

# HUMAN RIGHTS

# FEATURES

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Weekly series for the 61st CHR session

12 PAGES

A SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE PUBLICATION

ISSN NO. 1541-2482

GENEVA, 11-17 APRIL 2005

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## Reform: Where to now for the CHR?

### Proposals and prospects for the reform of the UN Commission on Human Rights

GARETH SWEENEY

THE recommendations of the High Level Panel for reform of the United Nations, and more specifically in this context, the reform of the Commission on Human Rights (CHR), has now faded into the distance following the release of the recommendations of the Secretary General in his report of 20 March 2005, *In Larger Freedom: Towards Development, Security and Human Rights for All*. The report of the High Level Panel, whilst detailed in its evaluation of other bodies of the UN, nonetheless fell far short in its perfunctory assessment of human rights mechanisms. Critically, its emphasis on the mainstreaming of human rights throughout the UN in principle did not manifest itself in practice. Regarding the Commission, it recognised the symptoms but did not address the causes.

The Secretary General was no doubt aware of the former shortcomings, although has arguably neglected the latter. Consequently, his own recommendations on reform, intended to be drawn from those of the High Level Panel, draw least from the recommendations concerning reform of the CHR. In fact, they are, in the most crucial aspect, almost antithetical. They are also sweeping, and, to date, devoid of detailed explanation beyond the broadest parameters, here mirroring the High Level

Panel. This has left States and NGOs in Geneva in an evident state of bewilderment, and shall be on the table as early as September 2005 at a meeting convened in New York to discuss their possible implementation.

#### The Content and Surprise Shift in Direction

The report of the High Level Panel made some reasonable observations and recommendations, albeit somewhat self-evident and/or at the periphery of concerns. Relative to the present

### CHR REFORM Proposals & Prospects

state of play, it suggested elevating the CHR to a "Human Rights Council", independent of and equal to the Economic and Social Council as Charter bodies, "reflecting in the process the weight given to human rights...in the Preamble of the Charter." It did not, however, elaborate in any manner on how this may come into being. Most critically, with seeming disregard for the above recommendation, it proposed universal membership and the absence of any criteria. The concept of universal membership was not accompanied by any reasoning as to how this would improve the credibility and professionalism of the Commission.

Thus, the Secretary General's proposals

arrived in bare contrast to those of the High Level Panel, inculcating the position of human rights within the UN apparatus by according it equal billing in the title of the report. The proposal to establish a Human Rights Council to replace the Commission entirely is an inventive interpretation of the Panel's recommendation, its separation from ECOSOC as a body of standing subsidiary or even equal to the GA a welcome re-iteration; the idea that it be "smaller", require strict criteria for membership, sit permanently or at least when required, and be elected by a two-thirds majority of the GA is not only new but directly contradicts the all-in universalism of its predecessor.

In his address to the Commission on 7 April 2005, the Secretary General elaborated very slightly upon his proposals for reforming the treaty bodies, the OHCHR (neither addressed here but both equally worthy of close attention), and the Commission. The CHR's strengths he noted in three lines, recognising its standard setting functions and country specific resolutions, and close work with civil society. He proclaimed, however, that "politicisation" of the sessions has undermined its ability to perform. He added that the Council would be rotational, and would evaluate the fulfilment of all human rights by all states. Such a Council, he states "would allow for a more comprehensive and objective approach."

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## 'Spirit among NHRIs is very positive right now'

Orest Nowosad, Coordinator of the National Institutions Unit in the OHCHR speaks to Human Rights Features...

**HRF:** Has there been any thinking within OHCHR on the refining of membership criteria for NHRIs that are members of the International Coordinating Committee of National Institutions (ICC), since some of them clearly contravene the Paris Principles?

**Orest Nowosad:** I think we have to look at it in the overall scope of what we are trying to do with the reform of the whole human rights movement. Within the Commission on Human Rights, there is a report of the Secretary General 2005/107, which talks about eligibility criteria of access to the Commission, and part of the process is strengthening what we call the credentials procedure of the International Coordinating Committee. And I believe if we can strengthen that procedure and refine it, that will provide part of the solution to the actual membership of the International Coordinating Committee. And what is really interesting about

### INTERVIEW Orest Nowosad

the proposal is that there would be a revisiting of accreditation every five years. So, there is no such thing as lifetime membership which has been in some ways a problem because institutions do change, but there has been no capacity really to revisit their accreditation. We revise the rules of procedure of ICC also to allow the chairperson or members of the ICC to call for revisiting of the accreditation of National Institutions again as part of the strengthening of the process.

**HRF:** Any ideas regarding the need for elaboration of the Paris Principles themselves? Particularly in the light of its lacunae such as the lack of non-derogable standards, the lack of clarity regarding the implementation powers of NHRIs and other provisions of the Principles?

**Mr. Nowosad:** The language we have used in terms of the Paris Principles is the reflection on the Paris Principles - what I would say is giving

some meat to the bone. And in December 2003, we held a very good round table here in Geneva, and that was part of [the process]. What we're also doing, as part of this process, is we're holding round tables of about 25 institutions per round table on thematic issues or areas of interest. For example, we did one on the administration of justice. The intention there is to look at the whole quasi-judicial powers section.

I think the reopening of the Paris Principles is not practically feasible right now. What we are trying to do is educate better what they mean, what independence means, what pluralism means, what accessibility means, and defining them step-by-step. That is not always so easy when you are trying to do it in a different country context. I think one thing we have to be very careful of is [that] we maintain the Paris Principles as universal, [that] we don't go to a

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## Where to now...

This is the totality of Annan's recommendations at the time of writing, replicating the High Level Panel only in the brevity of its pronouncements and its distinct lack of analysis of the inherent problems prior to moving toward reform. This has produced varying understandably tentative hypotheses on how best to proceed. In any case, the Secretary General requests that member States reach an "early agreement in principle to establish a Human Rights Council." The finer points can then be mapped out. But is there enough to agree on in principle at such an early stage?

### Perspectives and Concerns Raised to Date

The point has been raised that few have sought to explain what a Human Rights Council may offer that the Commission could not likewise offer under internal reform. It is impossible to pinpoint at this stage what the Council may offer that the Commission could not without first analysing in detail the institutional failings of the Commission itself. Only then can it be measured whether the Commission is at all capable of reform, and, if not, how a Council would better function.

As for the recommendations as they stand, the suggestion that human rights be elevated to a position of standing equal, or at least directly subsidiary, to the General Assembly is a welcome one by most. It is difficult at least for those who would privately prefer it to remain a secondary distraction to say so in public. However, an equal standing with the GA would require an amendment of the Charter. This would cause all manner of complications that many member States would find objectionable and unnecessary.

The actual size of the smaller Council has not even been suggested, nor the exact value in streamlining. Shooting square between one and fifty-two, a figure in the region of twenty five would most likely mean (first theoretically discounting criteria) an automatic five seats for the permanent Security Council members, and a subsequent insistence that those pressing for new permanent seats be accommodated, bringing the number to around twelve. If India is there, Pakistan will insist that they are entitled to be there also, as will Argentina in suit of Brazil, and so forth. Politically savvy member States such as Cuba will ensure General Assembly election. This means, in effect, a cat fight at the GA between some of the remaining 175-odd member States over perhaps four or five seats.

Even the voting process of a two-thirds majority is unclear as to whether this would apply to individual member States or regional blocs. If the former, it could be extremely convoluted, if the latter, what happens if a two-thirds majority is not achieved?

The rotational suggestion is newer, but

how credible would a Council be without the US, China, or India, for example?

If the requirement of stringent criteria is introduced to the equation the problem is compounded. Firstly, who can be expected to draft these criteria? It has been highlighted that high criteria will limit the possibility of maintaining geographic representation, and will not enhance credibility if it is perceived as a Council of Western imposition. On the other hand, low cri-

### Do's and donts

**- It is impossible to pinpoint at this stage what a Human Rights Council may offer that the CHR could not, without first analysing in detail the institutional failings of the CHR itself.**

**- All aspects should be discussed and analysed at length, rather than fast tracking a concept that may not offer new solutions**

**- The idea of criteria being met upon admission could be considered - for instance, the automatic extending of standing invitations to all Special Procedures and assurances of ratifications of core instruments - upon entry.**

**- It must be borne in mind, however, that the contribution of NGOs to the work of the Commission would be lost if the body is moved to New York, given New York's traditional treatment of NGOs.**

teria, self-evidently, are of little worth. The suggestion of criteria being met upon admission to any body - for instance, automatic standing invitations to all Special Procedures and assurances of ratifications of core instruments - would appear a more workable suggestion, although few are discussing it. The idea of criteria merits serious consideration, but is presently far from clear.

The notion of moving the Council to New York has also surfaced, despite no mention by the Secretary General of such a move. What this would accomplish is not self-evident. What most be borne in mind, however, is the contribution of NGOs to the work of the Commission, a contribution that would be lost in New York given its traditional treatment of NGOs. Ramos Horta and Asma Jahangir, to name but two, have questioned why such mechanisms should not be located in Africa or Asia. Why not indeed?

And to return to the contribution of NGOs, whether or not the Council sits permanently, it would be essential that it retain its annual six week focal sessions in order that NGOs may contribute effectively, lest NGO input be relegated to those who can afford to sit in Geneva or New York all year round.

### So Why Now?

There are certain more general aspects of the

issue of reform that grate with many people across the spectrum. One is why it has taken the Secretary General until now to make his proposals as a comprehensive package when all involved recognised the poor state of the Commission at the very beginning of his term. Why the rush now when these negotiations could have been taking place, independent of negotiations on reform of the entire United Nations, for the last six years? Conjecture on deflection from bad publicity and/or leaving a legacy have naturally surfaced.

The 'comprehensive' package approach itself is problematic. It offers member states the opportunity to declare support for certain aspects, but as they may have difficulty with other details, feel that they could not adopt the 'package'. We have heard this phrase emanating already as a language of non-commitment.

Finally, by way of motivation and the Secretary General's comments on the need for objectivity, the reference in his speech on April 6 to increased "politicisation" in the Commission is odd. The Commission, quite simply, is a political body. That is its intention. The political process is an intrinsic feature of any intergovernmental body, and there will always be ideological clashes. Any inference that a Council could be any different, and that this would necessarily be a good thing, appears naive.

### And What Next?

It is well understood that the Commission suffers from a lack of credibility and professionalism. On this basis reform, or workable reform, is welcome. Yet it would appear that many are intent on burying the Commission without considering what the Council could conceivably offer in its place, as if reform in itself provides automatic improvement. This is a mistake to which many in the NGO community have fallen foul, belying a lack of pure motive for their demands.

All aspects should be discussed and analysed at length, rather than fast tracking a concept that may not offer new solutions, yet upon establishment may be irreversible. To this end, not only the international community, but the Secretary General himself, has a long way to go in elaborating upon his proposals.

*Human Rights Features invites views and feedback on the Secretary General's proposals, on or off the record, for a possible follow up article next week. Please contact us at [hrf@aphrn.org](mailto:hrf@aphrn.org) or on Geneva mobile numbers 079-748 2543 or 079-589 6671.*

*Comments may also be sent to the South Asia Human Rights Documentation Centre (SAHRDC) office in New Delhi after the current CHR session ends.*

*Contact details on page 12.*

## WEEK 4 - ROUND-UP

### Playing sneaky

THE Danish delegation is leading again this year the negotiations on a draft resolution on torture and other cruel, inhuman or degrading treatment or punishment. What was a decent draft is being watered down during the negotiations by the US delegation in an attempt to limit the draft's references to other cruel and inhuman treatment or punishment. The US maintains that its treatment of detainees does not amount to torture, and that its obligations not to subject persons to cruel, inhuman, or degrading treatment end at its water's edge. The US apparently hopes that by limiting the references to "other forms of ill-treatment" it can maintain its excessively narrow interpretation of its legal obligations and avoid the political embarrassment of being condemned by the Commission.

First, the current draft's condemnation extends to "all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified". It is essential that the prohibition retain language extending the State obligation to any time or place and the prohibition permits no justification for its breach because the US administration considers its obligations under the CAT prohibition of cruel, inhuman, or degrading treatment to be coterminous with similar prohibitions under the US Constitution. According to US Attorney General Alberto Gonzales, the current US administration considers that when it

subjects persons outside the territory of the US to cruel, inhuman, or degrading treatment it is "as a legal matter" still in compliance with its obligations because "aliens interrogated by the US outside the United States enjoy no substantive rights" under the relevant US Constitutional provisions. Thus the position of the US government is that "there is no legal prohibition under the Convention Against Torture on cruel, inhuman or degrading treatment with respect to aliens overseas." This allowed Secretary of Defence Donald Rumsfeld to note with approval that "what has been charged so far is abuse, which I think technically is different from torture" and did not entail a violation of US international legal obligations.

The Commission should take this opportunity to observe that reservations to CAT that limit the territorial or temporal obligation of a State are contrary to the treaty's object and purpose and are void. Anything short of such a clear and direct statement will ensure that the US government continues to use what it considers to be a viable loophole in its obligation under CAT.

Second, the draft Resolution importantly includes a condemnation of public officials that act to "legalize, authorize, or condone torture under any circumstances", thus permitting no justification for acts of torture or other ill-treatment. A strong and clear statement of the absolute prohibition of torture and other

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## 'Let's build on the cooperative spirit of Seoul'

system of regional application. That has also been suggested, and that is not appropriate.

**HRF:** *Coming to a particular situation, have there been any ideas regarding the situation the Nepal Human Rights Commission finds itself in? What can OHCHR and/or other regional or international mechanisms such as ICC contribute to pressure on a government that seeks to undermine or possibly destroy a national institution?*

**Mr. Nowosad:** At the International Coordinating Committee meeting on Thursday there will be a discussion about early warning procedures for national institutions, and we hope that they will be adopted. There are number of steps to be taken, clearly there is a role for the Office of the High Commissioner for Human Rights (OHCHR) to engage when an institution is under threat. There is also an obligation on the part of the OHCHR to stress to an institution which is under threat that it is not necessarily the only part of the society which is under threat, and call on that institution to support civil society and stand behind civil society, and not only worry about its own survival but worry about the survival of society at large.

The second step is peer review, the pressure put by the regional groups. We mobilize regional groups when the institution is under attack. That is also extremely helpful. But not only that, it is very important, as we saw in the case of the Danish Institute when it came under attack, that we were able to mobilize civil society and we were able to mobilize the business community and Parliamentarians. So there has to be a concerted action. But I think for that to be successful, the institution itself has to be strong enough to stand up and say, "We are under threat, we need support." And it also has to be strong enough to stand up for others who may also be under threat.

**HRF:** *Any comments on the prospective role of NHRIs in the context of the proposed reform process of the Secretary General?*

**Mr. Nowosad:** Well, I think the reform process is looking very much at implementation and taking things to the national level. The High Commissioner herself has said that we have a large body of international human rights norms. What we need to do is stop talking about those norms and start actually implementing them. And in that regard, national institutions have a direct role to play. The reform of the Commission, the report that I mentioned earlier, 107, goes to the heart of this to say that we want national institutions to come to the Commission and add substance to the debate. We don't need national institutions coming and reporting on seminars they have undertaken. We actually need them to provide a critical analysis of particular issues. And that in itself, I think, is a part of reform.

The other element of the reform of the Secretary General is what we've referred to as Action 2. And Action 2 means mainstreaming human rights throughout the UN family. National institutions have a direct role to play at the national level in assisting the UN family in understanding human rights principles. And the second part of Action 2 is talking about building national protection systems and again national institutions are at the heart of that. So I do see them very much throughout that process.

**HRF:** *In terms of better consultation between civil society and national institutions - not just at the regional level but at the international level too - what is the OHCHR doing to facilitate access to NGOs to the ICC meetings, perhaps at least the open sessions?*

**Mr. Nowosad:** I think the example of the seventh international conference of national institutions held in Seoul is the one that we should be looking at. That was a terrific opportunity,

which was well embraced by both civil society and national institutions. We are now planning for the eighth international conference to be held next year and we are stressing very actively, with the support of the Chair of the ICC, that we must also have another NGO component and full NGO involvement as we saw in Seoul. What was very interesting in Seoul was that they were part of the working groups. The ICC meetings aren't closed meetings. The ICC meeting has 60 members of the ICC, but it is also open to the larger group of national institutions, and if

**The SG's report (2005/107) indicates that we want national institutions to come to the Commission and add substance to the debate. We don't need national institutions coming and reporting on seminars they have undertaken.**

requested to the Chair of the ICC, civil society can participate in the meetings. There is clearly a business portion of the meeting, which is really of direct interest to the national institutions, but I would encourage, and I think the ICC would welcome, the participation of NGOs in thematic discussions.

This year we have two thematic round tables as parallel events - one on the role of national institutions and minorities. And civil society should be present there. Also, one on HIV/AIDS and national institutions, and civil society will be part of the panel. And then we have thematic discussions on the role of national institutions and migration, and civil society should be willing to discuss these issues. What we want to do is to say that, look, both civil society and national institutions can contribute to reinforcing each other, understanding each other and adding substance to the discussion together.

So I think the Seoul example was well beyond our expectations. And we do have to push that to the regional level as well. I was at a meeting of the regional coordinating group of

**In terms of the national institutions movement, I wouldn't say we should be running. We should be walking cautiously... hand in hand with civil society and national institutions. Let's build on the cooperative spirit of Seoul.**

European institutions and on the agenda was how to better engage civil society and their work. So it's now on the map.

**HRF:** *You spoke about mainstreaming the work of national institutions across the UN system and a key issue is that sometimes we hear divergent approaches to some UN agencies' efforts to create national institutions under their governance programmes and the initiatives taken by your office. How do you plan to streamline this and get them to work in unison?*

**Mr. Nowosad:** It's a very good point because we've got to speak in one voice and I think first we need to better educate the UN family on what a national human rights institution is. And I am not trying to be technocratic in my approach but what we are doing this year is we're developing training modules on national institutions so that we can go to a country context and train the UN country team on what a national institution is. We recently had a resident coordinator come to us to speak about support for her country's institution or developing an institution. But at the same time she said I also want you to come for a day or two and train the staff on what a national institution is. That has to be the starting point. I don't think we should be encouraging UN country teams to be establishing or strengthening institutions when they don't understand what they are. And in fact it can run to a counter-purpose. You can be creating a fig leaf institution which is in the interest of

nobody.

If you actually look at the programme of the Office of the High Commissioner, of its National Institutions Unit, we are very much focusing on the UN country teams over the next couple of years. We now have a strengthened Unit, we have six staff divided among geographical focal points, and with the training programmes we would be able to respond more actively to those requests. But it is absolutely fundamental that the knowledge base be as across the board as possible.

The other way of doing it too is by actually tapping into the good practices of national institutions and bringing them along to events or assessments rather than the easier and more traditional - and I think more costly and less effective - approach of consultancy-based support. For example, we are going to Chile and Uruguay in a few weeks' time. We will actually be taking with us representatives of national institutions to be able to demonstrate how they function with them in practical sense.

**HRF:** *Are you considering perhaps encouraging the replication of the regional model provided by the Asia Pacific Forum in other regions?*

**Mr. Nowosad:** I wouldn't use the term replication because every region is different. But I would say we should build on and learn from the good experience of the Asia Pacific Forum. And we are already doing that. In 2002, we had the Network of the Americas established and the membership of the Network of Americas is similar to that of the Asia Pacific Forum. They do not do their own review mechanism in terms of applicants because they only accept as members those institutions which have been accredited by the International Coordinating Committee. They are also now reaching out to civil society and bringing civil society to their events which the [Asia Pacific] Forum has done very effectively.

We are now working with the coordinator of the African group to see how we can strengthen the Secretariat of African National Institutions which has been based in South Africa for three years. And in fact, last week, we worked very actively on a series of documents on how we can move the African Secretariat forward, similar to an Asia Pacific approach where you have a coordinator, a secretariat, and a programme of activities.

In the European context, they have also evolved. I don't think you'll have the same structure as the Asia Pacific Forum in Europe because Europe is quite a different region. But they are also conscious of the need of existing Western European institutions in embracing those in Central and Eastern Europe. We recently had a discussion in Cairo on national institutions of the Arab world. Again, how the consultation will develop depends on those groups of states and institutions. But for us, what we are encouraging is that membership revolves around standards and the Paris Principles. And that we are not, as an Office, seen as a funding agency but as a partner in this initiative.

**HRF:** *Any issues that you would like to highlight that civil society and the wider audience which follows human rights in the UN system need to be aware of?*

**Mr. Nowosad:** In terms of the national institutions movement, I think it is a movement but I wouldn't say we should be running. I think we should be walking cautiously and that we should be looking carefully hand in hand with civil society and national institutions. I think let's build on the cooperative spirit of Seoul. And let's be objective and critical at the same time. There is a need for dialogue and let's keep that dialogue going.

I think the spirit among national institutions is a very positive one now and the door for civil society engagement with national institutions is extremely powerful.

# Shutting the door on minorities

*New draft resolution on the rights of minorities seeks to cut down on the duration of the Working Group, which may reduce the space for small NGOs from across the world*

**L**AST Thursday, the first meeting on the draft resolution on the rights of persons belonging to national or ethnic, religious and linguistic minorities took place behind closed doors. What is so new and spectacular about this resolution that the public is not allowed to know? What new plan have our distinguished state delegates cooked up so secretly?

Since the 2004 report of the High Commissioner, entitled "Rights of persons belonging to national or ethnic, religious and linguistic minorities" (E/CN.4/2004/75), the proclamation of an "international year for the protection of the world's minorities" as well as the establishment of a Special Representative of the Secretary General on minorities and a voluntary fund has been discussed in the conference rooms and corridors of the United Nations, in New York and in Geneva. The report outlines the existing mechanism for the protection of minorities, which currently consists only of the UN Working Group on Minorities (hereafter 'Working Group'), which is unable to grant sufficient protection for the approximately 18 percent of the world's population who are minorities.

This is due to the limitations of the mandate of the Working Group imposed by the international community. The report of the High Commissioner pointed to gaps in the protection system for minorities, which arise, for example, when state authorities do not recognize the minority status of members of certain groups within a community, or when citizenship is denied to persons belonging to minority groups. The Working Group is meant to provide a forum for dialogue between minorities, governments, and academics, where minorities can explain their concerns directly to governments. However, the mandate of the Working Group does not allow for direct intervention by means of country visits or receipt of individual complaints. Currently, there is no emphasis on early warning in the work of the Working Group and the absence of a special procedure makes it impossible to address tense situations regarding minority groups before they result in humanitarian catastrophes.

The Austrian delegation, which traditionally sponsors the resolution on minorities within the UN Commission on Human Rights (CHR), attempted to allow other CHR members to decide on the establishment of a new mechanism in the field of promoting and protecting minority rights. The Austrians found themselves in good company since not only the High Commissioner, but also Resolution 2004/13 of the Sub-Commission, the Working Group on Minorities, and last but not least, a wide range of NGOs from all around the world called for the restructuring of the minority protection system of the UN. A close look at this year's draft resolution on minorities reveals, however, that the suggestions made by the main sponsor fall far short of the proposals that have been made by other actors involved, since the new paragraphs focus exclusively on the establishment of a Special Representative on Minorities. Further efforts such as the proclamation of a 'year for minorities' are not included.

The newly added operative paragraph (OP) 6 defines the mandate of the Special Representative as to "promote the implementation of the Declaration on the Rights of persons belonging to National, Religious and Linguistic Minorities" as well as to "engage in dialogue with governments" and "other interested actors" on the effective implementation of minority rights. Moreover she or he is supposed to "identify best practices and possibilities for technical cooperation by the OHCHR", "apply a gender perspective" in the work and "cooperate closely" with existing national, regional and international mechanisms relating to minorities, in order to

avoid duplication and waste of the limited resources available to the UN to protect human rights.

According to the delegations of Hungary and Switzerland, who have traditionally co-sponsored the resolution on minorities, this rather weak mandate is needed in order for the resolution to be approved by other members of the CHR. However, the question remains whether this rather broad mandate will include

*The WG on Minorities is a unique mechanism because it facilitates the access of civil society to its meetings by granting accreditation to academics and NGOs without ECOSOC status, unlike most other mechanisms. If WG meetings were be held in parallel with the Sub-Commission, the rules of accreditation of the Sub-Commission would surely apply, and only NGOs with ECOSOC status would be allowed to participate.*

important components such as country-visits and urgent communications.

According to the Austrian delegation, the phrase "engage in dialogue with governments" is to be interpreted widely and is supposed to include these activities. The mandate of the OSCE High Commissioner for National Minorities reflects the language in OP 6 and the UN Special Representative is meant to focus her/his work on offering good services, early intervention through urgent actions and collecting international data on best practices to provide them on request to governments that face difficulties involving minorities.

The discussion on the new draft also revealed that several delegations, especially the United Kingdom and the United States, have concerns about how to finance the new mechanism if it is established. Latvia, among others, in response suggested improving the efficiency of the existing Working Group rather than inventing new procedures. On the other end of the scale of solutions, the UK suggested replacing the Working Group, bearing in mind that it would be an inefficient and costly task.

The main line of thought, however, seemed point to the streamlining and rationalizing of the mandate of the Working Group by concentrating on its role as a mere forum for dialogue and conceptual work, and cutting down the duration of its session from five to three working days, which are supposed to be held in parallel with the session of the Sub-Commission. Proposals thus indicated that the Working Group was to function on a smaller budget, freeing resources to finance the Special Representative.

What seem to be reasonable suggestions to improve the standard of protection for minorities, however, must be viewed more critically on second glance. The motives behind sapping the resources of the Working Group become clear when one takes into account its special features and working methods. It is a unique mechanism within the UN system because it facilitates the access of civil society to its meetings by granting accreditation to academics and non-governmental organizations (NGOs) without ECOSOC status, unlike most other mechanisms. NGOs interested in participating in the meetings need to send information about their organisation and references to the Secretariat, upon receipt of which the Secretariat jointly with the Chair of the Working Group, decides on accreditation.

If the meetings of the Working Group would be held in parallel with the Sub-Commission, the rules of accreditation of the Sub-Commission would surely apply; this

would mean that only NGOs with ECOSOC status would be allowed to participate. Previous experience has shown that meetings requiring ECOSOC status are poorly attended by members of civil society, particularly in comparison to the average participation of more than 80 NGOs and academics at the meetings of the Working Group on Minorities.

Governments as well as the High Commissioner and several treaty bodies repeatedly refer to the importance and great value of including civil society within the working methods of the UN and always call for more participation. The Dutch delegate, Mr. Van den Berg, stated, for example, at the 59th session of the General Assembly (GA) on behalf of the European Union (EU), that "[i]n order to meet the challenges of the twenty-first century, the United Nations must become (...) more grounded in reality" and that "[n]othing can serve this purpose better than closer interaction with civil society".

Unfortunately, this is contrasted by the meagre participation and attention of the governments given to the Working Group on Minorities, which could serve as a role model for the cooperation of the UN with civil society. This is one of the underlying reasons why the Working Group is perceived as being ineffective.

While taking into account that the Working Group is in its very nature unable to initiate preventive measures in response to communications from individuals, groups and monitoring mechanisms, it is because of its constitution as a unique forum for dialogue and conceptual work that it should be preserved.

Instead of cutting out this important opportunity to be in direct contact with civil society, it is the responsibility of governments to finally realize the great value of the UN Working Group on Minorities and take advantage of it in order to improve the treatment of minorities.

Against the established background that all the UN human rights mechanisms need to be funded by the limited resources of the UN, one has to acknowledge the diverse functions of the Working Group.

A potential Special Representative on Minorities should therefore be established complementarily, rather than in place of the existing procedures.

## Coming soon?

AT its 57th session, in 2001, the Commission on Human Rights decided to create an "intersessional open-ended working group charged with elaborating a draft legally binding normative instrument for the protection of all persons from enforced disappearance."

Since early 2003 this working group has been preparing a draft document and this year, the resolution on Enforced or Involuntary Disappearances, drafted by the French delegation asks the working group to complete its work by the end of 2005. One final 10-day meeting should suffice to complete the drafting of a text which will be presented to the 62nd session of the Commission on Human Rights.

An important document is finally making a crucial step forward towards becoming part of international law, much of its success, however, depends on its passing through the Commission next year.

Also, the French delegation deserves credit for making use of the Extranet portal of the OHCHR by making draft resolutions publicly available under "Texts from Delegations". The Hungarians have followed the French example, and others should too.

# Defenders need more than a Declaration

*State paranoia must give way to a healthy respect for the work and rights of human rights defenders; access to funding is one such right*

DANIELA KAESTNER

THE UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration) is one of the key international instruments focusing on the rights of human rights defenders. This is complemented by the mandate of the UN Special Representative on human rights defenders Hina Jilani, who submitted her fifth report (E/CN.4/2005/101) to the Commission on Human Rights (CHR) this year.

The delegation of Norway, which has sponsored the resolution on human rights defenders at the Commission for several years, has made honest efforts to promote and respect the work of human rights defenders, and to prevent actions undermining their work. The European Union (EU) has also demonstrated commitment to strengthening the vulnerable position of human rights defenders by adopting the Guidelines on Human Rights Defenders in June 2004 through its General Affairs and External Relations Council, even though the Guidelines are not legally binding.

In short, human rights defenders do have instruments with which to fight persecution and other human rights violations. Unfortunately, all of these legal measures prove to be rather weak tools as they favour the exclusive application of domestic legislation, leaving NGOs and human rights defenders vulnerable to the whims of State interests. Most importantly, this phenomenon problematizes one crucial aspect of the functioning of NGOs and other human rights activists: their right to receive and utilise financial resources.

## Deficiency of the Declaration

Prior to adoption, a draft of the Declaration had specified that it promoted "a clear commitment on the part of all UN member states to respect the rights of human rights defenders at the national and international levels". This was later excised from the final draft, compromised in the interests of adoption of the Declaration.

The language eventually used in the adopted Declaration offers little by way of real protection to human rights defenders. The reference to the role of national law in Article 3 of the Declaration results in the subordination of international law to domestic law, which restricts the rights of human rights defenders through the applicability of more stringent national legislation.

Although Article 3 of the Declaration stipulates that domestic laws must be "consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms...", this, at a closer look, proves to be counterproductive. Due to the fact that the international obligations are not expressively cited in the Article, it aligns domestic laws only with those international treaty obligations already ratified by the state and not with other international standards or customary law. Thus, the Declaration's possibility to provide for any protections other than those already implied in existent human rights law instruments, to which the state is a member, is exhausted.

Moreover, as indicated by Article 21 and 22 of the International Covenant on Civil and Political Rights, Article 5 (d) (ix) of the International Convention on the Elimination of All Forms of Discrimination and Articles 2, 3, 5 and 11 of the International Labour Organisation Convention No. 87, the right to association and assembly has already been guaranteed and is nothing exceptional to the Declaration.

As another example, Articles 2 and 4 of the Declaration simply reiterate the duty of States to promote and protect human rights, which is already proclaimed by the Universal

Declaration of Human Rights. The result is that the majority of the provisions of the Declaration are simply modelled on other international human rights conventions, which apply equally to human rights defenders as to all other individuals.

With respect to financial resources, the Declaration does incorporate the right to receive and obtain funding for human rights activities in Article 13, a right not articulated as such in any existing human rights standard. Yet, according to Article 17 of the Declaration, Article 13 is subject to the limitations "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of the meeting of the just requirements of morality, public order and the general welfare in democratic society." Hence, all that is required to prevent human rights defenders from

## Defence mechanism?

IN December 2004, a new NGO Bill was introduced in the Parliament of Zimbabwe. The Bill does not only require NGOs to register with a government-appointed regulatory council but also prevents international organisations from receiving foreign funding. Moreover, through the new law, the Government has increased its excessive control of the NGO Council and obliges all NGOs to present a three-year plan of action when applying for their annual registration.

Yet another piece of repressive legislation emerges from Egypt. Article 11 of 'Law 84' (2002), which took effect in June 2003, levies criminal penalties for "unauthorized" activities, including "engaging in political or union activities, reserved for political parties and syndicates". As pointed out by Human Rights Watch, this results in the liability of a person to a three-month term of imprisonment when engaging in NGO activities prior to the organisation's formal registration. Article 17 of the Bill bans NGOs without justifiable reason from receiving foreign funding and Article 42 even empowers the Ministry of Social Affairs to liquidate an NGO and to thereby seize its property without the authority of a court ruling.

The root cause of this problem of suppressive legislation is perhaps that most State leaders refuse to acknowledge human rights defenders as partners in the democratic process. For example, last year, Russia's President Vladimir Putin claimed that NGOs serve the interests of "dubious groups and commercial interests", rather than the welfare of the public at large.

doing their work by cutting off their source of capital is to label them as "politically motivated" or as a threat to "national security", "public order" or even the "general welfare of society".

## Resolution on Human Rights Defenders

Particularly because the Declaration does not contribute to any additional rights that may strengthen the position of human rights defenders, a strong resolution at the CHR is indispensable. Unfortunately, the draft resolution on human rights defenders, to be tabled during the ongoing 61st session of the CHR, again fails to address the legitimate aspiration of human rights defenders to freely access funding.

The draft resolution does reflect other key elements of the report of the Special Representative on human rights defenders. Firstly, the special emphasis Ms. Jilani has put on the increasing number of cases of serious violations is reflected in the draft resolution.

Secondly, the draft refers to the focus of the report on "the concern at the increasing restrictions imposed by States on the freedom of association, through the passing of extremely restrictive and cumbersome legislation regulating freedom of association."

Thirdly, it seeks to broaden the idea of protection by extending it to relatives of human

rights defenders, since Jilani's report documents how relatives of human rights defenders have repeatedly been targeted in order to pressure the defender. Last but not least, the draft text recognizes the important role defenders play in upholding human rights during times of armed conflict, with special regard to their vulnerable position during war. Several aspects of the General Assembly's (GA) resolution of the 59th session in October 2004 have also been incorporated into the CHR resolution, such as the request for States to "...ensure that complaints from human rights defenders about threats or violations against them or their relatives are investigated promptly".

One hotly debated paragraph of the draft consists of the call upon States to "...ensure, protect and respect the freedom of expression and association (...), in particular with regard to facilitating the acquisition of legal status...". This issue has also been inserted with regard to the GA's Resolution, but slightly amended from 'registration' to 'acquisition', which can be seen as some progress since acquisition also refers to the process prior to registration. However, despite the word "inexpensive" concerning acquisition, financial means are not mentioned once throughout the resolution.

In short, the resolution copies the language of the Declaration, rather than taking it forward.

## Obstacles Posed by Domestic Legislation

The use of policies, legislation and procedures - often justified as "security" or "counter-terrorism" measures - to restrict the work of human rights defenders has been increasing and may even target the defenders themselves. India provides a good example: the Foreign Contributions Regulation Act (FCRA) requires all Indian organisations and individuals that seek to receive foreign contributions to receive clearance first from the Ministry of Home Affairs, in the form of either registration or prior permission. An anachronistic, Emergency-era statute, the FCRA is a potent tool used by the government to restrict the work of human rights defenders.

Governments have a legitimate interest in holding NGOs accountable for financial or other wrongdoing. However, normal regulatory and criminal justice procedures provide sufficient institutional resources to accomplish this task. Similarly, narrowly tailored financial reporting requirements for NGOs serve legitimate governmental interests and should remain in place. In India, however, it is the highly politicised Ministry of Home Affairs that administers the FCRA rather than the Ministry of Finance. This leaves the application of the law open to manipulation and selectivity.

The Government of India also attempts to curtail the freedom of assembly and association. From mid-1999, NGOs organising international conferences in India have required prior permission from the Ministry of Home Affairs and other relevant ministries. The clearance requirement is not pursuant to any law, rule or guidelines, it is simply the new practice of the Government of India. The clearance requirement is not manifest as a written policy with established procedures. It functions at the whim and fancy of the Government of India.

This *ad hoc* operation places NGOs at a distinct disadvantage in its dealing with the Government of India as the procedure lacks transparency. The clearance requirement procedures are clearly prone to arbitrary use and abuse in the absence of established policies and procedures.

The problem of legislation aimed at hindering human rights defenders in their work is not restricted to India, although it is particularly reprehensible that such legislation would find a place in the statute book of a democratic country. (see box)

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# 12 years on, lessons not learnt

*The Indian NHRC was well placed to serve as an inspiration, a blueprint for other NHRIs in the region. It now appears that it is more likely to show them the way to the bottom...*

IN these pages one year ago, during the 60th session of the Commission on Human Rights, *Human Rights Features* had expressed its views on the quality and manner of appointments to the National Human Rights Commission of India (NHRC). A year on, it turns out the same concerns are still valid, magnified by the fact that one member whose appointment has been called into question did not deem it fit to step down on moral grounds, even if temporarily, after the Supreme Court of India delivered a split verdict on the issue.

Furthermore, there has been no attempt to address, or even acknowledge, the fact that more than 98 percent of NHRC staff is drawn from other government departments, seriously undermining their effectiveness. Of even greater concern is that as much as a fifth of the staff in key departments is reportedly drawn from the Intelligence Bureau of the Government of India.

In the legal challenge to the appointment of Mr. P.C. Sharma, former director of the Central Bureau of Investigation, Justice Sabharwal ruled against the appointment, while Justice Dharmadhikari held that the appointment had conformed to all legal procedures and requirements, and was therefore valid. The case will now be heard by a larger bench.

There is, nevertheless, even at this interim stage, a lesson for the government. For, even if the legal procedures in this appointment were followed, it still does not absolve the government of its responsibility, in this case as well as in future cases, of ensuring that such appointments are above board, and more importantly, seen to be above board.

## Question of Credibility

At the core of the issue is the credibility of the NHRC. As Justice Sabharwal emphasised in his order, the NHRC is a high-powered statutory body functioning as an instrument to protect and promote human rights, and "the credibility of such an institution depends upon [a] high degree of public confidence".

Again, as Justice Sabharwal pointed out, "[a]n individual Police officer may be very good but his participation in decision making as a member of the Commission is likely to give rise to a reasonable apprehension in the minds of the citizens that he may sub-consciously influence the functioning of the Commission. Such reasonable perception[s] of the affected parties are relevant considerations to ensure the continued public confidence in the credibility and impartiality of [an] institution like [the] NHRC."

Public confidence is clearly nowhere at the top of the government's agenda - neither the

***Public confidence is clearly nowhere at the top of the Indian Government's agenda. If it was, the NHRC's annual reports would not have been stowed away in the Ministry of Home Affairs, waiting to be presented to Parliament. The annual report for 2002-2003 was tabled only in December 2004.***

Central Government's, nor the States'. If it was, the NHRC's annual reports would not have been stowed away in the Ministry of Home Affairs, waiting to be presented to Parliament. The annual report for 2002-2003 has only recently been tabled in Parliament - in December 2004. If public confidence was indeed on the agenda, the NHRC's directions would be complied with as a matter of priority. State Human Rights Commissions would have been established in every state. The dismal performance of the existent state human rights commissions would be reason enough to bring them under the purview of the NHRC.

## Eligibility

In addition to the general impropriety on the part of a former police officer to accept a position on a human rights monitoring body, Mr. Sharma also lacks the necessary qualifications for membership of the NHRC. Section 3 of the Protection of Human Rights Act stipulates that the four members of the NHRC shall include

one former judge of the Supreme Court, one former Chief Justice of a High Court and two persons having knowledge of, or practical experience in, matters relating to human rights. Mr. Sharma does not have either a judicial or a human rights background.

Further, as Justice Sabharwal's order states, "A Police officer may be [a] very good investigator. He may have vast experience in respect of the nature of commission of crime and consequentially its prevention. But, for the present purposes what is relevant to be borne in mind is that [a] number of cases reported to NHRC relate to acts of omission and commission by the members of such forces."

The order also questioned the utility of having a former police officer serve as a Member of the NHRC on the grounds that the NHRC could put his expertise in investigation to good use. "[T]he knowledge or practical experience in relation to commission of crime, investigation and solving a crime which may show violation of human rights is one thing and the knowledge or experience relating to protection of life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India is altogether different," Justice Sabharwal observed. "The requirement of section 3 (2)(d) - relating to the constitution of the Commission", he held, "is of [the] latter and not [the] former."

## Amendments to the Protection of Human Rights Act

SAHRDC has long advocated the raising of the bar. According to Section 4 of India's Protection of Human Rights Act 1993 - the enabling legislation for the setting up of the National Human Rights Commission - the President of India appoints the Chairperson and other members of the Commission based on the recommendations of a Committee comprising of the Prime Minister of India, the Speaker of the Lok Sabha

**CONTINUED ON PAGE 12**

## Time to get cracking

THE NHRC must engage in some activism of its own, for its own sake. This, the Commission has been reluctant to do. With India's free and vibrant press the NHRC could have developed a dynamic relationship and used newspaper columns and television interviews as a platform. In its engagement with peer networks and other human rights bodies at the international level, it could be more forthcoming about its problems, and use them as a sounding board.

Instead, when questioned about its work, ability, or bottlenecks encountered, the NHRC's reaction is to go on the defensive. It appears to do no introspection, and its approach to inquiries and suggestions is at best subdued and aloof, at worst, prevaricating.

With non-governmental organisations, which continue to regard the NHRC with hope and promise, the NHRC could have established a transparent and constructive method of interaction, one that goes beyond token meetings and perfunctory, dead-end discussions. Meetings of the NHRC's Core Committee of NGOs are desultory exercises in defensiveness on the part of NHRC officials, and repeated attempts by some NGO Core Committee members to elicit concrete action from the NHRC on substantive issues have failed. The NHRC's failure to act on - or even comprehensively discuss - the appointments issue prompted the resignation of Ravi Nair, Executive Director of the South Asia Human Rights Documentation Centre (SAHRDC) from the NGO Core Committee in December 2004. That leaves only two human rights activists on the Committee - Mr. Y.P. Chhibber of the People's Union for Civil Liberties (PUCL) and Henri Tiphagne of People's Watch, Tamil Nadu.

There are other steps the NHRC can take to demonstrate its commitment to transparency. Its website ([www.nhrc.nic.in](http://www.nhrc.nic.in)) and its newsletters are a study in abstract minimalism. It must take a leaf, or rather a webpage, from the sites set up by the Human Rights Commission of Fiji or even the Nepal Human Rights Commission which puts out a good quantity of information even as it grapples with a host of problems.

For starters, the website must put out the complete case papers on every complaint it takes up for consideration. The NHRC currently puts out only the 'status' of each complaint, which normally consists of terse one-sentence reports stating who and where a reply to the complaint is being awaited from. No mention of the time given to the official to submit a reply, and no reference to what the NHRC would propose to do by way of follow up in case the reply received is inadequate.

In rejected cases, substantive reasons must be provided for the rejection. This would assist prospective complainants and the general public in ascertaining what kind of complaints can in fact be addressed to the NHRC.

The task may seem daunting but it is not. The NHRC has the good fortune of being located in one of the most IT-savvy countries in the world, and it would be a simple matter to find and appoint a good team of IT professionals to get on with the job.

Secondly, it must publish on its website the career histories of all staff members. Citizens have the right to know where the staff of the NHRC is coming from.

All this material should also ideally also find a place in the annual reports. However, in view of the pathetic speed at which the Indian Home Ministry tables the NHRC's annual reports, the website and the newsletter would serve as a much quicker reference.

BANGLADESH

# Dhaka fascinated by idea of NHRIs

*...and it's been so entranced it hasn't managed to get a move on for nine years now*

**T**HOUGH official pronouncements over the past decade claiming progress towards the creation of a Bangladeshi National Human Rights Commission have been frequent, there has been no substantive development toward this end beyond announcements of "further research" on the matter. Such statements were first made in 1995, under the initiative of the then Bangladesh Nationalist Party Government's 'Action Research Study on the Institutional Development of Human Rights in Bangladesh' (IDHRB). Yet, the work of the National Consultative Committee, formed to monitor and evaluate the IDHRB, has stalled. According to its website, it has only published two working papers, the last one in 1997, and neither of which refer explicitly to the establishment of a national human rights commission.

In late 2004, the United Nations Development Programme (UNDP) Bangladesh, in cooperation with the Australian High Commission in Dhaka, organised a conference in Dhaka titled "Institutional Protection of Human Rights: Role of National Human Rights Institutions".

The purpose of the conference was to "explore the possibilities of creating a functional network within South Asia and other Asia-based Human Rights Commissions and Institutions" and more specifically, to serve as a "starting point for laying down the foundation for an independent human rights commission for Bangladesh and a wider platform for South Asia."

To activists and experts working on issues related to National Human Rights Institutions (NHRIs) - and on Bangladesh - it was incomprehensible as to how the Government of Bangladesh and UNDP Bangladesh chose to refer to the conference as a "starting point for laying down the foundation an independent human rights commission", and still keep a straight face.

Successive governments in Bangladesh have been hinting at the imminent establishment of a national human rights commission - for the past nine years, no less. And if that was not adequate, His Excellency, Mr Reaz Rehman, Adviser (State Minister) Foreign Affairs, Government of Bangladesh, and head of the Bangladeshi delegation in Geneva, stated in his speech during the CHR's High Level segment that a Law Reform Commission set up to review existing [legal] instruments and institutions

would also make "recommendations for setting up a National Human Rights Commission." (see box below)

This is far from reassuring. The Bangladesh Government and its officials have had innumerable occasions to consider the setting up of a human rights commission, to review

*It is true that substantive efforts must be undertaken to establish an NHRI in Bangladesh. But ill-considered and futile initiatives such as the one recently attempted by UNDP only serve to legitimise the procrastination of the Bangladesh Government despite the best intentions of the organisers.*

and revise those considerations, to request recommendations from a number of bodies, both domestic and international, and to make numerous trips abroad to see for themselves how a national institution may be established and how it may function.

The "attempts" began in 1995, under the initiative of the then Bangladesh Nationalist Party Government which set up an 'Action Research Study on the Institutional Development of Human Rights in Bangladesh' (IDHRB). Since then, there has been no substantive development beyond "further research".

The work of the National Consultative Committee, formed to monitor and evaluate the IDHRB, seems to have frozen. According to its website, it has only published two working papers, the last one in 1997, and neither of which refer explicitly to the establishment of a national human rights commission.

Meanwhile, representatives of various ministries, as concurrent members of the IDHRB, have undertaken study tours of India, the Philippines, Canada, and the United States, amongst other countries, presumably in order to further "appreciate" how national institutions function.

Whilst the IDHRB has been successful in organizing seminars much on the lines of the aforesaid UNDP conference of 2004 - such as "Composition, Powers and Functions of the National Human Rights Commission in Bangladesh" on 28 May 1997 and "The Relation Between the National Human Rights Commission and the Judiciary on 30 August

1997 - it has in no way advanced the creation of a national human rights commission. (see also box below) The IDHRB's only substantive contribution, namely the draft bill of the Bangladesh National Human Rights Act 1999, has been shelved for five years.

Despite the fact that this bill is unsatisfactory and would effectively reduce any future institution to a mere recommendatory body, these prolonged deliberations in parliament only serve to suggest that the authorities have no intention to establish a national institution. Meanwhile, seminars and conferences such as the one recently organised by UNDP, help keep up the pretence that the establishment of a national institution is of genuine interest to the Bangladesh Government.

It is true that substantive efforts must be undertaken to establish a national human rights institution in Bangladesh. These must include the application of focused and sustained pressure on the Bangladesh Government to implement its pronouncements of the past nine years. However, ill-considered and futile initiatives such as the one attempted by UNDP, as with all other conferences of the past several years on the same topic, have only served to legitimise the procrastination of the Bangladesh Government, despite the best intentions of the conference organisers.

The Bangladesh Government has all the knowledge it needs to establish an institution, and should do so without delay. Conferences such as the one organized by UNDP are a misuse of valuable UN funding which could be allocated to technical advisory services from the Office of the High Commissioner on Human Rights (OHCHR), designated to assist in the creation of independent national human rights institutions.

Further, since Bangladesh does not have a national institution of its own, discussions on regional arrangements or improving upon the Paris Principles in Bangladesh would be premature - a clear cart-before-the-horse scenario.

Furthermore, the Asia Pacific Forum on National Human Rights Institutions (APF) already adequately serves as a functional network within the entire Asia-Pacific region. No observer from Bangladesh appeared to be present at the last APF annual meeting, which may only further raise suspicions as to the Government of Bangladesh's genuine commitment to such arrangements.

## The astounding progress of an NHRI-that-isn't...

[W]e are now finalizing a statute for the establishment of a National Human Rights Commission in Bangladesh. Considering the importance and role of such a Commission, the draft Bill was first formulated by my Ministry and made open for public consultation and deliberation on the day of the 49th anniversary of the UDHR, i.e. on 10th December, 1997. Since then, this draft Bill for the National Human Rights Commission has been discussed and scrutinized by a large number of groups and sections of or civil society comprising of jurists, judges and academics have consistently responded to their suggestions and recommendations. A number of organizations have not only commented but also published and circulated the draft. Bill to elicit public opinion and have put forward their comments. We have incorporated a number of such suggestions and recommendations into the Bill for the establishment of the National Human Rights Commission.

*Excerpt from an article by Abdul Matin Khasru, Minister of Law, Justice and Parliamentary Affairs in the Daily Star (Dhaka), 7 September 1999*

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Speakers at a discussion in the city yesterday termed the proposed draft of human rights commission bill as 'weak' and demanded the inclusion of recommendations of various human rights organisations.

Public debates before finalising the draft is mandatory, they said at a discussion organised by Ain-o-Salish Kendro at its office. Earlier, two draft bills were proposed on the human rights commission.

*Daily Star (Dhaka), 22 January 2003*

"An interlinked institutional framework is taking firm shape. One important direction is enhancing the efficiency of the Judiciary and making legal protection available to all citizens. A Law Reform Commission has been set-up and mandated to review existing instruments and institutions so as to update and reform them. Its terms of reference include making recommendations for setting up a National Human Rights Commission."

*His Excellency, Mr Reaz Rehman, Adviser (State Minister) Foreign Affairs, Government of Bangladesh, Statement at the High Level Segment of the 61st session of the Commission on Human Rights, 16 March 2005.*

### Activities of the IDHRB:

- Setting up of the Participatory Rural Appraisal Programme (PRA) to research human rights issues at the local level.
- December 1996: Open discussion on the "Establishment of a Human Rights Commission in Bangladesh"
- May 1997: Seminar on the "Composition, Powers and Functions of the National Human Rights Commission in Bangladesh"
- National seminar on "The Relation between the National Human Rights Commission and the Judiciary"
- Study tours to India, Sri Lanka, Indonesia, Philippines, Canada, and the United States to meet functioning NHRIs, statutory bodies and NGOs.

## SOUTH KOREA

# Skewed judiciary undermines human rights

*The prosecution in South Korea exercises near complete control over the pre-trial and trial process*

THE South Korean prosecutorial system is in urgent need of reform. Judicial independence is being undermined by the predominance of the prosecution and the collusion between judges and prosecutors. Politicisation of the judiciary is rampant. There are shortfalls in evidentiary provisions and methodology, which also weakens the judicial process and denies justice to the defendant.

The prosecution exercises almost complete control over the entire pre-trial and trial process, manifestly increasing the opportunity for bias, corruption and abuse of process. The *Public Prosecutor's Office Act* vests prosecutors with the "duty and authority" to investigate crimes, institute and maintain public prosecutions, direct and supervise judicial police officers and direct and supervise the execution of criminal judgment. Human rights petitions filed with the National Human Rights Commission of Korea revealed "abuse of prosecutorial powers" was the most frequent complaint among cases relating to the prosecution.

It is common practice of the courts to utilise the interrogation protocol produced by the prosecutor's office as indisputable evidence upon which a conviction may be based. The *Donga Ilbo* stated, "the report drawn up by Public Prosecutors during criminal investigation [is] adopted as decisive evidence, and the Defendant and his Defence Counsel only resort to imploring the judge 'to consider extenuating circumstances'." It was as recently as December 2004 that the *JoongAng Daily* reported on a Supreme Court ruling, which found "that an accused person's written confession in most cases must match their live testimony in court for the person to be convicted of a crime." In this case, the witness submitted that his testimony was different from his interrogation statement because the original statement was induced by the prosecutor's threats. Prior to this decision, a defendant was convicted based on nothing more than the word of the prosecution, and only time will tell whether this judicial precedent will be adopted in practice.

Judges strive to never return a not-guilty verdict; the courts "boast" a conviction rate of approximately 99 percent. This is possibly attributable to the pre-supposition of the bench that if there is sufficient evidence for an indictment to be presented, there exists sufficient evidence for conviction. The result of this is that the defendant is effectively judged guilty upon indictment; the judgment by the court is mere rubber stamp approval of what has already been determined by the prosecution. This is a violation of the United Nation's International Covenant on Civil and Political Rights ratified by South Korea. It states in Article 14(1) that "... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Another by-product of this preordained verdict is that defence counsel often does not bother with cross-examination.

There are severe limitations on the presumption of innocence. The South Korean Constitution and the Criminal Procedure Act both specify that a defendant is to be presumed innocent until a judgment of guilt is pronounced; note that the provisions do not concern proof of the defendant's guilt, but rather the time at which the court states that the defendant is guilty. The problem with this is that the prosecution effectively presupposes a "judgment of guilt" before the matter reaches the bench for deliberation. South Korea has ratified the International Covenant on Civil and Political Rights, which states in Article 14(2) that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law". However, in South Korea the emphasis is on the defendant to produce evidence to assert innocence and refute the presumption of guilt. Exacerbating

this problem, defence witnesses frequently feel too intimidated to testify in court to help rebut the 'presumption of guilt' in operation and so choose to ignore the court summonses and simply pay a monetary fine of up to 500,000 won (approximately US\$500).

A recent high profile case in point is that of Un-Yong Kim, the Vice President of the

***South Korean courts tend to utilise the interrogation protocol produced by the prosecutor's office as indisputable evidence upon which a conviction may be based. Judges strive to never return a not-guilty verdict; courts 'boast' a conviction rate of about 99 percent.***

International Olympic Committee and founder of the World Taekwondo Federation. Observers have described him as a 'prisoner of conscience' who is being scapegoated by South Korean politicians for Pyeongchang's failure to win the 2010 Winter Olympic Games bid in 2003. The Supreme Court concluded in its verdict on 14 January 2005: "Since Mr. Kim failed to give convincing and rational explanations on why he drew the money and how he spent it, it can be

**In the performance of their duties, prosecutors shall:**

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

...

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

- Excerpt from the UN Guidelines on the Role of Prosecutors A/CONF.144/28/Rev.1 at 189 (1990).

inferred that he used the public money for personal purposes."

The courts often exercise judicial restraint in their failure to interfere in matters regarding the executive, or render a favourable judgment. Politicisation of the judiciary, in the form of the grant of amnesties, pardons and stays of execution induced by political bias, only serves to undermine the essence of judicial impartiality. The *JoongAng Daily* reported that "informal offers of leniency [are made] through negotiations with defendants, most notably in high-profile political corruption scandals." This is a violation of Article 2 of the United Nation's *Basic Principles on the Independence of the Judiciary*, which states that decisions should be made impartially without any restrictions from any quarter for any reason.

The practice of initiating unfair prosecutions against political enemies of the ruling party is also not uncommon. Ironically, the *Public Prosecutor's Office Act* specifies, "the public prosecutor shall observe political neutrality". This is in conformance with Article 13(a) of the United Nation's Guidelines on the Role of Prosecutors, which requires prosecutors to carry out their functions impartially, avoiding all political discrimination.

It is alleged that collusion between the bench and the bar is rampant, compromising the premise of individual independence of judges that, according to the International Commission

of Jurists, is required for the existence of an independent judiciary. There is an engendered tradition of favouring personal connections. Both judges and prosecutors are recruited from the Judicial Training Center, where they are obligated to study for two years before entering the profession. This creates a breeding ground for alliances between professionals. Exacerbating the problem of complicity between the bench and the bar, the practice of *Junkwanyewu* gives preferential treatment to retired judges and prosecutors acting as private attorneys; when they finish their term in office on the bench or the public prosecution, they may choose to return to the bar, where their former colleagues are willing to look favourably upon them in their judgments. According to the Judiciary Reform Committee, lawyers who were previously judges or prosecutors tend to use personal connections to influence the proceedings and benefit financially at the expense of the accused, thereby further undermining judicial independence.

In a recent example of this, prosecutors decided either there were no grounds to prosecute, or dismissed charges against eight public officials, one of whom was a judge, who were on the sex sales list of a drinking establishment. Public Prosecutor Ik-joong Kang of the Seoul High Commission stated that "we recognize that Judge 'A' received sexual services/entertainment but it was unrelated to his duties, so we decided to defer bringing a case against him, in consideration of the fact that prosecution was also deferred against other suspects involved in this sex sales case for violation of the Prevention of Moral Delinquency Act." The public prosecutors also said there was suspicion against another judge, who had twice dismissed arrest warrants for the establishment's owner. Public prosecutors were also implicated in the affair. To date, no high ranking officials have been prosecuted for their involvement.

Judges are appointed either by or on the recommendation of the Chief Justice. The *Gyunghyang Shinmun* alleges that "what becomes more important to individual judges is not what is just and fair according to the constitution, but the leaders of the Judiciary who hold the authority to make decisions on their promotion." Primarily attributable to the historical influence of Confucianism, high respect for authority figures is commanded by Korean society and these values are superimposed on the court hierarchy. The 2003 US Department of State report stated that the Minister of Justice initiated a new system of appointments and promotions "based on merit rather than the previous traditional system based on seniority".

South Korean academics and certain members of the judiciary believe the prosecutorial system requires an immediate overhaul. Of a 2004 opinion poll of 101 legal scholars, 97 percent believed that reform of the Public Prosecution system was necessary, with 46.4 percent attributing the need for reform to political bias. Judge Joon-Young Jung stated that "it is unprecedented in any other country for the Prosecutor to monopolize the investigation and at the same time for the court to admit the investigative report prepared by the Prosecutors as evidence."

As lawyer Sung-ryul Ahn of the National Human Rights Commission of Korea commented in a recent interview with *Naeil Shinmun*: "In contrast to the continuing improvements in people's human rights standards, the reality is that the Korean criminal justice system and the prosecutorial authorities that run the system are not catching up with these standards." The Director of Public Prosecution in the Ministry of Justice has said that "the priority task at hand is to eliminate factors that cause infringement of human rights in all stages of the criminal prosecution procedure." South Korea must turn this vision into reality, sooner rather than later.

## Privatization of Security

# The South African and American experiences

Part 3 of a series on human rights perspectives on the privatization of security and the resurgence of mercenarism

JENNIFER LANGLAIS

THE explosion of private companies selling military services on the global market has spurred vivid debates on the need to strengthen the international instruments regulating mercenary activities. The anticipated lack of support for an amendment to the 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries has however made international observers concentrate on alternative approaches, including the promotion of national legislation.

To date, a handful of countries possess laws prohibiting the recruitment of mercenaries. A lesser number have laws regulating private military companies directly. Two major suppliers of private military services, South Africa and the United States, have however enacted in recent years innovative pieces of legislation addressing the threat posed by the new providers of security. While these laws suffer numerous flaws and are arguably more concerned with avoiding breaches of foreign policy than human rights, they are nevertheless instructive in developing strategies to bring these new providers of security under greater control.

### i) South Africa

Embarrassed by the involvement of Apartheid-era military personnel in a number of armed conflicts plaguing the African continent and the notorious "exploits" of the private military company Executive Outcomes, the South African government adopted in 1997 the Regulation of Foreign Military Assistance Act. The Act forbids South African citizens and companies from engaging in mercenary activity wherever they are and from recruiting, financing, using or training persons for the same ends. The provision of military assistance is not prescribed under the Act but instead controlled by a licensing and authorisation procedure administered by the National Conventional Arms Control Committee (NCACC). Authorisation will be granted only if the contract does not undermine national interests, is not likely to result in the infringement of human rights or the destabilisation of a region, and conforms to the international obligations of South Africa.

Despite its stated purpose to promote and protect human rights and fundamental freedoms universally, it has been argued that the Act is more concerned with ensuring that the activities of military suppliers do not run counter to South African foreign policy. The wide discretionary powers given to the Minister of Defense under the Act as well as the broad definition of mercenary activity which even captures certain forms of humanitarian assistance, tend to support this contention. The Act is further rendered almost impotent by the inherent difficulties associated with enforcing extraterritorial legislation. So far, only two condemnations have been secured under the Act. This poor record would nevertheless be a source of optimism if it were not relating to the 1,500 South Africans currently working for private security companies in Iraq in breach of the Act.

More disturbing however is the fact that some private security companies based in South Africa are operating in Iraq without having gained clearance from the NCACC. A firm named Meteoric Tactical Solutions is currently providing protection services in Iraq and training new Iraqi police and security forces. Erinyes, a joint South African-British company, has received a multi-million dollar contract to protect Iraq's oil industry. Both companies deployed their personnel in Iraq without the assent of the NCACC. Erinyes reportedly failed to apply at all. This flagrant indifference of the industry vis-a-vis the Act reflects in part the severity of the penalties it provides.

The first mercenary prosecuted under the law, French-born South African Richard Rouget, was fined 100,000 rand (\$17,300) for having recruited fighters for the civil war in Ivory Coast. Similarly, retired pilot Karl Alberts, arrested in 2004 for fighting rebels in Ivory Coast, was fined less than 20,000 rand (\$3,500) for his offense, an amount equivalent to a day or two of pay in the industry. Not surprisingly, these penalties hardly act as a deterrent.

It might be hoped that the mercenaries and those who employ them could be prosecuted under international humanitarian law for the crimes committed. The problem is that states are often unable or unwilling to denounce mercenaries. Mercenaries operate in regions not easily accessible and often characterized by a lack of efficient police forces capable of, or willing to detect, offences. Moreover, governments are

### That was easy

THE leniency of South African law is no better illustrated by the recent plea bargain struck between Mark Thatcher and the South African justice authorities. Suspected of financing a failed coup attempt in oil-rich Equatorial Guinea, the son of the former UK Prime Minister Margaret Thatcher was arrested in August 2004 at his domicile in Cape Town under charges of violating the anti-mercenary legislation. After admitting to paying for a military helicopter used by the mercenaries in the failed coup (but denying knowing the uses for which it was destined), Mark Thatcher escaped a five year prison sentence in exchange for a 3 million rand (\$500 000) fine. Threatened by an extradition warrant from Equatorial Guinea, Thatcher sold his house in South Africa and left for the UK after the plea bargain.

unlikely to denounce the abuses committed by the mercenaries they have themselves hired to neutralize rebel forces.

Even when the registering and licensing procedures are complied with, the Act lacks any monitoring mechanism to ensure that the terms of the license are not breached. It was reported for example that many companies registered as landmine removers in order to benefit from the exemption granted to humanitarian agencies, but engaged in all sorts of activities on the terrain.

More worrisome is the possibility that these offenders, despite having committed acts of mercenarism, might benefit from the protections of the laws of war presumed under Additional Protocol 1 to the Geneva Conventions. As suggested by some academics, the requirement that every contract be approved by the government arguably removes the authorized companies and their employees from the international definition of mercenary which excludes people sent on official duty.

### ii) The United States

The activities of private security firms are regulated in the United States by the 1998 International Traffic in Arms Regulations (ITAR), which is part of the US Arms Export Control Act of 1968. Under part 123 of the Act, private security companies wishing to provide defence services must apply for a license before signing a contract with a foreign client. Generally, a license will be denied when a contract for military assistance would not be in furtherance of world peace and the security and foreign policy of the United States. Section 126.1 also prohibits the export of military services to certain enumerated countries and those with respect to which the United States or the United Nations maintain an arms embargo.

Upon receipt of an application, an internal assessment process involving a variety of bureau within the Defence and State Departments is triggered. The process has been

often criticized for its lack of transparency. There are no provisions to ensure transparency in the granting of licenses other than a congressional notification requirement for contracts in excess of US 50 million dollars. Many contracts naturally fall under this amount while those in excess of the threshold amount can easily be broken up. Only those contracts that end up being notified to Congress may be subject to public scrutiny.

The ITAR is perhaps the most sophisticated piece of legislation dealing with private security companies. Yet, it suffers the same problems of enforcement than its South African counterpart. Regrettably, there is no follow-up mechanism to ensure that the terms of a license are not trespassed. Embassies are officially entrusted with the task of monitoring compliance but there is no official mechanism or reporting procedure put in place. One official from the Colombian embassy was even reported as saying that it was not the responsibility of the American government to investigate the mistaken killings of civilians by employees of an American private security company. Some countries where American private military companies operate do not even have an American embassy.

### Conclusion

As the American and South African experiences demonstrate, national legislations are not a panacea to the problems engendered by the new providers of security. Private military companies can easily escape cumbersome legislation adopted by their home states by moving their quarters to more hospitable shores or by operating through subsidiaries registered elsewhere. Attempts at regulating their activities may moreover tend to drive them and their clients further underground. And not less importantly, most national laws are likely to remain a dead letter given the vagaries associated with extraterritorial enforcement.

Yet, in light of the low level of support that a multilateral convention would get at this stage, the promotion of national standards should not be entirely discarded but rather considered as one element of a wider strategy to bring private military companies under greater control. While not a substitute for an international riposte, a greater number of countries with appropriate regulations would make it more difficult for private military companies to escape regulation through relocation and would potentially marginalize the most disreputable companies.

Convincing countries to regulate the export of military assistance is not an easy task but could be encouraged by the development of international standards for model national legislation. The South African and American laws are in this respect particularly useful. Ideally, these international standards should be drafted in conjunction with the industry and military experts. The present definition of mercenary should be abandoned and replaced by one that reflects modern forms of mercenarism. If registering and licensing procedures are recommended, they should be accompanied by reporting mechanism that ensure that the terms of license are not breached. Embassies could be entrusted with the task of revising reports, although other means of oversight could also be developed.

Most importantly, authorization or licensing procedure should involve the democratic processes or be submitted to an independent committee accountable to the public. In the end, however, and as important as it is to develop model national legislation, it should be remembered that the eradication of mercenary activities will only be possible in the long run with the consolidation of strong political structures and the creation of accountable public security systems.

## TRANSNATIONAL CORPORATIONS

## The present status of the UN Norms

GARETH SWEENEY

*"Challenged as never before by public mistrust and suspicion of motives, business cannot afford to continue to reject an opportunity to demonstrate that the pursuit of profit is based on principle and on the values of international society."*  
- Sir Geoffrey Chandler

DESPITE the closely guarded deliberations of aligned states on the subject and the secretive circulation of position papers by an aggressive coalition of adversaries, the treatment of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms) remain at the forefront of concern for this year's Commission on Human Rights (CHR).

The content of the Norms shall not be detailed here, but shall be referred to throughout in the accompanying piece by Nils Rosemann (for a general summary, see *Human Rights Features series for the 60th CHR session at <http://hrdc.net/sahrdc/hrfchr60/pdf/issue3-v7.pdf>*). It should be emphasized, however, that the Norms are not complete, either in form or by any manner of implementation. They are at the elementary stage of development at the CHR, despite the claims of certain factions of the Sub-Commission Working Group on TNCs that it is a closed book following the end of Professor David Weissbrodt's membership.

The trade off for presenting the Norms uncontested before the CHR, by way of Sub-Commission resolution 2003/16, was an absence of any referral as to how the CHR may be guided in its treatment of the Norms, as is customary in the transfer of guidelines from the Sub-Commission to the CHR. Indeed, credit can be attributed to the lobbying of the NGO coalition at last year's CHR for the Norms coming before the CHR at all. This served as an inval-

able counterbalance to the lobbying of the International Chamber of Commerce (ICC) and International Organisation of Enterprise (IOE), who have maintained their defiance against the Norms and in 2004 branded them a resolute "failure", "privatising human rights" and "legitimising vilification of private persons".

This resulted in last year's decision on the 'Responsibilities on TNCs and Related Business Enterprises with Regard to Human Rights' (E/CN.4/DEC2004/116). In light of the above, it constituted a moderate success. Positively, it expressly recognised the Norms as containing "useful elements and ideas for con-

As an embodiment of existing international human rights standards, and placing involuntary obligations on TNCs as distinct from other voluntary initiatives such as the Global Compact, the Norms provide for equal opportunity and non-discrimination; the right to security of persons; the rights of workers, including the right to collective bargaining and the right to a safe and clean working environment; respect for national sovereignty and policies in the economic, social and cultural fields; respect for all economic, social and cultural rights as enshrined in international law, including the right to health; respect for all civil and political rights, including freedom of movement and assembly; and consumer and environmental protection.

sideration by the Commission" and requested that ECOSOC "confirm the importance and priority" it accords to these responsibilities, thus instituting the issue of business and human rights as an issue relevant to the work of the CHR. It also requested that the High Commissioner compile a report on the "scope and legal status of existing initiatives and standards" and "identify outstanding issues".

The High Commissioner's report on evaluating "existing initiatives" has further strengthened the relative position of the Norms.

Assessing the scope of voluntary initiatives such as the OECD Guidelines and the Global Compact, applicable ILO standards, and voluntary self-commitments, the report emphasises throughout the use of the Norms as the most comprehensive manner in which to proceed. The report was also inventive in its interpretation of "outstanding issues". This includes the potential that business has in the promotion of human rights, responsibilities and the lacunae in voluntary initiatives, and whether a UN statement is preferable. Most importantly, the report concludes by recommending that "there is merit in identifying more closely the "useful elements" of the draft Norms noted by the Commission in its decision 2004/116" and "therefore recommends to the Commission to maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration."

This year, on the basis of the High Commissioner's report, a draft resolution is in the process of being finalised by the UK, Argentina, Nigeria, India and Russia. Initial indicators are reasonably positive, requesting the appointment of a Special Adviser to the Secretary General for a period of two years to clarify minimum standards, the implications of such concepts of "complicity" and "sphere of influence", and the general development of ideas to address accountability. The decision is unlikely to mention the Norms explicitly, yet the incorporation of reference to the report of the High Commissioner and "existing initiatives" adequately encompasses their application, thus enabling the potential for the Norms to remain relevant. Recommendations for advancement can then be expected in 2007. This, in no small part, can be attributable to the efforts of civil society. A David-and-Goliath story of the future perhaps, but most certainly a measure of justice, for under international law "every organ of society" is expected to be held accountable.

## The case of Nestlé 'Pure Life': How the Norms apply

NILS ROSEMANN

THIS article will show the added value of the Norms with the example of the impact of production of Nestlé's bottled water "Pure Life" in Pakistan (For a more a detailed analysis see: Nils Rosemann: *Drinking Water Crisis in Pakistan and the Issue of Bottled Water - The Case of Nestlé's 'Pure Life'*, Swiss Coalition, Bern 2005; at: <http://209.238.219.111/Nestle-Rosemann-Mar-2005.doc>).

Access to safe and sufficient drinking water is not only a basic need but a human right (see General Comment 15 of the Committee on Economic, Social and Cultural Rights). The global water shortage of affordable and safe drinking water is manifested in Pakistan where an estimated 75 percent of the population are without access to safe drinking water. In rural areas, up to 90 percent of the population may lack such access. As one indication of the magnitude of the problem, it is estimated that 200,000 children in Pakistan die every year due to diarrhoeal diseases alone.

The first principle of the Norms states that human rights obligations - such as the right to water - are the primary responsibility of states. With regard to the activities of corporations, the obligation to protect requires states to prevent third parties - such as corporations - from interfering in any way with the enjoyment of the right to water. Among other factors, this obligation includes adopting necessary and effective legislative and other measures to restrain corporations, for example, from denying equal access to adequate water or polluting or inequitably extracting from water resources.

Groundwater extraction is one of the few possibilities to satisfy people's need for drinking

water in Pakistan. But groundwater extraction in the province of Punjab (Pakistan) is unregulated. In the case of Lahore, different users from agriculture and industry, as well as public water providers, compete for the use of this scarce source.

In 1998, Nestlé chose Pakistan as a country to roadmap its global water strategy in the bottled water market. Nestlé originated "Pure Life" in response to "the global need for a safe family drinking water with a pleasant taste, affordable price and tailored to local preferences". But Nestlé's 'Pure Life' is not affordable to those in need of safe and clean drinking water; nor is it sold only in Pakistan. If a family were to satisfy its daily water needs with 'Pure Life' it would spend approximately \$38.60 (US) per month, constituting approximately one third of an average household income or four-fifths of an average monthly wage. Because of the stagnating bottled water market in Pakistan, Nestlé exports its water to booming markets. Although public figures are not available it is presumed that Nestlé exports 'Pure Life' to Saudi Arabia, to troops in Afghanistan, and possibly to Iraq. For the sake of profit, Nestlé contributes to the decrease of the ground water level, which dries out local water provisions and exceeds the renewable volume.

The negative impact of Nestlé's engagement and business policies in Pakistan contradict its own commitments to human rights and its principle of sustainable use of resources. It also undermines the credibility of its membership to the United Nations Global Compact. Furthermore, both Switzerland, as the host country of Nestlé International, and France, as the host country of Nestlé Waters, are reluctant to consider Nestlé's activities as violations of the voluntary OECD Guidelines. ILO standards are

also not applicable since labour standards are not concerned in this case.

The Norms are therefore the only set of principles whose implementation would enable victims of corporate human rights abuses to address their concerns towards reluctant governments and corporations directly. The first principle of the Norms declares that corporations have their own obligations with regard to human rights in instances where governments fail to meet their regulatory and guiding obligations or in situations where corporations are acting independently due to economic power or market position.

Within its respective sphere of influence, Nestlé has to respect the right of access to water, and the rights to information and participation. It has to restrain from any activity that jeopardizes the realization of human rights (Principle 12 of the Norms). In addition, in their market operation, Nestlé would have to act in accordance with fair business, marketing and advertising practices and take all necessary steps to ensure the safety and quality of the goods and services they provide, and not produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers (Principle 13). Finally, Nestlé should generally conduct their activities in a manner that contributes to the wider goal of sustainable development (Principle 14). Human rights protection is about accountability. And accountability for business in the 21st century should not stay as a voluntary principle.

*Nils Rosemann is based in Islamabad and works as an Attorney of Law and Human Rights & Development Consultant in Islamabad, Geneva and Berlin.*

NORTHERN IRELAND

# Human rights progress: Good, but can do better

*State agencies have improved their human rights records; but other problems, such as racist attacks, have emerged*

BRICE DICKSON

A PEACE agreement was concluded in Northern Ireland in 1998. Called the Belfast (or Good Friday) Agreement, it was the product of extensive negotiations between the British and Irish governments and most but not all of the political parties vying for votes in Northern Ireland.

The Agreement was approved in a referendum throughout Ireland, by 71 percent of voters in the North and 94 percent in the South. It provided for an elected Assembly in Belfast and for cross-community power-sharing within the Executive Committee of that Assembly. These institutions were up and running by the end of 1999.

Central to the Agreement was a commitment to ensuring that human rights are properly protected in Northern Ireland. As part of that commitment a statutory Human Rights Commission was established, opening its doors on 1 March 1999. Later that year an Equality Commission was formed (uniting three pre-existing bodies) and in 2000 a Police Ombudsman's Office began operating.

Temporary bodies were set up to make recommendations on how the policing system and, more generally, the criminal justice system should be reformed. When those bodies reported, they put at the heart of their proposals the need to ensure that all agencies within the criminal justice sphere adhere strictly to human rights standards. Implementation of their recommendations is well under way and is being supervised by Oversight Commissioners.

In the 1998 Agreement the participants reaffirmed their total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, as well as their opposition to any use or threat of force by others for any political purpose. They also reaffirmed their commitment to the total disarmament of all paramilitary organisations and their intention to continue to work constructively and in good faith, and to use any influence they may have, to achieve decommissioning of all paramilitary arms within two years.

It is true that since 1998 there has been a dramatic decrease in the number of deaths resulting from the security situation in Northern Ireland, but the Agreement has certainly not delivered an end to paramilitarism and only a handful of weapons have been decommissioned. Since 1969, when the "troubles" broke out, there have been nearly 4,000 such deaths. In the six-year period 1999 to 2004 there were 70, whereas in the previous six years there were 247. In the six years preceding the paramilitaries' cease-fires, announced in 1994, there were 495.

The continuing paramilitary violence, racketeering, smuggling, drug-trafficking, robbing and intimidation have not done much to enhance the reputation of Sinn Féin - the main political party supporting the Republican paramilitaries. Although that party represents almost one quarter of the electorate in Northern Ireland, other parties are at present unwilling to collaborate with it unless it cuts its apparent links to criminality.

In October 2002 the Northern Ireland Assembly was suspended because of alleged spying activities conducted from within Sinn Féin offices. Further allegations concerning the party's involvement in the UK's biggest ever bank robbery (which took place in Belfast in December 2004, netting more than £26 million) have done little to ease others' distrust. Because of this, there is no prospect of the Assembly being re-established within the next year or so.

Apart from the deaths, the most hideous

human rights abuses committed by the paramilitaries are the so-called "punishment attacks", when people suspected of "anti-social behaviour" (usually young males) are shot or beaten, usually in or on the hands, kneecaps or ankles. In the six calendar years since the Agreement (1999 to 2004) there were 1,652 of these attacks, compared with 1,308 during the previous six years. Shootings are slightly more common than assaults and Loyalists commit roughly twice as many of each form of attack as Republicans.

Another common form of human rights abuse in Northern Ireland is racism, with *Der Spiegel* announcing in early March 2005 that Belfast is now the most racist city in the world. The number of racially motivated attacks on, for example, Chinese and Indian people, or on the growing number of Eastern Europeans, Filipinos and Africans who have recently come to Northern Ireland, is steadily rising. In the last nine months of 2004 there were 474 racist incidents across Northern Ireland.

Discrimination on religious and political grounds is now relatively uncommon, having been targeted since 1976 by effective "fair employment" legislation. On the other hand, Northern Ireland is a conservative society, so discrimination based on gender or sexual orientation is not unusual, despite EU-derived laws being in place to combat it. Obtaining an abortion in Northern Ireland is also very difficult, with perhaps 1,500 women travelling to England each year for the operation.

State agencies have much improved their human rights record in recent years. Only one person has been killed by the police or army in Northern Ireland since 1992, and no plastic bullet has been fired since September 2002. The new Police Service of Northern Ireland (PSNI) has gone to some lengths to instill a human rights approach throughout the organisation, with draft Force Orders, a Code of Ethics and various internal policy documents being sent to the Human Rights Commission for prior scrutiny. The PSNI conducts good human rights training for all its officers, especially new recruits. A positive discrimination measure means that the percentage of police officers who are Catholic is now 17 percent, compared with just 8 percent in 2001. It is projected to rise to 30 percent by 2011 (the Catholic population as a whole is about 44 percent).

The Prison Service has to date been less receptive to a human rights culture. There have been seven deaths in Northern Ireland's prisons in the past three years and the conditions in which some prisoners are held, particularly women prisoners and those with mental health problems, have been condemned by both Her Majesty's Inspectorate of Prisons and the Human Rights Commission. The latter is currently banned from visiting the women's prison because the government believes that other statutory bodies are better placed to inspect those institutions. Overcrowding is not a problem, unlike in Great Britain's prisons, but "slopping out" still continues in places. Only at the end of February 2005 was a Prisons Ombudsman appointed, and even he will not be empowered to investigate deaths occurring in prison.

All is still not well as regards the systems for complying with the state's positive duties under Article 2 of the European Convention on Human Rights. In three recent court cases the judge held that the state had applied the wrong test when deciding whether applicants for personal protection measures

should receive them.

Following judgments by the European Court of Human Rights between 2001 and 2003 in six cases involving deaths in Northern Ireland, the Council of Europe's Committee of Ministers is still not satisfied that enough is being done by the UK authorities to put matters right. The inquest system is experiencing a huge backlog, the Public Prosecution Service will still not give reasons (save in wholly exceptional circumstances) for its decisions not to prosecute agents of the state (or anyone else for that matter) and the House of Lords has ruled that deaths occurring in Northern Ireland prior to 2 October 2000 (when the Human Rights Act 1998 came into force) do not need to be investigated in accordance with the stringent requirements of Article 2 of the European Convention.

In relation to a number of high-profile deaths, the British government has reacted very slowly to calls for public inquiries to determine whether there was any collusion between state security forces and Loyalist or Republican paramilitaries. Following exhaustive work by retired Canadian judge Peter Cory, who recommended that public inquiries should be held into all four deaths he looked at in Northern Ireland, the government has established inquiries into three of them. But for the fourth (that of solicitor Patrick Finucane in 1989) it has introduced new legislation (the Inquiries Bill) to replace the Tribunals of Enquiry (Evidence) Act 1921 so that more control can be retained by government Ministers over what information is disclosed at the inquiry.

Lord Stevens, the recently retired Commissioner of the Metropolitan Police Service in London, has already announced in his own inquiry into the murder of Patrick Finucane and Brian Lambert that there was collusion in their deaths. He added: "Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected."

One of the remaining problems in Northern Ireland, therefore, is how to deal with the past. The government has been looking at models used elsewhere and the Northern Ireland Affairs Committee at Westminster is currently conducting an inquiry into the topic. A Victims and Survivors Commissioner is to be appointed, but no Truth and Reconciliation Commission is on the cards for the time being. The police have a Serious Crime Review Team looking at unsolved killings and occasionally the Police Ombudsman can help if new evidence relating to such deaths comes to light. Republicans who are "on the run" are to be amnestied if and when a new overall settlement is reached between local parties and the governments.

The Human Rights Commission is still trying to persuade the British and Irish governments, the local political parties and the community and voluntary sectors to sign up to its proposals for a Bill of Rights for Northern Ireland. Meanwhile the Commission continues to urge improvements in a variety of more specific contexts, such as mental health care and human rights education.

Generally the overall human rights picture in Northern Ireland is a lot rosier than it was some years ago but, as ever, more remains to be achieved.

*Brice Dickson is Professor of International and Comparative Law at Queen's University, Belfast. He recently retired as Chief Commissioner of the Northern Ireland Human Rights Commission, having served from 1999-2005.*

**Only one person has been killed by the police or army in Northern Ireland since 1992, and no plastic bullet has been fired since September 2002. The new Police Service has tried to instill a rights approach throughout the Service.**

**One of the remaining problems in Northern Ireland is how to deal with the past. A Victims and Survivors Commissioner is to be appointed, but no Truth and Reconciliation Commission on the cards for the time being.**

**...from page 5**

## Defenders need more...

### Hopes for the Future

The Declaration and the draft resolution simply re-affirm human rights standards without offering any added protection to human rights defenders.

The one unique provision on the right of NGOs to receive funding is subordinated to national legislation, although the very States where funding is most urgently required are those which do not respect international standards of basic human rights, and especially the concerns of human rights defenders.

Therefore, it is even more desirable that the international community, and especially the sponsors and co-sponsors of the annual resolution do not capitulate to the strong opposition of countries commonly viewed as being unconcerned about human rights.

States truly dedicated to human rights issues, must recognize the valuable contribution of civil society and NGOs.

They must keep the issue of their access to funding on their agenda.

**...from page 2 - Week 4 Round-up**

ill-treatment is needed to rebuff the US administration whose official policy from August 2002 until late December 2004 maintained that torturing terrorists in captivity abroad "may be justified", and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the "war on terrorism", thus authorizing the President to sanction and immunize acts of torture. Alarming, the position that the President could immunize perpetrators of torture from criminal liability was recently maintained by Alberto Gonzales when he was confirmed to the top law enforcement position in the United States.

Third, the current draft text recalls that states shall not in any way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment. The US has engaged in a well-documented practice of outsourcing torture of alleged terrorist suspects to countries that even the US State Department recognizes engage in torture and prohibited ill-treatment. The CIA has been granted authority by the US Congress and President to use a program of so-called "extraordinary rendition" whereby private jets are used to ferry suspects to Syria, Saudi Arabia, Egypt and other countries where they are subjected to torture and other prohibited ill-treatment during interrogation. Jane Mayer recently wrote a lengthy exposé on the US "extraordinary rendition" practice, available at [http://www.newyorker.com/fact/content/?050214fa\\_fact6](http://www.newyorker.com/fact/content/?050214fa_fact6).

This practice is in clear violation of US obligations in international law, including the Convention Against Torture article 3 and the Fourth Geneva Convention article 49. Although the US purports to obtain "diplomatic assurances" that rendered suspects will not be mistreated, according to Human Rights Watch and other NGOs these are frequently violated. One of several illustrative examples is that of Australian Mamdouh Habib, who was rendered to Egypt and tortured for six months before being returned to Guantánamo Bay and eventually freed without

charge on January 28, 2005. The Commission must make clear that this practice is illegal, and that empty promises do not absolve the US of its obligation not to transfer persons to any State when it has substantial grounds for believing that the person would be in danger of being subjected to torture or other prohibited ill-treatment.

### Quick swipes

The Mexican resolution on counter-terrorism now appears to be far from a foregone conclusion. Rather than challenge the intention to establish a Special Rapporteur, given the overwhelming groundswell of support within the human rights framework, the US have aligned themselves once again with India and Russia to this year attempt in substantially weakening the mandate of the Special Rapporteur. Their precise methods are as yet unclear, as Friday signalled their first real contribution to the debate. What is clear, however, is India's co-ordination in the plot. Their methods will become apparent this week. A different kind of march to freedom, no doubt.

The mandate of the Special Rapporteur on Mercenaries is gone. In a quick fell swoop, a Working Group has replaced it. The Cubans had always considered it as their turf, their little extension of the war against the Miami exiles and Washington. On 4 April 2005, they moved to "end the mandate of the Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination and to establish a working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, made up of five independent experts, one from each regional group, for a period of three years..."

Finally, on Nepal, the Foreign Secretary from Kathmandu flew into Geneva last week and initialled a Memorandum of Understanding with OHCHR. The secrecy surrounding the visit and the agreement that paves the way for a resolution under item 19 indicates that we may be here next year grappling with the issue once again.

**...from page 6**

## NHRC-India...

(lower house of Parliament), the Home Minister, the leader of the opposition in the Lok Sabha and Rajya Sabha (upper house of Parliament) and the Deputy Chair of the Rajya Sabha.

The Appointments Committee is not free from political influence and in practice recommendations evince a pro-government stance. The opposition is given two spots in the Committee and the representatives of the Government form two-thirds majority in the Committee. Independence in the appointment committee, as is insisted upon by the Paris Principles - the minimum criteria for the establishment and functioning of national human rights institutions - is therefore not assured. Thus, while an appointment may have been carried out with due regard to the consultation process, it is worth examining if the process itself is adequate, in letter and in spirit.

The Protection of Human Rights Act 1993 specifies that the Commission shall be headed by a person who has been Chief Justice of India. The other members shall include a former judge of the Supreme Court, former Chief Justice of a High Court, and experts in matters relating to human rights. The current NHRC

membership comprises three former judicial officers, one retired police official and one former diplomat. Chairpersons of the National Commission for Minorities, National Commission for the Scheduled Castes and Tribes and the National Commission for Women are ex-officio members.

Although, the legal fraternity has been represented in the NHRC, persons having knowledge and experience in the field of human rights (the Act provides for two such persons) have no representation in the NHRC. It seems unlikely that a Commission meant to protect and promote human rights can achieve its objective without giving any representation to those who work directly for the cause of human rights and are aware of the various issues that need to be addressed in this area. If the Commission is to be represented only by present and former public servants, a true and fair representation of the human rights situation in India cannot be expected. The enabling legislation setting up the Commission is restrictive in scope so far as membership is concerned and fails to guarantee a pluralistic membership to the Commission as is required by the Paris Principles, thus violating the standards in practice.

### What next?

Hopefully not a former chief of the Intelligence

Bureau. As SAHRDC has pointed out in the past, a significant percentage of NHRC staff is drawn from the Intelligence Bureau. In a functioning democracy, this should be considered sacrilege. Those who belong to the intelligence community, on becoming part of the NHRC, must resign from their parent cadre and agree to be absorbed as regular NHRC staff. The NHRC, most of all, cannot allow for dual loyalties in its serving personnel.

With more vacancies arising in the NHRC, it is incumbent on the government to ensure that future appointments are made with the utmost discretion. There is a vast pool of human rights expertise in the country that the government can tap into. It is inconceivable that from the entire range of available human rights lawyers, activists, and academics, the government could only find a person who has had no human rights experience worth the name. Mr. Sharma's official profile on the NHRC website is proof of the inadequacy of his credentials. Any more dubious appointments will serve to greatly lower the prestige of the NHRC, both domestically and internationally.

The Indian NHRC was among the first to be established in the Asian region. It was hoped that it would serve as an inspiration, a blueprint for other upcoming NHRIs throughout the region. It now appears that it is more likely to show other NHRIs the way to the bottom.

### 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](mailto: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](mailto:secretariat@aphrn.org)

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

#### HRF Team

\*\*\*\*\*

Kaavya Asoka  
Anthony Cullen  
Massimiliano Desumma  
Ehtasham Khan  
Steve Kostas  
Rineeta Naik  
Ravi Nair  
Kathrin Schlitt  
Piccolo Willoughby

\*\*\*\*\*

Webpage Design  
Shyam Sundar K.

### Printed and published by the South Asia Human Rights Documentation Centre (SAHRDC)

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