

HUMAN RIGHTS

FEATURES

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OPESCR: Adding substanceP3

Enforced Disappearances: No more secrets.....P4

INDIGENOUS RIGHTS

A Declaration long overdue.....P6

PRESSING ISSUE

Security, justice and restitution for Darfur.....P8

NHRIs at the Human Rights Council.....P9

Special Procedures: Procedural limbo?.....P10

And now, to work

High-Level Segment delivers cause for hope - along with the predictable platitudes and some horrific hypocrisy

SO it has begun at last. The inauguration of the new Human Rights Council marks the most significant change in the international human rights architecture in 60 years; in doing so, it also represents many uncertainties about the future operation of the international human rights system. Last week's high-level segment revealed great optimism among many States that the new Council will prove a substantial improvement in dealing with human rights abuses. However, beneath the platitudes and the politeness, it was also clear that many States enjoy an equal measure of optimism that the creation of the Council may mark a paradigm shift to a system where 'cooperation' and 'non-confrontation' means less willingness to hold States accountable for their rights records. The great irony of the week was surely that, for all the talk of ending 'politicisation' and 'selectivity', some States clearly intend to be as political and selective as ever in seeking to stymie international accountability.

An opportunity for change

In his speech to the Council's First Plenary Meeting, Secretary-General Annan called for States to make a "clean break from the past" in order to establish "a culture of cooperation and commitment...". The sentiment was echoed by many delegates, including many who emphasised the importance of the Council for achiev-

ing tangible change. The United Kingdom, for example, noted that "[w]hile we listened to the Secretary-General's inspirational words yesterday, countless numbers remained imprisoned for expressing their own views", while Australia acknowledged some of the human rights abuses that occurred over the period of last year's Commission. For its part, the United States

Fortunately, the rhetoric went beyond mere lip-service. Many statements suggested important principles to underpin the effective functioning of the Council. Numerous States endorsed the Secretary-General's call for human rights to be recognised as the 'third pillar' of the UN.

joined the High Commissioner in drawing specific attention to the cause of Aung San Suu Kyi, who celebrated her 61st birthday under house arrest on the day that the Council convened.

Fortunately, such rhetoric went beyond mere lip-service. Many statements suggested important principles to underpin the effective functioning of the Council. Numerous States endorsed the Secretary-General's call for human rights to be recognised as the 'third pillar' of the UN; as the President of the General Assembly put it, "[t]o place human rights on the same level as peace and security and development and to stress the interdependence of all three pillars

was an historic contribution to achieve security in a broader sense, a life in dignity for all." Some States even took this principle to its logical conclusion - that, as France expressed it, "[n]o subjects relating to human rights should be taboo", so that the "longer and more numerous sessions of the Human Rights Council will make it possible to ensure real follow-up and ongoing monitoring of its decisions...". In the context of numerous calls for technical assistance and capacity building (for example, from Zimbabwe, Egypt, Pakistan, India and China), it is also relevant that France drew particular attention to the importance of ending impunity for rights abuses: "The fight against impunity must be a common thread in all the technical cooperation work provided by this Council...".

States repeatedly reaffirmed the Council's commitment to deal with human rights in their totality. Many speakers drew attention to the important role of economic, social and cultural rights - including the often-cited right to development - both as independent entitlements and as corequisites to first generation rights. Brazil, for example, argued that "[h]unger and disease can...be seen as forms of anonymous torture...[t]hose affected by such scourges are in no position to enjoy other civil and political rights". The High Commissioner even went so far as to argue that, "properly understood, poverty continues to be the most

CONTINUED ON PAGE 2

What's on the table

DU E to the sheer amount of new and important procedural elements under review at the first session of the Human Rights Council, there is some confusion among observers as to what precisely is on the table for the week ahead. For this reason, a brief preview should prove helpful.

The first session of Monday morning will address 'implementation of GA resolution 60/251', the resolution which provided for the establishment of the Human Rights Council. This session should provide a forum for open discussion amongst member States on how best to proceed in the transition from the Commission on Human Rights to

the Human Rights Council. Informal consultations on a draft agenda for the year have been ongoing since April in Geneva, and the opening session on Monday may provide an opportunity to summarise these meetings formally, to provide additional statements on what States see as priority transitional issues (Special Procedures, Universal Periodic Review etc) and perhaps (although unlikely) to elaborate on the programme of work for the following year.

Following the discussion of implementation, the Council will then move to discuss the final reports of the five Working Groups of the Commission whose mandates have expired. This will run

AGENDA for the week

from Monday morning until the end of the Tuesday session. Beginning on Monday with the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, which was mandated to "make recommenda-

tions with a view to the effective implementation of the Durban Declaration and Programme of Action" and "prepare complementary international standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance", the Council will then decide on adopting its findings, and will decide whether to extend the mandate of the Working Group. The same applies to the Working Group on the Right

to Development, discussed on Monday afternoon, which has specifically requested an extension of its mandate.

Tuesday sees the Council address the final deliberations of the Working Groups on the Consideration of the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, on the Draft Convention on Disappearances and on the Draft Declaration on Indigenous Peoples. This will constitute the Council's first opportunity to adopt new normative standards of international human rights law, and the substance of each are dealt with in consecutive articles in this week's *Human Rights Features*. This might also be of most significance to those who have spent decades

CONTINUED ON PAGE 11

HUMAN RIGHTS FEATURES on the Web: www.hrdc.net/sahrhc/hrCouncil06/index.htm

from page 1...

And now, to work...

serious, invidious and widespread human rights violation that we must confront."

'New instruments and working methods'

The need for new approaches was a common theme of many statements. The President of the Council used his opening address to call for "new instruments and working methods"; many States obliged, suggesting a diverse array of new approaches. New Zealand, for example, suggested "focussed panel discussions, a decision to return to an issue when more information has been gathered, or referral elsewhere in the UN system". Indonesia renewed the innovative suggestion that one of the Council's annual meetings could be held outside Geneva, "as a way of spreading awareness and appreciation of its important work".

Interestingly, Egypt argued that "the reform of the human rights machinery must be linked to the comprehensive reform of all United Nations bodies, including the Security Council and the General Assembly". It was left unclear whether Egypt meant this comment to endorse the mainstreaming of human rights within the UN structure.

Numerous suggestions were made about the best approach to the Universal Periodic Review. For example, Lithuania argued that the review process will need to be implemented promptly in the case of those States whose Council membership expires after just one year. This contrasts New Zealand's suggestion that the review of those States could be held in abeyance, so that the formulation of the Review format need not be rushed for this reason alone. The Netherlands' proposal was perhaps the most comprehensive, comprising five specific points: (i) that the Council should assess every country's human rights situation once every four years; (ii) that a separate standing chamber or working group should be created to actually conduct the reviews; (iii) that the working group should produce a report for each country under review; (iv) that the Council should take a decision based on that report, including conclusions and recommendations; and (v) that the working group should "closely monitor" the implementation of recommendations, and should be able to refer non-compliance to the plenary session of the Council.

As in the past, many reform suggestions involved the Office of the High Commissioner itself. Both Russia and China, for example, argued that the Office should improve its transparency and geographical representation. The Commissioner responded, claiming that the increased funding provided for the Office "provides us with a unique opportunity to expand our staffing to better reflect the pluralism that human rights work requires...". Both Russia and China also argued, respectively, that the Office should increase its "accountability to the UN Member States" and to "subject its work to the oversight of Member States".

China went further, in comments notable for their bluntness; the Vice Minister of Foreign Affairs hoped that the Office would improve the "professional competence of its staff", while, in the formal dialogue with the High Commissioner on Friday, the Chinese delegate said that, when it came to employing staff, "no-one should underestimate other people's IQ".

Country-specific resolutions

The issue of country-specific resolutions proved a contentious one for the Commission, and it was no surprise that the High-Level Segment revealed a wide disparity of approaches.

A number of States strongly defended the importance of addressing country-specific situations. Finland, for example, justified such resolutions as integral to the role of the Council: "...a Human Rights Council barred from addressing situations in different countries would be just as absurd as would be a Security Council unable to deal with any concrete threats to international peace and security." The

Netherlands similarly argued that "we should all recognise that the Council has the legitimate authority to make statements about the human rights situation in our countries". The United Kingdom agreed that "it is legitimate to discuss challenges and concerns in a particular State".

Many States, though, remained sceptical of the country-specific approach, including

In the hands of the LMG and their supporters, the need for "adequate balance" is not so much a call for a more holistic treatment of rights as it is a demand for less accountability on abuses of civil and political rights.

If 'balance' was the biggest buzzword, opposition to 'double standards' ran a close second. In the hands of the LMG and supporters, avoiding 'double standards' does not mean adhering to universal benchmarks. On the contrary, it apparently means quite the opposite. For example, Russia argued - with no hint of irony - that avoiding 'double standards' means applying different standards for different States.

some that do not generally trumpet the tune of State sovereignty. For example, in a statement otherwise notable for its support of international accountability, Brazil argued that "[c]ountry resolutions [should] only occur in exceptional cases of gross violations, in situations which are both grave and urgent."

Business as usual?

Most of the non-interventionist sentiments were much less nuanced. Regrettably, it is clear that many States are opposed to the ideals of universal rights and the importance of effective accountability.

The touchstone for this approach was the asserted need for "balance". For example, the Like-Minded Group (this year listed as comprising Algeria, Bangladesh, Belarus, Bhutan, Burma, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, Syria, Venezuela, Vietnam and Zimbabwe) wrote in their 'non-paper' that "The agenda of the Council must respect an adequate balance in the treatment of all human rights categories, civil, cultural, economic, political and social rights, in particular the right to development, as well as individual and collective rights."

Of course, it is difficult to argue with this statement as an abstract principle. However, in the hands of the LMG and their supporters, the need for "adequate balance" does not so much represent a call for a more holistic treatment of rights as it reflects a long-held desire for less accountability on abuses of civil and political rights. Vietnam said as much: "the former Commission was too politicised, and emphasised too much on civil and political rights, while failing to pay sufficient attention to economic, cultural, social and development rights." For Singapore, 'balance' between rights is apparently about cherry-picking which rights to respect and when: "Political, economic and social rights are equally important, but it is for each country to decide for itself how it will balance their competing demands. A balance must also be found between the rights of the individual and those of the community to which every individual belongs...". Indeed, for all their championing of economic, social and cultural rights, it bears noting that the vast majority of LMG members are opposed to the drafting of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (see "Adding Substance to Procedure", page 3).

The most tangible illustration of the implications of this approach came in the Organization of Islamic Conference paper, which (after reciting almost verbatim the LMG stance quoted earlier in this article), listed the following issues as themes for the agenda of the Council: "Right to self-determination; occupation and its implications and consequences on human rights; violations of human rights in Palestine and other occupied Arab territories including Syrian Golan; racism, racial discrimination, xenophobia and combating defamation of religions; promotion of tolerance and respect for freedom of religion and belief; and the Right to Development." For an organisation claiming commitment to the ideals of 'universality', 'objectivity' and 'non-selectivity', the list of themes was breathtaking for its irony. Few can deny the importance of the individual issues raised, but the OIC will surely struggle to sound sincere with a list so - how does one put it? - 'selective' and 'politicised'.

If 'balance' was the biggest buzzword, opposition to 'double standards' ran a close second. In the hands of the LMG and supporters, avoiding 'double standards' does *not* mean adhering to universal standards. For example, Russia argued - with no hint of irony - that avoiding 'double standards' means applying *different* standards for different States: "We also need to relieve this area of international cooperation from elements of confrontation, politicization and 'double standards'... The assessment of the human rights situation in individual States should take into consideration historic, economic, social and confessional [*sic*] factors and traditions, as well as basic socioeconomic conditions." One might be forgiven for wondering whether opposition to 'double standards' might be little more than an excuse for some diplomatic 'doublespeak'.

Depressingly, Cuba used its statement not to discuss its specific obligations as a Council Member - nor even to make constructive suggestion about the functioning of the Council - but to score political points against the United States and the European Union (all while supporting "non-selective mechanisms", of course). Provocatively, Cuba promised to "speak out for the rights of the American people and, particularly, for the rights of its most discriminated and excluded sectors". The United States replied, making a welcome commitment to "work with the Council Members to support the United Nations' historic mission to promote and protect the human rights of all the world's citizens", and rejecting Cuba's invitation to represent the American people.

Specific issues

Among all the abstract discussion, there were clear indications of the particular issues that some States will pursue this week and in subsequent Council sessions.

Perhaps the most prominent was the issue of Palestine. The topic drew widespread comments from many States. Malaysia, for example, argued that this single issue "represents the litmus test for the Council's credibility and legitimacy", while Saudi Arabia went so far as to argue that "[t]he fact that the Middle East is suffering more than other regions of the world from lack of stability, peace and security is due to Israel's occupation of Palestinian and Arab territories." Jordan called upon the Council to "concentrate our efforts" on the Middle East, while justifying unspecified acts of "legitimate resistance against occupation".

Support for the Palestine issue was not limited to traditional corners, though - China pledged to "support the Council in continuing to closely monitor the human rights situation in the occupied Palestinian territory in the interest of early realisation of the Palestinian people's human rights, including the right to self-determination".

The Palestinian delegation spoke only briefly, during the dialogue with the High Commissioner, and called for "practical steps in order to put an end to the unjust economic siege imposed on our people", "a fact-finding mission in order to prevent Israelis from killing civilians" and "to put an end to the occupation".

CONTINUED ON PAGE 11

Adding substance to procedure

The Optional Protocol to the ICESCR is on the brink of doing just that

GARETH SWEENEY

THE opening day of the High Level Segment produced strong statements of hope for the future. According to Secretary General Kofi Annan, any improvement of the work of the Council, which may come to result in Annan's desire for its elevation to the status of a principal organ of the UN in five years, is incumbent upon a 'change of culture' guided by 'co-operation and commitment'. Annan emphasized that such a change required a realisation of the fact that human rights are a single body of obligations that constitute an interlinking and mutually reinforcing pillar of the United Nations, alongside economic and social development and international peace and security. His first hope in realising such a 'change of culture' was that the Council might reach "agreement on an additional protocol establishing avenues for lodging complaints under the Covenant on Economic, Social and Cultural Rights."

This is, of course, the reiteration of a desire from successive high profile members of the UN. The High Commissioner has on numerous occasions referred to the fact that, as she stated to the Commission's High Level Segment in 2005, "there can be no cause today to question the equal status of economic, social and cultural rights." In her address to the first session of the Human Rights Council in 2006, she adopted a more emotive tone, declaring that: "Too many times the promise of protection has gone unmet. When lives and livelihoods are lost or imperiled, the emptiness of paper guarantees, not backed by the genuine resolve to act, is nothing short of betrayal." And so it is that in its first session the Council may lay to rest one of the most divisive issues in international human rights law - the relegation of economic, social and cultural rights (ESCRs) to the second tier of protection - through a mechanism that will require more than "the emptiness of paper guarantees".

The following article does not rehash the technical minutiae that surround the need for an Optional Protocol (the position papers of the NGO Coalition for an Optional Protocol already address the subject entirely and provide an excellent advocacy tool). Rather, the article aims to explain the likely outcome of the Human Rights Council's decision on the future of the OP according to the apparent positions taken by Member States.

Background

Despite the unequivocal assertion by the international community in 1993 that all rights are "universal, indivisible and interdependent and interrelated", the position of many States remains that ESCRs are mere aspirations to be progressively realised and cannot be subject to a quasi-judicial complaints mechanism at the international level, in the face of overwhelming evidence to the contrary. It is this obstinacy, often emanating from States who find no difficulty in claiming that the elevation of civil and political rights is an imposition of Western values, which has blocked the possibility of attaining any form of equal status.

The issue of a complaints mechanism for the International Covenant on Economic, Social and Cultural Rights (ICESCR), in accordance with the authority of other treaty monitoring bodies, and the contentions that surround it, are old. Pursuant to the World Conference on Human Rights, the Committee on Economic, Social and Cultural Rights (CESCR) discussed and issued reports concerning its work on a draft optional protocol and issued a draft for consideration by the CHR in 1997. The protocol mandated the CESCR with the competence to receive individual complaints and established a

communications procedure in accordance with the mandates of other treaty monitoring bodies.

Rather than adopt the optional protocol, the CHR spent the following three years receiving communications from states, appointed an independent expert for two years, and followed with a Working Group to consider the elaboration of an optional protocol. This lengthy process has provided exhaustive examinations of all issues relevant to the creation of an optional protocol. These have included, time and again: the justiciability of ESCRs; normative understandings of "progressive realization" and the obligations to "respect, protect and fulfill" ESCRs; the debates surrounding the availability of resources, allaying fears of an impact on national executive decision making; the complementarity of such a protocol with other treaty body mechanisms; the need for international cooperation; the applicability of the Committee's 1997 draft protocol, and so forth.

The Working Group's mandate expired

A quick survey suggests that whilst 31 of the 53 State participants favour the adoption of a mandate to draft at the first session of the Council, and the majority of these prefer that this would encompass a comprehensive approach to the scope of communications contained within the resolution, only 13 of these States are members of the Human Rights Council.

Amongst those who are either resolutely opposed to any Optional Protocol (Japan, Australia, US, Netherlands, Pakistan, South Korea, Saudi Arabia), or who express reservations to drafting at this stage (Romania, UK, Canada, Austria, Germany), all bar Australia and the US are members. Therefore, the outcome rests squarely with the silent majority of the Council, which may yet tip the balance.

in March 2006, and is now awaiting renewal with amendments to begin the drafting phase. The options that now present themselves before the Council are to decide whether to renew the mandate of the Working Group, whether then to move toward the drafting of an optional protocol and, if so, by whom.

Final Deliberations of the Working Group

The Working Group's deliberations in 2005 lacked focus and were largely derivative. However, the task bestowed upon the Chairperson of drafting an 'elements paper' proved fruitful, even accounting for being asked, at the lowest point, to consider "the option of 'no option'". This report of the Chairperson was reasonably exhaustive (although it is worth noting that certain States such as Austria disagreed with this as a means of creating an aperture for potentially requesting further studies in the future), encompassing all elements of the communications procedure (the scope of rights, admissibility, interim measures, recommendations and follow up etc.), the possibility of an inquiry procedure, an inter-state procedure, and cross cutting issues (resource allocation, relationship with other mechanisms, international cooperation etc.).

Amongst the options presented in the elements paper was the elaboration of a 'comprehensive approach' to the communications procedure, whereby all rights of the Covenant would be subject to the procedure in accordance with the indivisibility of all human rights.

With the elements paper as the corner-

stone of discussions for the final session, and perhaps mindful of the fact that the 2006 session of the Working Group was the last mandated session under the Commission's resolution, the outcomes were, in fact, relatively positive. The strong support offered by GRULAC and the African Group would indicate that a sufficient consensus has been reached amongst those who participated in the Working Group for the adoption of a new mandate allowing the Chairperson to begin preparing a working draft. Yet elsewhere the collective positions of States' support for an Optional Protocol is atypical in that it has split traditional groupings, most notably in the case of the European Union. Whereas Portugal (the initial sponsors of the Commission resolution to establish a Working Group) and Finland, for instance, have expressed their full support for a comprehensive OP, others, such as the Netherlands, oppose any OP, whilst Austria and the UK (joined by Canada), although not per se opposed to an OP, have expressed clear reservations as to its potential scope and seek further examinations of 'a la carte' options prior to any drafting.

But it is possible to place too much emphasis on the importance of a positive outcome of the Working Group's deliberations (see box).

The Balance of the Council

It is important therefore to retreat to the last substantive resolution before the Council in 2004, pertaining to the extension of the mandate of the Working Group for a further two years, in order to gauge how states are likely to act in 2006. The eventual adoption of the 2004 resolution after seven rounds of votes on attempted amendments, was preceded by commentaries from an alliance not often visible at the CHR. Both China and the US openly rejected an optional protocol, expressing its concern that the language describing such rights as legal entitlements threatened sovereignty and gave rise to an "incorrect view".

India added 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. Most egregiously, Saudi Arabia then moved to discontinue the mandate of the Working Group, and was supported by Australia, with Indonesia and the Russian Federation abstaining. The following States then voted in favour of Pakistan's request that a member of the CESCR not be invited to the Working Group's next session: Australia, Bhutan, India, Nepal, Pakistan, Saudi Arabia, Sierra Leone, Sri Lanka and the US.

What may be expected?

Of those states that sought to obstruct the work of the Working Group in 2004, half remain members of the new Human Rights Council. Many of the most aggressively anti-OP states (US, Australia) are absent, but many (Japan, Saudi Arabia) remain. The above rudimentary sketch would however indicate that the odds favour the extension of the mandate of the Working Group and the preparation of a draft by its Chairperson, particularly given that the general support of the African Group (13 votes), GRULAC (8 votes) and the individual votes of States such as Azerbaijan, France and Finland should be sufficient to carry a majority vote.

However, it is likely that the African Group will also insist on an express inclusion of the need for 'international assistance' in the provisions of the OP "the establishment of a fund to assist developing States in the implementation of the Committee's recommendations", an element that was defeated by one vote on the floor

CONTINUED ON PAGE 11

No More Secrets

Time for the Convention on Enforced Disappearances

The man who can keep a secret may be wise, but he is not half as wise as the man with no secrets to keep.

- Edgar Watson Howe

WHEN the UN Commission on Human Rights ended its last session in March, the fate of the Draft International Convention for the Protection of All Persons from Enforced Disappearances was left uncertain. Member States at the new Human Rights Council face both a challenge and an opportunity: to win back some of the credibility lost by the worst inadequacies of the Commission and to set a constructive tone and ethos for the new body. The Council must push forward on the Draft Convention and approve it for the General Assembly as soon as possible.

Progress on enforced disappearances

The Commission made incremental progress over the past thirty years in combating the problem of enforced disappearance. In 1980, the Working Group on Enforced or Involuntary Disappearances initiated drafting of a Declaration on the Protection of All Persons from Enforced Disappearances; it was adopted by the General Assembly in 1992. The Declaration is not legally binding on States, and has consequently made little impact. Indeed, the phenomenon of enforced disappearance continues unabated in all regions of the world, as indicated by annual reports of the Working Group. Moreover, few States have taken specific action to comply with the standards set out in the Declaration.

Other relevant instruments emerged, including the 1994 Inter-American Convention on the Forced Disappearance of Persons and the 1998 Rome Statute of the International Criminal Court. However, neither of these instruments forms an effective response to the problem: the former is limited in scope, while the latter is restricted to "exceptional circumstances." This legal vacuum underscores the urgent need for a separate instrument to define and address adequately the scourge of enforced disappearance.

At its 58th Session, the Commission created an inter-sessional open-ended Working Group to develop a legally binding instrument. On the basis of a 1998 draft from the Sub-Commission, and in light of the 1992 Declaration and an independent expert report, the Working Group adopted a final draft of the Convention in its fifth and final session from 12 to 23 September 2005. The adoption of a draft was a tribute to the efforts of many State representatives, the Chair of the Working Group (Bernard Kessedjian) and the long-running efforts of a coalition of NGOs, including FEDEFAM, AFAD and the We Remember Foundation).

Achievements of the Draft Convention

The draft Convention is a compromise text that retains the essential character of the Declaration; taken as a whole, it is a strong and positive statement against enforced disappearance.

For the first time, the entitlement not to be subjected to enforced disappearance is recognised as a non-derogable right. It has been noted that disappearance amounts to a cumulative human rights violation of at least three essential rights: the right to recognition as a person before the law; the right to liberty and security of the person; and the right not to be subjected to torture and other cruel, inhuman and degrading treatment or punishment. Nonetheless, it is

important - both for the recognition of the problem and for its redress - that the right against enforced disappearance is enshrined specifically.

The Convention defines an enforced disappearance as "an arrest, detention, abduction or any other deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by

The right to truth

The right to information was a fundamental aspect of NGO lobbying on the Convention; it is a crucial form of redress for relatives of disappeared persons and an important safeguard against the practice. Article 18 of the Draft Convention represents a landmark development by committing States to guarantee family members or other representatives substantial information, including details of a detention, the whereabouts of a detained person, details of a detained person's release and information on detainees' health and, where necessary, information concerning the circumstances of death.

Regrettably, there are exceptions to this principle. Article 20 enables States to refuse a request for information "on an exceptional basis", where a detainee is "under the protection of the law" and such secrecy is necessary for "privacy or safety", criminal investigation or "other equivalent reasons" (presumably including national security).

Article 20 rightly emphasises that exceptions cannot be used to justify "secret detention"; nonetheless, there remains a clear risk that this provision will be misinterpreted by States to justify the practice of disappearance *de facto*, if not *de jure*. As numerous NGOs have emphasised, the vast majority of enforced disappearances involve victims all too concerned to have their identities and circumstances known.

concealment of the fate or whereabouts of the disappeared person..." (Article 2).

A final criterion, "which places the person outside the protection of the law" became the so-called 'third and half element', thus, allowing for differing interpretations of the text. A United States proposal to introduce the element of intent was vehemently opposed and

Article 26 of the Convention creates an independent monitoring body - the Committee on Enforced Disappearance, comprising 10 experts serving in their personal capacity. The creation of such a mechanism is one of the major developments of the Convention.

rightly dismissed. Inclusion of intent would have unnecessarily narrowed the definition, introduced subjectivity and made it more difficult to establish proof, especially in cases where States refuse to divulge information.

The Convention improves upon the Declaration in several significant ways. It establishes the principle of universal jurisdiction among member States party to the Convention, a critical success that the Declaration failed to achieve. The definition of the crime has been elevated to that of a crime against humanity, improving upon the narrow conception laid out in the Preamble to the Declaration. Formerly, the "systematic practice" of enforced disappearance was considered to be "of the nature of a crime against humanity" (Preamble to the Declaration, emphasis added). The Convention

text, however, is stronger: "[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity..." (Article 5).

The Convention adopts an expansive interpretation of the concept of a victim: "the disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance." Thus, anyone who has been adversely affected, including family members and relatives, may be considered a victim according to the definition. Significantly, this has direct implications on the scope of the right to reparation, which extends to all "victims" of enforced disappearance (Article 8(2)).

Recalling Article 18 of the Declaration, the Convention prohibits the granting of amnesty to perpetrators - a change welcomed by NGOs and the majority of States, and a major step in the fight against impunity. Some States had proposed that the granting of amnesty should be determined based upon the seriousness of the acts; this weakening of the principle was rightly rejected. Further, the Convention reaffirms the obligation of member States, elaborated initially in the Declaration, to include enforced disappearance as a crime under domestic penal codes, setting a sharp standard for countries to follow.

The inclusion of non-State actors within the text (for example, terrorists and insurgent military forces) is a noteworthy achievement on a major area of contention. Delegations advocating the inclusion of non-State actors argued that enforced disappearance is no longer confined to the domain of the State, since crimes are often perpetrated by non-State actors, the Convention should cover such actors and should draw attention to States' responsibility over them. Opponents argued that their inclusion gives excessive prominence to non-State actors and de-emphasises States' primary responsibility for enforced disappearances.

For opponents, enforced disappearance carried out by the State, or with its acquiescence, is a distinct offence requiring specific measures.

Ultimately, it was agreed that non-State actors would be dealt with in a separate article rather than the article of definition.

This is an effective compromise position: it emphasises States' responsibility for enforced disappearances as it applies to non-State actors without diminishing the force of the Convention.

Article 8, relating to the statute of limitations, has been strengthened. One crucial issue of contention was whether a limitation period - if a State chooses to apply one - should begin at the moment that a victim is detained or upon the victim's death or discovery. It was agreed that the period should commence at the "moment when the offence of enforced disappearance ceases, taking into account its continuous nature".

Adoption of this wording is a key achievement of the text; this position assists in deterring perpetrators by, for example, the concealment of evidence or of other information. Critically, it was also decided that the statute of limitations does not apply in the context of a crime against humanity.

An independent monitoring body

Article 26 of the Convention creates an independent monitoring body - the Committee on Enforced Disappearance - comprising 10 experts serving in their personal capacity. The creation of such a mechanism is one of the major developments of the Convention.

Despite concern for the proliferation of
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ENFORCED DISAPPEARANCES

A priority for the Human Rights Council

PATRICIO RICE

THE question of an International Convention against Enforced Disappearances was one of principal themes mentioned in speeches made during the inaugural session of the new UN Human Rights Council on Monday June 19th in Geneva.

The Human Rights Council is a new UN organ which replaces the Commission on Human Rights founded in 1945 and that had as its first outcome the drafting of the Universal Declaration of Human Rights in 1948. Its history afterwards was indeed contradictory as it continued to produce important standard setting documents but had little influence on the ground for the protection and promotion of human rights. Many years have therefore gone by, which were witnesses to genocide, repression and political persecution in all corners of the world with little or no immediate response from the UN.

However much of the debate on the Commission and the Council is not only theoretical for FEDEFAM (Latin American Federation of Associations of Relatives of Disappeared Detainees) and other organizations of families and survivors of grave human rights violations, but in a certain sense extremely dangerous as it has given to States the perfect excuse for a paralysis in the consideration of human rights during several months. In March this year the Commission was effectively closed down in a very controversial decision. Weak as it may have been the Commission was at least functioning and the Council had not even began its activity.

The Council promises an important new hierarchy for human rights on the international agenda but how that is to be achieved is still unknown. The chosen tool is a public periodic review process (every 4 years) of the situation of human rights in each of the Council's 47 member States. But we do not know what will happen with the rest of the 140 other countries members of the UN and above all if it will be prepared to examine the situation in the US, the world power that was the chief promoter of the Council but was significantly absent for its inauguration. The US is not even a member of the Council and it is feared that it will try to constantly undermine its more decisive initiatives as together with Israel, it finally voted against its creation in the UN General Assembly last March.

This ambience of general scepticism towards the Council has been so strong among human rights activists that generally speaking they have not travelled to Geneva for its inauguration. Unlike the sessions of the Commission it was not at all difficult to get good seating in the space reserved for NGOs.

The only two sectors present for the occasion were both organizations who are trying to win approval for the International Convention against Enforced Disappearances and representatives of indigenous peoples who

are trying to get the Council's support for a Declaration on the Rights of native peoples. That is to say that the approval of these two documents by the Council before it ends its session on June 30th has now become a litmus test for its future credibility. A failure to act on either of these two texts will provoke even greater scepticism about the possibility of the UN engaging in effective action on behalf of human rights in today's world.

Judging from the speeches we have been hearing, it would seem that there is finally a clear awareness among the majority of States that much is at stake in the debate on the Convention against Enforced Disappearances.

The UN General Secretary himself Kofi

GUEST COLUMN

Patricio Rice

Annan in his inaugural speech surprised us when he said: "The Commission has also bequeathed to you two vital documents- the draft Convention on Enforced Disappearances and the draft Declaration on the Rights of Indigenous Peoples. You have a chance, by considering and approving those instruments at the earliest opportunity, to start your work with a tangible achievement - one that will bring hope to large groups of people who have lived in a

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dark shadow of fear."

During the speeches of foreign ministers heard during the High Level segment, there were many explicit mentions of the need to approve the Convention on Enforced Disappearances. One could highlight the words of Jorge Taiana (Argentina), Paulina Veloso (Chile), Belela Herrera (Uruguay), the statements of European Union members, Japan, among many others.

During the afternoon Mr. Philippe Douste Blazy, Foreign Minister of France, convened a press conference which was also attended by Minister Taiana from Argentina and representatives of Belgium, Chile, Spain and

Mexico, whose Ambassador Luis Alfonso del Alba is chairing the Human Rights Council itself. The principal international human rights organizations such as Amnesty International, International Commission of Jurists, International Federation on Human Rights (FIDH) and Human Rights Watch made a joint statement, and FEDEFAM also distributed among journalists our own statement. The objective of meeting with the press was to promote the Convention, and France expressed its intention, if necessary, to request a vote from Council members although the ideal outcome would be that the Council support the initiative by a consensus resolution. The delegations of FEDEFAM, AFAD (Asian Federation on Involuntary Disappearances) and We Remember (Belarus) present in Geneva are very pleased with this first day of the Council and hopeful of a positive outcome.

There is now an intense lobby program ahead. Marta Vasquez (Mothers of Plaza de Mayo -Founding Line) will address the Council itself on Thursday and on Friday there will be the launch event in a parallel meeting of an NGO Coalition in favour of the Convention. That same day an open letter to the Council in support of the Convention signed by leading world personalities will be handed over to Ambassador del Alba.

On Monday June 26th there will be a special evening event in the "Memorial Garden of the Disappeared" which will be attended by French Ambassador Bernard Kessidjan who chaired the Working Group that approved the draft Convention. And from Tuesday 27th on comes the moment of truth when the debate on the Convention is scheduled and a decision has to be taken by the Council before Friday 30th June.

France has already prepared the necessary resolution and has secured sponsors from all regions. However not all doubts have so far been dissipated. We know there is opposition from many very important countries such as Russia, China, USA and India. We have repeatedly heard those voices during the drafting process in the Working Group. The doubt now is about their current position.

We believe that in the end as it is a Convention those States in disagreement always have the option of not signing or not ratifying the instrument. What is important to us is that there is a vast majority of States who want to do something about enforced disappearances and they cannot have their hands tied by those few but very powerful countries. Families of the victims and survivors have suffered in that situation for too many years. It is for this reason that we say: "Convention Now! For the Right not to be Disappeared."

- Patricio Rice is Senior Adviser, FEDEFAM (Latin American Federation of Associations of Relatives of Disappeared Detainees)

from facing page...

Enforced disappearances: No more secrets now

human rights instruments, proponents (led by Italy, Spain and some Latin American States) asserted the need for an independent body that would be flexible and able to respond to emerging situations. NGOs supported this decision. As Human Rights Watch explained (27 September, 2005), the creation of the independent monitoring body "guarantee[s] the treaty's effectiveness in the future, even after reforms of the UN human rights system".

The monitoring body is mandated to carry out five core functions. These are: consideration of State reports, county visits (with State permission), individual complaints, humanitar-

ian/urgent action, and referral to the General Assembly through the Secretary General. The two latter functions are novel features that are not found in other instruments.

A proposal to restrict state visits to situations which are deemed "massive and systemic" was introduced (supported by China, India and Egypt). With adamant opposition to this weakening of the text, the final wording was amended to "grave violations".

A moderate improvement on the proposal, the ambiguity of this wording continues to inject subjectivity into the document, and unfortunately restricts the body's ability to carry out

its preventive role.

The need for support

Despite the dilution of key provisions, the Convention addresses key issues and is a major step forward both in creating binding obligations for States against enforced disappearance and in holding perpetrators to account. Further postponement would constitute a betrayal to the victims of enforced disappearance and their families, not to mention the NGOs that have worked so hard to bring this issue to its current state.

The Council should adopt the draft Convention Against Enforced Disappearances as a vital first step to establishing its reputation as a strong and effective body capable of promoting and protecting all human rights.

A declaration long overdue

Draft Declaration on the Rights of Indigenous Peoples

MMUCH was said at the High-Level Segment last week about the need for the Council to mark a distinct change from the Commission. The Draft Declaration on the Rights of Indigenous Peoples will pose an early challenge for the new Council when it gets down to business this week. This article will outline the need for such a Declaration, and the key components of the current draft. The article argues that, notwithstanding concerns expressed by some States, the current draft is a constructive addition to the development of indigenous rights, and one that deserves the approval of the Council.

21 years young: a workable draft at last

By anyone's standards, the Draft Declaration has been a long time coming. The UN Working Group on Indigenous Populations ('WGIP') was created by the Economic and Social Council in 1982, as a subsidiary organ of the Sub-Commission. The WGIP began work on the Declaration in 1985; a draft was adopted by the UN Sub-Commission nine years later, in 1994. When the Sub-Commission submitted the draft to the Commission, the Commission established in 1995 the inter-sessional Working Group on the Draft Declaration ('WGDD'). Unlike the WGIP, a body of independent experts, the WGDD comprises State representatives.

The Commission initially aimed to have the Declaration adopted by the end of the International Decade of the World's Indigenous People, in 2004. Regrettably, problems achieving consensus - both among States and among indigenous peoples - made this impossible.

However, by the end of the Eleventh Session of the WGDD in February this year, the Chairperson-Rapporteur (Peruvian Mr Luis Enrique Chávez) concluded that his revised proposed draft would be presented to the Commission for consideration as a final compromise text. Now, 12 years after the adoption of a draft by the Sub-Commission and 21 years after drafting work began, the new Council has a unique opportunity to affirm its commitment to indigenous rights by approving the Draft Declaration and recommending it to the General Assembly.

The need for a Declaration

The need for a Declaration on the Rights of Indigenous Peoples is a pressing one. Current international customs and treaties do protect many indigenous rights in many ways; however, there remains no single or coherent affirmation of the special role and particular rights - including group rights - enjoyed by indigenous peoples. This is wrong as a matter of principle; it is also especially distressing given the discrimina-

tion faced by indigenous peoples in so many ways.

In particular, the only other prominent treaty directed at indigenous rights - the 1989 International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries - is lacking in many respects. This was noted by the 2004 Joint Submission by numerous indigenous groups (Grand Council of the Crees et al) to the Office of the High Commissioner for Human Rights. First, Convention No. 169 does not deal with the issue of self-determination.

Self-determination of 'peoples' generally

The Draft Declaration will not be legally binding upon States. However, once adopted, it will establish an important normative standard for international treatment of indigenous peoples, and set a framework and foundation for the possible future development of a binding Convention. To that end, the draft comprises a number of important achievements.

is well-established in international law; for example, as common Article 1 of the International Covenants. However, the extension of the recognition of this right to indigenous peoples - at least in a qualified form - is an important and overdue development of group rights in international law, as well as a conceptual justification for the special recognition of indigenous peoples' rights generally. As the Joint Submission recognises, "the human right of self-determination is indivisible, interdependent and interrelated with all other human rights". The recognition of this collective right is central to the Draft Declaration (Article 3).

Second, as a specialised agency, the ILO has a different purpose to the Council and the General Assembly. The recognition of indigenous rights deserves the imprimatur of the international community as a whole, not merely the support of an important but specialised agency.

Third, as the Joint Submission notes, indigenous representatives have been involved much more extensively in WGDD drafting process than they ever were in the formulation of ILO Convention No. 169.

Finally, it bears noting that ILO Convention 169 never received extensive or widespread support; it has been ratified by only 17 States, of which 13 are in Central or South America.

The international human rights framework needs a coherent Declaration on the Rights of Indigenous Peoples. The drafting process of

the past 21 years has been slow and often frustrating. However, the resulting draft is a balanced and coherent statement of indigenous entitlements that deserves international support.

The current draft

The Draft Declaration will not be legally binding upon States. However, once adopted, it will establish an important normative standard for international treatment of indigenous peoples, and set a framework and foundation for the possible future development of a binding Convention.

To that end, the draft comprises a number of important achievements.

The Declaration reaffirms many entitlements already enjoyed by indigenous people in international law. The draft recognises the right of indigenous peoples and individuals to be free from discrimination on the grounds of origin or identity (Article 2), including in employment (Article 18). It affirms the individual entitlement to a nationality (Article 5). The freedom from acts of genocide is acknowledged, and it is emphasised that forcible removal of children can amount to such an act (Article 6).

Further, the draft gives specific recognition and protection to the role of indigenous culture. The Declaration calls upon States to provide effective redress for actions taken with the aim or effect of depriving indigenous peoples of their integrity as distinct peoples; of dispossessing such groups of lands, territories or resources; for forced assimilation; and for propaganda designed to promote racial or ethnic discrimination (Article 7).

The Declaration recognises the right of indigenous peoples "to practice and revitalize their cultural traditions and customs" (Article 12), to manifest and develop spiritual and religious traditions, to access religious and cultural sites, to use and control ceremonial objects and to repatriate human remains (Article 13). Indigenous rights to use and transmit to future generations their history and language are protected, and States are required to take effective measures to ensure the protection of this right (Article 14); similarly, the Declaration recognises indigenous rights to establish and to control their own educational systems (Article 15). Most fundamentally, perhaps, the draft affirms the collective right of indigenous groups to live as distinct peoples (Article 6) and to belong to distinct communities (Article 9).

The Declaration is significant for its recognition of indigenous rights to political representation, participation and consultation. The draft recognises a collective right for indigenous peoples "to participate in decision-making in matters which would affect their rights" (Article

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Support for the draft

THE Draft Declaration has received prominent support from a number of quarters, including States, NGOs and UN representatives. Most prominent among the State support, the Mexican statement to the High Level Segment last week opined that the current draft "is a well-thought compromise text" that should be adopted without further modification.

Similarly, Peru argued that, given the compromises that were required, "the Draft Declaration that has been submitted by the Chairman-Rapporteur of the Working Group is the best possible proposal", while Norway also called for the early adoption of the current draft.

Other States offered their support for the Declaration, but left open the possibility of further negotiation; for example, the statement of China hoped "that on the basis of full consultation the Declaration...can be adopted as soon as possible", while Brazil supported the adoption of "a" Declaration, without specifically endorsing the current text.

Indeed, both Australia and New Zealand themselves called for a Declaration,

while opposing the current draft. (Australia advocated "the adoption by consensus of a Declaration", while New Zealand was more blunt: "New Zealand cannot associate itself with this text which, despite our most strenuous efforts and genuine intentions, remains fundamentally flawed.")

The Secretary-General, Mr Kofi Annan, used his opening Address to the Council to call for the adoption of the draft Declaration "at the earliest opportunity". The High Commissioner herself declared last September that "the adoption of the declaration by the General Assembly [is] the foremost goal for the United Nations in its work directed towards indigenous peoples".

Further, the UN Permanent Forum on Indigenous Issues considers that, when adopted, the Declaration "will likely be the most comprehensive statement of the rights of indigenous peoples ever developed", so that its adoption "will give the clearest indication yet that the international community is committing itself to the protection of the individual and collective rights of indigenous peoples".

The current draft also enjoys widespread NGO support.

from facing page

Declaration on Indigenous Rights long overdue...

19), and requires States to consult and cooperate in good faith to seek indigenous consent to measures affecting them (Article 20). Indigenous peoples are entitled to maintain and develop contact with members of groups across international borders (Article 35), and to have previous treaties and agreements recognised (Article 36).

Importantly, the Declaration recognises collective indigenous economic and social rights, including the right to development (Articles 22 and 23), which oblige States *inter alia* to take effective measures for indigenous health (Article 28). Crucially, such economic rights include the collective right to control and protect indigenous "sciences, technologies and cultures, including human and genetic resources, seeds, medicines, [and] knowledge of the properties of fauna and flora..." (Article 29), an important principle that will surely only become more relevant in future.

However, it is the Declaration's provisions concerning indigenous rights to land that are perhaps the most significant. The starting point in the Declaration is that indigenous peoples have a collective right to their traditional lands, territories and resources (Articles 25 and 26), including "to determine and develop priorities and strategies" for the development of entitlements.

Crucially, the Declaration provides a collective indigenous right to "redress" for traditional lands, territories and resources that have been "confiscated, taken, occupied, used or damaged" without free indigenous consent (Article 27). Earlier drafts provided specifically for a right to "restitution", with "just and fair compensation" available where restitution is impossible; however, in the light of State concerns, the text was weakened to the right to "redress", with restitution suggested as one possible means for achieving this.

Thus, the current draft text represents an important and balanced development in the international recognition of indigenous rights, both individual and collective.

Concerns with the draft

The most prominent opponents of the current draft are Australia, New Zealand and the United States. None of those States are Members of the Council; as noted in last week's issue of *Human Rights Features* ("Australia: Missing in Action", p.5), Australia and New Zealand agreed to support the Canadian candidacy rather than launch their own. Thus, it remains unclear how the objections of Australia, New Zealand and the United States will play out in the Council. However, those concerns (enunciated most clearly in a joint statement at the Permanent Forum on Indigenous Issues on 17 May 2006) are specific and deserve attention.

The joint statement argues that "the provisions for articulating self-determination for indigenous peoples" are "inconsistent with international human rights law". The statement argues that Article 3 is "unqualified", and "could be misrepresented as conferring a unilateral right of self-determination...and possible secession upon a specific subset of the national populace...".

However, it is simply untrue that Article 3 is "unqualified"; at the least, it is qualified and informed significantly by Article 45. Indeed, the relationship between the articles was specifically noted at an International Workshop on the draft hosted by the Government of Mexico last September. Article 45 requires the Declaration to be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith", and consistently with the UN Charter.

In that light, the suggestion that Article 3 could be interpreted as changing the international order so radically is utterly untenable. To read the Article in that way would be to interpret a single Article in isolation from the other provisions

of the document, an approach as foreign to international law as it is to the domestic legal traditions of the objecting States.

Further, the statement argues that Article 20 apparently confers "a power of veto over the laws of a democratic legislature". Article 20 reads, "States shall consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

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The suggested interpretation is achieved only by placing a very particular interpretation on the conjunction "in order to", and an interpretation that renders otiose the requirement that State consultation and cooperation shall be "in good faith". The clear objective of Article 20 is to require good faith consultation to *seek* indigenous consent; the interpretation suggested by Australia, New Zealand and the United States ignores the clear intention of the article and substitutes an obviously unreasonable approach. If the first objection amounted to reading an article in isolation from the rest of the document, the second objection amounts to reading half an article in isolation from the other half.

Third, the joint statement considers the provisions on lands and resources to be "particularly unworkable and unacceptable", and "would be impossible to implement". Specifically, the statement argues that the provisions "ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by

What we said five years ago...

"THE UN has been working on a Draft United Nations Declaration on the Rights of Indigenous Peoples (E/CN.4/SUB.2/RES/1994/45), but with only two Articles of the Draft Declaration adopted after nearly twenty years of effort, that process may best be described as stalled.

In 1982, the Working Group on Indigenous Populations, a subsidiary of the then-Sub-Commission on the Prevention of Discrimination and Protection of Minorities, began drafting the United Nations Declaration on the Rights of Indigenous Peoples. The draft was completed in 1993 and forwarded by the Working Group to the Sub-Commission. The Sub-Commission adopted the draft in 1994 and forwarded the text to the Commission on Human Rights. In 1995, the Commission on Human Rights established "as a matter of priority" an Open-ended Working Group to elaborate the Draft Declaration (E/CN.4/RES/1995/32, para. 1 (3 Mar. 1995)). Six years later, as mentioned, only two articles have been adopted."

(From WCAR Think Paper IX: *Time for Indigenous Peoples' Rights - South Asia Human Rights Documentation Centre, April 2001*)

other citizens, both indigenous and non-indigenous".

There are several flaws to this objection. First, it is empirically untrue that it is "impossible to implement" a recognition of indigenous rights to lands owned by third parties. The Australian experience itself, for example, shows that indigenous groups can be compensated financially for dispossession of land and resources currently owned by third parties, and that coexistence of proprietary rights *is* possible in some cases; to this end, it is significant that Article 27 *allows* but does not *require* restitution of dispossessed property.

Second, the Draft Declaration deliberately does not impose any particular formula for determining the extent of necessary physical, cultural or spiritual connection between a particular indigenous group and particular lands, territories or resources. Indeed, as the recent domestic experiences of Australia, New Zealand and the United States themselves show, the process of developing and refining such formulae is necessarily complex. To imply that the Draft Declaration requires any particular approach to the problem - let alone an approach so unreasonable as to be "impossible to implement" - is to ignore the general and aspirational intent of the Draft Declaration. In short, the interpretation is unreasonable, alarmist and blind to the context of the draft.

Finally, the statement argues that the Draft Declaration apparently assumes that individual rights "are a secondary consideration"; for example, that Article 34 (giving individual peoples "the right to determine the responsibilities of individuals to their communities") allows collective rights to prevail over the human rights of individuals.

However, this objection, too, ignores the important qualification of Article 45; their clear combined effect is that, while Article 34 recognises the collective right of indigenous peoples "to determine the responsibilities of individuals to their communities", the exercise of that right requires that the "human rights and fundamental freedoms of all shall be respected...in accordance with international human rights obligations" (Article 45).

To the extent that the articles recognise a tension between individual and collective rights, it is clear that Article 34 is controlled by Article 45. A similar point was made in the 2005 Joint Submission of numerous indigenous groups (again, led by the Grand Council of the Crees) to the 62nd Session of the Commission: "a dispute could arise in the future between collective and individual rights, just as there could be a future dispute between the individual rights of two persons or the collective rights of two peoples".

It is clear - given both the general nature of these human rights guarantees and the specific text of Article 45 - that the interpretation taken by Australia, New Zealand and the United States is an unreasonably dismissive approach to the draft.

Conclusion

At the conclusion of last year's UN World Summit, the Heads of State and Government resolved, as part of the Summit Outcome, "to continue making progress in the advancement of the human rights of the world's indigenous peoples...and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible".

The current draft Declaration is a workable compromise that makes substantial strides in recognising indigenous rights. It recognises indigenous groups' special role, particular vulnerability and unique rights, while reaffirming the universal and indivisible entitlements of all.

The adoption of the Draft Declaration this week would be a vital early achievement for the new Human Rights Council.

It would also be a timely fulfilment of the World Summit's promise to indigenous groups around the globe.

Security, justice and restitution for Darfur

Report by Physicians for Human Rights tells the story of villages literally wiped off the map

KAREN HIRSCHFELD

THE crisis in Darfur, Sudan, has devastated the civilian population since the conflict began in the spring of 2003. Hundreds of thousands of Darfurians have fallen victim to attacks by the Government of Sudan's (GOS) armed forces and its proxy militia, the Janjaweed. The International Crisis Group has described the Janjaweed as follows: The term "Janjaweed" has been used for decades to describe bandits who prey on the rural populations through cattle rustling and highway robbery...Building on the tradition of banditry, government security planners gave their new proxy militias the old name for psychological effect. Over 2 million people have lost their homes and more than 3,000 non-Arab villages have been razed to the ground. Studies and news reports have focused on killings, rape and other acts of violence. Comparatively less attention has been paid to the destruction of individual and community livelihoods - landholdings, livestock, and homes; and communal infrastructure - schools, irrigation systems, mosques and markets.

A report by Physicians for Human Rights (PHR), "Darfur - Assault on Survival: A Call for Security, Justice and Restitution", tells the story of three of the thousands of villages literally wiped off the map by GOS forces and Janjaweed in an all-out assault on the very survival of a population - Furawiya, Terbeba and Bendisi. PHR has added to the mounting evidence of war crimes, crimes against humanity and genocide perpetrated against non-Arab civilians in Darfur. This devastation entails enormous losses - both emotional and economic - for which the survivors must receive compensation, restitution and reparations in order to rebuild their lives.

Since its establishment in 1986, PHR has conducted rigorous fact-finding investigations and research on human rights violations in over fifty countries. During three trips to eastern Chad and Darfur between May 2004 and July 2005, investigators for PHR collected first-hand testimony from dozens of survivors of the attacks by interviewing heads of households selected at random in the refugee camps in Chad.

From these interviews, PHR concluded that the GOS forces and the Janjaweed engaged in the systematic, intentional and widespread destruction of a time-honored way of life. Though Furawiya, Terbeba and Bendisi were far from one another and attacked at different times, eyewitness accounts of the assaults were strikingly similar. The Janjaweed swept into the village early in the morning on camels and horses and on foot. In Bendisi and Terbeba, 20 out of 34 respondents reported that the attackers yelled racial epithets, such as "Exterminate the Nuba!" Nuba is a derogatory term for black Africans. The people of Darfur have been Muslim for centuries. The Fur, Zaghawa and Masalit, the main ethnic groups in Darfur, are largely agriculturalists and are referred to as 'zurga', or blacks, while the attackers are primarily nomadic and self-identify as "Arab".

Government troops often followed close behind; 44% of respondents in Bendisi and Terbeba reported GOS troops in vehicles mounted with rocket launchers entering after the Janjaweed, and many respondents in all three villages reported aerial bombing of villages by GOS Antonov airplanes and helicopters. The GOS and Janjaweed shot indiscriminately, set compounds and public buildings on fire, looted homes and shops in the market, and drove survivors out of the villages, in many cases scattering families. Prior to the attacks, the 46 men and women PHR interviewed had a total of 558 people in their households. Of these, 141 were "confirmed dead" - their deaths were witnessed or their bodies found - while 251 were "killed or

missing" - their whereabouts were unknown. The average household size before the attacks was 12.1; after it was 6.7. "Household" was defined as 'people who eat out of the same pot'.

The great majority of those interviewed reported the complete loss of their livestock, farmland, homes, and of all possessions except the clothing they were wearing when they fled. They reported that the GOS and Janjaweed forces stole or killed thousands of camels, horses, cattle, donkeys, sheep, goats and chickens. They also reported the collective loss of thousands of sacks of sorghum, millet, ground nuts and other food stocks; the torching of scores of acres of prime farmland; the burning of their compounds to the ground; and the looting and theft of rugs, beds, Korans, mats, personal documents and household items.

The Janjaweed chased the Darfurians into the harsh desert and were aware that this would potentially lead to death. One woman said she overheard one attacker say to another: "Don't bother, don't waste the bullet, they've got nothing to eat and they'll die from hunger."

Many survivors wandered through the bleak landscape for weeks or months, often with infants or elderly parents in tow. They escaped death by eating wild foods growing in the desert and eventually found their way to refugee camps in Chad, where humanitarian groups established refugee camps providing basic services. Others weren't so lucky; PHR found that many house-

PRESSING ISSUES

Sudan

holds experienced a substantial drop in size due to death and separation while making their way to Chad.

To fully comprehend the magnitude of loss, it is important to understand the traditional way of life in the region. Darfur is semi-arid, with limited arable land and little annual rainfall. While many of Darfur's Arabs are nomadic herders, almost all of the region's non-Arab residents owned and cultivated plots of land, and stored sacks of grains and seeds to survive through dry periods and occasional droughts.

Almost all families owned livestock, including cows, sheep, goats and chickens; those who were better off also owned horses and camels. Animals not only provided food and transportation but were also considered disposable income and could be used in times of need to pay for necessary or unforeseen expenses, such as healthcare. Generations of families helped each other through difficult times, including famine and drought. And now, on top of the death and the terror that has been inflicted on them, the majority of those who have survived have been stripped of everything they had, from land to livestock to the very social structures that bound them together.

Outside of village life, Darfur is an extremely difficult place to survive. At the foot of the expanding Sahara desert, the region is known for its searing heat, recurrent drought and minimal infrastructure. When people were herded from their homes and chased into a land that offered little shelter from the sun and winds, no potable water and no animals for food, milk and transport, they succumbed to exposure, starvation, dehydration and disease.

PHR's findings clearly demonstrate crimes under Article II(c) of the Convention on Genocide, which defines genocide as including the deliberate infliction on a group of "conditions of life calculated to bring about its physical destruction in whole or part." This clause ensures that genocide encompasses situations in which the perpetrators do not seek to kill all members of a group immediately but instead intentionally subject them to such harsh circumstances that death would be virtually assured without outside intervention and aid. Under international law, the fact that most of those forced from their homes did not die does not mitigate the responsibility of the GOS and Janjaweed forces for their genocidal actions.

And the misery continues in Darfur, on the border and now well into Chad. Nearly three million Darfurians are living in squalid camps for "internally displaced people" in Darfur with little assistance from the Sudanese authorities, under security conditions that render the delivery of international assistance nearly impossible. Still another 200,000 are living in Chad. Thousands continue to cross into Chad, and violence between rebel groups and government-sponsored militias is on the rise in the area.

Despite the signing of the Darfur Peace Accord (DPA) on May 5, 2006, the GOS and the Janjaweed continue their assault on survival. Armed attacks, including rape and killing, continue, rendering large swaths of land insecure for passage and therefore essentially uninhabitable. Rebel groups are also responsible for obstructing aid deliveries and increasing attacks on civilians as well. In the current environment, the protection of civilians, wherever they are currently living, remains paramount. The African Union force, lacking in capacity and meaningful mandate, cannot protect these people alone. A United Nations Peacekeeping force should take over from the AU as soon as possible. Moreover, a just settlement and a lasting peace will necessarily involve serious commitment to reparations and compensation for the victims of these crimes.

Any mechanism must incorporate the five following elements:

- Restitution: The restoration of the Darfurians' land and property, as well as their liberty, legal rights and citizenship

- Rehabilitation: The provision of or access to medical, legal, psychological and other services necessary to help restore their well-being

- Compensation: Monetary reparations for damage to homes, possessions and the death or theft of livestock, and less quantifiable damage, i.e. pain and suffering, loss of economic or educational opportunities, damage to reputation and costs required for legal, psychological or medical services

- Satisfaction: An enforceable ceasefire and a truth commission or another mechanism designed to acknowledge the facts and hold perpetrators responsible

- Guarantees of Non-Repetition: To enable the Darfurians to return to their land without fear that they will once again be subjected to attacks.

Recognizing this, in January 2005, the United Nations Commission of Inquiry on Darfur called for the establishment of a Compensation Commission to redress the rights of the Darfurian victims.

Under the DPA, the GOS is required to pay \$30 million in compensation to victims in Darfur. This figure must be dramatically increased to meet the needs of victims. For each of the nearly 800,000 families affected to receive even \$1,000, which represents a fraction of the losses sustained by most, would require nearly \$1 billion. Victim assistance and individual support to rebuild lives and livelihoods is a central demand of all the affected populations is one of the most critical issues for securing peace.

Currently, ensuring the security of civilians through a UN force under Chapter VII of the UN Charter is the highest priority. However, holding perpetrators accountable for their crimes and ensuring that the surviving Darfurians are able to return home and rebuild their lives are critical elements of any effort to foster peace, stability, reconciliation and recovery of this war-wracked region.

- Karen Hirschfeld is Sudan Coordinator, Physicians for Human Rights.

To read the Physicians for Human Rights report, 'Darfur - Assault on Survival: A Call for Security, Justice and Restitution', go to:

www.phrusa.org/research/sudan/

NHRIs at the Human Rights Council

Need for close cooperation and effective contribution

PAUL GREEN

IT was only in the twilight years of the Commission on Human Rights that National Human Rights Institutions (NHRIs) began to consolidate their role at the international level. Recognising their importance and the need to elevate their status, the Commission, at its 61st Session, requested the Secretary-General to report at the 62nd Session on "ways and means of enhancing participation of national human rights institutions in the work of the Commission".

Given the abortive final session, the report, 'Effective Functioning of Human Rights Mechanism: National Institutions and Regional Arrangements' (E/CN.4/2006/102), now falls to be dealt with by the Human Rights Council. So what role should NHRIs perform in the work of the Council?

Evolving role

At their conception, NHRIs were not guaranteed a role in international fora. Rather their status has evolved over the years. Their importance being slowly but steadily recognised and their role accordingly enhanced.

They were first granted rights of participation at the World Conference on Human Rights in Vienna in 1993, but had only observer status at the Commission for a number of years, until 2000, when those NHRIs in compliance with the Paris Principles were allowed to participate in meetings of the Commission and its subsidiary bodies.

In 2001, representatives of NHRIs were allowed to participate as observers in the deliberations of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and to address the Conference in the general debate. In 2002, the General Assembly invited NHRIs to participate in the drafting of the Convention on Disabilities. Some NHRIs have also been participating in the treaty bodies' reviews of State party reports.

At the 61st Session, reports were presented by three of the regional groupings of NHRIs: the Asia Pacific Forum, the Ibero-American Ombudsman Federation and the European Coordinating Group. These reports were submitted under agenda item 18(b), 'Effective Functioning of Human Rights Mechanisms: National Institutions and Regional Arrangements', and contained useful information on the activities and concerns of the NHRIs within the regional groupings. In addition, there were over 50 oral statements from individual NHRIs. The 62nd Session was to have been the first year accredited NHRIs could speak, according to their mandates, under all items on the agenda.

It is therefore a natural and logical progression that the Council should seek to consolidate and enhance the role of NHRIs in its work. In this regard, the OHCHR reports that its National Institutions Unit has already been strengthened by an increased number of staff to provide better assistance to NHRIs.

Monitoring and implementation

The General Assembly resolution that created the Council provides that the Council will work in "close cooperation" with NHRIs. And the participation of NHRIs is to be based on the procedures observed by the Commission "while ensuring the most effective contribution of these entities". The question is therefore how best to achieve this.

The starting point is where the Commission left off, with accredited NHRIs having the right to intervene under all agenda items. Exactly how this will be incorporated into and enhanced by the Council's work is an intrinsic

part of the discussions at this first session. Whatever procedures are adopted, the Council needs to recognise and ensure the most effective use of the primarily dual role of NHRIs at the international level: monitoring and implementation.

In terms of monitoring, NHRIs play an important role in providing accurate, detailed and objective country information. They are particularly well-placed to contribute to the Universal Periodic Review (UPR). Indeed, the International Coordinating Committee of National Human Rights Institutions (ICC) - the international representative body of NHRIs - in its 'Discussion Paper on NHRIs in the UN Reform Process' (17th Session, April 2006), proposes that NHRIs should not only contribute information to the UPR, but also participate in any interactive dialogue.

NHRIs are also well-placed to act as early warning centres, providing information to the Council on "gross and systematic violations"

Criteria again

THE primary criteria for ICC membership is to allow only the participation of NHRIs that are genuinely independent and that comply with the Paris Principles - the internationally recognised standards for NHRIs.

The number of accredited NHRIs increased significantly over the last few years (1999: 15; 2000: 26; 2001: 32; 2002: 40; 2003: 45; 2004: 50). About half of the world's NHRIs are now ICC accredited. However, this has proved to be a mixed blessing as in the push to increase participation at the international level, accreditation standards fell.

At the moment all questions of membership are decided by the ICC's Sub-Committee on Accreditation, which submits its recommendations to the ICC members for approval. The ICC comprises representatives of 16 NHRIs, four elected from each of the regional groups - Africa, the Americas, Asia-Pacific and Europe. Its Sub-Committee has four members, one elected to represent each regional group.

The ICC Sub-Committee, and the ICC itself, therefore bears considerable responsibility in ensuring that those NHRIs who are accredited to participate in the Council properly comply with the Paris Principles. The OHCHR, as a permanent observer on the Sub-Committee and acting as its secretariat, also has an important role.

of human rights, which the General Assembly has requested the Council to "address" and "make recommendations" on". It follows that NHRIs should also have an active role in forming the recommendations on such thematic issues and country situations.

They also have a crucial role to play in implementing recommendations and standards in general. If the Council is to meaningfully improve on the work of the Commission, then it must be more successful at facilitating the implementation of international human rights standards and norms, and the recommendations of UN bodies. With their mix of substantive local knowledge and expertise, NHRIs are in a unique position to assist with implementation at the national level.

In this context, the ICC Discussion Paper suggests that NHRIs could provide valuable expertise on the workings of relevant national institutions, advice and recommendations to the State on the implementation of its human rights obligations, and assist with follow-up to the recommendations of the Council and special procedures.

In order to allow NHRIs to do their work at the national and international level, the

Council must in return help to protect them from undue interference. A mechanism is required whereby NHRIs can report to the Council and special procedures when an institution or its staff members are subjected to threats or external pressure. The need for this has been identified by the OHCHR and the ICC in its paper 'National Institutions in need: Guidelines for Early Warning'.

Tougher accreditation standards

The practice adopted by the Commission was for those NHRIs accredited by the ICC to be treated as accredited for the Commission. This practice was endorsed by the Secretary-General's report to the 62nd Session and will no doubt be adopted by the Council. Strict accreditation criteria is therefore required to maintain and promote the quality of NHRIs participating in the Council (**see box**).

At the 61st Session, the Commission requested the Secretary-General to report at the 62nd Session on the ICC accreditation process to "ensure that the process is strengthened with appropriate periodic review". According to the Secretary-General's findings, the OHCHR should provide the Sub-Committee with "an objective analysis as to the various powers, functions and composition and other relevant information of the applicant institution". The role of the OHCHR is therefore crucial in providing the Sub-Committee with the relevant information on which to base its decision.

Given the lapse in accreditation standards over recent years, the Secretary-General has also recommended that NHRIs already accredited by the ICC should be reassessed. In response to this, the ICC at its 17th Session produced a 'Draft Proposal for ICC re-accreditation procedures for NHRIs'. The ICC proposes a periodic review of all accredited NHRIs every five years, with a transition process leading to the review of all currently accredited NGOs by the end of 2008. As the ICC notes, this is a heavy schedule: it is hoped that the quality of the strengthened process does not suffer as a result.

The Draft Proposal also sets out a suggested review procedure and method. It proposes an "in situ fact finding mission" to the relevant NHRI, which would include meetings with NHRI members, staff, as well as both state and civil society representatives. This would represent a significant improvement on the existing accreditation process, which does not involve country visits or formal NGO input.

Integration

The participation of NHRIs was one of the most positive developments in the last years of the Commission. There were some problems with the standards applied to the accreditation procedure, in the push to increase the number of participating NHRIs.

However, these have been recognised by the ICC and the OHCHR, and the appropriate reforms are in progress.

Starting at this first session, the Council, together with the participation of NHRIs and NGOs, must focus on furthering the process of NHRI involvement and develop procedures that ensure their most effective contribution. This will require enhanced and meaningful integration of both the work and expertise of NHRIs into the UPR process, as well as the other thematic and country mechanisms adopted by the Council.

Above all, given the Council's responsibility to more effectively implement the promotion and protection of human rights at the national level, particular focus must be given to the unique role that NHRIs can play in achieving this.

Special Procedures: Procedural Limbo?

This useful legacy of the Commission must be salvaged

MASSIMILIANO DESUMMA

PROBABLY the greatest achievement the newly created Human Rights Council (Council) has inherited from the late Commission on Human Rights (Commission) is the system of Special Procedures. The different mechanisms, i.e. Special Rapporteurs, Independent Experts, Special Representatives and Working Groups stretch over thematic issues to human rights situations in particular countries. By conducting country visits, reporting, and receiving individual complaints, these mechanisms have the mandate and responsibility, in the name of the Council, to bear witness to human rights violations, thus allowing the Council to react and possibly foster conditions to prevent such violations.

During the last years of the Commission, Special Procedures were often cited as a positive aspect of it and a key reason why the body should not merely be discredited as hopelessly politicised and obsolete. Nonetheless, in the year 2000 voices were raised asking for a reform of the Special Procedures system. This is when a process was started that saw, on the one hand, countries against scrutiny by external institutions trying to weaken the mandate of Special Procedures, and, on the other, countries supporting the mandates. The latter faced the difficulty of having to defend the system while conceding that there was the necessity and potential for improvement. Legitimate concerns were at times insufficiently addressed by the mandate holders, thus making way for introduction of new criteria and limitations by countries disapproving of the mandates.

The question of "Enhancing the effectiveness of Special Procedures" has been a recurring issue throughout the process of reform of the United Nations as a whole, in particular with the development of the Office of the High Commissioner for Human Rights (OHCHR) and the Commission. The report from the year 2000 of the inter-sessional working group on enhancing the effectiveness of special mechanisms (E/CN.4/2000/112) and Action four of the Secretary General's report "Agenda for Further Change" (A/57/387) laid the groundwork. The review of the Special procedures became a biennially discussed issue and in 2004 the resolution of the Commission was enlarged to cover also country mandates in addition to thematic ones. This was a significant development, bearing in mind that over the last years of the Commission denouncement of country situations diminished, and country related issues were increasingly moved from the denouncing "item 9" to "item 19" dealing with technical assistance.

The otherwise rather successful campaigns within the Commission by countries opposed to external scrutiny failed to stall the expansion of the Thematic Procedures resolution and its incorporation into the Special Procedures resolution. However, this came at a price; the resolution was, unlike in the past, voted on, and the following year, which should have been an off-year for the issue, brought about a new chapter in this struggle for reform. A few countries within the Asian Group presented a paper on "Enhancing and strengthening the effectiveness of the special procedures of the Commission on Human Rights", which they tried to have adopted by the Commission. Other

countries agreed on the necessity to address enhancement and strengthening of the Procedures, but disagreed with many other suggestions that threatened to weaken the Special Procedures.

After a lengthy debate, the Commission eventually adopted a decision (E/CN.4/2005/113) which led to, after the compilation of positions and papers of all relevant actors, the convening of a Seminar in October of 2005 to address the question of reform of Special Procedures. The Seminar's output is a report (E/CN.4/2006/116), one of the many documents the Commission failed to address in its final session in March 2006.

The key actors involved in this process, besides countries trying to protect the mandates and Countries trying to weaken them, are the mandate holders themselves and the OHCHR. The mandate holders reacted to the delicacy of

The opportunity deriving from the current momentum in favour of the Special Procedures must be used to its full potential.

Before this optimism can be overshadowed by frustration, the Council needs to express its true commitment to the Special Procedures. The mandate holders, for their part, must renew their commitment to the process of reform by producing tangible results.

of the issue right after the above-mentioned Decision 113. During their 12th annual meeting of Special Procedures, held in June 2005, they decided to take the lead on the issue and not wait until the Seminar in October. Suggesting ways and means to improve conditions and methods of work, the mandate holders have tried to anticipate the Commission-driven process with a view to reaffirm independence.

Monday, 19 June 2006, marked the beginning of what was undoubtedly a crucial week in many respects, with the coinciding of the first session of the Council and the 13th annual meeting of the Special Procedures. Despite the scepticism that observers of the work of the Commission often resort to, one cannot deny the perception that some positive changes may be in the offing.

On Friday 23 June the Council held an exchange of views with the Chairperson of the Coordination Committee of Special Procedures. This exercise allowed for a first impression of what could be the future of the Special Procedures. Both sides expressed their commitment to wanting to advance in the process of reform, and elements were introduced such as the proposal to make the Special Procedures an important part of the Universal Periodic Review within the Council (see box on this page - 'In the Plenary').

Thanks to the participation of countries unwilling to allow any weakening of the system and the participation of NGOs, the attempt by some countries to limit the scope and means of the mandates was stalled. There is now an opportunity for a truly constructive contribution to improving the work of Special Procedures, and therefore its impact on the promotion and protection of human rights.

However, the opportunity arising from the current momentum is a very narrow one and needs to be used to its full potential. Before the optimism can be overshadowed by frustration, the Council needs to express its commitment to the Special Procedures.

The mandate holders, for their part, need to renew their commitment to the process of reform by producing tangible results.

Not seizing this opportunity would mean failing to salvage one of the most crucial legacies of the UN Commission on Human Rights, one that has perhaps the greatest potential to improve the promotion and protection of human rights throughout the world.

In the PLENARY

[The] independence [of the Special Procedures] from external political or other influence is the crucial element which enables them to fulfil their functions with true impartiality. To retain this unique quality, it is important that potential mandate-holders are in no way perceived to be partisan. Therefore it is required that independent human rights experts appointed as these Special Procedures are not in decision-making positions within the executive or legislative branches of their Governments.

...

We note that cooperation with the Special Procedures was a factor taken into account in the elections of the present Members of the Human Rights Council. We encourage the Council to further strengthen this approach by calling on its current and future members to extend full cooperation to Special Procedures, including by extending standing invitations to visit the country.

- Statement of the annual meeting of the Special Procedures' mandate-holders on the occasion of the establishment of the Human Rights Council

Treaty bodies welcome the potential that universal periodic review will have to provide a framework for a broader and different kind of scrutiny than that available in the context of the human rights treaty body system. Treaty bodies also see the review as providing an opportunity for States to be reminded of their substantive obligations resulting with regard to reporting and follow-up of recommendations in concluding observations, views relating to individual complaints and queries.

...

Treaty bodies are also of the view that the objective and reliable information which forms the basis of this review should include their findings and recommendations which are reflected in their concluding observations. To this end, the InterCommittee meeting which adopted its report on Wednesday [21 June 2006] was of the opinion that these concluding observations should form part of the basis of Universal Periodic Review.

- Statement of Christine Chanet, Chairperson of the meeting of the Chairpersons of the human rights treaty bodies

With the creation of the Human Rights Council and our commitment to strengthen the UN human rights system, more should be expected from us, the Governments. In order for the Special Procedures to continue functioning effectively and without interruption, they need the full cooperation of States, in particular during their visits and by receiving prompt replies to their communications. To give further impetus to the follow up, the findings of Special Procedures should form an important part of the universal periodic review.

- Statement by the Representative of Austria on behalf of the European Union

from page 2...

And now, to work...

Many of the States raising the Palestine issue so vociferously are also opposed to country-specific resolutions, though few sought to justify the anomaly of this position.

If the Palestine issue receives the specific attention of the Council - as it surely deserves to - it should follow that the OIC will also support investigation of other pressing country-specific issues. Were it not to do so, this would be a clear example of the 'selectivity', 'double standards' and 'politicisation' that apparently troubles that organisation so much. It will be interesting to see how the OIC proposes to deal with the Palestine issue with appropriate 'cooperation' and 'non-confrontation'.

It is clear that the Palestinian territories will play a prominent role in the Council's future work, though it remains unclear how States will push the issue, and the extent to which they may use the issue to limit discussion on other matters. In this way, perhaps the most intriguing comment regarding Palestine was made by the Sri Lankan delegate during the dialogue with the High Commissioner, when she said, "Sri Lanka associates itself with the view of the Asian Group, which has proposed that Palestine should be the single issue dealt with in this session." It remains to be seen whether the Sri Lankan comment reflected a significant difference of position from the earlier Jordanian statement, or an insight into the Asian Group's strategy for the week ahead.

It is clear, too, that many States will use the recent cartoon controversy to argue for greater religious tolerance. For example, Egypt described the cartoons' publication as causing a 'crisis', while Indonesia referred to the caricatures having infuriated "the Muslim world" (and this sweeping categorisation after arguing that the world is not "in any danger of a 'clash of civilizations'"). This is surely an important issue for international discussion - as the High Commissioner herself argued, "The proliferation of acts and expressions contributing to the exacerbation of cultural and religious tensions is producing new cleavages within and between communities, and has recently led to unprecedented levels of violence and destruction, on the ashes of which trust and tolerance must now be rebuilt."

However, it is clear that many States' concern with the issue lies less in rebuilding 'trust and tolerance' and more in justifying broader limitation on freedom of expression in the name of religious tolerance. For example, speaking on behalf of the OIC, Pakistan called for the Council to "take action to combat defamation of all religions". Similarly, Iran argued that "enjoying freedom of expression

should not constitute a pretext and a platform to insult religions and their sanctities. Defamation of religions, particularly

the divine message of Islam, should be rejected...". Interestingly, the Iranian and Pakistani calls went significantly further than the Baku Declaration of the Islamic Conference of Foreign Ministers, adopted just a few days earlier, which limited itself to calling for "concrete efforts to enhance dialogue and broaden understanding". It remains unclear how this issue will be raised in future, including whether States will use the controversy to call for specific measures to limit freedom of expression.

A number of specific human rights abuses were raised by various States. The Iranian Foreign Minister, for example, criticised suspects being held "with or without charge in the horrifying and sometimes unknown presence and remote detention centres for months if not years", including at Guantánamo Bay and Abu Ghraib.

This is surely legitimate criticism. Unfortunately, the Minister did not clarify whether his disgust extended to Iran's own treatment of prisoners - for example, how the principle would apply to the treatment of Saleh Kamrani, a lawyer and human rights defender who, according to Amnesty International (MDE 13/071/2006) was feared to have been abducted by security forces eight days prior to the Minister's speech, and who is apparently being held without charge in Evin Prison in Tehran.

Iran's disdain for the Council was illustrated by one of the side-stories of the week: that the Iranian delegation includes General Prosecutor for Tehran Saeed Mortazavi. It is reported by Human Rights Watch and the governments of the United States and Canada that Mortazavi is implicated in the death of Zahra Kazemi, a Canadian journalist who died in 2003 after spending two weeks in custody in Tehran; it is alleged that she was tortured and ultimately died as a result of beating. Both Canada and the United States protested Mortazavi's presence at the Council; Canadian Prime Minister Harper even called on the international community "to use all manner of law available to detain this individual, and have him face justice".

There were other specific complaints, too. South Korea "note[d] the concerns over the human rights situation in the DPRK", a comment that, according to North Korea, constituted "the betrayal of the North-South declaration" (language almost identical to that used by North Korea on the same day at the Conference on Disarmament). Serbia made an emotional plea for the rights "of the Serbs and other non-Albanians in a part of the State of Serbia, the Province of Kosovo": "The political leaders of the Albanian majority are being congratulated for their promise to respect the rights of the

in order to "review and, where necessary, improve and rationalize all mandates" within one year. This should be fulfilled through the adoption of an omnibus decision by the Council. However, debate will centre of States' preliminary concepts of 'review', on the existing proliferation of certain mandates, and on the future role of the Sub Commission on Human Rights and the 1503 procedure. The end result may culminate, as predicted, in a decision to establish another intergovernmental working group to finalize the modalities on the process of review.

Thursday morning is set aside for discussing the programme of work for the Council over the coming year. The intention is to reach agreement on the date and duration of future sessions, and on the substance of these sessions towards dually fulfilling the process of transition and addressing immediate human rights concerns. According to circulated non-papers, this may comprise of breaking down sessions into the reports of mechanisms and mandates, review and institution building, and 'other substantive issues'. Some preliminary frameworks have been agreed upon in the informal consultations, yet this procedural quagmire still needs to be tediously unravelled.

Thursday afternoon is then dedicated to 'co-operation and dialogue', human rights educa-

from page 3...

Adding substance...

in the 2004 resolution. It is also likely that Canada, Austria, Romania, Germany and the UK will push rather for the extension of the mandate of the Working Group not to draft but to further elaborate complex elements that might make up such an OP, including pushing for an 'a la carte' approach, by which States can then choose which rights they would allow to be subject to individual complaints.

What can be certain is that the so-called 'change of culture' is unlikely to emanate from the discussion of the Working Group on the OP. Instead, we can expect the same disparity as that which characterised the Commission.

However, this does not preclude the possibility that real progress can be made, and an initial foray into finally resolving the longest standing inequality of the UN treaty mechanisms may in fact lie just around the corner.

Serbs provided the Province of Kosovo be declared an internationally sovereign State; very strange approach. They're demanding [a] university diploma, promising that after [receiving that] diploma, they will be ready maybe to start to study."

For her part, the High Commissioner drew specific attention to the lack of cooperation and access by the Government of Uzbekistan (following allegations of several hundred killings in May 2005), as well as human rights problems in North Korea, Iraq, Burma, Palestine, Sudan and Somalia.

Hope, but don't expect

The High-Level Segment was a first insight into what has changed in the attitudes of States since the last Commission - and what has not. Among a large number of States, there are already many signs of the new beginning for which the Secretary-General called. Suggestions of innovative new methods, renewed commitment to universal human rights and prospects of better review all promise substantial improvements in human rights outcomes around the world.

However, amidst the current of optimism, there is an undertow of political realism. The new Human Rights Council will surely struggle to thrive if those States that complained most loudly about politicisation, double standards and selectivity are not willing to practice what they preach.

Can attitudes really change in the Council? Can the new Council meet its great promised potential? If the first week offers any guidance, we can hope - but perhaps should not yet expect.

from page 1... What's on the table

awaiting results on the respective issues, and should constitute the first successes of the Council.

Wednesday then brings us to the general discussion on the modalities of the Universal Periodic Review, the most prominent new mechanism of the Council. Discussions are likely to concentrate on States preferred criteria for the Review, including the timeframe, the sources of information, the means of avoiding duplication of existing monitoring bodies and so forth. It may be decided at this stage, as is predicted, to move towards a decision to establish a form of intersessional governmental working group to finalize the modalities, although debates will centre around the timeframe that this will require, in light of the fact that GA resolution 60/251 recommends that all Council Member States are reviewed during their term of office.

Wednesday afternoon moves to the review of all mandates and mechanisms assumed by the Council from the Commission. It has been provisionally agreed, in accordance with OP 6 of GA resolution 60/251, that all mandates will be extended for a period of one year

tion and learning, advisory services, technical assistance and capacity-building, as provided by OP 5 of GA resolution 60/251. The original allocation of time for 'pressing issues' has been deleted in favour of a 'softly-softly' approach to the first session, in reality resulting in further procrastination on critical human rights issues that require immediate attention. The Thursday session will likely consist of States declarations of their hope a more 'co-operative' Council, no doubt an essential element of its work, but it may also give rise to attempts by States to downplay the legitimacy of direct criticism under the old hyperbole of 'selectivity and politicisation'. This session may turn out to be constructive and distracting in equal measure.

The final session is then given to conclusions and recommendations of the Council, including "interim measures on mechanisms and mandates", and agreement on the Report of the Session. It should be an interesting week, and whilst actual human rights situations in various countries can take a back seat for another three months, a framework may be set in place for more efficient responses in the future. Gauging by the mood that permeated the Council on its first week, the phrase "equal parts pessimism and optimism" would seem apt for the week ahead.

HIGH LEVEL HIGHLIGHTS

The Council has achieved a breakthrough with the adoption of monitoring as the rationale of [its] universal [periodic] review (UPR). This concept places all States on the same footing. All are equally subject to review. This should address the problem of selectivity. Certain states should no longer be able to indulge in judging the human rights performance of others. No State should be issuing unilateral reports on other States. We will all share responsibility on human rights matters.

- *H.E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs of the Republic of Indonesia*

National conditions and capabilities differ. We should therefore strive to build a credible culture of dialogue and cooperation to strengthen the protection and promotion of human rights. Dialogue should not however preclude constructive criticism when this is required. Regardless of the difficulty of this task, the [Human Rights Council] must never refrain from addressing severe human rights problems, whenever and wherever they occur.

- *H.E. Raymond Johansen, State Secretary, Norwegian Ministry of Foreign Affairs*

...let us be honest in our work here. Let us not pretend that human rights are not about real human beings. Nor about the states in which they live. That human rights do not flourish or suffer depending on governments' policies. That they are not political; and that they are not difficult and at times, very difficult.

To pretend this would be build our Council on the foundations of a fiction. It is a fiction that we cannot afford, either as politicians or as human beings.

- *Ian McCartney MP, Minister of State Responsible for Human Rights, Foreign and Commonwealth Office, UK*

Tremendous constitutional changes have taken place following the CPA [Comprehensive Peace Agreement] whereby it has been provided in the Constitution a Bill of Rights through which all human rights and freedoms are very clearly stated without any discrimination on the basis of race, religion, culture, sex or political affiliation. These rights and freedoms are preserved and protected by an independent and impartial Constitutional Court. There is not now a single political detainee in the Sudan.

- *H.E. Mr. Mohammed Ali Al Mardi, Minister of Justice and Chairman of the Advisory Council for Human Rights, Republic of Sudan*

My country has made considerable progress in its endeavours to promote and protect human rights through the adoption of measures and procedures consistent with the particularities and requirements of society rather than with theories and concepts imposed on it from abroad. To this end, the Kingdom has promulgated a Basic Law, instituted a process of national dialogue among all sections of Saudi Arabian society and broadened the powers of the Consultative Council to include the review and development of laws and regulations.

- *H.E. Mr. Turki Bin Khalid Al-Sudairy, President of the Human Rights Commission, of the Kingdom of Saudi Arabia*

Within the UN system Australia places high priority on the promotion of indigenous issues. We support the Permanent Forum on Indigenous Issues as the primary UN body dedicated to the consideration and coordination of the UN's work on indigenous issues.

- *H.E. Ms. Caroline Millar, Ambassador and Permanent Representative of Australia to the UN*

While cooperation and dialogue can achieve much in the advancement of human rights, the Council needs to also stay true to its responsibility to speak for those patriots who have had their voice silenced. People like Aung San Suu Kyi, whose 61st birthday, 2 days ago, was spent under house arrest on the day this Council convened. It is interesting to note that in 1948 Ms Kyi's home country of Burma was among the first countries to vote for the adoption of the Universal Declaration of Human Rights. It is our sincere hope that together through this new Council we will be able to put an end to the kind of deterioration in the protection of human rights that we have seen over the years there and elsewhere.

- *US Ambassador Warren W. Tichenor*

The Permanent Standing Committee on Human Rights, set up to provide policy guidance and leadership to the State machinery with regard to the promotion and protection of human rights, met just two weeks after Sri Lanka was elected as a member of this Council, in order to take stock of how the pledges made during our campaign could be implemented as early as possible. A large number of decisions taken at that meeting... will serve as our road map in the coming months.

- *H.E. Mahinda Samarasinghe, Minister of Disaster Management & Human Rights of Sri Lanka*

The resolution establishing the Human Rights Council calls for cooperation and dialogue to be the guiding light of this new body. Hence human rights should not be used to address bilateral political differences or problems... human rights can only be affirmed and become meaningful through their practical enjoyment and progressive realization.

- *Dr. ZST Skweyiya, South African Minister of Social Development*

...we consider the Sub-Commission on Protection and Promotion of Human Rights to be a necessary element, which must be preserved among the future mechanisms... this is not about preserving its present name or role. The important thing, from our point of view, is to maintain the availability of an organ subordinate to the Council with a mandate to carry out research work and collective expertise in the filed of human rights issues - something the Council will actually have no time to do.

- *H.E. Ambassador Alexandre V. Yakovenko, Deputy Minister of Foreign Affairs of the Russian Federation*

...since 1966, when the International Bill of Human Rights was concluded, a debt towards all persons was acquired, because we have not been able to offer them a mechanism to enforce their economic, social and cultural rights, whereas this does not happen with their civil and political rights. After three years of works and discussions, it is indispensable and urgent that the mandate of the Working Group to consider options regarding the drafting of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, not only be renewed by the Council, but also adjusted and transformed in order for the Working Group to have the authority to properly begin drawing up a draft Optional Protocol.

- *H.E. Maria del Refugio Gonzalez, Deputy Foreign Minister for Multilateral Affairs and Human Rights, Mexico*

From the point of victims of human rights violations - time is crucial. My compatriot, the Polish lawyer Rafal Lemkin, became the initiator of and a tireless promoter of the Convention on the prevention and punishment of the crime of genocide. He once explained his impatience at the slow pace of work on the convention by pointing out that you could hardly expect patience from a victim with a rope around his neck.

- *H.E. Mr. Janusz Stanczyk, Under-Secretary of State, Ministry of Foreign Affairs, Poland*

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Please send all feedback to:

Human Rights Features

South Asia Human Rights Documentation Centre
B-6/6 Safdarjung Enclave Extension
New Delhi - 110029, INDIA
Tel/Fax: (+) 91-11-2619-2717 / 2706 / 1120
Email: hrf@aphrn.org
Web page: <http://www.hrhc.net/sahrhc/>

HRF Team

Rina Dhalla
Rineeta Naik
Ravi Nair
Simon Quinn
Nellie Viner

Webpage Design
Shyam Sundar K.

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