

HUMAN RIGHTS FEATURES

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NHRC Nepal: A case for review of status

King Gyanendra has packed the NHRC and throttled its legitimacy and independence in breach of the Paris Principles. The APF must take cognisance of the successful attempt of the king in curtailing the independent character of the NHRC...

ON 12 April 2005, as part of the APF side-meeting in Geneva, Rt. Hon. Nayan Bahadur Khatri, Chairman of the National Human Rights Commission (NHRC) of Nepal, elaborated upon the magnitude of human rights violations in the state of emergency and the difficulties encountered by Commissioners on account of restrictions on their movement. The Chairman asserted that, despite the situation, the NHRC had been "intensifying its monitoring and investigation works [sic]" and discussing the obstacles faced with the Government.

Considering the honest admissions of the NHRC, coupled with an apparently undeterred and fearless resolve to monitor human rights violations, the Ordinance amending the NHRC Act promulgated by King Gyanendra on 22 May 2005 is hardly astonishing. By way of this Ordinance, the king has effectively stymied the only independent and neutral statutory institution within the country capable of pressuring the king to comply with basic human rights standards.

The credibility and neutrality of the NHRC has been considerably undermined, and the confidence of the public and members of civil society in its independent functioning has taken a beating. Further, the appointment procedure in place fails to meet the core minimum standards contained in the Paris Principles, thereby mandating a review of status and plac-

ing under probation by the Asia Pacific Forum.

Implications of the May Ordinance

Section 4 of the Human Rights Commission Act, 1997, outlines the procedure for appointment of the Chairperson and members of the Commission. The appointments are to be made by the king, who must base his decision entirely on the recommendations of the representative

ASIA PACIFIC FORUM of National Human Rights Institutions

Recommendation Committee composed of the Prime Minister as the Chairperson, and the Chief Justice and the Leader of the Opposition in the House of Representative as members.

After the king's coup and the dismissal of Parliament on 1 February 2005, apprehensions regarding the NHRC's fate were voiced as the Recommendation Committee was no longer in place to select candidates to replace the previous members of the NHRC, whose term of office was set to expire on 25 May 2005. The king amended the Human Rights Commission Act and reconstituted the Recommendation Committee. The committee now consists of the Chief Justice of the Supreme Court as Chairman, the Speaker of the dissolved Parliament and the Foreign Minister as mem-

bers, all of whom are high-ranking officials in the king's government. Each of the members of the newly composed Recommendation Committee - Foreign Minister Ramesh Nath Pandey, former Speaker of Parliament Taranath Ranabhat, and Chief Justice Hari Prasad Sharma - are known to have openly supported the royalist takeover.

Having put in place the Recommendation Committee of his choice, King Gyanendra has clearly determined the membership of the NHRC and effectively throttled the legitimacy and independence of a statutory body, in complete breach of the Paris Principles. Whether the NHRC will be able to autonomously discharge all its statutory functions and make a fair assessment of the human rights climate in Nepal or, as is feared, will work towards hushing up the excesses of the regime remains to be seen. A close scrutiny of its functioning is therefore required.

The new Nepal NHRC consists of the following members: Nayan Bahadur Khatri,
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HRF welcomes comments on this issue and invites suggestions, announcements and contributions for the series to be brought out in March-April 2006 during the 62nd session of the Commission on Human Rights in Geneva

Given the logistical constraints under which the Mongolian Commission functions, it appears to have done quite well

Financial security key to success of NHRM

MONGOLIA adopted its Constitution in 1992 and has been gradually moving towards a democratic framework since then. The Constitution of Mongolia of 1992 establishes a framework for the promotion and protection of human rights in Mongolia. The promotion and protection of human rights is a primary objective of the State. The Constitution lays down that "the State shall be responsible to the citizens for the establishment of economic, social, legal and other guarantees for ensuring human rights and freedoms, for fighting against violations of human rights and freedoms, and for providing remedy for infringed rights."

Therefore, the guaranteeing of human rights in Mongolia is not an act of government but a key obligation provided by the Mongolian Constitution.

The National Human Rights Commission of Mongolia (NHRM) was

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established by the State Great Hural (Parliament) by the National Human Rights Commission of Mongolia Act 2000. The setting up of the NHRM was a big step towards achieving human rights goals in Mongolia.

The NHRM is a fledgling commission,

Mongolia is one of the few countries to have adopted a National Human Rights Action Plan, which, among other things, aims to carve out an important role for the NHRM.

grappling with some of the problems that new organisations ordinarily face. It is still in the process of establishing standard practices for the effective functioning of the Commission. In 2003, Mongolia became one of the few countries to have adopted a National Human Rights Action Programme (NHRAP).

The Programme etches out an important

role for the NHRM to protect and promote human rights in Mongolia.

The NHRM suffers from a serious lack of resources and staff. Other than the three Commissioners, there are nine full time employees responsible for policy development, complaints handling, human rights education and promotion, and administrative support. Given the logistical constraints under which the NHRM functions, it appears to have done well.

Although the NHRM's enabling legislation stresses on the operational principles of independence, justice and transparency to fulfil its objective of protecting human rights in Mongolia, it is not always followed in practice. The NHRM falters on one significant count; that of maintaining financial independence and autonomy.

The financial independence of a NHRI is absolutely essential for the efficient discharge of its functions. The Paris Principles clearly

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Review of status...

former Chief Justice and previous chair of the Commission, was reappointed. The new Commissioners include Sushila Singh Silu, a former judge of the Supreme Court of Nepal; Sudip Pathak, chairman of Human Rights Organisation, Nepal (HURON), a non-governmental organisation; Dr. Ram Dayal Rakesh, a former senior official of the Election Commission; and Gokul Pokharel, a journalist and former chief editor of Nepal's oldest newspaper, the pro-royalist *Gorkhapatra* daily.

Perusal of the qualifications of the members of the NHRC ostensibly suggests that Principle 4 of the Paris Principles which mandates adoption of a procedure that ensures "the pluralist representation of the social forces" has been observed as the NHRC does include a prominent member of the legal profession, a human rights NGO member, a journalist, and a civil servant. However, the fact of the matter is that loyalty to the king has been the sole qualifying criteria for appointment.

The Ordinance unequivocally contravenes the objective of the NHRC Act - that of constituting an 'independent and autonomous National Human Rights Commission for the effective enforcement as well as protection and promotion of Human Rights' - and is also repugnant to the Paris Principles which prescribe appointment through an official act establishing "the specific duration of the mandate" so as to "ensure a stable mandate for the members".

As the House of Representatives has been dissolved, the Ordinance will cease to have effect at the expiry of six months from the date of promulgation. Stability of membership has a direct bearing on the independence of operation of the Commission - a fact that the king has intentionally ignored by bypassing the existing legal precepts.

Having disregarded the suggestion of allowing the Commission to continue despite the expiry of its term, the king's desire to control the NHRC has become more transparent, rendering his public claims regarding restoring democratic freedoms disingenuous. Also the members are unlikely to function fairly, and owing to their allegiance to the king, they will be able to revel in the assured 'stability' of impunity.

Reactions to the Ordinance

The Ordinance has had a severe impact on the rapport of the NHRC with Nepalese human rights organisations. Prior to the May 2005

Ordinance, the NHRC maintained a positive and mutually beneficial relationship with many civil society organisations, consulting with them and conducting joint awareness programmes. The introduction of the new Commission has been greeted with hostility from NGOs who are understandably sceptical about its independence. They have even called for international human rights bodies to refuse to recognise the Commission.

Twenty-five human rights organisations in Nepal have already issued a joint press release, which states that the amendment is illustrative of "the undemocratic and illegal nature of the regime" that seeks to "dismantle

As Nepal's House of Representatives has been dissolved, the Ordinance shall cease to have effect six months from the date of promulgation. Stability of membership has a direct bearing on the independence of the operations of the Commission - a fact that the king has intentionally ignored by bypassing the existing legal precepts.

the structures of democracy."

The king's move has also been criticised by various international human rights organisations. The International Commission of Jurists in a letter to the king on 25 June 2005 stated that the amendment "has placed in doubt the independence, representativeness and accountability of the current NHRC", that it is no longer in

The Nepal NHRC must be placed on probation. A review process must involve monitoring of the working of the NHRC by an APF-constituted committee for at least one year in order to assess the NHRC's independence and efficacy. The final determination of the status of the NHRC can be made on the basis of the report of the committee.

compliance with the Paris Principles, and that it has assumed an executive character as opposed to that of an independent body.

APF to take charge

While human rights organisations within the country and outside have expressly criticised the amendment, the king should be held accountable for infringing democratic principles of governance, disregarding the sanctity of a statutory body, abusing constitutional provisions, and

inverting the rule of law in order to appropriate power and authority.

In this context, the Asia Pacific Forum (APF), which constitutes the most cohesive regional human rights body in the Asia-Pacific, can assume a significant role. Since its inception in 1996, the APF has developed as a key human rights institution that mirrors the emerging regional consciousness. If the APF is to uphold its high membership standards, it must take cognisance of the king's successful attempt in curtailing the independent character of the Nepal NHRC.

The manner in which the king has appointed the recommendation committee, and by extension, the members of NHRC, must not go unchallenged. A review of the status of compliance with the Paris Principles is warranted in accordance with Article 11.4(a)(1) of the APF Constitution and is a task to be undertaken by the councillors of the APF.

The Constitution of the APF outlines three categories of members corresponding to the extent of their compliance with the Paris Principles - full members, candidate members and associate members. The NHRC of Nepal, by virtue of being an initial member, is designated a full member under Article 11.1(c). In keeping with its obligation under Article 11.4(a)(2), the Commission through a letter dated 9 August 2005 has provided an update on the human rights situation in Nepal and the activities of the NHRC.

Apart from repeated assertions of independent and impartial functioning the Commission overlooks the abrogation of Paris Principles caused by the change in the composition of the recommendation committee and instead expresses relief that the Ordinance does not amend the eligibility criteria, tenure and other provisions of the Act.

Non-initiation of the review mechanism by the APF will imply condoning the regressive and debilitating measures undertaken by the king to impede the autonomous functioning of the NHRC. The corollary would be the undermining of the credibility and authority of the APF in the Asia-Pacific region.

In conjunction with the review process, surveillance of the working of the NHRC should be undertaken by an APF-constituted committee for at least one year in order to assess its independence and efficacy. Considering that absolute discretion vests with the councillors to expel a member through a resolution if "it is not in the interests of the Forum for the institution to remain a member" or if the review indicates non-compliance with Paris Principles, the final determination of the status of the NHRC can be made on the basis of the report of the review committee.

Join APHRN

The Asia Pacific Human Rights Network (APHRN) is a network of human rights organisations and individual activists across the Asia Pacific region. APHRN seeks to address trans-Asia Pacific human rights issues in an effective manner by developing formal relationships with its individual and organisational members and increasing cooperation to address such issues.

The Secretariat of the APHRN, which is administered by the New Delhi-based South Asia Human Rights Documentation Centre (SAHRDC), assists APHRN members by:

- supplying accurate and timely information on national human rights institutions, the United Nations and its specialised agencies;
- campaigning and lobbying on country situations and individual cases;
- providing training to human rights activists on the use of national and international norms and procedures; and
- providing legal, political, and practical advice according to the needs of individual NGOs.

APHRN undertakes research projects and provides input on international human rights standards and procedures. The organisation's activities are carried out on the basis of the requirements of its members which are determined after extensive consultations.

Membership

APHRN offers three types of membership:

- Full membership for Organisations
- Associate membership for Organisations
- Individual membership, both Associate and Full.

Full APHRN membership, both at the individual and the organisational level, is offered by invitation only. Human rights groups accepting membership (full members, associate members, and individual members) must be able and willing to take up individual cases to be redressed and must pay a membership fee (US\$ 100 per annum for organisations and US\$ 50 for individuals). Membership fees can also be paid in kind by making a commitment in work hours for each year. Individuals will need to contribute 50 work hours per year. Organisations must contribute 100 work hours per year.

Activities

APHRN plays an active role in regional and international fora and has sought to provide substantive input to human rights initiatives at the international level. It has organised regional consultations on various issues and has been a regular observer at regional bodies such as the Asia Pacific Forum of National Institutions (APF). Its work on the international level includes participation in the annual meetings of the UN Commission on Human Rights, the annual inter-governmental meetings of the UN on Regional Arrangements in the Asia Pacific, and in world conferences such as the World Conference Against Racism.

APHRN organises training workshops in several countries in the Asia Pacific region and also provides training for organisations on a consultancy basis.

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Prevention of Torture

Not our area, says Indian NHRC

The NHRC of India believes it is not bound to press the Indian government on the issue of torture since India has not ratified the UN Convention Against Torture or the Rome Statute.

It also believes it has no role to play in international human rights forums because the matters discussed are 'between States'.

The NHRC clearly needs to take a fresh look at its responsibilities...

DURING the 10th annual meeting of the Asia Pacific Forum of National Institutions (APF), the Advisory Council of Jurists (ACJ) - the body of legal experts advising the APF - will submit its study on the question of torture and the role of national institutions. A request to this effect - made by the APF to the ACJ in Seoul in 2004 - was a positive attempt aimed at addressing one of the most serious forms of human rights violation in the Asia Pacific region.

Even before the drafting process, however, the National Human Rights Commission of India (NHRC) attempted to derail the process by requesting at the consultative stage in Seoul for a clarification of the meaning of "customary international law". Of even greater concern was the request of the Indian NHRC that it be excused from any recommendations of the ACJ deriving from the UN Convention Against Torture (CAT) and the provisions of the Rome Statute, as India is party to neither. Such attempts to sidestep peremptory norms on the prohibition against torture do not sound like the position of an independent national institution.

First, it should be noted that the recommendations of the ACJ are not binding on institutions or the State. They are derived from conventional and customary international law, from which national institutions can apply standards of best practice.

Second, ratification of core instruments is not a prerequisite to applying international norms in holding States accountable for their actions. In this case, it appears necessary to explain to the Indian NHRC that the prohibition against torture is a peremptory norm of international law that meets the level of *jus cogens*. '*Jus cogens*' is defined as being "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" according to the Vienna Convention on the Law of Treaties.

The prohibition is therefore binding on all states as customary international law whether or not they have ratified CAT and other treaties that prohibit torture. If NHRC members don't know this, they are in the wrong job, which, incidentally, is already obvious in certain cases.

India's Track Record

Perhaps India's desire for deficient recommendations stems from a desire not to shine a light on the NHRC's own meagre track record on combating torture, at least in the last two years.

The NHRC has enjoyed successes in the past. As early as December 1993, the Commission issued guidelines that it must be informed of any incident of custodial death or rape within 24 hours of any such occurrence, to be followed by a post-mortem report, an inquest report, a magisterial enquiry report, and so forth. It credits itself for having "contributed in a large measure to India signing the Convention Against Torture on 14 October 1997" through its submission of a comprehensive memorandum to the Prime Minister in 1997. In 1998 it provided extensive guidelines on police reform and effective remedial measures for victims of custodial violence, establishing district authorities to examine complaints from the public and make appropriate recommendations to Government and the State or National Human Rights

Commission. In 2000, the NHRC created a separate cell within the Investigation Division to scrutinise incidents of custodial violence and their adequate reporting by State authorities.

Since then, however, the scale of the problem has far exceeded the barometer of achievement.

On the ratification of CAT, the NHRC's approach since 1997 has been weak. Then, the NHRC took its case directly to the Prime Minister and did not back down from the response that there were "reservations among some States in regard to allowing an international agency to interfere in the internal affairs of the country." Instead, it scheduled a meeting at the highest level to explain why such apprehensions were groundless, leading to the announcement on 26 June 1997 that India would ratify CAT. In fact, the government only signed the Convention, misleading the NHRC, and has since maintained that the eight-year delay in ratifying CAT is purely "procedural".

Since 1997, the NHRC has continued to restate the same rhetorical annual plea. This statement follows a general format - that non-ratification gives rise to "serious concerns" and is "long overdue", and that ratification presents no difficulties as the right against torture has

Spell it out

THE Indian Evidence Act and the Criminal Procedure Code provide certain safeguards for means of investigations but do not expressly prohibit torture. The Indian Penal Code details types of punishment for perpetrators of torture, but provides no definition, referring instead to "grievous hurt", "bodily pain" or "infirmity". Furthermore, the same laws provide effective immunity from prosecution for police forces.

In 1998, the NHRC drew on the recommendations of other bodies, such as the Indian Law Commission and the National Police Commission, to reiterate certain points that had not been acted upon, including: "a Section 114(B) be inserted in the Indian Evidence Act 1872 to introduce a rebuttable presumption that injuries sustained by a person in police custody may be presumed to have been caused by a police officer"; "Section 197 of the Code of Criminal Procedure needs to be amended...to obviate the necessity for governmental sanction for the prosecution of a police officer."

Having been informed by the Home Ministry seven years ago that these points were under consideration, the NHRC has since remained silent.

been judicially recognised by the Supreme Court as a fundamental right, as enshrined in Article 21 of the Indian Constitution.

This annual cut-and-paste exercise gets the NHRC nowhere. It is high time the current NHRC membership showed the same spirit as its predecessors. The NHRC must reiterate the same indisputable arguments as in 1997, recall the failed pledges of the time, and demand a detailed explanation of the mysterious procedural anomalies that are said to exist. It must expose and shame those who use the misguided argument that ratification would result in "interference from outside".

Nor does the NHRC seem to think it has a role to play in the international arena beyond the annual cosy trip to Geneva to give a six-minute synopsis of its general operations, where torture is never mentioned. It appears to have never submitted any shadow reports to any treaty monitoring body. Nor has it ever intervened to criticise the fact that India has not offered any invitation to the UN Special Rapporteur on Torture.

The NHRC Chairperson, Justice A S Anand, also recently refused to consider the NHRC's responsibility in monitoring India's behaviour at the international level. When questioned on his opinion of India's attempt to block the resolution establishing a Special Rapporteur

on Counter Terrorism - which incidentally constituted another contribution by India to the erosion of the prohibition of torture as a peremptory norm - he stated: "[W]hen it is between States, the NHRC does not come into way [sic]." Justice Anand must surely realise that when it is about human rights, whether between States or otherwise, the NHRC cannot shirk from holding the government to account. Whilst the debate may be between States, the end result affects the human rights of individuals.

What can be done

Domestically, the NHRC's limited powers of investigation automatically absolve those at the forefront of torture practices in India. Security legislation such as the Armed Forces Special Powers Act has created a culture of impunity in parts of India, against which the NHRC can do nothing. The NHRC has recently reiterated the need to revisit its proposed amendments for the Protection of Human Rights Act, but its pleas have fallen on deaf ears.

The NHRC has also been silent during the past few years on the fact that Indian law and jurisprudence still avoid any express definition of torture (*see box*). The NHRC, since its recommendations for reform of the Indian Evidence Act and Penal Code in 1998, has not even advocated for an initiation of these required steps to make the ratification of CAT possible.

The NHRC should consider releasing a White Paper documenting all instances where the Home Ministry promised to implement its proposals but failed to deliver. This would reopen dead letters and shame the authorities into action. Likewise, given the endemic practice of torture in India and the prevailing view that the amount of cases referred to the NHRC represent a fractional amount of actual torture cases in India, the NHRC must commit its resources to actively investigating practices in each state in India, in cooperation, where possible, with State Human Rights Commissions. A comprehensive report unearthing such practice would be invaluable.

Nor is the NHRC adequately forthcoming in offering a concise dissemination of findings regarding torture. Its annual reports present selected case law pertaining to different categorisations of violations. Cases of torture come under the larger heading of "Other Police Excesses". While the NHRC provides precise figures on cases received concerning illegal detention/arrest, custodial deaths, false implication, sexual harassment, jail conditions, and atrocities against members of the Scheduled Castes/Scheduled Tribes, it does not provide such figures for cases of victims of torture. This omission needs to be remedied.

In the area of public education, the NHRC has yet to organise a seminar or workshop on the specific subject of torture. Outsourced research projects on 'Curriculum Evaluation of Human Rights Education in Police Training Institutions in India' and 'Training and Non-Training Organizational Interventions for Inculcating Human Rights Observance by Police in India', whose core objective is to "identify human rights education domains (knowledge, skills and attitudes) relevant to the police", indicates an elementary stage in this process. The NHRC should have gone far beyond these simple exercises.

Finally, as has been well documented, the very credibility of the NHRC has been undermined by the appointment of a former Director General of the Central Bureau of Investigation (CBI) as a Commissioner. It is in the context of such practices as torture that the credibility of this appointment becomes more dubious. It is fitting to finish by posing this question to the NHRC: how does it plan to encourage victims of torture to file complaints with an institution that has among its members a former policeman?

PARIS PRINCIPLES

The P.C. Sharma appointment

HRF respectfully submits that the Supreme Court of India may have erred in its dismissal of the Paris Principles

ON 26 February 2004, the People's Union for Civil Liberties (PUCL) filed a petition before the Indian Supreme Court challenging the legitimacy of the appointment of Mr. P.C. Sharma, former director of the Central Bureau of Investigation, to India's National Human Rights Commission (NHRC). The initial two-judge decision delivered a split verdict on 18 January 2005, and the matter was consequently referred to a three-judge bench. On 29 April 2005, the larger bench of the Supreme Court ruled unanimously in favour of upholding the appointment. The judgment has since led to the submission of a review petition by the PUCL on the basis that "the learned three judges, with respect, have failed to address themselves to the real questions and submissions which were urged and emphasized by the Petitioner in support of the writ petition." The Court has yet to rule on the admissibility of the review petition.

The ruling of the three-judge bench was problematic in one critical aspect. While the outcome was not unexpected, the Court lapsed in its reading of the most critical provision relevant to the Sharma case - the requirement that any candidate possess "knowledge of, or practical experience in, matters related to human rights."

The endorsement of Sharma's appointment did not confer legitimacy upon it. It did, however, serve to expose the hollow pretences of the Protection of Human Rights Act (PHRA) in protecting human rights, despite this being outside the scope of the Court's review. More specifically, it confirmed what *Human Rights Features* has long since protested; that the appointment process, and the structure of the Select Committee, is so weighed in favour of the government of the day that the idea of independence is trampled underfoot.

Knowledge or practical experience under the PHRA

The initial judgment of Y.K. Sabharwal had primarily challenged the validity of having a former police officer serve as a Member of the NHRC on the grounds that this did not encompass the required criteria of "knowledge of, or practical experience in, human rights [where human rights is deemed to encompass "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India"]. He surmised that "[t]he knowledge or practical experience in relation to commission of crime, investigation and the knowledge or experience relating to protection of life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India is altogether different."

He thus correctly held that "[t]he requirement of section 3 (2)(d) - relating to the constitution of the Commission is of [the] latter and not [the] former." The PHRA definition of knowledge of human rights encompasses all civil and political, economic, social and cultural rights in great detail; not just in the realm of criminal procedure, which constitutes a fraction of human rights violations.

How Do Cops Fare?

In the case before the Supreme Court, the respondent had outlined the qualifications of Mr. Sharma to the Court as per Section 3(2)(d), amounting in total to his involvement in the Punjab mass cremation cases, and his Vice-Presidency of Interpol (Asia), which involved developing mechanisms in police co-operation

on crimes such as terrorism, "human safety", and trafficking.

The Court, without demur, accepted this as adequate, and in so doing erred severely in its judgment. Firstly, terrorism and trafficking do not strictly fall within the ambit of human rights violations as embodied in the International Covenants, despite the inclusion of terrorism in the PHRA (Section 12) as a factor that the NHRC may consider, as they are perpetrated not by States but by non-state actors. They are, more correctly, transnational crimes, and that is why Interpol, and not the NHRC, work primarily in this field. Consequently, this experience is of no great import to the Commission, and does not correlate to the "knowledge or practical experience" criteria.

A look at Mr. Sharma's biography on the website of the NHRC substantiates this lack of experience. All that he can point to is his participation "in various international seminars" on economic offences, corruption, money laundering, the Euro, and "the Ombudsman." None, bar possibly corruption, have any great bearing on human rights, drawing the reasonable conclusion that he does not come close to what the PHRA envisages under section 3(2)(d).

Yet the Court did not give any consideration to this most critical aspect, choosing rather to concentrate on the arguments of the impossibility of gauging public perception of the police. The biggest misperception here was judicial.

Still not clear? Turn to the Paris Principles

Secondly, the three honourable judges were mistaken in their dismissal of the Paris Principles. Whereas the petitioner had detailed the Paris Principles as the means by which the PHRA should be interpreted in order to uphold the spirit of the Act, the Court ruled that the Act is *intra vires* in so far as the Paris Principles "neither expressly or impliedly exclude the inclusion of a Police Officer in the Commission."

The bench determined that no interpretation was necessary as Section 3(2)(d) was "express in its language" and that "once the Indian legislature enacts a law pursuant to an international convention, then the legislative area in that field being covered it is the municipal law alone that prevails hence, *the validity of the appointment of second respondent can only be examined with reference to the provisions of the act.*" [emphasis added] Whilst the prevalence of domestic law is undoubtedly correct, and while the Principles do not even attain the legal status of a Covenant, the above is a misapplied and overly narrow reading of the role of international guidelines.

Firstly, the judgment states that the PHRA is clear in its meaning. Yet, whilst it may be express in its language, it still lacks legal definition, most precisely in what "knowledge" or "practical experience" may constitute. This is something that the Supreme Court is invested with the powers to determine, and this would be done by applying international norms where gaps in municipal law exist, precisely in an instance such as this whereby the PHRA was enacted following the adoption of the Principles by the UN General Assembly.

The correlative importance of Section 12 of the PHRA was overlooked by the Court, which details the function of the Commission. By extension, knowledge or practical experience would be expected to enable a Commissioner to adequately fulfill these functions. This includes reviewing safeguards provided under the Constitution or any law, making recommenda-

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More power to the Paris Principles

Gaps in the Principles are serving to undermine the credibility of NHRIs

MOST National Human Rights Institutions (NHRIs) for the protection and promotion of human rights have been in existence for more than a decade. Their utility and relevance are undeniable, and governments, at least in the Asia Pacific region, are finding it increasingly difficult to brush aside calls for setting up NHRIs.

However, as NHRIs grow, and grapple with an increasing volume and variety of issues, the problems with regard to the interpretation of their mandates are becoming evident. And, as the minimum standards for the establishment and functioning of NHRIs, the Paris Principles (hereafter "Principles") have been shown to be inadequate in many respects.

One of the key gaps in the Principles relates to qualifications for potential NHRI members. The Principles envisage pluralist membership, and a broad idea of the role and responsibilities of NHRI staff can reasonably be drawn from the functions of NHRIs themselves, as laid down in the Principles. However, the Principles do not expressly set out even basic qualifications for NHRI members. Most NHRIs appointments

therefore followed a logical process, with the core membership consisting of former Justices of superior courts, eminent lawyers, and representatives of other specialized bodies such as minorities' panels. The more enlightened NHRIs included representatives of civil society among their members.

The Principles do not draw an exclusivist line at appointments, which is fair, and even advisable. However, the lack of basic criteria has allowed governments, in some instances, to make appointments that serve to undermine the credibility of NHRIs. Since domestic legislation on NHRIs derives guidance from the Paris Principles, it is imperative that the Principles are as unambiguous as possible.

The need for elaboration of the Principles was illustrated recently when the Supreme Court of India upheld the appointment of a former police official. Mr. P.C. Sharma, former director of India's Central Bureau of Investigation, a federal policing body, was appointed as a member of the NHRC even though he has no human rights experience to speak of (*see accompanying story on this page*).

The Court, it appears, failed to fully appreciate the most critical provision relevant to the case: the requirement of India's Protection of Human Rights Act (PHRA) that any candidate possess "knowledge of, or practical experience in, matters related to human rights."

The Court also ignored the elements of the Principles referring to "competence and responsibilities", which could have informed its understanding of the PHRA. However, it is apparent that had the Principles spelled out specific criteria for appointments to NHRIs, the Court would have been compelled to take cognizance of them, even if the PHRA did not include those provisions. Elaboration and upgrading of the Principles would also make a strong case for revision of domestic laws such as the PHRA in India, leaving little room for interpretation that may permanently impair the independence and credibility of NHRIs. There are other gaps in the Principles, which must be addressed. For example, one of the responsibilities of NHRIs, as enumerated in the Paris

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The Supreme Court lapsed in its reading of the most critical provision relevant to the Sharma case: the requirement that any candidate possess 'knowledge of, or practical experience in, matters related to human rights.'

**NHRIs
RAISE THE BAR**

Sri Lanka's best kept secret

THERE is no question that the Human Rights Commission of Sri Lanka has made some notable improvements in its operations since the turnover of new Commissioners in 2003. But one would not necessarily know this from talking to interested parties in the country, be it non-governmental organisations (NGOs), the media, or victims of human rights abuses alike. Ask the great majority concerned, and they are inclined to wonder what it is that the Commission does exactly. Some see it as an aloof academic think tank, whilst others even fall into the trap of suspecting that the Commission is aligned with the interests of government and is not willing to criticise those most responsible for human rights violations in Sri Lanka.

Upon further inspection, these assumptions are generally unfounded. In fact, the Commission has made strong advancements in certain areas, as one would hope from an institution with 200 staff and ten regional offices, proportionately the most well represented national institution in the Asia Pacific. But this does not mean that those who remain pessimistic automatically have any personal agenda with the Commission. The blame should more fairly be directed toward the Commission on the basis that it continues to fall face-down at the final hurdle; disseminating its findings to the public.

What's New That We Don't Know?

SAHRDC recently had the opportunity to visit Sri Lanka in order to interview members of the Human Rights Commission, which turned out to be a fruitful exercise, unearthing a great deal of information which would otherwise have remained unknown.

Since 2003, the Commission has undertaken many new ventures, often in consultation or cooperation with other organisations, as is its wont on account of the severe shortage of funding it receives from the Treasury. The Review of Legislation Project, funded by the United Nations Development Programme (UNDP) and the Swedish International Development Agency (SIDA), included a complete review of Sri Lanka's relevant domestic laws and administrative practices in relation to its international human rights responsibilities, and was a model initiative for other Commissions.

The Commission has pressed the President to continue the commutation of the death sentence, in response to the President's proclamation that she would lift the long standing moratorium. In this regard, it claims to have been successful. The Commission has recently appointed a former judge and summoned an independent judicial inquiry into all alleged cases of extrajudicial executions from July 2004 to July 2005. In response to the accusation of many NGOs that the Commission shies away from this issue, it has stated that that it has summoned the Chief of Police to appear before it on four occasions in the last year.

The Commission has recently established a database on disappearances, and claims to be beginning the process of investigating the outstanding 16,000 cases that have not yet been investigated. The Commission has also undertaken fact-finding missions on economic, social and cultural rights. For example, it has recently made two visits to the Eastern province. It has also created posts of a Special Rapporteur on Religious Conversion and a Special Rapporteur on the Economic, Social and Cultural Rights of Plantation Tamils. The latter has arisen from the observation that the standard of living of plantation Tamils is decreasing, without obvious explanation, and a Rapporteur would help determine the root causes of this decline.

Perhaps most notable for the audience of the Asia Pacific Forum is the Commission's adoption of an innovative form of Strategic Plan. Given the fact that funding received from the Treasury, around 44 million Sri Lankan

rupees (\$ 440,000) in the last term, barely covers the Commission's annual salaries, it has been forced to receive donor funding. To avoid the risk of being donor driven, the 2003-2006 Strategic Plan sets out the areas that the Commission feels are most urgent, and invites donors to support them. It claims that it does not waver from this set agenda. To date it has been relatively successful in securing funds, and while this is not an ideal scenario, it is an interesting model for other similarly placed Commissions to observe.

This is only a select example of the type of work the Commission is undertaking, and is

Details please

The examples of cases provided in the biannual report for the period of 1 April 2001 to 31 March 2003 report inadequately reflect the Sri Lankan Commission's work. A majority of the cases received by the Commission relate to torture, yet the examples of resolved cases included in the report primarily involve employment related complaints. The report lacks clarity and thoroughness and each of the Commission's activities is addressed in a brief and vague manner.

The annual report for the period 1 April 2003 to 31 December 2003 is equally skeletal and inadequate. It addresses the activities of the Commission in a broad and general manner without providing specifics on the work the Commission has done. Such a surface level account of the activities of the Commission fails to adequately convey the relevant information to the public.

by no means exhaustive. The purpose of this description is not to criticise or congratulate, but to pinpoint the disparity between what is being done and what is being seen to be done.

Falling at the Last Fence

Among the pillars of dissemination are relations with civil society, use of the media, the issuing of annual reports and self-publicity through utilising the Internet. In each area, the Commission falls short.

Relations with civil society in Sri Lanka are mixed, from cordial relations with the Tsunami unit to frosty indifference among smaller grassroots NGOs. Since its appointment in April 2003, the current Commission has held only two general consultations with representatives of civil society organisations in the Colombo district.

Although the Commission had intended to hold consultations every three months, the last one it conducted was in November 2004.

It is in the interest of the Commission to show that it is responsive and proactive in protecting and promoting human rights. If it is not transparent in its operations, then the public is entitled to ask whom the Commission intends to serve.

The Commission contends that these two open ended meetings with civil society were poorly attended and discussions tended to be largely rhetorical. Instead, the Commission now consults with NGOs who have expertise in any given area that the Commission is engaged. Some contend this allows the Commission to hand pick its associates and exclude critical observers.

The Commission used to issue reports of its activities only every two years, arguably in contravention of the Paris Principles. This has since been rectified, and the Commission's forthcoming annual report will adopt a new format incorporating both the general human rights situation in Sri Lanka and the Commission's activities for this period. However, it only comes

before Parliament in October, rendering its content outdated. In any case, it is the Commission's policy to only present the report to Parliament, the media, and *select* NGOs. This principle of selectivity is anathema to the concept of public dissemination.

This also applies to the publication of other reports as well. The commendable effort that was put into compiling the above-mentioned legislative review, for instance, is entirely negated by the fact that the Commission has not only failed to publicise these findings, but it has not yet even referred them to the appropriate ministries.

The media remain at a loss as to many of the operations of the Commission. Despite establishing a position for a media officer in August 2004, journalists at two major Sri Lankan newspapers were not even aware that the Commission had such a person. Between January and July 2005, the Commission issued a total of four press releases. The view that the Sri Lankan media exhibits a general antipathy towards human rights issues should, if anything, embolden the media officer to promote the work of the Commission and maintain strong ties with the national and even international media.

National institutions in the Asia Pacific region are not generally renowned for award-winning websites. With the notable exception of the webpage of the South Korean Commission, which appears to be updated daily, and perhaps the relatively user-friendly sites of the Australian and New Zealand Commissions, the websites are, in fact, appalling. Alongside the Philippines, Sri Lanka shares the ignominy of being the worst offender.

The first port of call for any person who needs to contact the Commission via Internet is to use a search engine. A Google search does not show the link to the Commission until page three! Upon opening the site, it becomes immediately obvious that it is skeletal and poorly maintained. Whilst designed to include information on the activities of the Commission, biographies of its members and staff, and copies of its published reports, the links to these items contain next to no information on the work of the Commission. Most materials are years old, and appear to have been haphazardly selected. It is not surprising that the average visitor would therefore suppose that this is the sum total of its contribution.

At least certain Commissioners are willing to admit that the site is a "disaster", and have recently employed a web designer from Human Rights Internet in Canada to come to Colombo and redesign the Commission's website. This should be completed by early 2006. It is not clear why it is only now that anything is being done, but five years late is better than never.

What We Now Know

For all that the Commission of Sri Lanka may or may not do, it remains generally difficult to assess how it functions. Aside from the fact that the overriding failure in disseminating information to the general public and interested parties is, in itself, a derogation of responsibility, this has the cumulative effect of weakening the working of the Commission in other areas. By way of minor mitigation, the Chairperson of the Commission has been honest enough to admit that the Commission needs to improve considerably in this regard, but this does not help to explain why very little has been or is being done.

At the very least, it is in the best interest of the Commission to show that it is responsive and proactive in protecting and promoting human rights.

In fact, the promotion of its own work is a manner of promoting human rights. If the Commission is not transparent in its operations, then the public is entitled to query whom it is that the Commission is actually intended to serve.

PHILIPPINES COMMISSION

Stymied by its character

Fundamental flaws in its enabling legislation limit the Philippines Commission's effectiveness

THE Commission on Human Rights of the Philippines (hereinafter 'CHRP') was established under the 1987 Philippine Constitution. The following analysis intends to provide an overview of the CHRP by concentrating solely on its essential character, in order to illustrate the institutional impediments that limit the Commission's effectiveness in practice.

The Legal Foundation

The Paris Principles state that NHRIs should be given as broad a mandate as possible, either set forth in the Constitution or by enabling legislation. Public legitimacy is partially derived from the legal status of the institution and an instrument that is well established in the national law will likely sustain greater public legitimacy.

The Philippines Constitution of 1987 established and outlined the powers and functions of the CHRP. The Constitution specifies that the Commission will be comprised of a chairperson and four members, however the term of office and other qualifications were left to be provided by law. Later in 1987, the President declared the dissolution of the Presidential Committee on Human Rights and the establishment of the CHRP by Executive Order No. 163. The Order reiterated the powers and functions of the CHRP and further expanded on the structure and basic criteria for membership.

The 1998 Commission on Human Rights Act further outlined the functional and structural organisation of the CHRP. This included more details regarding the composition and qualifications, appointment and terms of office, and the prohibition and disqualification of members. Further, it expressly defined the scope of cases that the CHRP is empowered to investigate and adjudicate.

The existence of legal instruments setting out the organisation and mandate of the CHRP provide legitimacy to the CHRP. The Philippines should thus be commended for establishing the CHRP using the best model available, incorporation in the State constitution. However, the constitutional provisions are very cursory and the details were left to presidential decree, which is undesirable. Fortunately, the presidential decree was followed by a congressional act, which is a less preferable, but acceptable alternative.

The Appointment Process

The appointment procedure for members of NHRIs should ensure the pluralist representation of civilian society involved in the promotion and protection of human rights. The executive branch of government should not exclusively determine the selection of members. Rather a transparent process of selection and appointment should be typified by wide consultation and involve both the legislature and civil society.

The appointment process of the Philippine Commissioners is not compliant with these recommendations. The President of the Philippines has the sole power to appoint members of the CHRP, thereby foregoing a safeguard that would ensure exclusive independence from the government. The President appoints the Chairperson and Commissioners for seven-year terms. Presidential appointment is often perceived as a political reward for those under the influence of the executive branch government or a means for the executive branch to maintain control of the CHRP.

The appointment process should be reassessed and adjusted to lessen this fear. A transparent process with congressional and civil

society input will help the CHRP gain more independence in its selection.

Membership

Membership criteria and plural NHRI composition are intended to ensure that the body is competent and independent. Chosen members should be well qualified to support the NHRI's mandate. Therefore NHRI members should be selected based on their requisite professional skills, experience, and expertise in the promotion and protection of human rights.

The limited CHRP composition guidelines are found in Executive Order No. 163 and the Commission on Human Rights Act of 1998. The CHRP is composed of a Chairman and four Members who must be natural-born citizens and, at the time of their appointment, at least thirty five years of age, and must not have been candidates for any elective position if the elections immediately precede their appointment.

The Philippines should be commended for establishing the Commission using the best model available, i.e. incorporation in the State Constitution. However, the Constitutional provisions are cursory and the details were left to Presidential decree, which is undesirable. Fortunately, the decree was followed by a Congressional Act which is a less preferable, but acceptable, alternative.

The Commission on Human Rights Act of 1998 adds that the Members must hold a college degree. In addition, the Act requires that Members possess "proven integrity and competence" and that previous involvement in human rights protection and promotion activities are necessary.

The only other stipulation regarding the composition of the CHRP is that a majority of the Members must be members of the Philippine Bar and have practiced law for at least ten years. This requirement can negate any guarantee of pluralism, as in the current situation where every member of the CHRP is a member of the Philippine Bar. Requiring a majority of the commissioners be members of the Philippine Bar and have practiced law for at least ten years is acceptable; however a more specific proportion should be stipulated.

Chairperson Quisumbing and Commissioner Calamba are exceptions to the norm in that they have some experience working in the field of human rights. Aside from these two, the CHRP does not have much expertise in the field of human rights. Many Commissioners lack a basic human rights background. From the biographies posted on the CHRP website, one can see that Commissioner Mallari has very limited experience in the field of human rights, and Commissioners Cueto and Soriano have no experience with human rights organisations or human rights training.

The Relationship with Civil Society

NHRIs should establish and maintain contacts with civil society in order to ensure that public concerns and priorities are handled in the institutional work, to assure independence and pluralism, to further public legitimacy, and to aid in access to and dissemination of information.

One of the CHRP's commitments is coordinating human rights programmes to include civil society. The Office of NGO, Civil Society and Media Cooperation within the CHRP is the focal point for oversight of management, coordination and implementation of

cooperation programmes, projects and activities.

Under the Linkage Development Program, the office prepares annual and medium-term assessments of the CHRP's cooperation programs. Although the CHRP's website outlines the Office's goals and commitments, it does not summarise what actions the Office has undertaken. Research has not been able to uncover any reports published by the Office assessing the CHRP's cooperation programs. While such reports may be prepared internally, they are not published online. The CHRP's website does not inform the public how to obtain a copy of the annual and medium-term assessments and does not even make reference to any completed assessments.

Independence

Independence is an essential feature of an effective NHRI and one of the most central factors in establishing legitimacy and credibility. The legal foundation should outline mechanisms to create and maintain independence, such as a transparent appointment process, terms of office, fiscal autonomy and lines of accountability.

The CHRP Operations Manual recognises the importance of independence and identifies the maintenance and strengthening of independence and fiscal autonomy as one of its strategic goals. Executive Order No. 163 outlines guidelines related to maintaining the independence of the CHRP, including defining the appointment process and term limits and setting forth guidelines pertaining to conflicts of interest. However, the CHRP provisions leave out other important measures needed to maintain institutional independence. Commissioners are not granted immunity from legal liability for acts taken in good faith. Also lacking are guidelines laying out the grounds on which CHRP members may be dismissed.

The CHRP was allocated US\$ 3.75 million for 2004, a seven percent increase from the previous year. However, this funding was reduced for the full year of 2005. The CHRP's functions continue to be hampered by insufficient resources. The US State Department's 2004 Country Report on Human Rights Practices reported that "approximately one-third of the country's 42,000 barangays had Human Rights Action Centers...however, the CHRP's regional and sub regional offices remained understaffed and underfunded." A 'barangay' is the smallest local government unit in the Philippines.

The Commission's Accessibility

An effective NHRI must be accessible to the public it serves. Accessibility in the sense of being physically accessible is important.

The CHRP has taken steps to increase its accessibility. The Barangay Human Rights Action Center (hereinafter "BHRAC") Program is intended to bring the CHRP's programmes and services to the neighborhood level. The CHRP recognised that the Regional Field Offices and sub-offices only partially serviced the geography of the Philippines and were beyond the reach of the remotest areas where the majority of underprivileged reside. They also recognised that poverty in the countryside remained a roadblock to providing services. In response, the CHRP instituted the BHRAC Program to improve and broaden its services and increase client-servicing.

The concept behind the BHRAC Program is laudable. However, there are members of civil society in the Philippines who believe that training, finances and organisational support have not been made available.

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Human Rights Defenders

NHRIs and the protection of defenders

APHRN proposes that the Advisory Council of Jurists be requested to submit a study on this critical issue

IN 1998, the UN General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, also referred to as the Declaration on Human Rights Defenders. The Declaration was intended to bolster the protection afforded to human rights defenders, whose rights are particularly susceptible to attack by governments.

The Declaration, however, provides little actual protection. Many of its provisions are already encompassed in other international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture, and the International Convention on the Elimination of All Forms of Racial Discrimination. The Declaration does assert that human rights defenders must be able to receive adequate funding in order for their work to be meaningful.

The Declaration attempts to protect the fundamental rights of human rights defenders, but qualifies its provisions with language that allows states to avoid carrying out the spirit of the Declaration. For example, Article 18 states that "[e]veryone has duties towards and within the community in which alone the free and full development of his or her personality is possible," and Article 16 further states that defenders have "an important role" in promoting public awareness of human rights questions, but must "bear[...] in mind the various backgrounds of societies and communities[] in which they carry out their activities."

Such language greatly weakens the unique provisions that are included in the Declaration. Article 13 of the Declaration states that everyone has the right to "solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms," recognising that human rights defenders constitute a group with a special, and justified, need to organise resources and effect change. Article 13 subjects itself, however, to Article 3, which states that "[d]omestic law consistent with ... international obligations of the State ... is the juridical framework within which human rights and fundamental freedoms should be implemented." In essence, although a State has some responsibility to allow human rights defenders access to funding, it has leeway to impose legislation limiting funding, and it is possible for a state to limit defenders to inadequate funding while still adhering to the letter of the Declaration.

Human rights defenders not only face organisational obstruction of their work, but also threats to their own fundamental rights, by both governments and non-state actors. Their rights to free speech and fair trials are regularly compromised, and the failure by governments to bring offenders to justice has resulted in a climate of impunity for those who obstruct and threaten human rights defenders.

In some countries, human rights defenders are killed because of their work.

According to the Federation of Nepalese Journalists, thirteen journalists have been killed in Nepal since 1996.

In the Philippines, a climate of impunity encourages "vigilante" killings, which have been increasing in number every year since

2000. Local human rights groups suspect that government agents have colluded with "vigilante" gangs, and statements by the Mayor of Davao City in 2004 have prompted Amnesty International to express concern that he condones extrajudicial killings as a way to fight crime. In countries dealing with armed conflict, human rights defenders are often regarded as threats to peace and stability.

In Sri Lanka, security forces often commit human rights abuses, and the failure of the government to identify those responsible has led to a climate of impunity as well. Due to abuse of the emergency regulations put into effect in

REFERENCE

Human Rights Defenders

2000, several hundred persons have reportedly been extrajudicially executed by the security forces or have disappeared after being taken into custody. With the exception of six security officers who were convicted in the 1996 killing of Krishanthi Kumaraswamy and four convictions

The Asia Pacific region remains a dangerous and difficult place for human rights defenders. States have chosen not to adhere to the Declaration on Human Rights Defenders, and have restricted the rights of defenders through legislation, policy and the failure to act.

for abduction involving 88 security personnel, no member of the security forces has been convicted for any crime. In the majority of cases where military personnel have committed human rights violations, the government has not identified those responsible.

The right "to develop and discuss new human rights ideas and principles, and to advocate their acceptance," "to [participate] in the government of one's country and in the conduct of public affairs," and "to benefit from an effective remedy and to be protected in the event of violation of these rights" are affirmed by Articles 7, 8, and 9, respectively.

Clearly, these rights are being ignored by state actors in their efforts to maintain "order." While civil rights often come second to national security, several governments have been unduly sacrificing fundamental freedoms in order to suppress dissent.

In July 2001, the Sri Lankan Army in Inuvil arrested Thivyan Krishnasamy, the former Secretary of the Jaffna University Students'

More checks, no balances

The Foreign Contribution (Regulation) Act, 1976, or FCRA, problem child of the Indian Emergency of 1976-77, was brought in with the perverse logic of those times - that of keeping a check on the opposition parties at the time by waving the dreaded "foreign hand" danger flag. Circa 2005, this paranoia persists. The FCRA's key concern was to restrict foreign funding to "organisations of a political nature not being political parties". All organisations, including NGOs, seeking to receive foreign funds must therefore either register under the FCRA or get prior permission from the Ministry of Home Affairs (MHA) for receipt of such funds.

The Indian government now seeks to repeal the FCRA and introduce the Foreign Contribution (Management and Control) Bill, 2005 (FCMC Bill). This Bill not only seeks to reincarnate the draconian provisions of the FCRA but looks to augment them in order to tighten political control over NGOs.

Laws like the FCRA, and now the FCMC Bill, seek to obstruct the functioning of genuine NGOs by granting the monitoring role to the MHA rather than the Ministry of Finance, which is the appropriate agency to monitor financial matters. The implications of MHA control were brilliantly illustrated by the 1999 clampdown on 13 organisations that had dared to publicly criticise India's nuclear tests. The paranoia is also evident in the fact that all foreign nationals intending to participate in seminars in India must first obtain clearance from the MHA, and subsequently from other government departments and ministries.

If passed, the new law is likely to have an adverse impact on all NGOs, but particularly on human rights defenders working on issues considered 'sensitive' by the State.

Union, who had criticised the activities of Sri Lankan security forces in Jaffna, and was involved in a non-violent movement protesting against the State armed forces. The police accused him of being a member of the LTTE, and Krishnasamy alleged that he had been tortured while in custody.

In Nepal hundreds of activist students have been arrested and detained under a security act, and are detained for peaceful activities. In several cases, the Supreme Court has ruled that the detentions have been illegal and has ordered the students to be immediately released, but after release the students have been re-arrested and served with new detention orders, in violation of the Supreme Court orders.

It is the responsibility of national human rights institutions to ensure that human rights defenders are able to promote and protect human rights without suffering abrogations of their own rights. NHRIs must also maintain linkages with civil society in order to establish public legitimacy, ensure that the interests of the public are reflected by the institution, increase access to and dissemination of information, and strengthen the independence of the institution. The Paris Principles Methods of Operation address the importance of having NHRIs maintain contact with other institutions and non-governmental organisations involved in the promotion and protection of human rights.

Unfortunately, human rights commissions and non-governmental organisations often operate under government-imposed restrictions, in the form of both legislation and harassment by officials. Human rights commissions suffer from various institutional weaknesses, may be granted inadequate powers and given inadequate funding. Some, such as Malaysia's Suhkam and Nepal's National Human Rights Commission, do not operate with complete independence.

Others are hindered in their investigations by a lack of governmental cooperation or legislation that places a direct limitation on their ability to function. In India, the government maintains control over its national human rights movement by limiting foreign contributions through the Foreign Contributions Regulation Act (FCRA), which requires associations with "a definite cultural, economic, educational, religious or social programme" to register with or obtain permission from the government in order to receive foreign contributions (see box below).

The Asia Pacific region remains a dangerous and difficult place for human rights defenders. States have chosen not to adhere to the Declaration on Human Rights Defenders, and have restricted the rights of human rights defenders through legislation, policy, and the failure to act.

APHRN submits that a comprehensive study of laws and policies that have an impact on the safety and independence of human rights defenders across the Asia Pacific region is long overdue.

The flaws in the Declaration on Human Rights Defenders also warrant scrutiny, particularly the need for unqualified provisions relating to availability of, and access to, funding for human rights defenders.

APHRN proposes that the Asia Pacific Forum refer this pressing issue to the Advisory Council of Jurists (ACJ) and request that the ACJ's report be submitted to the 11th annual session of the Forum.

IDPs and the role of NHRIs

INTERNAL displacement is an issue that demands urgent action. While the global number of internally displaced persons (IDPs) far exceeds the number of refugees - up to 25 million as opposed to 12.1 million - they have received very little recognition and assistance from the international community or their nations. The unfortunate truth is that the political will to deal with their situation is dwarfed by the staggering scale of the problem. Part of the reason for this is that most governments are at least partly complicit in the creation of the problem and are therefore reluctant even to recognise its existence, let alone deal with its underlying causes or symptoms. The international community is disinclined to intervene through the UN for national sovereignty reasons. As a result, unlike refugees who have the United Nations High Commissioner for Refugees (UNHCR) mandated to deal with their needs, IDPs have been forgotten.

In 2004, 3.3 million people were displaced because of prolonged internal conflicts in the Asia Pacific region alone, and there is broad agreement that a major cause of internal displacement in this region is ethnic and civil conflict. Even though this is widely acknowledged, most governments in the area still refuse to recognise IDPs as a legal category. What is even more unacceptable is their unwillingness to acknowledge the existence of those displaced by large-scale development and infrastructure projects. According to the Indian Social Institute (ISI), as of 2000, those displaced by large-scale infrastructure and development projects in India alone amounted to a staggering 21.3 million.

The most notable and important advance in establishing universal standards for the internally displaced was the 1998 United Nations Guiding Principles on Internal Displacement. While providing an important normative and ethical framework for dealing with the IDP problem, this declaration has unfortunately had little practical effect on the functioning of national governments and National Human Rights Institutions. The many existing covenants established, acceded, and ratified by UN member states under international humanitarian and human rights law, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1949 Geneva Conventions and its Second Additional Protocol Relating to the Protection of Victims of Non-International Conflict, have also been ignored when it comes to establishing equal rights for IDPs.

NHRIs have a pivotal role to play in documenting, monitoring and pressuring national governments to ensure the realisation of the rights of IDPs. Yet, these institutions have often not been autonomous and independent watchdogs, which is a basic prerequisite for monitoring and exposing human rights violations. Most NHRIs have also failed to hold national governments to the national and international agreements they have ratified.

A number of countries in the Asia Pacific region are facing grave internal displacement crises. India, Indonesia, Nepal, and the Philippines are four such countries. In each of these cases, the concerned national governments and NHRIs have done little to guarantee the rights of vulnerable internally displaced populations.

While ethnic and civil conflict is a source of displacement in India, large scale infrastructure and development projects, such as the controversial Sardar Sarovar Project (SSP), are also major sources. In terms of numbers, India faces one of

the biggest IDP crises in the Asia Pacific region. Yet, the government continues to remain partial in both its recognition of IDPs, as well as in the meagre assistance it has provided to these groups. It has marginalised the concerns of those displaced by large-scale infrastructure and development projects despite the fact that these groups constitute the majority of the country's displaced populations. Similarly, the government has been more generous in providing assistance to displaced Kashmiri Pandits than to other ethnic groups.

For these reasons, NHRIs like the National Human Rights Commission of India (NHRC) must become self-critical and accept recommendations aimed at making them more effective in dealing with the IDP crisis.

The size of the country, coupled with both the magnitude of the problem facing India's IDP populations and the country's federal structure, necessitates the creation of human rights commissions at the state level (SHRCs) where they do not exist. SHRCs must coordinate with, and remain accountable to the latter. Moreover, in order to ensure impartiality, each SHRC should establish a sub-committee for IDPs, with representation from all stakeholders, both governmental and non-governmental. This should be put into effect in Jammu and Kashmir, the North Eastern states, and all other states that have witnessed major IDP-related problems.

The Indian NHRC must also recommend and advocate the establishment, at a national level, of an Inspection Panel similar to that established by the World Bank in the 1990s. As in the case of the latter, this panel should serve as a forum for complaint, redress, and appeal by those directly displaced or significantly affected by large-scale development and infrastructure projects. This panel must also give special consideration to the needs of those already displaced by such development and infrastructure projects since their needs have, thus far, been largely ignored. It should be a permanent body, made up of three to five prominent national figures known and respected for their integrity, independence and broad appeal. The body

should be both autonomous from the NHRC and also linked to it, making its recommendations directly to the parliament through the NHRC.

In contrast to India, in Indonesia, Nepal and the Philippines, ethnic and civil conflict has been the major sources of displacement. Prolonged conflicts in Aceh, West Papua and East Timor between military forces and armed opposition groups have been fuelled by the relocation of thousands under transmigration programmes coupled with internal colonisation by the dominant ethnic group. Similarly, on the Mindanao islands of the Philippines, internal colonisation played a role in triggering fighting between the Moro Islamic Liberation Front (MILF) and government security forces that has caused massive displacement. Finally, in Nepal the principal source of displacement has similarly been prolonged conflict between Maoist rebels and the monarchy.

In order to strengthen its national capacity to deal with its IDP crisis, the Indonesian NHRC must establish a neutral and independent tribunal, which must seek to identify and deal with violations on both sides of the conflict as a prerequisite to a lasting peace. This tribunal should first prioritise the province of Aceh. In contrast, the major challenge facing the Nepal NHRC is perhaps more basic, and lies in its fundamental responsibility to build a culture for the respect of human rights in Nepal. One of the key ways in which it can do this is by establishing independent programmes to facilitate the promotion of human rights education. By raising awareness about human rights and encouraging respect for related issues, it will simultaneously be legitimising and strengthening its own role, autonomy and independence from the government, which are both crucial for its current and future credibility.

Similarly, the Philippines Human Rights Commission should also take steps towards ensuring community education about ethnic tolerance and respect for Muslim communities, by acknowledging their desire for autonomy and their right to religious freedom.

Finally, it is essential that NHRIs ensure that specific protection is granted to women and children, who constitute the largest groups amongst IDPs worldwide. It is imperative that each respective NHRI coordinate with the national Ministry of Women's Affairs, the Women's Bureau, and women's organisations and NGOs, to ensure that female IDPs are granted the specific protection they are entitled to under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The unique position of NHRIs gives these institutions considerable power to ensure the protection of IDPs. For this reason it is essential that they, together with other concerned international and national human rights organisations and actors, utilise their capabilities to the greatest possible extents to ensure that the Guiding Principles are translated into a UN covenant for ratification by member states. Ideally, this should be a legally binding document which, established under international humanitarian or human rights law, explicitly requires governments to address the needs and concerns of IDPs.

In the final analysis, what remains to be seen is whether these institutions and their national governments will demonstrate the will necessary to protect vulnerable IDP populations. It is in this context that individual human rights activists and NGOs, can, and must, work together with governments and NHRIs.

NHRIs have their work cut out

AT the national level, NHRIs in countries in the Asia Pacific region, must establish a comprehensive national framework, which meets basic universal and minimum requirements for the protection of IDPs. Ideally, such a framework would both guarantee the rights enshrined in the national constitution and incorporate the key elements of the UN Guiding Principles on Internal Displacement in enabling legislation which provide appropriate implementation mechanisms and budgetary resources to translate these rights into practice. This national framework must explicitly recognise IDPs as a legal category and as a group that needs protection during all phases of displacement. It must also guarantee the creation of dedicated national legislation to recognise the State's obligation to ensure the realisation of the basic rights of displaced populations, and responsibility for providing both universally established and context specific solutions.

NHRIs must document cases and causes, as well as monitor specific situations of displacement, to provide a forum for complaints and to submit periodic and regular reports on their activities, findings and policy recommendations, to the national parliament or equivalent bodies for action. NHRIs must also impel governments to improve their data collection mechanisms. In order to achieve this, adequate budgetary resources must be provided to enable this function through the NHRI. NHRIs must also establish sub-commissions on IDPs under their purview. These sub-commissions must consist of information centres in areas with significant displacement problems, and research the root causes of conflict in these areas. They should also be able to bring together NGOs as well as local communities and members of civil society in their work.

It is imperative that NHRIs throughout the Asia Pacific region ensure that governments ratify the second ILO Convention (No. 169) on Indigenous and Tribal Populations (with the exception of the Philippines, which has done so) and the Second Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Conflict. The ratification of ILO Convention No. 169 is particularly important for the Indian NHRC because of the massive displacement and violation of the rights of tribal and indigenous groups, specifically in the Narmada Valley. The Indian NHRC must also work towards guaranteeing State compliance with the earlier Convention No. 107 on Indigenous and Tribal Populations which India has ratified.

from page 1...

Mongolian Commission...

state that it is necessary for an NHRI to have adequate funding in order to be independent. The funds of the Commission should be fixed for a given period of time and should not be subjected to curtailment, which affects the implementation of its programmes and activities. The Commission should be able to freely raise funds for its activities, both from private and public sources.

As of 2003, the total budget of the NHRCM was US\$ 60,493 and only two percent of this amount was allocated for operational costs. The Commission is facing a severe financial crunch but the Capacity Development Project for the Commission, undertaken jointly by the OHCHR and NZAID, is making a significant contribution towards overcoming this problem. The Commission has also received funding from the Canada Fund and the International Labour Organisation (ILO) for some of its projects. The United Nations has a strong presence in Mongolia and agencies like UNDP are actively involved in developmental activities in the country. The Human Rights Strengthening in Mongolia (HURISTMON) project is jointly funded by the OHCHR and UNDP.

The annual report of the Commission does not specify the annual budget or the sources from which it receives funding apart from the Mongolian government. The Commission must declare its annual budget in its annual report to ensure transparency.

The NHRCM has also devised a Strategic Plan for the period 2004-2006 to ensure a realistic protection of human rights. The Strategic Plan outlines certain goals of the NHRCM and their implementation plan for the period in question. Objective 4.5 of the Strategic Plan recognises the financial problems faced by the Commission and identifies alternative modes of funding and opportunities for technical cooperation.

The NHRCM plans to take the following measures to meet its financial needs: by providing regular information to donor organisations about its activities (Activity 4.5.1); training its staff to develop project proposals and imple-

menting and reporting on such projects (Activity 4.5.2); cooperating with international and national donors and partners effectively (Activity 4.5.3); contacting funding agencies to explore the possibility of setting up a regional human rights training centre (Activity 4.5.4); and organising activities to inform donor agencies in Mongolia about the projects implemented by the Commission (Activity 4.5.5).

While it is laudable that the Commission has identified the financial problems that it is faced with and has decided to seek avenues to overcome them, it still needs to be asked if this

The NHRCM can adopt a similar approach as that of the Sri Lanka Human Rights Commission. It can specify in its plan of action the priority areas of concern and seek private funding in those areas. If the NHRCM is able to change its fundraising approach, it can hope to achieve the twin objectives of ensuring adequate funding for itself and realising the protection of human rights.

is a legitimate manner to raise funds for the Commission. The emphasis of the Strategic Plan is clearly towards attracting international donor agencies to sponsor activities of the Commission in view of the shortage of funds, but at what cost?

The manner in which the NHRCM wishes to go about raising funds for its activities is clearly flawed. It runs the risk of turning the NHRCM into a donor driven organisation. The funding plan as drawn out in the Strategic Plan places too much emphasis on private donors. This aspect can be easily manipulated by the donors by creating pressure on the NHRCM to study those areas that attract more funding and not those that require urgent attention.

It is understood that government funding received by the NHRIs is often not sufficient to meet all its expenses. Not only does it limit the fulfilment of the basic mandate of the NHRIs but it also restrains them from addressing emerging human rights concerns.

However, other options can be explored. The Sri Lanka Human Rights Commission follows a very effective plan in relation to procur-

ing funds from private donors. Like most other NHRIs, the Sri Lanka Human Rights Commission is also faced with a regular shortage of funds. In 2004, the Commission requested 183 million Sri Lankan rupees from the government Treasury to cover its estimated costs for the year, but was only granted 40 million Sri Lankan rupees.

The chronic shortage of funds has forced the Commission to seek financial support from private donors. According to Dr. Radhika Coomaraswamy, Chairperson of the Sri Lanka Human Rights Commission, the Commission has drawn up a strategic plan in which it outlines the activities that it will undertake for the given period (three years) in advance and then accordingly approach donors for funding for these activities. All the payments are channeled through the government treasury to ensure transparency in the process.

The Sri Lankan Commission was offered a lot of funding to work on the issues of involuntary repatriation of migrant workers and domestic violence but it turned down these offers as it felt that NGOs and social service organisations were better equipped to study these problems.

It would be ideal if the Mongolian government was able to meet all the financial needs of the NHRCM without compromising on its independence, but in reality, it is quite a different story. The government is faced with severe financial constraints and therefore, is able to only partially fund the activities of the NHRCM. Therefore, the NHRCM is left with no option but to seek funds from private donors, which might give the donors undue influence.

The NHRCM, on the other hand, exposes itself unnecessarily to the risk of being manipulated by the donors, thereby adversely affecting its much-needed independence.

The NHRCM can easily work its way out of this trap or at least mitigate the evils of donor funding by adopting a similar approach as that of the Sri Lanka Human Rights Commission. It can specify in its plan of action, the priority areas of concern and seek private funding in those areas.

If the NHRCM is able to change its fundraising approach, it can hope to achieve the twin objectives of ensuring adequate funding and bringing about real protection of human rights.

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Regional Cooperation

The legacy of Tehran, and a paradigm shift

There is nothing evolutionary about the Tehran Framework. It is, in fact, a retrograde step that has served to absolve States of having to worry about anything close to regional arrangements, or even regional cooperation

THE 13th United Nations Asia Pacific Human Rights Workshop in Beijing is perhaps appropriately titled, in so far as it does not confer any specific reference to the initial intention of these meetings sponsored by the Office of the High Commissioner for Human Rights (OHCHR), i.e. working towards regional arrangements. This, it would seem, has been relegated to the footnotes of history since at least 1998.

The Beijing Workshop meeting presents a good opportunity, therefore, to remind the States present of the original purpose of why they are here today, to jog their memories regarding promises made over the years that have not been fulfilled, and to sound a warning for the future of foreseeable proposals which may steer the region further away from the original purpose of evolving a regional human rights framework.

At an estimated cost of US\$150,000, when the OHCHR is bereft of much needed resources, it is hoped that those present in Beijing intend to seek genuine answers to the questions posed, and not to stretch the budget further.

In anticipation of the Beijing workshop, the OHCHR has circulated a discussion paper by Professor Vitit Muntarbhorn, an eminent expert on the subject of human rights in the Asia Pacific region, assessing the evolution towards a regional framework. The study is usefully divided into the "evolution of three tracks". The first track constitutes the adoption of the Tehran Framework for technical cooperation at the regional level in 1998. This is the subject of the present article. The second track, concerning the potential for sub-regional intergovernmental organisations to be instrumental in the protection and promotion of human rights, is dealt with in the article on the facing page.

The Paradigm Shift from Regional Arrangements to Regional Cooperation

The Tehran Framework is built around the four pillars of national institutions, national action plans, human rights education programmes, and the realisation of economic, social and cultural rights. This, as mentioned above, is now referred to as an element in the process of evolution. Had it been asserted that the Tehran Framework was to constitute only *one* strand of development towards regional or sub-regional arrangements, this would be a fair assessment.

However, given that it now exists as the *sole* framework on regional cooperation, there is nothing evolutionary about the Tehran Framework. It is, in fact, an intentionally retrograde step that has served only to absolve States of having to worry about anything close to regional arrangements, or even regional cooperation in the implementation of these four pillars. The very fact that the working title for the annual meetings has shifted from "Regional Arrangements" to "Regional Cooperation", in tandem with an identical shift in the resolutions of the UN Commission on Human Rights regarding regional developments, should have sounded the alarm. Tehran has, in effect, signalled the death of a 15-year snail race toward even considering some sort of regional arrangements.

The precedents for Tehran were set in Kathmandu and Amman. These built on the consensus that the strengthening of national capabilities was the best means to ensure the protection and promotion of human rights, as part of a "step-by-step", "building blocks" approach, and that any developments toward regional arrange-

ments must emerge from and be directed to the needs and priorities set by governments of the region, with roles, functions, tasks, outcomes and achievements determined by consensus by governments of the region.

The fact that governments chose to prioritise their interests was rightly criticised by civil society as subjugating the inalienable and universal rights of the individual, where State selectivity should never be an option. The sidelining of NGOs during this process and thereafter reflects States' attitudes to human rights in general, let alone any regional initiative for protection and promotion of rights.

The precedents for Tehran were set in Amman and Kathmandu. These built on the consensus that moves towards regional arrangements must emerge from and be directed to the needs and priorities set by governments. Such selectivity should not be an option.

Thus, following Amman in 1997, the Tehran Framework was adopted, asserting "that strengthening national human rights capacities is the strongest foundation for effective and enduring regional cooperation for the promotion and protection of human rights." And it was here, with the commitment to develop national institutions, national action plans, human rights education programmes, and the realisation of economic, social and cultural rights, that any conceivable movement toward regional arrangements ended.

Firstly, and quite simply, there is nothing regional about national institutions, national action plans, or human rights education programmes. Whilst the initiatives to establish national institutions, national actions plans and education programmes are absolutely worthy, and in fact the work of the Asia Pacific Forum (APF) is one of the true success stories in the region, neither have any direct relation to any regional initiative. They are, in short, domestic issues. That is to say, if every State had a national action plan, a national institution, a human rights education programme and a keen awareness of ESCRs, this would still not constitute any form of regional arrangement, or indeed even necessarily any form of regional cooperation.

Secondly, the "building blocks" approach not only builds a wall against the original plan to establish a regional arrangement, but it also provides no timeframe. To date, all that is required is for States to pay lip service to the notion that they are slowly but surely moving in this direction. As any activist in the region can tell you, in a sizeable proportion of States in the Asia Pacific this is nothing short of a lie. Bangladesh has been leading the United Nations Development Programme (UNDP) on a merry dance for years by promising that it will establish a national human rights institution. Every year, Dhaka appears to feel a desperate urge to hold yet another UN-sponsored meeting on the subject. And no one is ever going to claim that Burma or Laos are about to devise a national action plan in the near future. But, rest assured, States are comfortable with the Tehran Framework, which is as much condemnation of the Framework as you could ever need.

This is compounded by the contradictions of Asian States' endorsement of the Tehran Framework and their pronouncements at other international forums.

For example, concerning the adoption of resolution 2004/29 on extending the Working Group on consideration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights at the 60th session of

the Commission on Human Rights, China roundly supported the United States' open rejection of an optional protocol. It expressed concern that the language describing such rights as legal entitlements threatened sovereignty and gave rise to an "incorrect view".

It should be remembered that the fourth pillar of the Tehran Framework is the "realization of economic, social and cultural rights and the right to development." India has stated that it is "premature" to consider developing an optional protocol as there is no clear standard of measuring progressive realization, and therefore monitoring State compliance would be virtually impossible.

In fact, the majority of those countries that have in one way or another opposed development on the establishment of an optional protocol, and by extension the development of international accountability, are from the Asia Pacific region, including Australia, Nepal, Pakistan, Saudi Arabia, Sri Lanka, Bahrain and Qatar. We can only assume that, for all the cultural relativist talk of social development outweighing the concern for individual civil and political rights, when pressure is applied to upholding ESCRs, States are equally reticent.

States also have no intention of fulfilling the fourth pillar of the Tehran Framework, although the "building blocks" approach can disguise this for time immemorial. Again, this may construe the view that working towards progressive realisation, ala the Tehran Framework, is a sound way to avoid actually realising ESCRs. All told, this is no 'evolution'.

Conclusion: Does it all Justify the Cost?

The 'building blocks' approach not only builds a wall against the original plan to establish a regional arrangement, but also provides no timeframe. All that is required is for States to pay lip service to the notion that they are slowly but surely moving in this direction.

One of the recommendations of the World Conference on Human Rights was that "more resources be made available for the strengthening or the establishment of regional arrangements for the promotion and protection of human rights..." To facilitate this, "States are encouraged to request assistance for such purposes as regional and sub-regional workshops, seminars and information exchanges designed to

strengthen regional arrangements".

The official language of States from the Asia Pacific region, and the cultural relativist excuses proffered against the formulation of any regional human rights mechanism, render the obvious question as to whether OHCHR is being led down the garden path. After all, as long as a "building blocks", "multi-track" approach is still being pursued, the possibility of some movement still exists, and OHCHR may not be in a position to walk away, conscious of the precedent that this may set.

It may well be a matter of perspective, but it is the view of APhRN that a time must come to call upon States to officially proclaim their long term goals and display immediate and short term commitments through action in order to justify OHCHR's continued support. OHCHR should then invite select governments that are serious about drafting a regional charter and/or establishing a regional/sub-regional Commission or Court, and discard those who refuse to commit to this express purpose.

The alternative is to proceed with business as usual, where States assemble at the UN's expense to formulate barely distinguishable annual conclusions that re-affirm their commitment to strengthening national capabilities, at their own pace, in accordance with their own priorities.

In other words, business as usual is tantamount to no business at all.

Regional Cooperation

Sub-regional initiatives wide off the mark

SAARC and ASEAN cannot be relied upon to develop regional cooperation on human rights in Asia

THE story of the Asian continent is one of contrasts. Given such a diverse setting, how does one develop a truly regional human rights mechanism in Asia?

Annual workshops have been held in the Asia Pacific region since 1982 on the subject. The Tehran Workshop of 1998 saw the adoption of a Framework for Regional Technical Cooperation in the Asia Pacific Region. This Framework focuses on strengthening national capacities by developing national human rights action plans, national institutions for the promotion and protection of human rights, human rights education programmes, and by realising economic, social and cultural rights.

Despite the emphasis of the Office of the High Commissioner for Human Rights (OHCHR) to develop and strengthen human rights mechanisms in the Asia Pacific region, a clear lack of political will has prevented any steps from being taken in this regard in the region. In his background paper - submitted to the Thirteenth Annual Workshop of the Framework on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region - Professor Vinit Muntarbhorn attributes the failure to establish a uniform regional human rights mechanism in Asia to several factors.

These include the vastness and heterogeneity of the region; the unwillingness of Asian States to accede to international human rights instruments (even in cases of accession, implementation is weak); the notion of human rights being debated as a Western concept and the international human rights system as Euro-centric; and that "regional pragmatism" and quiet diplomacy as preferable to a regional inter governmental system which leaves room for accountability, confrontation and reprimands.

This article attempts to study the problems and prospects of endorsing SAARC and ASEAN as possible sub-regional human rights mechanisms in Asia.

Sub-regional mechanisms in Asia: Are they truly human rights sensitive?

Concerted efforts have been made to bring about closer ties in the Asian region through the development of sub-regional bodies like the South Asian Association for Regional Cooperation (SAARC) in South Asia and the Association for South East Asian Nations (ASEAN). These organisations are not mandated to deal with human rights issues, yet the OHCHR sees them as possible "entry points for the promotion and protection of human rights, if the political will permits."

Before endorsing SAARC and ASEAN as potential human rights protection mechanisms, we must first study the characteristics and mandates of these bodies and assess whether they can evolve into effective human rights protection mechanisms in Asia.

SAARC

The SAARC Charter was signed by India, Nepal, Bangladesh, Maldives, Bhutan, Pakistan and Sri Lanka on 8 December 1985. The stated goals of the SAARC Charter are that the member states will work together, in a spirit of friendship, trust and understanding, to improve the people's quality of life; to accelerate economic growth, social programmes, and cultural development; to strengthen self-reliance among South Asian states; and to promote collaboration in economic, social, technical, and scientific fields. The promotion of human rights is not one of the listed goals of SAARC.

In 2002, SAARC adopted the Convention on Prevention and Combating Trafficking in Women and Children for Prostitution. The Convention fails on many counts. There was little informed NGO input

prior to the drafting. The result was a weak, inadequate and moralistic Convention. Its understanding of trafficking is confined to trafficking of women and children for the purpose of prostitution. It ignores the fact that women and children are often trafficked for use as domestic servants and other kinds of labour. Victims of trafficking also include men (and

Taking it easy

TWELVE years have passed since ASEAN first broached the possibility of setting up an ASEAN Human Rights Mechanism in 1993. Till date, no such a mechanism has been established. According to M.C. Abad Jr, Assistant Director in the Office of the Secretary-General of ASEAN, one of the reasons for slow progress has been the expansion in the membership of ASEAN - the different political orientations of its member states have made it difficult to reach consensus.

There has also been a lack of initiative on the part of member States like Thailand, Malaysia, Philippines and Indonesia - which have established NHRIs - when it comes to advocating for a sub-regional human rights mechanism.

boys) who are used as domestic servants, camel jockeys and the like. Its language includes words such as "evil" and "honour of human beings", terms that reflect a moralistic approach, and which are marginal to the effective addressing of the issue. While all the SAARC nations have signed the Convention, it has been ratified only by Bangladesh, Bhutan and the Maldives, which raises grave doubts about the effectiveness of the Convention.

The OHCHR has endorsed the 2002 SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution as a human rights Convention. But it must be emphasised that the Convention was primarily drawn up to protect the state party's interest in clamping down on criminal activity instead of upholding the rights of the individual.

SAARC has not yet adopted a specific and detailed uniform human rights charter nor have they agreed to create any common regional institution to monitor adherence and implementation of various human rights instruments signed by member countries or to provide redress to victims of human rights abuses and to impose sanctions or punishments on the perpetrators. The idea of drafting a South Asia Human Rights Code by SAARC has been mooted informally in human rights circles but no concrete action has been taken.

The drawing up of the 2002 Convention does not justify SAARC being promoted as the prospective human rights mechanism in South Asia by the OHCHR. These efforts indicate, at best, that SAARC is becoming more human rights "conscious".

In a region where "human rights" is still considered to be an internal or domestic concern, what is the scope for an organisation like SAARC, with its limited mandate, to intervene in cases of gross human rights violations within the borders of a member state? While SAARC can draft, and perhaps implement, the South Asia Free Trade Area (SAFTA) Agreement in the next ten years, or a convention for the prevention of cross border trafficking of women and children for the purposes of prostitution; can it intervene when hundreds of innocent people are killed during anti-minority riots in India or when members of the minority Ahmaddiya community in Bangladesh are persecuted?

Alongside regional human rights mechanisms, it is important for states to be human rights compliant at the national level by establishing national human rights institutions in accordance with the Paris Principles. In South Asia, Bangladesh and Bhutan are yet to set up a

human rights commission, while others such as the Nepalese and Maldivian Human Rights Commissions have not ensured minimum compliance with the Paris Principles.

ASEAN

The OHCHR has also identified ASEAN as a possible human rights mechanism in South East Asia. ASEAN is primarily engaged in promoting economic growth in South East Asia but it has broadened its mandate to regional security issues. ASEAN expressed its willingness to develop a human rights mechanism in a Joint Communiqué of the 26th ASEAN Ministerial Meeting held in Singapore on 23-24 July 1993 declared that, "in support of the Vienna Declaration and Programme of Action of 25 June 1993,.. ASEAN should also consider the establishment of an appropriate regional mechanism on human rights".

Some positive developments have taken place since then, including greater emphasis on the role of civil society and more attention to children's rights and women's rights, as well as cross border cooperation against environmental harm and transnational crimes.

The Working Group for an ASEAN Human Rights Mechanism was set up in 1996. It is an informal coalition of individuals and groups within the region who are working with government institutions and NGOs in the field of human rights. The Working Group follows a step-by-step, constructive and consultative approach involving governments, parliamentary committees, academia and NGOs. In July 2000, a Draft Agreement for the Establishment of the ASEAN Human Rights Commission was submitted by the Working Group to ASEAN officials as a working document to begin the process of consultation and dialogue. Since 2001, annual workshops on the regional mechanism have been jointly organized by the Working Group with the governments of Indonesia, the Philippines and Thailand.

It was soon realised that the process of establishing an ASEAN human rights mechanism needs to be a cooperative one, including ASEAN governments, national human rights institutions, NGOs and the Working Group for an ASEAN Human Rights Mechanism. (see box)

Both SAARC and ASEAN are mandated to bring about regional cooperation in South Asia and South East Asia respectively. Introducing human rights into the agenda of these organisations is not an easy task owing to the political differences between member states and their preoccupation with other regional concerns like economic cooperation. These organisations are not independent of their members and can therefore function only in the way their members want them to. Unfortunately, membership of SAARC or ASEAN does not require respect for human rights as a criterion. Thus, countries like Laos and Burma are respectable members of these very regional fora that are being pegged as the prospective sub-regional human rights mechanisms in Asia by the OHCHR.

What is required is a mechanism exclusively for the protection and promotion of human rights in the region, which cannot be achieved by simply adding human rights to the SAARC and ASEAN agenda. Some of the activities that SAARC and ASEAN are engaged in have an indirect link with human rights, for instance women, children, and trafficking, but these represent multilateral state interests in pursuit of development rather than human rights concerns.

More than two decades of negotiations and discussions on the subject have failed to produce the desired results. But that does not warrant a compromise by settling for lesser, inadequate regional human rights mechanisms such as SAARC or ASEAN.

...from page 4

More power to the Principles...

Principles, is to ensure the harmonization of national legislation with international human rights instruments to which the State is a party. This is restrictive; the Principles should require that the entire corpus of international human rights law be considered, not just those to which the State is party.

This requirement is evident when the NHRC of India, for example, claims that any recommendations deriving from the UN Convention Against Torture are not applicable to a discussion of its role simply because India is not party to the Convention. And based on this erroneous belief, the NHRC also refrains from adequately pressing the Government of India on the need to set down in domestic law an explicit reference to the prohibition of torture (*see p3: "Not our area, says Indian NHRC"*).

Moreover, the Paris Principles do not contain any non-derogable standards. Some NHRIs, according to their statute/ordinance, are barred from independently inquiring into abuses by armed forces. The Paris Principles are silent on this.

It must be remembered that the Paris Principles are the minimum standards for NHRIs. As NHRIs face more and newer challenges, it is important to ensure that the standards governing their work are constantly reviewed and upgraded.

Perhaps, the 10th annual meeting of the Asia Pacific Forum is a good time to start.

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Philippines human rights commission...

Task Force Detainees, a Philippines NGO, has stated that organisational and training issues remain unchecked within the BHRAC Program. However, the Medical Action Group, which monitors State-sponsored instances of torture, feels that the BHRAC Program's education initiatives have been successful and that citizens are now more aware of their human rights.

Finally, the CHRP is practically inaccessible from a public information viewpoint. The website of the CHRP is practically impossible to navigate and is outdated. As of 15 July 2005, the website's most recent posting was dated 14 December 2004. The website's site map is incomplete and lacks a search function.

In addition to the difficulty in finding information that is and should be available in the public domain, the website also lacks basic information. It does not contain a listing of barangay office locations or contact information and also lacks a staff listing. It does not display the CHRP's annual reports, making it difficult to ascertain the kind of activities the CHRP may have undertaken. It is also difficult to identify the CHRP's accomplishments and failings and to determine whether it is, in fact, meeting its goals. Additionally, the website does not specify how CHRP publications can be procured.

Crucially, the website does not even inform the public how to file a complaint with the Commission.

These are problems that can be very easily remedied, yet are indicative of the lacklustre approach of the CHRP when it comes to addressing its limitations.

It is due to these factors that the CHRP is unable to reach its full potential. Its character precludes the possibility of success.

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P.C. Sharma judgement...

tions for the effective implementation of international instruments, and encouraging the efforts of non-governmental organizations and institutions working in the field of human rights. It also includes, most importantly, the provision for "such other functions as it may consider necessary for the protection of human rights." And it is here that attention should have turned to the Paris Principles, as they refer to what should have been a beacon to the Court: the "competence and responsibilities" of institutions [emphasis added].

Determination may be drawn from what the Paris Principles envisage to be the role of Commissioners, as outlined in Section 3(a)-(g). If an appointee is suitably capable of fulfilling these tasks, additional to the express PHRA provisions, then he or she could be said to meet the criteria of Section 3(2)(d) of the PHRA. Additional to the Act, the Principles mention advisory submissions to Parliament on any matters, encouraging ratification of international instruments, contributing to reporting to UN bodies and Committees, assisting on the formulation of teaching programmes for schools and the like, and publicising efforts to combat discrimination, in particular racial discrimination.

A cross-reference of the professional experience of Mr. Sharma, to compound the argument put forward by Justice Y.K.

Sabharwal, does not exhibit any competency to fulfill these tasks, either within the PHRA or by reading into international guidelines to expand upon the "other" functions that the Act might envisage according to its spirit. What could a police officer know about the entire range of legislative provisions intended to preserve and extend the protection and promotion of human rights, about submitting shadow reports to the Committee on the Rights of the Child, for example, or combating racial discrimination and formulating programmes for teaching in schools?

Here the Principles contribute to what knowledge or experience would encompass. The Court instead held forth a positivistic alle-

Only a thorough amendment of India's Protection of Human Rights Act can halt the political manipulation and discrediting of the NHRC. And no institution is better placed to press for reform than the NHRC itself.

giance to municipal law and in so doing entirely missed the core component of Sharma's unsuitability to the post of Commissioner.

Conclusion

There are a number of factors that have led to the appointment of Mr. Sharma that could and should have been avoided. He should not have been forwarded for consideration, a move, to quote from Nirmala Sitharaman in the context of

the National Commission for Women (NCW), which "sends a message of utter disregard to institutions". Likewise, Mr. Sharma should not have been endorsed by five of the six members of the Select Committee. And he should have had the humility and good grace to turn down the offer, knowing full well the impact that it would have. The end result is that the NHRC is internally weakened and externally discredited, despite what the Supreme Court has to say about public perception and international guidelines.

The NHRC also has a lot to answer for. As a body that is supposedly free to speak its mind, it has been silent in its criticism. Whilst the Chairperson did let it be known that he was unhappy with the appointment, and has since expressed as much when pressured by BBC India's Hardtalk programme, the NHRC has, in fact, refused to take an official position. It has also been reticent in its dealing with the concerns of the NGO Core Committee on the subject, leading to the resignation of the SAHRDC executive director, Mr. Ravi Nair.

Only a thorough amendment of the PHRA can halt the political manipulation and discrediting of a once reputable institution. And no institution is better placed to press for reform than the NHRC. The irony, of course, is that a certain P.C. Sharma may not warm to the idea of shooting himself in the foot.

Unless the Supreme Court gives proper consideration to the much improved review petition of the PUCL, the decline in standards is likely to continue. At the time of writing, this remains to be seen.

Comments and suggestions are welcome

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