadullah was imprisoned for his opposition to the widespread and religious use of the *Ruhnama* and his criticism of Niyazov's policies. Reportedly, all government mosques in Turkmenistan have to display copies of the *Ruhnama* along side the Koran. Imams are also required to recite passages from Niyazov's 'holy book'.

Moreover, despite registration, members of minority religious groups complained about continued harassment and selective discrimination for their beliefs. According to the U.S. State Department, at least three Jehovah's Witnesses were in prison for their beliefs at year's end. Unfortunately, the United States is more concerned about symbolic gestures and their own security relationship with Turkmenistan than actual, pertinent and systematic abuse.

From presidential decree to presidential decree, Niyazov also dominates and controls the entire political process. On 19 December 2004, Turkmenistan held Parliamentary elections, which were neither free nor fair. Foreign observers characterized the election, where seventy-six percent of eligible voters voted, as a "hollow process." Although the OSCE expressed its willingness to monitor the election, no independent or foreign election monitors were invited to oversee the election. Furthermore, no opposition candidates stood for office - as all political opposition groups are banned within the country. All of the candidates who stood for office were also all reportedly ethnic Turkmen. According to the Central Asia Caucasus Analyst, the Mejlis (Parliament), "for the whole time of its functioning has... practically never overruled any executive order or legislation proposed by the executive branch."

While the silhouette of Niyazov revolves around the corner of the television, all viewers know where they stand and who is constantly watching. Niyazov appoints all editors of Turkmen media outlets, an obvious tool through which he can filter information and distribute propaganda to the general populace. Needless to say, censorship is common and freedom of the press continues to be entirely non-existent. In July 2004, the Government closed the Russian-owned radio station, Radio Mayak, citing technical difficulties. Radio Mayak was Turkmenistan's only remaining Russian language broadcast station, and reportedly a "main source of credible international information."

Those who dare criticize Niyazov's policies do so at their own risk; most either use pseudonyms or report from abroad. Even those journalists who operate from abroad, in places like Russia, are still at risk of harassment by individuals reportedly affiliated with Turkmenistan's security service.

Breaking the Ice

It is quite clear that if anything is going to change in Turkmenistan sustained and collective international pressure is needed. As Niyazov bends to sugar coat the depth of Turkmenistan's human rights abuses, the international community must continue to step up the pressure and adapt their strategies to ensure that real change is made. At this year's session of the Commission on Human Rights concerned governments should support a stronger resolution, which must aim to establish a Special Rapporteur on Human Rights for Turkmenistan. Diplomacy is indeed a fine balance, but the construction of Niyazov's \$43 million dollar ice palace should only remind the international community of where his priorities lie.

...from page 4**Australia & CERD...**

delegation in 2000 and is remembered as the Immigration Minister under which the Pacific Solution was tailored and the children-overboard scandal emerged) was in 2003 elevated to Federal Attorney-General in 2003. This sends an important message: loyalty in the Howard Government, even at the expense of the integrity of a treaty body, is rewarded.

Ambassador Mike Smith, heading the Australian delegation's 2005 Committee appearance, continued this pattern of condescension, accusing the Committee of operating outside its mandate, for basing recommendations upon a "cursory treatment of complicated issues", and for endorsing the recommendations of Special

Rapporteur Mr. Maurice Glèlè-Ahanhanzo, which the Ambassador dismissed as "inaccurate and a perpetuation of misconceptions".

Some suggest that the Government's attempts to present itself as unmoved by Committee recommendations is in fact indicative of an apprehension of the Committee's influence. The postponement of Australia's appearance before the Committee from late 2004 to March 2005 to prevent the release of Committee recommendations that would have coincided with the Australian Federal Elections certainly supports this supposition.

However, as Committee Member Mr. Régis de Gouttes stated, "to call into question the method of work of the Committee is extremely rare and is not consistent with the traditional methods of the Committee." Australia's indif-

ference to Committee recommendations reflects, rather, the lack of mechanisms and institutions that hold the Government to account.

Australia does not have a Bill of Rights. There are no regional human rights instruments to which it must comply, and likewise it lacks membership to a regional human rights body or council. The mechanisms which hold the Australian Government to account have each in part been exhausted or compromised: Committee recommendations have been rejected; HREOC is, as evidenced in its 2005 Alternative report, largely voiceless, practicing a self-censorship that smacks of defeat; the interpretative capacity of the courts has been curtailed, well illustrated in the context of asylum applications; the political opposition is plagued by internal conflict; and, in an exoneration, the Howard

Government has, four times now, been awarded office by the popular Australian vote, with the Government in the last election securing a Senate majority.

In short, the responsibility for Australia's policies sits squarely in the lap of the largely apolitical Australian people. Increased human rights education is required, including education as to Australia's human rights contraventions.

Ironically, the human rights education-orientated mandate planned for HREOC could be channelled for such a purpose. The Australian people, invested with not only a right but an obligation to vote, and accountable for the actions and policies of their Government, should be afforded the capacity to cast a vote in which the consequences of their choices are clear.

from page 6... Colombia

Rights Watch reports that at least one of every four irregular combatants in the Colombian paramilitaries or guerrilla groups is under the age of 18.

It is essential that the government of Colombia finally agree to live up to and implement the series of recommendations made by the High Commissioner regarding steps to improve human rights. The resolutions and declarations have gone largely unheeded by the Uribe administration. The major test of this will be the final law that provides the legal framework for the demobilization process. Will it be a carbon-copy of previously proposed frameworks which have made a mockery of international justice, or will they provide a model for truth, justice, and reparations for the families of the countless innocent victims who have been killed by both sides of the conflict? The proposed Truth Commission in Colombia must have independence and adequate enforcement power to make the demobilization process of Colombia's paramilitaries an example to the world of the institutionalization of a lasting rights regime.

from page 7... Chechnya: A forgotten conflict

authorities in Russia or the Chechen armed groups. The International Criminal Tribunal for the former Yugoslavia authoritatively defined internal armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups". As it is clear that the situation in the Chechen republic fits this definition, the existence of armed conflict and thus also the applicability of international humanitarian law cannot be denied without calling into question one of the cornerstones upon which this body of law is founded - that it should depend upon the arbitrary decision of the authorities concerned.

Russia's policy of normalization is clearly one designed to help prevent further attention of the international community being drawn to the situation. The ICRC's reference in its annual report to the situation in Chechnya as one of worlds "forgotten wars" suggests that this policy of the Russian government is not without some success. Nevertheless, it is clear that many States recognise the existence of armed conflict in Chechnya and that expert legal opinion generally supports the characterization of

the situation as such. The applicability of international humanitarian law to the Chechen Republic is therefore not in doubt. While Russia's policy of normalisation may to some extent succeed in deflecting international scrutiny, it is important to note that it clearly does not preclude individual criminal responsibility for violations of the laws and customs of war. The adoption of a resolution on the human rights situation in Chechnya would play an important role in ensuring some prospect of accountability for such violations.

After the killing of former Chechen President Aslan Maskhadov by Russian Forces in the Chechen Republic, the prospects for peace are remote. Even as reports of excessive and indiscriminate use of force by Russian forces continue to flow from Chechnya, President Vladimir Putin has urged his Interior minister to take tougher action in the region. Considering the previous record of federal forces in the Chechen republic, the need for international intervention to ensure respect for international human rights and humanitarian law has never been greater.

...from page 1**Cabbages and kings...**

Neolithic age of absolute monarchy. Duplicity being a fine art in Nepal government-speak, they are already telling States at the CHR that Nepal should not be named and shamed, or lo and behold, the Maoist hordes will reach the gates of Vienna.

In March 2004, the Government of Nepal brought out a human rights commitment paper. There was also a human rights action plan. No implementation. At the end of 2004, many assurances were given to the EU troika. Lest it be forgotten, a memorandum of understanding was signed between the Government of

Nepal and the UN on 13 December 2004, which was aimed at helping the National Human Rights Commission (NHRC) of Nepal. Yet, the Government in Kathmandu on 18 March 2005 announced a new executive Human Rights Committee only to subvert and circumvent the work of the beleaguered NHRC of Nepal.

A trail of visitors has been to Nepal. Six weeks before the High Commissioner for Human Rights arrived, the Working Group on Enforced and Involuntary Disappearances was there. The High Commissioner was followed by the Secretary General of Amnesty International. The International Federation on Journalists (IFJ) and the International Commission of Jurists (ICJ) visited Nepal recently.

Meanwhile, no legal remedies are possible for detainees in Nepal due to the pusillanim-

ity of the Supreme Court of Nepal. And while political prisoners rot in medieval detention conditions in Nepal, diplomatic footsie in Geneva continues.

Gyanendra, the authoritarian clone of King John, needs to be confronted at the modern day Runnymede in Geneva. The million-dollar question is whether CHR member states are willing to play English Barons.

Nepal's donors must realise that the king and the Royal Nepalese Army cannot stop those who seek to usher in a Ruritarian or should we say, a Pol Potian proletarian paradise. It is only the unconditional return of multi-party democracy that can thwart the designs of extremists both on the Maoist left and Royalist right. Human rights and democracy are two sides of a coin. Anyone listening? Item 9, please.

Comments and suggestions are welcome**For the duration of the CHR:**

Call Geneva nos. 079-748 2543 / 079-589 6671

or write to: hfr@aphrn.org

Permanent address:

South Asia Human Rights Documentation Centre

B-6/6 Safdarjung Enclave Extension

New Delhi - 110029, INDIA

Tel/Fax: (+) 91-11-2619-2717 / 2706 / 1120

Email: secretariat@aphrn.org

Web page: <http://www.hrhc.net/sahrhc/>

HRF Team

Kaavya Asoka

Anthony Cullen

Massimiliano Desumma

Rajdeep Singh Jolly

Daniela Kaestner

Ehtasham Khan

Steve Kostas

Rineeta Naik

Ravi Nair

Don Rassler

Kathrin Schlitt

Anni Turner

Webpage Design

Shyam Sundar K.

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