

HUMAN RIGHTS FEATURES

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'Great times, exciting times'

Reform initiative is a wonderful opportunity to look at the future, UN High Commissioner for Human Rights tells HRF

Human Rights Features (HRF): Do you subscribe to the critique that the Commission lacks credibility and enforcement powers, and if so, how do you see your Office working towards promoting the implementation of Commission resolutions by States?

H.E. Ms. Louise Arbour: I think it's important to unpack a bit this idea of lack of credibility. This Commission, if you look at it historically, has done absolutely fabulous work in a lot of areas, particularly in the whole area of standard-setting. They own the Universal Declaration, the international covenants, all the big international instruments. But I think they became prisoners to that framework, and have not been as agile in adapting to this era of implementation of rights, and that inevitably means putting countries under scrutiny for their performance as human rights implementers, States as duty-bearers. And I think it's in trying to discharge that function that they frankly have strained to some extent, and there really is a very serious credibility gap. And that's all they talk about themselves! One side or the other - and there are sides, there's not doubt about that - constantly accusing the other of being the worst violator, and they all accuse each other of double standards, and so on. But it's always on that issue, the issue of verification of compliance with norms, not norm-setting.

HRF: On the question of UN reform, it has been suggested in some quarters that the proposed Human Rights Council function from New York. Many NGOs have expressed major reservations on this score. Any preliminary thoughts on this?

Ms. Arbour: I think the critical issue now is to look at the role, function and the mandate of that new Council. And when that's well understood, I think everything else will fall into place. In a preliminary fashion, it seems to me most unlikely that the Council could totally move to New

York. We certainly have to support it and we can't be fractioned between our Council support arm and the rest of our activities. Nobody has suggested that all of us should move to New York.

But having said that, I think we should keep an open mind about the possibility of maybe some sessions of the Council - which people now think should perhaps meet more regularly than the Commission - taking place in New York, if it's going to be one of the three pillars, one of the three Councils of the UN system. It might want to, at some point, be slightly better connected to the rest of the political intergovernmental machinery. So frankly, my own sense would be: we should keep a very open mind about the possibility of some work being done in New York.

At this point, I'm not sure that I see much, or indeed the whole idea, of moving the whole thing to New York.

INTERVIEW

H.E. Ms. Louise Arbour

HRF: With regard to the reform of the Office of the High Commissioner for Human Rights itself, we are aware that it is premature to discuss in any detail the contents of this report that the Office has to compile within 60 days. But could you give us a few broad brushstrokes of what may be included in the report to the Secretary General?

Ms. Arbour: I think, in fact, we are asking ourselves the same question that we are asking the whole world, or asking of the Commission - and that is: are you equipped to be the major player in this implementation phase of the human rights movement as opposed to the monitoring phase? In fact, I think my own Office to some extent needs to reposition itself. It doesn't have to be a revolution. It could be sometimes even minor adjustments stepping in the right direction. But in general terms I think we are very focused on the idea of increasing our capacity to support States in implementing the norms that are now well understood and well established. That's the country engagement, which of course means,

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Mexico risks restoring CHR credibility

...so Australia & Co. connive to thwart progress on draft resolution on counter-terrorism & human rights

GARETH SWEENEY

THIS year's Mexican draft resolution on the protection of human rights while countering terrorism is both timely and necessary. It builds upon established opinion by providing not only for a Rapporteur to monitor States' compliance with their international obligations, but draws from the mandate of the Special Adviser to the Secretary General on the Prevention of Genocide by enabling the establishment of an early warning mechanism. It is also commendable in formalising relations between the Rapporteur, the Office of the High Commissioner, and other relevant bodies, including the UN Counter Terrorism Committee, in order to complement each other's work in filling existent gaps in protection.

This would seem to be in everybody's interest, of course, were States genuinely committed to protecting and promoting human rights. Yet, to no one's surprise, there is a coterie of objectors whose motives are not declared, yet are crystal clear.

The Mexican resolution, regrettably, will go to a vote on at least two counts this year. One, by Russia, is assured, attempting to sabotage the resolution by merging the issue of terrorism with counter terrorism. Despite the very best efforts of Mexico, time and again, to explain that this resolution is intended only to encompass States' responsibilities in countering terrorism, whilst deeply deploring acts of terrorism

COUNTER-TERRORISM & Human Rights

and respecting challenges this presents to States and the international community at large, Russia refuses to bend. The question why they haven't tabled a resolution on terrorism and its impact on human rights themselves this year is a legitimate one.

India has also weighed in at the eleventh hour by requesting that the mandate of the Rapporteur be expanded so that "full and equal attention" is paid to the issues provided by CHR

resolution 2004/44, addressing terrorism and human rights. The wording is different to the deluge of Russian proposals, which may be introduced individually in the voting process, but its intent is the same, and may also give rise to an oral amendment by India. If any of these amendments are adopted, the co-sponsors will in all likelihood find themselves unable to remain co-sponsors, and the resolution may be withdrawn. The perpetrators, of course, are well aware of this, and with support from China and the Like Minded Group, Pakistan and the OIC, and many others, this is a nauseating development.

The United States and India, whether acting independently or in alliance, have accepted the weight of support for a Rapporteur and are content rather to diminish her/his mandate to the point that the Rapporteur will be unable to

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'Exciting times...'

I think, in a lot of cases field presences. But that is too narrow to see it only in those terms. We are really thinking in very broad terms on how best to engage in a supportive, but if necessary, at times in a critical relationship with States in order to empower right-holders to seek and claim their rights.

HRF: *Would you consider taking the lead on stressing the need to convene a formal session of all stakeholders on the reform process?*

Ms. Arbour: The problem in this entire exercise is the timing. There is just not a huge amount of time. It is a big challenge the Secretary General has set, and the challenge is essentially to member States. And I think that those of us who support the reform initiative have to do what we can to assist member States in coming to September with a positive capacity to endorse a reform agenda. So I will do whatever is helpful, but I am not sure that time will really permit a very ambitious initiative between now and then.

HRF: *In the event that your Office will be expanded in terms of resources etc - and we hope it will - how do you see its role in 1) better supporting the Special Mechanisms and following up on the interest and ideas they generate, 2) greater interaction with civil society?*

Ms. Arbour: I think that is a constituency, there are many, many constituencies, that we need to address in looking at how best to do our work, and the Special Procedures are certainly one of them. I just had discussions earlier today on torture for instance, and how, first of all, we are not very good at following up, and also that we are very fractioned between the Fund, the Committee Against Torture, the Special Rapporteur, other Special Rapporteurs whose mandates very often touch upon torture, the Working Group on Disappearances... a lot of disappeared people are sitting somewhere being tortured.

So what we really need to do, in my own

Office first of all is to try to create a synergy between a lot of very disparate activities, which, if combined, could multiply their impact. The Special Rapporteurs have an annual meeting in June. I am very much looking forward to this. I missed them last year by two weeks before I took up my post, so I have only met them sporadically and individually. But this will be a

"We have a lot of work to do [on National Institutions], and they [also] have a lot of work to do, in accreditation committees, to make sure that the pressure is on each other to live up to standards of independence that will make them credible partners."

The worst thing that can happen, of course, is the appearance of independence. That adds insult to injury to invest in work with partners that are not perceived in a country as credible and independent."

great occasion to try to talk to them about what they think. We are going to do this also as part of the reform exercise, to try to see how we can best capitalise on what is a fabulous mechanism of the Commission. We must preserve all their qualities, their independence and so on, but also

"I hope that member States will look at the invitation to reform the Commission as an enormous opportunity to pause and get out of the cobweb that I see in this institution, where member States are prisoners of working methods, agenda items that carry a huge amount of political baggage."

reinforce their potential, support them better and encourage more consistency, better working methods and follow up.

HRF: *How do you perceive the utility, strengths, and weaknesses, if any, of National Human Rights Institutions, since National Institutions would be a key element in the implementation phase that you referred to?*

Ms. Arbour: They have to be our frontline partners when I talk about country engagement. In a

lot of countries we have no reason and no capacity to have, ourselves, a field presence. We have to also look at the regional presence, but that's another issue. National Human Rights Institutions are an absolutely critical part of civil society and human rights defenders. In being able to penetrate the more official machinery, I think they are very important. The problem is, they come in so many shapes and forms and mandates, that it is hard to talk about them in a very global fashion.

Again, in my earlier discussion today on torture, the idea turned up on: why don't we try to systematically promote the idea that Human Rights Institutions *should* have the capacity, all of them, to visit prisons and so on - or at least for those whose mandates are not too far from that. Engage them on that issue. So we have a lot of work to do and I think *they* have a lot of work to do, in accreditation committees, to make sure that the pressure is on each other to live up to standards of independence that will make them credible partners. The worst thing that can happen, of course, is the *appearance* of independence. I think that adds insult to injury to invest in work with partners that are not perceived in a country as serious and credible and independent.

HRF: *Any final comments to round up?*

Ms. Arbour: I think, frankly - although we are all very frazzled because though we've been given this wonderful opportunity to think about the future in broad terms, it's smack in the middle of the Commission - the timing could not have been worse because we are preoccupied, of course, with the Commission.

And yet, I look at this and I hope that member States will look at the invitation to reform the Commission as an enormous opportunity to pause and to get out of the cobweb that I see in this institution, where member States are prisoners of working methods, agenda items that carry a huge amount of political baggage. You just mention an item number and you see the blood pressure go up in the room. This is absurd; this is not healthy.

So I think it is a wonderful time of opportunity. I hope that civil society also will feel very engaged, supportive of all the initiatives that can get us out of this current morass.

So yes, great times, exciting times.

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Mexico risks...

fulfil what is required of her/him. This corresponds to attempts to remove the provisions of an early warning mechanism, the partaking of country visits, and receiving communications, for which they would have obvious concerns.

The logic that the scope of the Special Adviser on Genocide is particularised, whereas an early warning mechanism in this instance would create a "Super Rapporteur" to cover "every human right on the planet" is spurious, and has no foundation beyond shielding States from proper scrutiny. This does rule out the possibility, however, of attempted oral amendments by India or the US if the Russian, and possibly the prior Indian, initiatives fail.

India's cynicism is palpable in its request that the resolution's "taking note with appreciation" of the reports of the Independent Expert and the High Commissioner should simply read "taking note". Mexico took note of this, but needless to state, did not appreciate it.

Most deplorable in this process, however, is the position of Australia, which persists in claiming that existing mechanisms "have sufficient scope within their existing mandates to address the compatibility of national counter-terrorism measures with international human rights obligations", despite the express opinions of all mechanisms that they do not. It has thus flatly and openly rejected the need for a Rapporteur without a hint of entering into further public dialogue. This position is, as a matter of plain fact, untenable. To disagree with expert opinion is one thing, but to tell those Rapporteurs and treaty monitoring bodies that they have the capacity to fulfil certain tasks

when they themselves have stated clearly that they have not, is quite another. Nor is this position consistent, as their vote for the removal of the Special Rapporteur on Mercenaries shows.

Furthermore, when the Secretary General, High Commissioner, Independent Expert, and all relevant Special Procedures have requested a Special Rapporteur as a matter of urgency, if the CHR fails to deliver, Australia

Australia persists in claiming that existing mechanisms have sufficient scope within their mandates to address the compatibility of national counter-terrorism measures with international human rights obligations, despite the express opinions of all such mechanisms that they do not.

will stand as the prominent architect of this failure. This would constitute one of the most damaging erosions of the CHR's credibility. We are well aware that certain Australian delegates in their hearts know this only too well, yet are not paid to digress from the dictates of Canberra. Their junior representation at the consultations speaks volumes, as does the fact that only an intern of the Australian delegation had the courtesy to attend the presentation by Professor Goldman of his report to the CHR.

If Australia puts the resolution to a vote, which is possible as it cannot accept a consensus, it can count on the support of China and the Like Minded Group, Pakistan and its affiliates, Russia, and Japan, which, after its generosity to the victims of the tsunami, has made an inconceivable about-turn by bemoaning the potential cost of a Rapporteur as a basis for opposition.

Pakistan has joined the negotiations late on behalf of the OIC, but is clear in its objection

on the grounds of "resources, proliferation, technical ability and so many things". It was even suggested by the honourable delegate of Pakistan on 12 April that this may "slow down the fight against terrorism." What exactly he means by this is open to interpretation. China, more generally, has expressed its opposition to the resolution on the grounds that it will provide a shield that terrorists can hide behind. How can Mexico be expected to create understanding in the face of ignorance of that magnitude?

The Reality

All of the above maintain a blank refusal to consider the reports of the High Commissioner and the Independent Expert. For the sake of qualifying their obstinacy, perhaps they might indulge the CHR when explaining their votes by detailing which Rapporteurs, given all the issues that they must also address, can adequately cover the principle of *nullem crimen sine lege* and the dangers inherent in an overly broad definition of terrorism in national legislation, inter-State transfer of persons, extraordinary rendition and diplomatic assurances, and the use of certain counter terrorist measures in states of emergency and in situations of armed conflict, to name but a few.

The reason Australia, China, India, Japan, Pakistan, Russia, and the US wish to weaken or destroy the mandate is because the mandate has the potential to be effective, and they potentially stand to be implicated. The reason they speak of proliferation and overlapping is because it is a standard tool of obstruction, whereas the very fact that this mandate does not overlap, but fills gaps, worries them. For these gaps are the same gaps that have allowed these same States to flout their obligations to protect human rights while countering terrorism.

MERCENARIES

'Monitoring aspect is important'

IN its resolution on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (E/CN.4/2005/L.6), the Commission on Human Rights terminated the mandate of the Special Rapporteur and established a working group of five independent experts.

Human Rights Features spoke to the Special Rapporteur, Shaista Shameem, about her reaction to this development, her experiences as Rapporteur, and her views on how the examination - and the practical aspects - of this important issue may be carried forward.

Human Rights Features (HRF): Tell us a little about your experiences and the challenges you faced as Special Rapporteur on Mercenaries.

Shaista Shameem: The Commission on Human Rights decided, when it decided to extend the mandate [last year], that the job of the Special Rapporteur should be to circulate and consult with states on the new legal definition of mercenaries under the 1989 Convention, and secondly to take into account the activities of private companies offering military assistance, consultancy and security services on the international market and the impact of this on the exercise of the right of peoples to self-determination. So there were two things that the Special Rapporteur was supposed to do.

Now, the definition in the 1989 Convention is unsatisfactory given the modern phenomenon of mercenary activity and the definition did not keep up with the times. A new legal definition was proposed by the former Special Rapporteur and that was circulated to governments. In the old definition a mercenary was a person, who was engaged in armed conflict, who was recruited locally or abroad, through private gangs, to carry out various things to do with armed conflict or was really fighting in armed conflict. And the material gain he was going to receive was substantially in excess of what would be received by an ordinary soldier in the armed forces of a particular State. So really, it was a business proposition and it referred only to an individual mercenary.

There are a lot of problems with that definition and that is the reason why the former Special Rapporteur proposed a new definition. And the elements of the new definition concerned: first of all, how do you deal with more than one person engaged, like a company? And then there is the nationality issue because in the old definition, the person had to be recruited outside of the country where the armed conflict was taking place, but it was clear that this would become a problem because a lot of people now have two nationalities. And the issue of material gain was also a problem. The terrorism aspect was really problematic as well, because it was not included. For me, when I started to work on this, I realized that there are a whole lot of other problems associated with this proposed new definition.

Firstly, the former Special Rapporteur's definition, did not take into account the criminal activities typically undertaken by mercenaries today. I suggested instead that we should retain the core elements of the old definition, the 1989 definition. And the first element was that the person who was the mercenary had to be under contract. It was a contractual obligation, there had to be an offer, acceptance, consideration, all of these elements of a contract. And you had to show that because this was a business proposition.

The second problem I had was the fact that there are a lot of mercenary companies operating and there was no way that under the

old definition, or even under the proposed new definition, that companies could be included. So my proposal was that the core elements of the new definition ought to be, first of all, the existence of a contract of service, what payment is made; secondly, the person who was alleged to be a mercenary must knowingly participate in armed conflict.

The third one was that this person was not engaged in armed conflict in his own country, he was in another country altogether. And the fourth proposal was that we had to separate out a person who was actually engaging in armed conflict for the sake of it from a person who was engaging in armed conflict to destabilise the constitutional order of a state. I think we have to intellectually separate out those elements. So that was my proposal.

We had an Experts' meeting last year in December and that new way of looking at things went out as part of the Experts' report to the countries. I also asked the countries that are States parties to the Convention, to engage with me on this legal definition, but there was really no interest in that. I think three countries responded.

HRF: What is your initial reaction to the termination of your mandate, and what do you feel should be the role of the working group that has now been established through the resolution? And will this role be adequate?

Ms. Shameem: Today, the fundamental issue that we have with this mandate, that was of interest to me to put forward, is that mercenary activities are really prolific now. There is also the complicating factor of military companies that ostensibly call themselves security companies but are in fact operating as mercenaries as

"Even 'respectable' governments use military companies - that call themselves security companies - to extend their interests. This is why the monitoring aspect of the mandate is important."

INTERVIEW

Ms. Shaista Shameem

well, maybe not all the time, but certainly in various forms. I am also concerned about the fact many 'respectable' governments also on occasion use this to extend their own territories or their own interests in a particular area. This is why the monitoring aspect of the mandate is really important.

So while on the one hand I think it is a great idea to have a working group, the definition has to move along at some point. This mandate has been in existence for 17 years. It's a long time for something not to have happened. A little bit more interest on the part of States, perhaps... although I can understand why some States are not interested, because it exposes their own involvement with that kind of activity.

The concern of course is also that there is no such thing as conventional warfare anymore. That was another one of my concerns. Nowadays, you do not have the cold war, you do not have two countries fighting with each other. Because of nuclear proliferation and all of those things, you are not talking about simple conflicts any more. They have become quite complex. In some cases it is easier for countries to obtain the services of mercenaries to get what they want - territory or nuclear bombs or whatever - than it is for them to formally declare war on a neighbouring country.

That means, and this is where the element of human rights comes in, that wherever there is conflict, there are always going to be human rights violations. But just by knowing this phenomenon, human rights violations are not going to be documented. And it's more than

an academic exercise. The working group can carry on with the definition, and extending the definition and getting some other things done, like for example a code of conduct for military companies, which is another one of my proposals, and putting together a national model law, which is another one that I am interested in. But the monitoring aspect is going to be the difficult one. I suggest now that the working group continue with its work, but that NGOs provide the monitoring role, which has completely disappeared from this mandate. And that is of concern to me.

That also means that the NGOs can monitor when countries falsely accuse each other of engaging in mercenary activities, because this was another one of my concerns. Anybody can falsely accuse another country of using mercenaries, but if there is no evidence then it's very hard to say whether or not it was true. And the Special Rapporteur's job was in fact to gauge whether it was really mercenary activity, or whether they were terrorists with an ideological basis for their engagement in this conflict, or whether this was a false accusation just to destabilise relations in the region.

That's the reason why I think that NGOs are very critical now in this process and they will need to work in a cohesive and coordinated way and be quite vigilant - this phenomenon is not something that will go away; it is increasing, in fact.

HRF: As far back as February 2000 in the report on the rationalisation of the work of the Commission, the working group on enhancing the effectiveness of the mechanisms of the Commission on Human Rights had actually made a recommendation for the termination of the mandate of the Special Rapporteur on the use of mercenaries and recommended that this matter henceforth be considered directly in the General Assembly's Sixth Committee. We were concerned that in the name of rationalisation the only Special Procedure that they thought needed to be terminated, even at that stage, was this particular mandate. Why do you think this debate manifested itself in this form?

Ms. Shameem: As I said, this mandate has been going since the early eighties - and there was a particular history behind this mandate. That had to do with apartheid in South Africa and the fact many governments were engaged in an underhand sort of way in Angola and Mozambique and all those countries. That is the reason Cuba took on the resolution, and in the early eighties decided to rescue it and carry on with it.

But the United States and some other countries have always maintained that the subject of this mandate belongs to the Sixth Committee, because that is the legal committee. I have never been able to find any documentation which suggested exactly why they might think so. The only thing that I can think of is because it is a definitional issue, perhaps.

In 1989 the Convention came into being. By 2000 it would probably have been quite clear that the definition was not something that was practical, but that it needed to be revisited, in fact, pretty much soon after the Convention came into being. It did not allow for private companies to be considered under the definition. The new forms of mercenary activities could not be considered.

Mercenaries are considered in popular culture as these adventurous former green berets, soldiers who want to go out and carry on with their job. There might be an excitement to it and so on. But at the same time the seriousness of this particular issue - it could just be a business thing - but the seriousness of this particular issue was that mercenaries were being used to

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"While it is a great idea to have a working group, the definition must move along at some point. This mandate has been in existence for 17 years. It's a long time for something not to have happened."

Community of Democratic Deficits

Human rights is definitely not on the march - has the CoD looked at the records of its members?

KAAVYA ASOKA

PERHAPS one of the most revealing aspects of the Community of Democracies (CoD), whose stated objective is "to promote democratic principles and consolidate democratic institutions all over the world", is that it has no permanent members. The Convening Group (CG) of the CoD, is composed of ten countries - Chile, the Czech Republic, India, Mali, Portugal, Poland, South Korea, Mexico, South Africa and of course the United States, which coordinate and issue invitations to the Ministerial Conferences, two of which have been held so far, in Warsaw (June 2000) and in Seoul (November 2002).

The CG, which is perhaps the closest analogy to a group of permanent members, extends invitations to countries for the Ministerial Conferences on the basis of certain criteria, formalized by the adoption of the Final Warsaw Declaration in 2000, which is based upon established principles of international standards embodied in the UN Charter, the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. The 17 criteria for participation cover various topics such as democratic elections and "multi-partidarism", freedom of expression and religion, freedom from torture and discrimination, the rights of women, children, elderly persons and persons with disabilities, and the right to a fair trial, to name a few.

In short, the CoD is like an elaborate dinner-party, hosted by the United States. States can attend by invitation only, but once you have been invited, you can pretty much do as you wish. It is not insignificant that not a single Middle Eastern country is a member of the CoD or the CG. As long as the glamour of free elections, free expression, and if possible a free market, are preserved, the CoD is content with its aspirations to democracy.

There is something suspiciously exclusive about the idea of a community of democracies. Or maybe it is just this Community of Democracies, which looks less like a community that cares about human rights and more like a club that likes to show that it keeps company with the right kind of people. The selectivity of human rights issues addressed by this group are fashionably coutured as 'criteria' for CoD member states, which busily gloss over hard core rights issues that several CoD members have failed to adequately address. With all this talk of reform of the Commission on Human Rights (CHR) being replaced by a 'Human Rights Council' whose smaller, more select group of members would fulfil certain criteria, the CoD could be the living doppelganger of just such a body. Perhaps a good question to ask is what kind of criteria would be put forward, and to what extent would members have to fulfil them? Is it enough to have ratified a convention if the country has not demonstrated its commitment to the issue at stake?

The best example may be the CoD's ostensibly most noteworthy achievement, when all members met together for the first time on 1 November 2004 as a Democracy Caucus at the UN General Assembly to consider support for four draft resolutions being tabled by the members of the Community. One of these was the resolution against torture. This year, during the 61st session of the CHR, while the US was one of the main co-sponsors to this resolution, it has successfully managed to get the Danish delegation to delete mention of 'other forms of ill-treatment' from the draft (see *The Unbearable Weakness of the Danish draft, in this issue, p.5*).

The primary function of the 'UN Democracy Caucus' (UNDC) is to lobby support from governments to push through resolutions on democracy and human rights in order to counter the efforts of groups that attempt to thwart the finger-pointing at violators of human rights, or even deflect discussion of the human rights records of countries through 'no-action' motions and country resolutions, such as those

on Belarus, Sudan or Zimbabwe, last year. But while the CoD aspires to have the efficiency of the Like-Minded Group's (LMG) strategy of block-voting (or blocking votes), it would appear that it lacks a clear consensus between these esteemed members of the UNDC to truly and genuinely support democracy and human rights. While the LMG is fairly consistently against the protection and promotion of human rights, the CoD cannot seem to agree on which

Like what you see in the LMG?

ANY critique of the CoD must be taken in the true democratic spirit of participation in the ongoing dialogue of the best way to address human rights violations. There is a strange contradiction in the fact that members of the CoD keep some very undemocratic company, which does not extend only to those who are not yet a part of this esteemed group, but to those aboard the CoD itself. This is evident in the fact that the CoD does not look closely at the human rights records of its allies.

The CoD has a lot of cobwebs to clear out of its closet before it can lay claim to its own lofty aspirations, and should be vigilant to avoid appearing like a bulwark to shield its own members from international scrutiny. Or it risks looking like a Like Minded Group of another shade.

human rights issues should be pushed forward. Given the indisputable inter-relatedness of democracy and human rights, perhaps it is time to take a long hard look at the records of some of the important CoD countries on some key human rights issues.

United States of America

The record of the US on torture is not flattering, and can be summed up with two well-known examples of institutionalized torture - Abu Ghraib (see *HRF dated 21-28 March 2005: 'The Road Towards Abu Ghraib'*) and Guantanamo Bay (see *HRF dated 29 March-3 April: 'What Law for Guantanamo?'*). The picture of the abusive treatment of prisoners and detainees is only further darkened in view of the fact that the events that transpired were the result of policy decisions by the US administration to consciously exploit the lack of legal personality of detainees and place them beyond the protection of laws to which the US had ostensibly pledged its commitment.

The US looks even worse in the light of developments at this year's CHR, where it has conspired to dilute the mandate of the Special Rapporteur on Counter-Terrorism, proposed by the Mexican resolution on counter-terrorism and human rights. The US is doing its best to get rid of country visits, communications, and early-warning mechanisms, which could be the three pillars upon which the resolution stands.

The erosion of the credibility of the US' commitment to civil and political rights in the 'war on terror' is being matched by its stance on economic, social and cultural rights (ESCRs). The resolution on the question of economic social and cultural rights at the 61st session this year was passed by an overwhelming majority of 50 member states, with only three abstentions: Saudi Arabia, Australia and the United States. The grounds for the continued non-recognition of economic, social and cultural rights by the US is wearing thin, especially since the US tack of 'not recognizing' them is increasingly spilling over into active obstruction.

The groundswell of international opinion on this issue was evident when the amendments proposed by the US on the Brazilian resolution on the right to health, which clearly expressed its general stance that economic, cultural and social rights are not 'rights' but ambitions which must be 'progressively realized' was rejected with 51 countries voting against the US amendment, and Japan abstaining. In addition, the US has publicly rejected the need for an

optional protocol on ESCRs, against the recommendations of the High Commissioner herself (see *HRF dated 29 March-3 April: 'That Mythological Divide'*). Maybe the CoD should prick up its ears when the US line on an issue falls in with that of countries like Saudi Arabia and Japan.

India

India, the 'largest democracy in the world' and member of the Convening Group of the CoD, not only voted in favour of a 'no action' motion on Zimbabwe last year, but replicated the move on Belarus this year and then promptly proceeded to vote against the resolution when the no-action motion fell-through by one vote. If that wasn't enough, India voted against the resolution on Cuba, and if anyone thought that the Democratic People's Republic of Korea (DPRK) had no friends, well, the Indians extended a compassionate 'abstention' in their favour. This goes to show not only that India keeps bad company, but that it is willing to contribute to the erosion of the Commission's credibility by supporting destructive moves like the 'no-action' motions. A worthwhile project for the CoD might be to convince such wayward members like India to support Item 9 under which human rights violators can be called up in the most effective manner, rather than mildly relegating them to the echelons of Item 19.

India, not surprisingly, follows the United States' determination to dilute the Mexican resolution on counter-terrorism and weaken the mandate of the Special Rapporteur. Whatever other motives India may have to make such a move, the thorny issue of Kashmir definitely takes precedence over its concern over the violation of human rights in the fight against terrorism. In the wake of tyrannical counter-terrorism legislation like the former Prevention of Terrorism Act (POTA) and the current Armed Forces Special Powers Act (AFSPA) in the North-eastern part of the country, it is clear that India's commitment to democracy is perennially subsidiary to its political interests.

United Kingdom

The compromise of the right to a fair trial and the sanctioned use of evidence obtained by torture through anti-terror legislation such as the Anti-Terrorism Crime and Security Act 2001 (ATCSA) and the Prevention of Terrorism Act 2005 (see *HRF dated 4-10 April: 'Losing Legitimacy: UK and the war on terror'*) for those suspected of being international terrorists and for British nationals violates the UK's obligations to uphold human rights under the European Convention on Human Rights and the ICCPR. As Professor Geoffrey Bindman, a prominent UK human rights lawyer remarked in connection with the issue: "[I]n the guise of protecting the public [both Britain and the US] are ready to abandon principles which are the hallmark of our democracies".

Australia

Australia perhaps takes the prize for thwarting its commitment to human rights by rejecting outright the need for a Special Rapporteur on counter-terrorism measures. In addition, Australia abstained on its vote on the resolution against racism, a key issue particularly after the CERD Committee's recent criticism of Australia's continuing treatment of aboriginals (see *HRF dated 21-28 March: 'Empty Anniversary: Australia and ICERD'*).

Australia's treatment of asylum seekers, which includes indefinite mandatory detention, has yet to be addressed by the government. As was pointed out by CERD Committee member Mr. Ralph F. Boyd, it is ironic that the reason asylum-seekers find Australia an attractive destination is precisely because of its "sound sense of democracy".

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The Asian Trojan Horse

The draft decision and the Asian paper on Special Procedures appear to be the groundwork for yet another assault on country mandates

MASSIMILIANO DESUMMA

THE Asian Group is getting ready to table a draft decision on "Enhancing and Strengthening the Effectiveness of the Special Mechanisms of the CHR" (see *HRF issue dated 29 March-3 April 2005; page 1*). Last Tuesday, the coordinators of the Asian Group, the South Korean delegation, called the first open-ended meeting on this draft decision, which was being awaited with impatience since a preliminary draft of the decision had leaked out in the first week of the CHR. It took the Asian Group more than three weeks to reach an agreement on a draft which could be disclosed, resulting in the first open-ended meeting being scheduled only two days before the tabling deadline under item 20, which was set to 14 April.

What had clearly emerged during the past weeks' long wait for the Asian Groups' draft, was that three regional groups, the Western group, the Eastern group and GRULAC were eager to have their say in the matter. They were ready with specific conditions that had been gathered from the two cross-regional meetings. On Tuesday, eight Asian Group representatives therefore found themselves aligned on the podium of a half empty room, waiting to be hit full speed by a diplomatic train, much like a deer in the headlights.

And that is exactly what happened. The presented draft decision asked the High Commissioner for Human Rights to initiate discussions on how to improve what are referred to as "Special Mechanisms" while building on the "initial discussion paper prepared by Experts of the Asian Group on Human Rights" (hereafter "Asian Paper").

The problems arising from the draft decision are countless. To begin with, the use of the term "Special Mechanisms" in the title is misleading. Mechanisms of the CHR include those such as the 1503 procedure, while the Asian Paper only addresses Special Procedures, and from among those, only examining Special Rapporteurs and Independent Experts, excluding the Working Groups. The draft decision also omitted NGOs as stakeholders worthy of consultation. What is also worrying is that it only "bears in mind" previous documents on how to improve special procedures (E/CN.4/2000/109 and 112 and Action Four of A/57/387), significantly leaving out references to the biennial resolution on Special Procedures of last year (E/CN.4/RES/2004/76). The argument made for leaving it out was that it had not been adopted by consensus. That is only half the truth. In fact, it had been adopted with 18 abstentions and no votes against. The abstaining votes had come mainly from States that do not recognise country mandates and were not willing to support a resolution that had been enlarged to include country mandates in addition to thematic procedures.

The Asian Paper is based on a draft compiled by Pakistan with the intention of limiting the scope of Special Rapporteurs and drastically weakening country mandates. It was circulated in December for consultation among the other regional groups as an Asian Group paper, claiming to address solely procedural questions, although the issues addressed by the paper were very much of substantive nature. However, only comments on the procedural aspects were solicited and the responses of the other regional groups were therefore mainly limited to procedure. It now appears that the written responses were never intended to play a big role in what Pakistan, India and China had planned. These countries foresaw what would merely be a procedural decision tabled by the Asian Group, only

a few paragraphs long, and given directly to the Bureau, but making explicit reference to the Asian paper. Here's where the image of an immense wooden horse with a big surprise hidden inside comes to mind.

This draft decision was about to be tabled last Thursday evening after the second open-ended meeting on the morning of the same day. The second meeting was a catastrophic replay of the earlier one, only this time, Pakistan and China left the South Korean coordinators of the Asian Group half-way through the meeting, just in time to miss seeing the South Korean delegate lose his temper.

It has to be said that the South Koreans made the effort of trying to incorporate some points raised mainly by the EU delegation and did present a new draft decision on Thursday morning which included a reference to NGO consultation. However, the opposition they probably faced within the Asian Group must have been horrifying. It is exceptional to see a diplomat lose his cool because he is afraid of returning to the Asian Group with the prospect of having to drop the draft due to the strong opposition. The South Korean representative was actually compelled to plead: "This is the first time in years the Asian Group has... [managed] to agree on something; you should acknowledge this!"

"This is the first time the Asian Group has [managed] to agree on something; you should acknowledge this!"

- South Korean delegate to other regional groups

Incredible as it may sound, the underlying assumption of the South Korean plea was that the draft deserved to be accepted, irrespective of whatever abominations it contained, solely because it was an unprecedented example of Asian consensus.

In the hours that followed, the Asian Group made two more concessions: States would be allowed to make additional comments, and the strong request by the EU for an open-ended seminar would be included in the draft decision. These concessions remain of a purely cosmetic character since they do not touch the key issues. The latest draft does not elevate the written responses of the other regional groups to the same level as the Asian Paper, it does not build on the existing Special Procedure-enhancing process mentioned before, and it still excludes references to last year's resolution.

The apparent insufficiencies of these concessions resulted in the Asian Group having to request the exceptional postponement of the deadline for tabling the resolution under item 20 to 17 April 2005.

The last week of this session starts with many unknown variables. The Asian Group seems to be determined to table the draft decision, EU and Asian Ambassadors are meeting to iron things out, some Western delegations are considering whether the Asians might have made sufficient concessions, and the Africans seem to believe their interests will somehow be represented by the Asians. If delegations genuinely worried about the effectiveness of Special Procedures give up now, it would mean a crucial victory for the Asian Group in its continued attempts at undermining the Special Procedures.

It has been obvious for far too long that many countries only participate in the proceedings to limit the damage made to their reputation. And here we have a display of how intricate the full-scale attack on human rights protection has become. It is even more obvious when considering how much item 9 has been weakened. The idea is to first make sure that scrutiny under item 9 is avoided; if this cannot be prevented, then it is ensured that whoever receives the mandate will be on the shortest possible leash.

This combination of the draft decision

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The unbearable weakness of the Danish draft

MASSIMILIANO DESUMMA

THIS year's resolution on torture and other cruel, inhuman and degrading treatment or punishment is, yet again, a disappointment for anyone genuinely concerned about this issue. Nonetheless, again, the resolution will pass by consensus. This consensus has been achieved at a high price: the Danish delegation renounced all that was progressive in the draft in order to get the seal of the United States on the document, i.e. to include the US as a co-sponsor. Of course, the work of the United Nations, and especially the Commission on Human Rights, is premised on the unassailable realities of State sovereignty and compromise, but the goal of a resolution should be its content, not its co-ownership.

It is a shame that the Danish delegation eventually gave up on references to "other cruel, inhuman and degrading treatment or punishment" when they collided with US interests (see *HRF issue dated 11-17 April 2005, page 2: "Week 4 - Round-Up"*). Thus, language referring to "other forms of ill-treatment" being a peremptory norm of international law and also a crime of war under international law, as well as language regarding its application to the principle on non-refoulement disappeared from the draft.

In addition, references to crimes of war and non-refoulement were further weakened. The preambular paragraph relating to the Rome Statute states merely that torture "can" constitute a crime of war and as for non-refoulement, the latest draft does not go beyond "urging" states not to expel a person to another State where s/he might be tortured. And "noting" that torture is a grave breach of the Geneva Conventions, the draft however omits to point out that under the Geneva Conventions "other forms of ill-treatment" constitute a grave breach as well.

The year 2005 also marks the 20th year of existence of the mandate of the Special Rapporteur on torture. This was the occasion for a historic meeting of the four mandate-holders that have held this mandate over the years. This did not inspire the Danish delegation to make a real effort to support and strengthen the Special Rapporteur.

And in order to get Spain on board, they gave up on an important reference to recommendations issued by the Rapporteur in previous years. During the 60th session of the Commission on Human Rights (CHR), Spain had rounded on Theo van Boven for his report on torture in Spain. It is surprising that the new Spanish administration has retained this paranoia regarding scrutiny and seems unable to stomach the idea of criticism by an independent authority appointed by the CHR.

Another operative paragraph urging efforts by States to prevent torture was dropped. And the language referring to the ratification of the Optional Protocol to the Convention Against Torture is lukewarm.

"This draft has been completely watered down," the German delegate said during the last open-ended meeting on the draft resolution, and threatened to reconsider Germany's co-sponsorship. Egypt, on the other hand, asked for applause for considering a first-time co-sponsorship of this resolution. It is a different matter that it has yet to put its name down in the co-sponsors' list.

In the face of this frustrating spectacle in which a timidly progressive draft is presented, only to eventually retreat, it would make sense to call for a new main sponsor. The Danish delegation does not seem to be worrying about prevention of torture, but solely about appeasing its allies. The fight against torture needs true commitment, it is a crucial pillar of the human rights movement and deserves an appropriate flag-bearer.

REFORM PROPOSALS

Reform: The state of non-play

GARETH SWEENEY

HUMAN RIGHTS FEATURES last week provided an analytical review of the Secretary General's proposals for reform of the Commission on Human Rights (CHR) on the premise that these proposals provided a distinct lack of analysis of the inherent problems prior to moving toward reform. The objective was to detail the finer points that require progressive and inclusive discussion. The informal meeting of the Commission on 11 April 2005 went some way in providing, or failing to provide as the case may be, the initial positions of States. The cross spectrum of interpretation of opinion was interesting, if largely rhetorical and rarely enlightening. This summary refers only to those who got off the fence for a day or pointed to some genuine reasons for still sitting there.

The upgrading of the status of human rights in the UN framework has generally been welcomed, although those who would not warm to the idea are not likely to express their reservations in public.

The African Group is largely of the position that the current constitution of the CHR should remain. They emphasised non-interference in the internal affairs of States, the need that States not be rushed, and the view that any reform package of the CHR should be conceptualised in the broader reform of the UN.

The latter "complete package" approach of the Secretary General, as we stated before, 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'. This is now beginning to emanate as a language of non-commitment also from the OIC, the Asian Group and the Like Minded Group. (On the other hand, the Philippines has expressed that each aspect should be considered independently). The Like Minded Group added, unsurprisingly but not altogether illegitimately, that they would not enter into any agreement without prior and thorough consultation, something that has been lacking in the Secretary General's

approach to date.

There is a very mixed position on the principle of criteria among States. Norway, Singapore, for instance, held that membership should be universal. The United States is the most outspoken advocate of stringent criteria, a position which shows remarkable self-assurance in presuming that they themselves would be eligible. To digress here from the discussion of reform of the Commission, the US also stated in explaining its view on wider reform that money could be saved elsewhere to increase the budget of the OHCHR. In other words, they are not willing to consider increasing their allocation of

The upgrading of the status of human rights in the UN framework has generally been welcomed, although those who would not warm to the idea are not likely to express their reservations in public.

resources. They also spoke of "standardisation" of Special Procedures in order to guarantee "more objectivity". What constitutes objectivity, of course, can be entirely subjective.

Romania, on behalf of Croatia, Bosnia-Herzegovina and others, supported the high criteria model, but raised the pertinent point that this could apply to the present Commission. Russia and Honduras expressed reservations for criteria observing the highest bar, with the former raising concerns about the loss of geographic representation. India queried creating criteria "through the back door", whilst only Switzerland at this preliminary stage has intimated that criteria upon admission to any body would have merit.

Others took the opportunity to raise questions about the difficulty of accepting the Secretary General's proposals on principle without first having a clear idea about what this may mean in practical terms. India asked whether the new Council would be a standing body, what size it would be, where it would be located, what

its terms of reference would be, how it would stand in relation to treaty bodies and other existing human rights mechanisms, whether it would accommodate regional groups, and whether it would allow for space to be shared with civil society and national institutions? The very fact that they would even ask the latter question is worrying.

Russia raised the point that covering the human rights records of all countries merits support, yet asked whether this would apply to States treaty obligations, as the fewer treaties States ratify the fewer obligations States have. It also pointed to the potential need for a Charter amendment, and noted that few have commented upon this.

The EU has done its homework a little better than the rest, it would appear, and many of its observations are commendable. Rather than address what might transpire, the EU took the opportunity to lay down the fundamental prerequisites that must remain. The good work of the Commission should be recognised and should be carried forward, particularly in the strengthening of Special Procedures. Geneva should continue to be the base for any human rights institution proposed as an alternative to the CHR. And civil society must remain an active participant in the process. Norway and Peru also deserve honorary mentions in their recognition of the role of NGOs.

It is perhaps fitting to end with a novel interpretation, devoid of any constructive content and epitomising the very worst in member States obfuscation. Cuba has proclaimed the failings of the CHR should not be attributed to the nature of the mechanism itself. Rather, problems concerning the effective promotion and protection of human rights are due to the fact that the CHR is a reflection of an unjust and unequal world. According to Cuba, the *world* needs reform in order for the promotion and protection of human rights to be more effectively achieved. We now have suspicions that Cuba is violating the Convention on the Rights of the Child by recruiting its consultants from the playground.

WEEK 5: ROUND-UP

TIMELY TEXT MESSAGE

Cuba has once again tabled its resolution on the "Question of detainees in the area of the United States Naval Base in Guantanamo", and this year they have vowed to see it through. In short, the resolution, recalling the duty of all States to comply with their obligations under international law, and recalling general comment no. 31 of the Human Rights Committee, "requests the Government of the United States to authorize an impartial and independent investigation by the relevant special procedures of the Commission on Human Rights."

This year, Cuba has been clever in doing away with the offending articles that led to the shelving of the resolution last year. It has removed any reference to international humanitarian law, thus eliminating the possibility of a pretext to avoid support on the basis that the Commission is not the appropriate body to address such matters.

It has also removed any reference to "arbitrary" detention, proclaiming that it does not want to prejudge the findings of the Special Procedures.

But, most cleverly, Cuba has inserted that the European Parliament, in its resolution on Guantanamo of 28 October 2004, "called on the United States administration to allow an impartial and independent investigation into allegations of torture and mistreatment for all persons deprived of their liberty in US custody". It will be interesting to see how the EU plans to manoeuvre its way out of supporting its own pronouncements.

The United States has already responded with a well-prepared statement, to the obvious delight of the Cuban delegation, that Guantanamo has already been authoritatively dealt with by the Commission under the 1503 procedure and was dismissed by a bureau that included Cuba. It claimed that it is in the process of facilitating the visits of Special Procedures and that Cuba's use of item 3 was a subversion of the rules of procedure.

This was music to the Cubans' ears. They pounced upon the US by claiming that the American statement merely complemented their resolution, which was to facilitate the entry of Special Procedures to Guantanamo. This, in essence, facilitates their facilitation. China then contributed a preambular amendment to insert the comments of the US spokesperson as an example of their support for the initiative been undertaken by Cuba!

This is just the beginning.

But this year it will also go to the end.

POINT OUT OF ORDER

As the low hum in Room XVII rose a few notches on Friday afternoon, as it is wont to do when it is the turn of the NGO speakers to give their oral statements, SAHRDC had a pleasant surprise - someone actually listened to our statement on the persecution of the Ahmadiyya community in Bangladesh under Item 14. A distinguished delegate of Pakistan from New York approached us to ask, in a polite and eminently polished fashion, why our NGO had chosen to speak on the issue of the Ahmadiyyas instead of the "various other minorities" in Bangladesh and elsewhere?

Our reply that it was a community that we felt was not receiving adequate attention did not seem to please the distinguished delegate, who proceeded to ask us when our organisation received consultative status at the Commission - a seemingly unrelated question if one is ignorant of the horrendous treatment of the Ahmadiyyas in Pakistan. Does their common position on the Ahmadiyyas herald a new friendship between Pakistan and Bangladesh? Perhaps they could cement their new alliance by making the issue of the stateless Biharis in Bangladesh seeking to return to Pakistan since 1971 their first project. We might even do an oral statement on *that* next year.

MORE POWER TO...

The first public meeting on the question of the death-penalty, hosted by Luxembourg on behalf of the European Union was full of pleasant surprises, the highlight of which was the progressiveness of the recommendations put forward by the delegation of Azerbaijan, who are abolitionists of the death penalty for all crimes. Currently drafted as OP2.bis., Azerbaijan pushed for the inclusion of the phrase "...and other groups", with regard to the discriminatory and disproportionate use of the death penalty against persons belonging to minorities, mentioned in the paragraph. Azerbaijan further recommended the addition of "discriminatory use" in addition to the already agreed upon language of "discriminatory legislation", specifically to target the application of death penalty laws that may not inherently be discriminatory, but that are directed towards specific groups in their implementation. The Swiss also lent their voice to the proposal. The only ones reticent about the proceedings were of course the Americans, who had predictably received "no instructions from Capital".

TRANSNATIONAL CORPORATIONS

Protectionism for profit

The North lacks understanding of human rights standards for business

NILS ROSEMANN

LAST year, the Commission confirmed in Decision 2004/116 "the importance and priority it accords to the question of the responsibility of transnational corporations and related business enterprises with regard to human rights". The drafting of the year's resolution underlines this importance while establishing a Special Representative to the Secretary General "to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights". In so doing, the Commission is following its mandate to strengthen international human rights protection by establishing institutions and clarifying standards.

But it has become clear that the trade off in this step forward toward institutionalisation is the reluctance of certain states to recognize human rights obligations of business entities. One could live with this, were it not for the fact that member states of the Commission try to protect their questionable interests instead of acting as the highest body of human rights protection within the Charter-based human rights system.

One example is Sweden. By stating that human rights standards only apply to states and non-state actors, they have claimed that corporations are not obliged to follow international standards if not implemented into national law, thus providing license for corporate free raiders to ignore human rights standards world wide. The UDHR, ICCPR and ICESCR are clear that corporations, as organs of the society, are also obliged to respect the rights enshrined therein. There is a clear difference between the binding character of state obligations and the appealing character of business responsibilities; nevertheless the report of the OHCHR (E/CN.4/2005/91)

makes clear that the obligation for business to respect human rights is not questionable.

The problems lie in gaps of international law, which - at least at the CHR - have to be approached from a victim's perspective and the knowledge that any impact on people's human rights has to result in accountability. One such gap is the power of corporations over developing countries. As expressed by South Africa and

While social standards in the World Trade Organization are perceived as protectionism of markets in the North, the discussion of the draft resolution on Human Rights and Transnational Corporations shows that the denial of human rights standards for business entities mirrors the same policy.

Pakistan in the drafting process, international human rights standards for corporate conduct would redress the imbalance of power and enable developing countries to set their socio-economic objectives towards their human rights commitments. Western state's rejection or non-recognition of this reality perpetuates the fact that the absence of regulation and human rights standards are being exploited for competitive advantage.

The second gap is the voluntary and geographical limitations of existing standards. Switzerland's reference to the OECD guidelines veils the fact that only OECD member countries have National Focal Points. And as its own experience with the "Panel of Experts on the Illegal Exploitation of the National Resources and other Forms of Wealth of the Democratic Republic of Congo" shows, it has no proactive approach to these voluntary guidelines. It was the Panel and not the Swiss National Focal Point

that questioned the illegal practices of Swiss business. In addition, if the Swiss legal framework was sufficient, one wonders why victims of the Apartheid system have to use the Alien Torts Claims Act in the United States to find restitution for the involvement of Swiss Banks in human rights violations.

The third gap lies in the selectivity of the approaches to address human rights abuses by business. The highlighting of consumers influence on business practices by Sweden might work in the case of IKEA, but it falls far short in the case of extracting businesses, mining or oil corporations. This position lacks any consideration of the fact that the majority of the world's population have no choice but to live in daily struggle for survival. It is for this reason that South Africa, Pakistan, Egypt and others demand common international standards that do not depend on the selectivity of consumers, voluntary business codes of conduct or domestic court systems, but apply the obligations of universal human rights.

While social standards in the World Trade Organization are perceived as protectionism of markets in the North, the discussion of the draft resolution on Human Rights and Transnational Corporations shows that the denial of human rights standards for business entities mirrors the same policy of protectionism. In any case, the Special Representative of the Secretary General will find his or her way to clarify the responsibilities of states not only to regulate business practices, but for businesses themselves to respect and protect human rights in their respective spheres of influence.

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Nepal: Back to the people

ON 8 April 2005, OHCHR and the Nepalese authorities signed a Memorandum of Understanding (MoU) allowing the Office of the High Commissioner for Human Rights (OHCHR) to establish a field presence in the kingdom. The political intricacies that actually compelled Kathmandu to sign up deserve mention, but that is another story for another day. Perhaps, we will all need to revisit the process anyway, when we will sit down to consider the situation, same time, same place, next year. And it is hoped that lessons learnt this year will come in handy then.

For now, we must go back to Nepal and assess the post-MoU situation. No surprises for long-time observers of Nepal here. His Majesty has been busy extending an anti-terrorism law that gives sweeping powers of arrest and detention to the authorities, having protestors arrested, and re-establishing local administration offices that had been revoked following the second restoration of democracy in 1990.

The Terrorist and Disruptive Activities (Control and Punishment) Ordinance or TADO was passed in 2001 and has been extended every six months ever since.

The king also announced the appointment of five regional administrators and 14 zonal administrators in line with the 5th amendment of the Local Administration Ordinance (2061 B.S) promulgated after the declaration of emergency. News reports quoted senior leader of the CPN-UML and former minister Subash Nembang as saying: "The overall political situation in the country is unconstitutional and anti-democratic and the recent appointments are nothing more than a ploy to institutionalize and prolong the authoritarian regime."

On 8 April, a team of the National Human Rights Commission of Nepal (NHRC) led by Prof. Kapil Shrestha was prevented from meeting detainees at a police office. This happened a day after Home Minister Dan Bahadur Shahi assured NHRC members that they would get all the cooperation they needed.

Security personnel prevented Informal Sector Service Center (INSEC) president and activist Subodh Raj Pyakurel from meeting CPN-UML general secretary Madhav Kumar Nepal, who has been confined to his residence. Former prime minister and president of the Nepali Congress-Democratic (NC-D), Sher Bahadur Deuba was not allowed to meet his political colleagues kept under security detention.

On 11 April, the Nepal University Teachers Association (NUTA), an umbrella organization for university teachers, observed 'pen down' across the country. They demanded the release of their president, Prof. Bhupati Dhakal 'Kamal' and other members who were arrested a day before.

It is evident that the king's administration is seeking to undermine the spirit of the MoU even before the ink is dry. Four OHCHR field presences in Mahendranagar, Nepalgunj, Pokhara and Biratnagar will be woefully inadequate in a situation where activists are increasingly marginalized from any process of public participation.

The king's game plan is slowly emerging. He wants to batten the hatches on legal political activity. In about a year, he will call for local and municipal elections. These elections will then be sold to all and sundry as building grass roots democracy from the bottom. In the meanwhile, political cadres of the democratic parties will vote with their feet and increasingly join the United Front that the Maoists are offering. The leaders of the democratic parties will soon be Generals without armies. Enter the king on a white charger at this stage to keep the Maoists at bay. It is evident that the king does not know his history. But how could he? We are seeing all the opening scenes of a tragedy of epic proportions.

An international human rights presence is a welcome first step. However, the issue is not taking a bookkeeper's attitude on human rights violations in the face of a devious and subtle king. The information will have to be used to propel the international community to take resolute but incremental steps to ensure that the government of the people, for the people, is given back to the people.

JAMAICA

Reggae battle signals larger war

Government-sanctioned hate speech points to need for international protection

A FEW weeks ago, Jamaican dance-hall reggae star 'Sizzla', a.k.a Miguel Collins, was released from a Kingston prison, where he had been incarcerated in connection with his alleged involvement in a gun-running scheme. In a raid in Kingston's August Town community, police apprehended nine AK-47 rifles, a submachine gun and three sniper rifles, which the 33 persons arrested were accused of possessing illegally. Sizzla was accused of 'inciting gang violence'. This was his second arrest in three months. He was earlier sentenced to 15 days in prison for 'swearing on stage'.

One of Sizzla's most popular songs, 'Pump Up' contains the lyrics (in Jamaican patois): "Fire fi di man dem weh go ride man behind". Translated, this line roughly corresponds to "Burn the men who have sex with men." Sizzla has therefore been arrested for inciting gang violence, he has even been arrested for swearing on stage, but somehow, the most violent, discriminatory, offensive and homophobic of his lyrics have escaped any condemnation by the Government of Jamaica.

Perhaps this is because reggae dancehall, the popular genre of music to which Sizzla belongs, is a major cultural force in Jamaica, and a force that expresses as well as reinforces popular opinion.

Even a cursory examination of the lyrics of some other dancehall artists like Sizzla reveals that he is, unfortunately, one among many. In St. Elizabeth, Jamaica in January 2004, about 30,000 people attended a concert and Rastafarian celebration called 'Rebel Salute', where musicians like Capleton and Sizzla sang almost solely about gay men, with lyrics like 'kill dem, battyboys haffi ded, gun shots pon dem...who want to see dem dead put up his hand' ('Kill them, gay men have got to die, gun shots in their head, whoever wants to see them dead, put up your hand.'). Another set of Sizzla's lyrics runs 'I kill sodomites and queers, they bring AIDS and disease pon people.' Beenie Man's songs contain lyrics such as "Hang chi chi gal wid a long piece of rope" ['Hang lesbians with a long piece of rope'] and "Tek a bazooka and kill batty-f*****" ['Take a bazooka and kill gay men'].

One of the most well-known homophobic lyrics in Jamaica are by Buju Banton - 'Boom bye bye in batty boy (gay man) head...rude boy no promote no nasty man (gay

man), dem haffi dead (they must die).' Brian Williamson, the most outspoken Jamaican-born defender of lesbian, gay, bisexual and transgender (LGBT) rights and one of the founders of the Jamaica Forum for Lesbians, All-sexuals and Gays (J-FLAG), one of the leading Jamaican NGOs to take up this cause, was brutally murdered in June 2004, in what activists suspect was a hate-crime, but what authorities claim was part of a robbery. This song, which was reportedly sung outside the home of Williamson at the

*"We will never, never compromise,"
Jamaican Prime Minister P.J. Peterson
publicly declared while asserting that he was
'exclusively heterosexual' and vowed not to
drop anti-gay laws due to pressure from
Jamaican and foreign human rights
organisations. But, as with the reggae
artistes, he is merely expressing the popular
and deeply-rooted prejudice against
LGBT persons in Jamaica.*

site of his murder, has almost become the anthem for the homophobic.

The popularity of these dancehall artists not only reveals the sway of public opinion in Jamaica given that it is a major component of Jamaican pop culture, but also the complex mesh of issues into which homophobia is entrenched in Jamaican society, such as ultra-conservative Christian values, ignorance about AIDS, Jamaican cultural relativism and freedom of expression. What was described by a homosexual Jamaican asylum-seeker to Britain as the 'fire and brimstone' quality of Christianity on the Caribbean island, has been effectively condemned and dismissed as a sinful practice. AIDS, which is becoming a burgeoning problem on the island, is falsely viewed as a 'gay disease' and is even equated with the use of condoms, a dangerous prejudice given the prevalence of the epidemic in Jamaica. Many Jamaicans claim that homosexuality is a 'Western export', and that it is something foreign and unnatural, and by extension unacceptable to their culture. Some spokespersons of these artists have defended their right to 'criticize the gay lifestyle' as part of their freedom of expression.

While debates as to whether such lyrics constitute incitement to hatred or violence, or

even whether there is a direct correlation between such homophobic and violent lyrics and actual acts of homophobic violence or hate-crimes may be relevant to an entirely different set of concerns, they cannot obfuscate the fact that in Jamaica, there is a legal and civic environment that supports, validates and rewards such violently homophobic attitudes rather than penalizes them. The crude reduction of this situation is that to sketch out the issue of homophobia in Jamaica as one that can be explained away by 'root-causes' such as 18th century colonial laws, Jamaican machismo or any one of these numerous arguments that have been cited by numerous people, is to skirt around the key issue - which is that homophobia in Jamaica is not only wide-spread and well-accepted by the public at large, but that the Jamaican government through its laws, institutions, police force and sanctioning of discrimination and violence in civil society, allows the persecution of LGBT persons to continue unchecked and uncondemned.

"We will never, never compromise", Jamaican Prime Minister P.J. Patterson publicly declared while asserting that he was 'exclusively heterosexual' and vowed not to drop anti-gay laws due to pressure from Jamaican and foreign human rights organizations. But, as in the case of the reggae artistes cited earlier, he is merely expressing the popular, deeply rooted prejudice against LGBT persons in Jamaica. Jamaican law criminalizes consensual sex between males under Article 76 of the Jamaican Offences Against the Person Act, which punishes the "abominable crime of buggery" by up to ten years' imprisonment and hard labour. Article 79 of the Act also penalizes private or public acts of physical intimacy between men by imprisonment of up to two years and the possibility of hard labour.

But such laws, while abominable, are not uncommon in other countries. In fact, these laws are rarely used in the persecution of LGBT persons. What is far more threatening is the 'unofficial' persecution of LGBT persons by the police and civil society. It is a well-documented fact that the police have refused to protect LGBT persons during attacks and have frequently encouraged others to continue attacks or physical assaults, if not actually participating in the attacks themselves. Police officials in Jamaica

CONTINUED ON PAGE 12

Human rights and sexual orientation at the CHR: Still a serious omission?

OF the now seven core international human rights treaty monitoring bodies, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child have interpreted their respective treaties to include protection from discrimination on the basis of sex to include sexual orientation, even though none of the relevant treaties explicitly make mention of sexual orientation. In recent years, mention of cases of persecution on the basis of sexual orientation have also slowly begun to emerge in the reports of special rapporteurs and independent experts.

There are, however, at least three major obstacles to the use of the Commission's mechanisms by NGOs who deal with LGBT rights. First is the practical problem of the relevant special rapporteurs broadly interpreting their mandates to include victims of discrimination or violence based upon their sexual orientation for fear that their mandates will be terminated by countries that do not wish to even recognize this issue.

This is highlighted by the fact that Brazil, who with commendable enterprise took up the question of a resolution on sexual orientation in 2003, have withdrawn from the issue this year. It would not be far-fetched to draw a connection between the conspicuous absence of a Brazilian proposal with the fact that they will be participating in a conference with certain Islamic states during the course of this year.

Secondly is the issue that even though several special rapporteurs have actively invited NGOs and other groups and individuals to make use of the complaints mechanisms and bring to their attention specific cases of persecution that fall under their mandates, it does not take into account the specific nature of the problems facing LGBTs. Victims of homophobic violence or discrimination are not forthcoming with their testimonies as they live in an environ-

ment of permanent fear, and do not wish to draw attention to their plight for fear of any kind of backlash. In addition, due to the fact that LGBT rights are still an emerging field, NGOs and other organizations are still unfamiliar with how to use the mechanisms of the Commission to the best of their abilities. In order to further this endeavour, Amnesty International has developed a primer for LGBT rights groups on how to make optimal use of the treaty-bodies.

Lastly, it must be recognized that the stigmatization and violence faced by LGBT persons is also experienced by human rights defenders who work for the protection of LGBT rights. The protection of these human rights defenders is a crucial issue for LGBT rights, and also provides a strategic entry point for LGBT issues into the conversations at the Commission.

The international visibility of LGBT issues has taken on increasing importance as the religious, cultural and political fundamentalisms of the domestic legislations of various countries have proven to be complex and difficult issues to undertake for groups that are already severely marginalized within them. The Commission on Human Rights thus provides an important forum for increasing the visibility of LGBT issues, even if it may not prove to be the most effective human rights mechanism to actually implement proposals on the ground.

This year, the Nordic draft resolution on Extra-judicial executions has the distinction of being the only resolution to contain an explicit reference to sexual orientation, with the support of over 30 countries distributed all over the globe. While the inclusion of the mention of sexual orientation, sexual rights and discrimination on the basis of sexual or gender identity under different topics such as extra-judicial executions and other thematic issues should not be used to deflect from a specific resolution or special procedure to exclusively monitor the issue, such inclusions go a long way in showing the indivisibility and the inter-relatedness of all human rights for all persons, without distinction.

JAPAN

Rising Sun sinks low on human rights

The sun's not shining on Japan's rights record - neither on treatment of minorities and prisoners, nor on past abuses

PICCOLO WILLOUGHBY with inputs from DANIELA KAESTNER

At the same time as Japan redoubles its efforts to gain a seat on the UN Security Council, its relations with regional neighbours and international standing have hit a new low. China and South Korea have declared their opposition to Japan's Security Council bid, even before there has been any serious consideration of the Secretary-General's (or High Level Panel's) proposals for reform. This comes amid renewed allegations that Japanese school textbooks distort history by sanitising atrocities committed by Japan's armed forces during World War II and by claiming sovereignty over islands that for centuries have been the home of Korean nationals (Dokdo). The Chinese emphasised their point with massive anti-Japanese street protests in Beijing and other cities last weekend.

Another worrying example of Japan's apparently revisionist attitude to WWII history is its long-standing denial of legal responsibility for the sexual enslavement of Korean and other women ("comfort women") by the Japanese military, and its refusal to prosecute the perpetrators or adequately compensate the victims.

Three years ago, *Human Rights Features* published a critical analysis of Japan's treatment of its ethnic minorities. As that country begins a fresh campaign for elevation to the world body's highest stage, it is timely that we should review that analysis. Security Council membership is not the sole preserve of virtuous States, of course, but if human rights are to become one of the three pillars of the UN, as the Secretary-General has proposed, then would-be supporters of the Japanese bid might like to be aware of that country's record in this area.

Japan is the wealthiest country in its region and the second largest national economy in the world. It is of course also the second largest financial contributor to the UN. Japan has a commendable record of ratifying international human rights conventions, becoming a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979, the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1985, the International Convention Against Racism (ICERD) in 1995, the Convention Against Torture (CAT) in 1999 and the Convention on the Rights of the Child (CRC) in 2004. It has yet to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

This enthusiasm for international conventions has not been matched on the domestic front, however. Japan still has no national human rights institution. The Human Rights Committee recommended in 1998 that it should establish one "without delay", but this has not been done. There was a Bill for a national human rights institution in 2002, but this was widely panned for placing the proposed body under the control of the Ministry of Justice, limiting its mandate over public authorities to complaints of discrimination and physical violence, and subjecting the media to a draconian "special relief procedure."

In 2004, the Committee on the Rights of the Child noted that the same Bill was due to be resubmitted to the Japanese Diet, and expressed concern regarding the body's likely independence, because it was still proposed to be responsible to the Minister of Justice. The CRC recommended that Japan "[r]eview the Human Rights Protection Bill to ensure that the planned Human Rights Commission will be an independent and effective mechanism in accordance with the [Paris Principles]".

Japan is also one of those countries that still retains the death penalty. This is despite rit-

ual condemnation of capital punishment by the Commission on Human Rights in every year since 1997. The Council of Europe has also urged Japan to abolish the death penalty, as has the Human Rights Committee, which also expressed serious concern regarding the conditions under which prisoners are held on death row.

Major discrimination

ARTICLE 14 of Japan's Constitution provides that all people are equal before the law. Far from affording them "equal" treatment, however, Japan has at best been even-handed in its systematic neglect of the rights and interests of minority groups. Perceptions of Japan as an ethnically homogeneous society contrast starkly with the reality that, since WWII, it has been home to over half a million ethnic Koreans (rising to an estimated 700,000 in 1990); and through the 1990s it experienced an influx of over 200,000 immigrant workers from Brazil (many of mixed Japanese and Brazilian ancestry). There are approximately 1.7 million foreign workers living in Japan today.

In addition, Japan has a number of indigenous minorities, including the Ainu people, descended from the first inhabitants of the northern-most islands, and the Okinawans in the south west - as well as the Burakumin community, which is a distinct caste group identified by descent, poverty and the menial nature of the work they typically performed in the past.

Then there is the treatment of criminal suspects and remand prisoners. The Human Rights Committee noted in 1998 that suspects may be detained by Japanese police for up to 23 days before being brought before a court, there are no rules limiting the duration of interrogation or requiring the presence of a lawyer, the grounds for obtaining *habeas corpus* are narrow and a large number of convictions in criminal trials are based on confessions.

Has anything changed in the intervening seven years? Cases publicised recently suggest not. Amnesty International took up the cause

In terms of economic prosperity and the provision of international development aid, Japan is the leader in the region. On a per capita basis, it is among the wealthiest nations on the planet. Why then is there so little investment in human rights?

As the UN strives for greater legitimacy and relevance, what exactly are the credentials that Japan would bring to a reformed Security Council?

last year of three activists who were arrested and detained for distributing leaflets in western Tokyo opposing the deployment of the Japanese Self Defence Forces to Iraq. The three were apparently charged with trespassing and subjected to daily interrogation without a lawyer for a number of weeks.

In March 2005, Japan's Supreme Court dismissed a special protest filed by Mr. Kazuo Ishikawa, by which he sought to challenge his conviction in 1963 for the murder of a schoolgirl in the city of Sayama. Mr. Ishikawa served 32 years in prison for the offence, despite alleging that police forced him to make a false confession. He has continued to maintain his innocence, but it appears the judicial authorities have repeatedly refused to examine evidence that the charges were false or to disclose all evidence

held by the prosecution to the defence.

Finally, we come to the treatment of migrant workers and indigenous peoples. The Committee on the Elimination of Racial Discrimination (CERD Committee) noted in 2001 that Japan's latest report to it lacked information on the ethnic composition of the population. No information was given on social and economic indicators of the well-being of minorities. (see box: 'Major discrimination') The CERD Committee further noted its disagreement with Japan's interpretation of the term "descent" in the ICERD, which would have denied protection from discrimination to caste groups like the Burakumin. It is no coincidence that Mr. Ishikawa, whose case was referred to above, is a Buraku.

The CERD Committee expressed concern regarding discrimination against Japan's Korean minority, including pressure placed on them to adopt Japanese names, and obstacles preventing Korean and other students of international schools from entering Japanese universities (such as non-recognition of studies in the Korean language). It also referred to the situation of the indigenous Ainu, and recommended that further steps be taken to promote their rights, including ratification of the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries.

It seems that Japan's only response to the criticisms of the Human Rights Committee in 1998 and the CERD Committee in 2001 has been to delay its submission of subsequent reports. However, the Committee on the Rights of the Child took up the same themes in 2004, expressing concern that "societal discrimination persists against girls, children with disabilities, Amerasian, Korean, Buraku and Ainu children and other minority groups, and children of migrant workers." The CRC Committee suggested public education and awareness campaigns as one means to address this.

Both the CRC and the CERD Committees have questioned Japan's stance that it does not need legislation to implement the international conventions it ratifies because Article 98 of the Japanese Constitution provides that conventions ratified by the State automatically become part of domestic law. The Committees' concern in either case was that the conventions have rarely, if ever, been referred to by the Japanese courts. The CERD Committee went further - calling for the enactment of a law to explicitly criminalise racial discrimination.

One notable exception to the lack of application of the ICERD in Japan was the 1999 case of Brazilian immigrant, Ms. Ana Bortz, who sued the owner of a jewellery store in Hammatsu after he demanded that she leave his shop because she was a foreigner. In a judgment that grabbed headlines both at home and abroad, a District Court judge ruled that, in the absence of a domestic anti-discrimination law, ICERD serves as the standard by which cases of racial discrimination must be judged in Japan. He awarded Ms. Bortz Y1,500,000 (\$US12,500). The shop owner did not appeal, and human rights activists hailed the case as a landmark. The excitement was short-lived, however, and the municipal and national governments still declined to legislate.

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And what should the international community make of the nationalistic undertones that can be heard in the textbook scandal and 'comfort women' fiasco?

Most of all, as the UN strives for greater legitimacy and relevance, what exactly are the credentials that Japan would bring to a reformed Security Council?

PAPUA NEW GUINEA

Beyond the 'good governance' approach

In contrast to pumping in technical assistance to get the state to function more effectively, the 'bottom up' community strengthening approach involves organic models developed within communities.

NEVA WENDT

DEVELOPMENT cooperation in Papua New Guinea (PNG), through significant Australian Government financial support, currently focuses strongly on state-based 'good governance' approaches. However, indigenous solutions to PNG's many development challenges should also be explored in order for sustainable human development to be achieved.

Papua New Guinea's challenges

Papua New Guinea, the largest of the Pacific island countries, faces significant development challenges. These include: declining living standards; the emergence of extreme hardship; rural disadvantage; lack of employment opportunities for an increasingly youthful population; law and order issues; and disturbing rates of HIV/AIDS. Statistics show:

- Life expectancy for Papua New Guineans is 53 years in rural areas and 60 in urban centres;
- Approximately 31 per cent of all people aged 15 years or over have no cash income earning activity;
- Only 56 per cent of females aged 15 years or over are literate;
- Approximately 33 infants die each day, the majority from preventable causes;
- HIV/AIDS rates are drastically high - growing annually by 15 - 30 per cent, transmitted predominantly through heterosexual contact;
- Approximately 58 per cent of the population do not have access to safe drinking water;
- PNG is now ranked 133 out of 175 countries on the United Nations Human Development Index. (Source: GoPNG, 2003; UNDP, 2003; Baxter, 2001; AusAID, 2004).

Underlying these development challenges, are a complex range of issues associated with politics, governance and the state. 700 disparate cultural groups (and over 800 languages) contribute to PNG's lack of political and social unity.

Australia's assistance to PNG

As the former colonial administrator and nearby neighbour, Australia has a long record of assistance to PNG - the Australian Government is PNG's largest development cooperation partner and has recently increased its financial support from approximately AUS\$330 million to AUS\$436 million per year. As well as Australian Government assistance, there is also considerable support to PNG from the Australian NGO sector, through engagement and relationships that extend back many years. Since PNG attained independence in 1975, some development gains have been achieved - increased life expectancy; a drop in infant mortality rates; a drop in illiteracy rates and increased school participation rates. Nevertheless, major challenges (as outlined above) remain.

In the post September 11 global environment, Australia regards PNG's fragility as posing a potential security threat. It is perceived that PNG's inability to monitor its land and sea borders or control parts of its territory make it attractive to transnational criminals, people smugglers, drug and arms traffickers and terrorists. There is concern about the potential for a failing state. Thus Australia, under a new regional security agenda, is adopting a more 'hands on' approach to PNG with a strong emphasis on 'good governance' - targeting law and order; economic management; and national security infrastructure - a focus regarded as necessary through 'enabling actions' to facilitate private investment and promote conditions for economic growth.

While much commentary focuses on the 'failing state' paradigm it is perhaps more useful

to think in terms of a failed model of development, with questions around the model of development arising at the political, social and economic levels. Underlying the issues of political instability and 'poor governance' are fundamental questions related to the mismatch between adopted Western political and administrative systems and the social and cultural realities of PNG's diverse societies.

It is argued here that the key issue is not whether the state is failing but rather that an appropriate state is yet to be built (Dinnen S., 2003, "Restorative Justice and 'Law and Order' in Papua New Guinea", paper delivered to 'Island

Getting the boot

RELATIONS between Australia and Papua New Guinea have critically deteriorated since an incident last month where Prime Minister Michael Somare was asked to take off his shoes for a security check at Brisbane airport. The diplomatic row sparked by this episode has resulted in the suspension of part of Australia's aid program by the Papua New Guinea government while its Prime Minister waits for an apology. This issue of aid suspension highlights the importance of adopting a 'bottom up' rights-based approach to development. Until such an approach is adopted as a vehicle for sustainable development, the process will always be subject to the competing agendas of the donor community.

State Security 2003: Oceania at the Crossroads' Conference, Honolulu, 15 - 17 July 2003, p. 2).

This article affirms the importance of Australian development assistance to PNG. It also recognises that there is no one easy solution to meeting PNG's development needs. However, it questions whether current 'good governance' approaches alone are 'sufficient' and calls for a greater emphasis on exploring alternative development cooperation mechanisms - especially looking to indigenous Papua New Guinean development solutions.

A rights-based approach

Article 25 of the International Covenant on Civil and Political Rights refers to "the right to participate in public affairs" which in a development cooperation context can be translated into: the right for vulnerable communities and civil society organisations to participate effectively in the formulation of poverty reduction strategies and to participate fully in the design, implementation and evaluation of development assistance programs. Rights-based development draws on human rights not only as a way of conceptualising the "ends" of development but also as the essential "means" of development - the right of communities in developing countries to have a greater say about the type of development cooperation they consider best suits their own specific needs.

In Western eyes 'development' is often seen as a desirable and necessary progression towards a Western-style economic and political system, from some inferior state of 'underdevelopment', with *kastom* and culture often viewed as getting in the way.

For many Papua New Guineans 'development' is seen differently. The introduction of the cash economy and the various pressures associated with past patterns of development are seen as part of the problem, leading to social dislocation, environmental degradation, divisions within society and the new phenomenon of poverty. Papua New Guineans want better access to income earning opportunities, better education and health services, improved water supplies, and social cohesion and harmony. However, they do not want to become 'westernised'. A Melanesian approach sees the way forward as a blend of tradition and modernity, and

emphasises the need for integrated human development.

The land tenure issue starkly demonstrates the tension between these different views of development. In PNG, land is vital to livelihoods and cultural identity - widespread community concerns about a possible shift from communal ownership to individual title have been flashpoints in past protests around donor-led structural reform programs. Some Australian commentators continue to call for the abandonment of communal land tenure. 'Wiser heads' point to the possibility of enhancing land utilisation for development purposes while maintaining traditional owner control.

'Bottom up' approaches

Population growth rate is high and predicted to double by 2026. With 85 per cent of the population living in rural areas, Papua New Guinean and Australian community workers stress the need to work with rural and peri-urban communities to motivate people for self-employment and self-help. In contrast to pumping in technical assistance to get the state to function more effectively, the 'bottom up' community strengthening approach involves organic models developed within communities, often with minimal resources. An increasing number of PNG communities are making progress with this type of approach - people working together within communities, building links between communities and ultimately exerting pressure on the state to be more responsive to the people's needs.

'Bottom up' approaches recognise that PNG is a very young nation being forged from essentially stateless Melanesian societies. Underlying the country's problems are the impacts of rapid social and economic change in the colonial and post-colonial periods, and issues related to global pressure. They recognise that the processes of 'development' and 'modernisation' have not served Papua New Guinea well.

Learning from indigenous approaches and perspectives; involving PNG civil society during the earliest stages of program design; and working through partnerships and ongoing relationships - all form an integral part of effective development cooperation in PNG. Above all else, assistance should be informed by Papua New Guinean views. Australian Government development assistance is undertaken in close consultation with the Papua New Guinea Government. However, there is considerable scope for more dialogue and ongoing discussion with Papua New Guinean civil society. The important message is that Australian development assistance should be based on information from as wide a cross section of Papua New Guinean society as possible.

Consultation should begin early in the process; it should be free of preconceived views and it should be based on mutually respectful relationships. As former PNG Prime Minister, Sir Mekere Morauta is reported as saying: "PNG should navigate the journey. Australia can chauffeur the vehicle, and indeed help fill the petrol tank. But the purpose of the journey, the destination and the direction, have to be set by PNG. We may well need to change direction and take detours on the route. Flexibility in the program is of paramount importance. Open communication, regular discussion, analysis of whether desired goals are being achieved, and willingness to change course if they are not, are essential ... The glue we apply for reform to stick needs to be much stronger than the variety used so far in the public sector. That glue ... must be 'Made in Waigani.'"

- Neva Wendt is Pacific Policy Officer at the Australian Council for International Development (ACFID)

Voices in the dark

DESPITE its obvious efforts to gain membership of the WTO and other international organizations, the Socialist Republic of Viet Nam continues to blatantly suppress all forms of criticism and dissent in direct contravention of its treaty obligations under international human rights law. Adding to an already dismal human rights record, authorities in 2004 have multiplied arrests of political dissidents and members of religious minorities. The most recent International Religious Freedom Report of the US State Department states that the government of Viet Nam has 'continued to restrict significantly those publicly organized activities of religious groups that were not recognized by the Government, or that it declared to be at variance with state laws and policies.'

While the release in January 2005 of four prominent prisoners of conscience shows signs of hope, the recent directives and policies of the Communist Party bear witness to an increased level of fear that mass media is being used to deny the "socialist ideal." The use of websites as a platform for discontent, in particular, has set the authorities on alert and resulted in the tightening of State control over the access and use of the Internet. As emphasised by the US Department of State Country Report on 28 February 2005, the Viet Nam government 'continued its longstanding policy of not tolerating most types of public dissent and increased efforts to monitor and control citizen's access and use of the Internet.'

Journalists and Cyberdissidents in the Mire

Perceived with extreme suspicion, newspapers, television and radio stations remain under strict government control. Requests for publishing licenses from independent organizations are systematically denied and disciplinary sanctions are routinely taken against journalists who release embarrassing information for the Communist Party. Websites are tightly monitored and those judged "reactionary" or too politically sensitive, especially those run by exiled dissidents, are systematically blocked.

As a result of these policies, many cyberdissidents have been apprehended for posting sensitive information on the Internet or simply communicating with Vietnamese organizations abroad. Many of them have been accused of "espionage" or other national security offenses and condemned to harsh prison sentences. Among those languishing in cells for their call for reforms are:

- Political dissident **Pham Hong Son** who was sentenced to 13 years' imprisonment for having, among others, translated and posted on the web an article entitled "What is Democracy." His sentence was reduced to five years of imprisonment in 2003. He is reported to be in very bad health.

- Businessman **Nguyen Khac Toan** who was sentenced to 12 years' imprisonment and three years of house arrest for passing information via the internet to overseas Vietnamese human rights groups about farmers' protests against land confiscation and corruption;

- Journalist and writer **Nguyen Vu Binh** who was sentenced to seven years of imprisonment and three years' house arrest on 31 December 2003 for having posted an article on the internet criticizing a controversial border treaty with China. Nguyen Vu Binh was well known to the authorities for having attempted to form an independent political party in 1999 and an anti-corruption association in 2001.

This practice of arbitrary detention is highlighted in the reports of the UN Working Group on Arbitrary Detention, the Special Rapporteur on Religious Intolerance, and the UN Human Rights Committee responsible for

monitoring adherence to the International Covenant on Civil and Political Rights. Despite repeated calls for religious pluralism, the government of Viet Nam continues to pursue its policy of suppressing dissent in clear and direct contravention of international human rights law.

Persecution of Religious and Ethnic Minorities

Consistent with Viet Nam's policy (albeit an unofficial one) of religious intolerance, the State maintains a stranglehold on religious minorities who refuse to join one of its officially recognized churches. Seen as potentially subversive, independent religious organizations are officially banned and their members kept under strict surveillance. Religious leaders and religious activists are routinely apprehended and illegally

At a time when Viet Nam aspires to join the ranks of economic international organisations, the international community should use its influence to ensure that the country honours its obligation to respect the fundamental freedoms of its citizens in accordance with international human rights law. All political dissidents and religious leaders unjustly imprisoned or held illegally under house arrest must be released.

detained by the authorities. In September 2004, taking note of the flagrant violations of religious freedom in the country, the U.S. State Department placed Vietnam on the list of countries with the worst human rights records for "particularly severe violations of religious freedom".

Among the religious communities targeted by the authorities is the Unified Buddhist Church of Vietnam (UBCV), an organization banned in 1981. Since their refusal to join a state-controlled Church, the leaders of the movement have faced ongoing persecution. Thich Huyen Quang, the church elderly patriarch, and Thich Quang Do, its deputy head, have both spent more than 20 years in prison or under illegal house arrest for their peaceful advocacy for religious freedom and democracy. In October 2003, it was reported that both were once again put under unofficial house arrest after holding a meeting of the congregation. Eight other monks, Thich Tue Sy, Thich Thanh Huyen, Thich Nguyen Ly, Thich Dong Tho, Thich Thien Hanh, Thich Vien Dinh, Thich Thai Hoa and Thich Nguyen Vuong, were condemned to two years of administrative detention under alleged charges of "possessing state secrets."

Like members of the UBCV, Christians affiliated with the banned Mennonite Church of Vietnam have long been the target of authorities for their repeated calls for religious freedom. In November 2004, a pastor of the Church and five of its followers were sentenced for up to three years in prison by the Ho Chi Minh People's Court. Reverend Nguyen Hong Quang was condemned to three years in prison on alleged charges of "instigating others to obstruct persons carrying out official duties" in connection with an altercation with two police officers who had been harassing members of the Church. It has been reported that Reverend Quang was arrested in March 2004 for his writings published on the Internet on the absence of religious freedom in Vietnam.

Last but not least on the list of persecuted religious communities are the Christian Montagnards of the Central Highlands. Since 2001, the group has been subject to pressure and harassment for their refusal to join the state sanctioned Evangelical Church of Vietnam. Considered by the authorities as subversive,

hundreds of Montagnards have been arrested and detained without warrant. Many of those arrested were condemned to harsh sentences for their advocacy for religious freedom or attempts to flee to neighboring Cambodia.

In 2004, a peaceful march by thousands of Montagnards to claim the return of their land and the release of jailed Montagnards turned violent after security forces and complicit civilians started beating the demonstrators with iron bars, shovels and clubs with nails. At least ten Montagnards died in the clashes and many were injured.

Justice without Mercy

While authorities regularly detain suspects for months without laying down formal charges against them, those brought to trial are systematically denied procedural guarantees. Falling clearly below the minimum standards for fair trial, these delays constitute a violation of Article 9(3) of the International Covenant on Civil and Political Rights which states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Trials, furthermore, hardly last half a day and are invariably closed to the public, the families of the detainees and international observers. The accused cannot hire the services of an independent counsel of their choice, let alone be heard.

In addition to these violations of due process, the death penalty is frequently issued. In 2003, Amnesty International reported a dramatic increase in the number of death penalties being pronounced at more than one hundred. In January 2004, in an attempt to muzzle voices that could tarnish its image, the Communist Party made the reporting and dissemination of statistics on the use of the capital punishment a state secret.

Conclusion

Assessing Viet Nam's adherence to Article 18 the International Covenant on Civil and Political Rights, the Human Rights Committee stated the following in its Concluding Observations of 26 July 2002: "In the light of information available to the Committee that certain religious practices are repressed or strongly discouraged in Viet Nam, the Committee is seriously concerned that the State party's practice in this respect does not meet the requirements of Article 18 of the Covenant. The Committee is deeply concerned by allegations of harassment and detention of religious leaders and regrets that the delegation failed to provide information relating to such allegations. In this context, the Committee is concerned at the restrictions placed on outside observers who wished to investigate the allegations."

As evidenced in the reports of NGOs, the U.S. State Department, and UN Special Rapporteurs, the situation in Viet Nam with regard to religious and political freedom has clearly not changed since July 2002. The Communist Party still censors any form of dissent and severely punishes those who dare criticise the government or its policies. The "national interests" invoked by the Vietnamese authorities to justify its repressive actions barely camouflage an intent to protect the ruling party from embarrassment and scrutiny.

At a time when Viet Nam aspires to join the ranks of economic international organizations, the international community should use its influence to ensure the Socialist Republic of Viet Nam honours its obligation to respect the fundamental freedoms of its citizens in accordance with international human rights law. It should further press the Vietnamese government to release without delay all the political dissidents and religious leaders unjustly imprisoned or held illegally under house arrest.

...from page 3

'Monitoring aspect...'

undermine the sovereignty of states, mercenaries were being used to undermine self-determination of an independent state, they were being used to violate human rights. So, I think on the one hand you could say that the reference to it going to the Sixth Committee could be a way of debating scrutiny, because you could just talk about it in terms of the legal definition and carry on both. But on the other hand the obvious thing from my perspective was that we needed to be able to talk about it in terms of human rights violations.

It has been a difficult mandate for many reasons. It is one of the earliest mandates, and human rights came into it suddenly, almost in the middle of the years of the mandate's operation. At the early stages there was no mention of human rights at all, but as the mandate progressed over time, it became clear that human rights had to be an element and then it was brought, I guess, into the Commission on Human Rights rather than to the Sixth Committee. It is a puzzling feature and I have never been able to find an answer to it.

from page 5...

Asian Trojan horse...

and the Asian paper are nothing but a non-negotiated shadow resolution, a revenge for last year's resolution, and the laying of groundwork for yet another assault on country mandates. Delegates from the Land of the Pure, the Middle Kingdom and the Holy Cow have braced themselves and are ready to hit the ground running, full speed.

And the headlights are getting weaker.

...from page 4... Of democratic deficits...

Japan

Japan also significantly abstained from voting on the resolution on racism, making its 'severe and long-standing' discrimination, to use the words of the US Department of State's Country Report on Japan, against the Burakumin, Koreans and other migrants to Japan all the more glaring.

In other recent commendable democratic exercises by the Japanese, they were the first country to pledge over US\$31 million dollars in aid to Nepal, following the royal takeover by King Gyanendra, even as other countries like the UK and India and even the World Bank were freezing their aid to Nepal in response to the take-over. In other words, Japan effectively discounted the fact that the Nepali king had absolutely no regard for democratic ideals.

South Africa

South Africa, one of the few African CoD members, desperately needs to clean up its act if it wishes to display its commitment to democracy and human rights. It voted against country resolutions on both Belarus and Cuba, abstained from the vote on the DPRK, and has supported 'no action' motions on several country resolutions in the past and in the present. Their short memory of how UN economic sanctions and the Commission on Human Rights played their part in ending apartheid has given way to their using the Commission to sanction the grossest of human rights violations in the 'Democratic' People's Republic of Korea.

The commitment of the South African constitution to build a society 'based on democratic values' is rendered hollow by its treatment of undocumented migrants who are considered illegal, and who are, ironically, the victims of xenophobia in a country that prides itself on its emergence from apartheid to equality based on non-discrimination.

Combined with its record of treating immigrants and its tolerance of mercenaries, under what possible criteria can South Africa be seen to belong in a community of democracies?

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Reggae lyrics...

also detain and arrest LGBT persons or those suspected to be LGBT on arbitrary evaluations of their appearance. This also applies to persons who associate with them, health-care workers who attend to them (particularly AIDS or HIV positive patients), and human rights defenders who fight for the cause of LGBT persons in Jamaica.

The uniqueness of the Jamaican case of these dancehall artists is that it has added a trans-national visibility to the issue of LGBT rights by extricating it from its local context, and by doing so, shown the lack of universal protection mechanisms and recognition of LGBT rights.

More than 30 Jamaicans have been killed in the past few years, in addition to numerous others being physically attacked, verbally assaulted, threatened and driven out of their homes. In the past two years, at least 5 Jamaicans have received asylum on the basis of persecution due to their sexual orientation in the UK, while others have been admitted into the US and Canada.

Last November, Sizzla's tour of the United Kingdom (UK) was cancelled after protests organized by the UK-based gay rights group, OutRage!, due to his aggressively homophobic lyrics. OutRage!, in conjunction with the black gay community in Britain and the lesbian-gay-bisexual-transgender (LGBT) community in Jamaica and abroad, launched an international campaign - 'Stop Murder Music' - across

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Europe and the United States (US), targeting eight Jamaican singers - Beenie Man, Bounty Killer, Buju Banton, Capleton, TOK, Elephant Man, Vybz Kartel, and of course, Sizzla - who they accused of inciting listeners to shoot, burn, stab and drown homosexual individuals through their music.

Leading trans-national corporations,

such as the sportswear company Puma, and the tobacco company RJ Reynolds have dumped artists such as Buju Banton and Beenie Man, claiming that they will not support anti-gay lyrics or 'hate statements of any sort' or 'tolerate this or any form of discrimination based on sexual orientation'. Virgin Records, while it could not resist cashing in on Beenie Man's notoriety, disallowed his more controversial lyrics from appearing on tracks issued by the label.

But no-one has as yet been able to hold up a scrap of international law or a universally agreed upon text that could explicitly hold Jamaica responsible for the treatment of its LGBT community. Jamaica is a party to the ICCPR, the ICESCR, CEDAW and even the American Convention on Human Rights, but none of these international agreements contain explicit references to persecution on the basis of sexual orientation.

While non-discrimination, the right to life, the right to security of persons and the right to privacy, exist as general but universal rights which may be applied to LGBT persons to protect them from such violations, the lack of a clear and explicit reference to the particular circumstances of their persecution leaves them at the mercy of the interpreters and enforcers of the law.

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

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