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Towards Operation Scuttle

After Item 9, it is now 1503 Confidential Procedure that is under attack; meanwhile, Sudan escapes censure

IT gets curiouser and curiouser, as Alice said in Wonderland. Late on Friday evening (26 March), a reliable NGO source from Sao Paulo called *Human Rights Features*. He mentioned that the Brazilian Government was under strong pressure to withdraw its resolution on sexual orientation, and that this pressure had been mounted by a number of state parties present at the CHR.

It is understood that some of the reasoning was formulated by the Cuban delegation. The Cubans, it is learnt, impressed upon the Brazilians that in the interests of solidarity with the Like Minded Group (LMG) and the developing world, any divisive issues within the LMG must be given the heave-ho or put off to the 61st session of the CHR. The Brazilians are sensitive to their new leadership role in the developing world as evidenced in the Doha round of trade talks and the troika of Brazil, South Africa and India that has emerged in the new rounds of trade negotiations. They are in a quandary. It is possible that they may acquiesce to postponing the consideration of their resolution rather than contemplate a withdrawal.

The South Africans, notwithstanding the explicit reference to the rights of sexual minorities in their Constitution, have decided that discretion is the better part of valour, and are going along with the ostrich-like attitudes of others in their region and in the Organisation of Islamic

Conference (OIC).

Last Friday was also a good day for the LMG in the confidential segment of the CHR's sitting on 1503. When this College of State Party Cardinals meets, no smoke emanates. It is reliably learnt that China, leading the charge on behalf of the LMG, asked that a certain African

The draft resolution on Nepal has yet to find co-sponsors. Uncle Sam has been telling its allies how much of a jolly good fellow the King of Nepal is. Forget the Democracy Caucus, forget the need to restore multi-party democracy in this beleaguered Himalayan country.

country not be considered under the 1503 Confidential Procedure as it already was being considered under a public procedure. There was much argumentation on this point. In the end, China moved for a vote to adjourn the consideration of the country under the 1503 Confidential Procedure during this session and was able to carry the day. The larger question as to whether a country being considered under a public procedure can be also considered under the 1503 Confidential Procedure was left for another day and another battle.

The Western Group, lurching from one

defeat to another, seems to be rudderless. Without hindsight, eyesight or foresight, it has been sounding the retreat rather than taking a vigorous public campaign of open diplomacy on defending the CHR's mandate. The Germans have decided to leave the field of battle on the Sudan mandate. Berlin, smarting after last year's defeat of the mandate on Sudan, has chosen to believe that Darfur is a nightmare that will go away. However, the denial of humanitarian aid is no mirage for the hapless in the Nubian Desert. (see P.11) All the bleeding hearts in Western and other chanceries are aware that the new oil prospecting deals offered by Khartoum are more lucrative than shouldering the burden of the war ravaged and internally displaced.

The Swiss, meanwhile, are understood to have their own share of problems. Their minimalist resolution on Nepal has yet to find co-sponsors as we go to print. (see P.3) Uncle Sam has been telling its NATO allies what a jolly good fellow the King of Nepal is. And how primeval the Maoists are. Forget the Democracy Caucus; forget the restoration of multiparty democracy. Belgium and the United Kingdom are helping keep the unemployment figures back home down, with arms sales to the Himalayan kingdom. So what if Norway shed a few genuine tears on the human rights situation in Nepal? Norway is not even a member of the EU

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'Growing support in CTC for human rights experts'

BACRE WALY NDIAYE, who heads the Office of the High Commissioner for Human Rights in New York, believes there is scope for progress within the UN as far as the issue of human rights is concerned. He should know, having been a UN Special Rapporteur for extrajudicial executions, and having reported on the alarming situation in Rwanda months before the massacres began. In an interview to HUMAN RIGHTS FEATURES, Mr. Ndiaye spoke about the evolution of the Special Procedures system, the lessons learnt from Rwanda, the initiatives within the UN on having an alerting mechanism to prevent genocide, and significantly, about indications of support within the Counter Terrorism Committee (CTC) for the appointment of a human rights expert...

Human Rights Features (HRF): In view of the new role of the Security Council and the General Assembly in looking more closely at issues impacting on human rights, how do you see the role of the High Commissioner's Office in New York evolving?

INTERVIEW
Bacre Waly Ndiaye

HRF: Given the greater role of UNDAF (UN Development Assistance Framework) and the increasing role of the UNDP and other agencies, how do you see your office in New York mainstreaming human rights components in the UNDP Country Programmes?

Bacre Waly Ndiaye (BWN): When I joined this office in 1998, there was almost, in fact no link, between our office and the Security Council. I remember, in 1999, it was not very easy, even for the High Commissioner, then High Commissioner, Mrs. Robinson, to represent, to speak to the Council on behalf of the Secretary General on the subject of protection of civilians in armed conflict. It was only at the last minute that she was able to do it because some countries were opposing the High Commissioner for Human Rights addressing, formally, the Council.

And since then, I must say, the situation has evolved considerably.

BWN: Well, we have been involved since 1998. First of all, the inclusion in the UNDAF of the six main human rights covenants, meaning the two Covenants (ICCPR and ICESCR), the Convention Against Discrimination, the Torture Convention, and the Child Convention and the one on women, and we should certainly add to these six covenants, the Migrant Workers Convention. So it is now part of the UNDAF. And about the CCA itself, it was the New York office also which was involved in introducing human rights indicators in the frame of the CCA. Since then,

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Operation Scuttle...

Club! Little do they realise that without representative democracy and human rights, all the king's horses and all the king's men were not able to put Humpty Dumpty together again.

As for Burma, or Myanmar, call it what you will, the Ambassador from Yangon had a smile as broad as the Irrawady River after the interactive debate on the Special Rapporteur's report. Duplicitous as ever, the military regime has yet to allow the Special Rapporteur access to Shan state where rape has been used as a methodical instrument of cowering down whole communities. No independent international inquiry on the dastardly attack on Daw Aung San Suu Kyi. And what is more, with the exception of the United Kingdom, all the other worthies are rushing to endorse the Bangkok process without even securing the minimal guarantees of human rights protection for the Burmese participants in the new constitutional process.

The Generals are aware that they need to keep their smirks at European credulity to themselves until 2006. Once they host the ASEAN summit, they are home. The sanctions in any event amount to little, with China, Thailand,

India and Singapore all helping at sanction-busting. Will the mandate remain as the SPDC looks at the Middle Kingdom for help on item 9? The answer, my friend, is blowing in the wind.

The news on the Special Procedures front is not hopeful. The EU's draft biennial resolution embraces all the special procedures, an improvement on previous resolutions which

It is not clear why CHR members are opposed to an enhanced role for the Security Council on human rights; after all, they don't seem to want to do the job themselves.

related only to the thematic procedures. It also urges States to issue standing invitations to all special procedures, and furthermore, requests the Secretary General to facilitate interaction between the special procedures and the Security Council. Did we say improvement? The United States opposes standing invitations on grounds of "sovereignty". Washington probably has visions of Special Rapporteurs and Representatives massed at America's frontiers, sharp pens and lethal reports held aloft. And if the US is petrified, surely you can't blame the Russians, the Japanese and the Australians for cowering.

There is also great resistance to the idea

of having the Security Council take a more proactive role on human rights. Many States, for example, are reluctant to have the special procedures interact in a more regular and systematic manner with the Security Council. The Council's mandate relates to matters of security, they maintain, dismissing the idea that human rights violations may sometimes pose a threat to security. It is not clear why CHR members are opposed to an enhanced role for the Security Council on human rights; after all, they don't seem to want to do the job themselves.

The debate on a role for the Security Council also puts the spotlight on proposals for a human rights monitoring mechanism within the Counter Terrorism Committee (CTC) of the Security Council. The Mexican draft resolution suggests a Special Rapporteur for the purpose and the indications are that the Secretary General may suggest a mechanism of some kind, if not a Rapporteur. Now, this should be one of the most important issues on the OHCHR's agenda as well; however, the proposal from the Acting High Commissioner is to have a Rapporteur on Trafficking. In view of the fact that resources for the special procedures are already scant, it might be worthwhile for the OHCHR to do some reorganising of priorities.

Two weeks down and four to go. Rub a dub a dub. Don't you feel you are in a tub? A leaking one at that!

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'Growing support in CTC...'

we have been contributing to reading and commenting on individual UNDAF countries and also we have been involved in the training of [resident representatives]. I myself attended two training sessions. We are regularly invited to the biannual [resident representative] meetings. We have also been involved in designing a training manual on human rights for regional coordinators.

HRF: *Beyond the Common Country Assessments at the national level, one sees little evidence of synergies in UN agencies on human rights. How do you plan to streamline this?*

BWN: An important feature of our synergy on human rights was the discussions we held, first in Princeton and last year in Stanford, about having a common understanding of what we mean by rights-based approach... to programming. This is one of the major issues in terms of mainstreaming human rights in all the UN activities. We were able, last year in Stanford, where I was also representing our office, to reach an agreement on what we mean by a rights-based approach, by policy, and I think that was very important. Some agencies have been playing a pioneering role, especially UNICEF, and some others were little bit behind, saying, we really don't see the need in our field for a rights-based approach. But, [we were] able to come, after these two meetings - and it was not easy - to a common understanding of what we mean by a rights-based approach and what will be the features, and all accepting that having a rights-based approach will make UN agencies or departments more effective, because the main features of course are based on participation, accountability, non-discrimination, transparency and also strong base on international human rights standards.

HRF: *Cognisant of State sensitivities on terrorism and the debate surrounding it, yet aware of the negative human rights impact of the counter-terrorism campaign, in addition to the bi-monthly report of the OHCHR, what concrete measures can be envisaged: 1) within the existing framework? 2) through new instrumentalities such as a special rapporteur to study the impact of counter terrorism measures on human rights?*

BWN: Because we are based in New York, I was the first one to brief on behalf of the High Commissioner the Counter Terrorism Committee (CTC) on the human rights aspects. Not only the CTC, but I also gave interviews -

the first one to the *Los Angeles Times* - on the counter productive aspects of counter terrorism policy when it comes to protecting human rights. Also, we're very pleased to benefit from a very strong and sustained position by the Secretary General who has always said there will be no trade-off between our rights and our security. But concretely speaking, the office has been able to provide to the CTC some kind of guidelines which will check how counter terrorism policies will be compatible with protection of human rights. In addition, we have been suggesting having human rights experts within the CTC. I must say that up to now, we have not been successful, but at the last meeting of the CTC, last month, we realised that we are gaining support even within the Committee for the inclusion of human rights experts in the CTC Secretariat. So it is one way for us to ensure that policies to counter terrorism will not produce more human rights violations or even more support to terrorists.

HRF: *You have been a Special Rapporteur yourself. Drawing from your own experiences, what are your thoughts on the resources available to the special procedures? In your understanding, what would have helped you carry out your job as Special Rapporteur better?*

BWN: Well, I was Special Rapporteur, but from 1992 to 1998, and since then - even when I was there, and [I realise] even now, more now when I'm on the other side, in the Secretariat - the lack of resources for them has been one of the patterns for the mandates. On the one hand, you have an increase in requests for mandates - and there has been a significant development of mandates in the field of economic and social rights - and on the other hand, we have the same basket of resources available. Even at the level of our office, we realise that despite some increase, we are still [receiving] less than two percent of the UN general budget. This is very worrying because human rights is one of the pillars of the Charter, and unfortunately, governments do not seem to have their resources where they have their words. Everybody recognises the importance of protecting and promoting human rights, but when it comes to giving resources for human rights programmes, it is one of the most difficult and the most controversial of the discussions on the UN budget.

I think this may be something we inherited from the past, but it is time to depart from it because there is increasing awareness of the need for a comprehensive approach to human security. Because development reforms, humanitarian aid and reconstruction, and peace and conflict resolution will not be sustainable without being inspired by human rights principles, and I believe that this awareness is not reflect-

ed in the way UN is distributing its budget. At the other end, we are not willing to have a giant office of the High Commissioner of Human Rights, but we are trying to multiply the effect of our small resources by building stronger partnerships, specially with our sister agencies, like the members of the Executive Committee for Peace and Security, members of the Executive Committee on Humanitarian Affairs and the United Nations Development Group.

For example, now we have regional advisers in all regional commissions, which is the way also to make sure that even if we are not able to cover everything, we have a presence in every region which will help at the regional level to take due account of not only a rights-based development, but also give due attention to human rights issues within the region.

HRF: *As Special Rapporteur, you carried out a mission to Rwanda, which, as we know, failed to be taken seriously by the higher echelons of the UN. Do you think any lessons were learnt from experience? Do you, for example, listen to reports coming in from Sudan and have a sense of déjà vu?*

BWN: I arrived in Rwanda on 6 April or 7 April 1993, just a year before the genocide. During my visit, I realised that there were indications that the massacres that had already occurred in Rwanda had been planned. And there was a kind of structure that played a role in the massacre which occurred, but was also capable of being involved in more massacres, maybe on a larger scale. It was with this decision in mind, I must say - and thanks to NGOs, when I undertook the visit, because they alerted me about the situation - my role was not to just confirm what I had seen but to see what was feasible to do to prevent these massacres from occurring. I realised that there was some indication that a genocide may be brewing, but I admit I did not foresee the scale, and in such a short framework, and also, I realised that it was not impossible to stop it.

My recommendation was about measures to stop it, including making sure that there would be a national mechanism to alert about massacres, that the militias will be disbanded and disarmed, that the hate media would be silent, and also that the UN should be present in the country, even if in the form of civilian police. Unfortunately, I realise now, our reports were not available through the internet; there was no internet. The reports were printed and made available to those who were willing to request them. It was really a feeling of just throwing a bottle in the sea and to see who is going to grab it. At that time also, there was no link between the Rapporteur and the Secretariat in New York, let alone the Security Council. But

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Recognising a problem

Nepal needs to acknowledge that its armed forces are as complicit in abusing human rights as the rebels themselves

NEPAL is a member of the Commission on Human Rights (CHR) this year, and, in line with contemporary CHR practice, will try to use its membership to block a resolution on its human rights situation, which is being drafted at this moment. By way of assistance, it may have its Asian neighbours for support. However, if these countries, particularly China and India, realise the gravity of Nepal's plight and the need for international scrutiny, they will endorse a strong yet constructive resolution.

Both India and Nepal, in their statements on agenda item 9 last week, denounced terrorism in no uncertain terms, but also, refreshingly, stressed on the need to ensure the due process of law and respect for human rights. It is in this spirit that a resolution on Nepal should be viewed. If the Nepal Government believes it can keep the spotlight on rights violations by the rebels and dismiss grave violations by the police and military forces as exceptional aberrations, it will not work. A number of reports and observations by rights groups, as well as the official National Human Rights Commission of Nepal, have documented cases of violations by both sides to the conflict.

Unwinnable War

Violence and the incidence of human rights violations are escalating in Nepal, where over 90 percent of human rights violations are associated with the country's armed violence. Last week, three Special Rapporteurs (on torture, arbitrary detention and expression) added their voices to the calls of urgent concern regarding the worsening situation in Nepal. A necessary minimal step on Kathmandu's part is a clear expression of its obligations under humanitarian law.

In 1996, the Communist Party of Nepal (Maoist) declared a "People's War" on the Government of Nepal, calling for abolition of the constitutional monarchy and the establishment of a "genuine people's republic," and began armed hostilities in an attempt to overthrow the government. The Maoists initially articulated the common sentiment of a need for social change and filled a political vacuum left by perceived inaction by the political parties and the monarchy.

In late 2003, the Maoists broke a ceasefire with the Nepal Government, in effect since January 2003, when they withdrew from unproductive negotiations and resumed armed hostilities. As many as 5,000 civilian deaths have occurred in the last three years. Nepal's democratic governance has been eliminated, armed hostilities have spread to 74 of the country's 75 districts, and increasingly the conflict threatens to destabilise regions in neighbouring countries.

Credible reports from human rights NGOs and monitors in Nepal indicate that both the Maoists and the Royal Nepal Army (RNA) commit human rights abuses on a widespread basis with impunity. The RNA has carried out extrajudicial executions of Maoists and civilians, torture, arbitrary arrests, forced disappearances, intimidated the press and NGOs, and interfered in the work of the judiciary.

The Maoist forces have engaged in similarly serious human rights abuses, assassinated key political and military figures, recruited children as combatants, engaged in widespread extortion and abduction, robbed banks and killed local journalists. The Maoists' rely on tactics, such as homemade explosive devices, that pose a heightened threat to civilians.

Rural Nepalese are now caught between Maoist cadres and a royalist military often willing to use indiscriminate force. The crisis is worsening. In November 2003, Prime Minister Surya Bahadur Thapa - who was not elected, but appointed by the king - unveiled an initiative to establish Rural Volunteer Security Groups and Peace Committees to fight the Maoist rebels. Nepal government ministers argue that these armed village defence committees could better protect communities from rebel violence. However, experiences from around the globe

have almost universally proven civilian militias to be a disaster. As the International Crisis Group recently reported, armed vigilante groups with no training and no oversight tend to intensify a conflict and exacerbate human rights abuses. The potential for such a short-sighted policy to broaden the already deadly conflict in Nepal is distinct, and States providing military assistance must disavow any plan to arm civilians.

Failure to apply the Geneva Conventions

The Nepal Government has yet to recognise its obligations under international humanitarian law. Most recently, on 9 January 2004, the Nepal

The Nepal Government's recalcitrance is having dire consequences for the civilian population and necessitates a CHR resolution calling upon the Government to immediately recognise the applicability of Common Article 3 of the Geneva Conventions. More than 9,000 Nepalese have been killed since hostilities began.

Supreme Court ruled that the Geneva Conventions are not applicable to the on-going conflict between the government and the Maoists. Press reports of the Court ruling indicate it is based on a misunderstanding that the Geneva Conventions are only applicable in international armed conflicts. This reasoning fails to take account of common Article 3 (CA3) which applies "[i]n the case of armed conflict not of an international character."

The government's recalcitrance is having dire consequences for the civilian population and necessitates a resolution from the CHR calling upon the government to immediately recognise application of CA3. There should be no doubt that the hostilities legally require application of the Geneva Conventions. Best estimates indicate that over 9,000 Nepalese have been killed since hostilities began.

Applicability of Common Article 3

The hostilities in Nepal constitute a clear case of "armed conflict not of an international character" covered by CA3. Although the Geneva Conventions themselves do not define the term "armed conflict," several sources of international law have been used to clarify the term's mean-

Common Article 3 imposes obligations on all parties to the conflict that are part of customary international law. Criminal violations of these obligations can be enforced against individuals as war crimes. This is important in the context of Nepal where the judiciary has been seriously compromised.

ing. First, the drafting history demonstrates that the Diplomatic Conference of Geneva of 1949 specifically rejected a narrow application of CA3 to only internal armed conflicts that closely resembled inter-state wars. Instead, the Diplomatic Conference chose to extend a core set of the substantive principles of the Geneva Conventions to all organised hostilities excluding "mere acts of banditry or ... unorganised and short-lived insurrections."

The ICTY (*Tadic* jurisdiction appeal) and ICC Statute apply CA3 whenever there is protracted armed violence between government authorities and organised armed groups within a State. The narrowest interpretation of the criteria suggest they require (1) protracted armed violence and (2) and organised armed group that controls territory.

These requirements are satisfied by the hostilities in Nepal. Armed violence has lasted for more than 8 years, whereas the ICTR (in the

Akayesu case) held that armed violence extending over only a few months satisfies the "protracted" requirement. The Maoist insurgents have a military command and control structure and control significant territory within Nepal, fulfilling the requirement of an organised armed group that controls territory. Thus, even under the narrowest interpretation of *Tadic* and the ICC Statute, the armed violence in Nepal requires application of CA3.

Factual determination of the application of common Article 3

Commentators on international humanitarian law point to several key factors for determining whether armed violence should be considered an armed conflict under CA3. These include: the nature and quality of the hostilities; the reactions of the parties to the hostilities; the international community's reaction; and the organisational characteristics of the armed group.

The nature of the Maoist insurgency constitutes an armed conflict, because it has the requisite purpose, intensity, protraction/duration, and coordination of the attacks. Maoists repeatedly refer to their actions as part of a "People's War" to overthrow the government. The Maoists repeatedly call for the government to respect the Geneva Conventions, although Maoists have yet to declare their own commitment to the Conventions and frequently violate them. Maoists control approximately one third of Nepal's territory. Maoists have a military command structure with similarities to a regular army, and have increasingly engaged in large-scale battles causing significant casualties. Maoists have established quasi-governmental apparatuses in territory under their control, and coerce "taxes" from anyone that works in their territory (including humanitarian workers).

The actions of the royal Nepal Government likewise indicate it is engaged in an "armed conflict" with the Maoists. In November 2001, after a series of violent attacks that broke a four-month ceasefire, King Gyanendra declared a nationwide state of emergency that remained in effect until August 2002. The King responded to the threat by eliminating democratic government, dissolving the parliament in May 2002, dismissing the Prime Minister and Cabinet in October 2002, and postponing elections indefinitely.

Until 2001, the government treated the insurgency as a law and order problem, using the police rather than the army in counterinsurgency operations. However, at the beginning of the state of emergency, the RNA took over command and control responsibility of counterinsurgency operations.

Finally, the international community's response demonstrates that they consider it a serious internal armed conflict. Using the United States as one example, in 2002 and 2003, the US appropriated \$17 million in Foreign Military Financing to Nepal (FMF; grants to a foreign government earmarked for purchase of U.S.-made military equipment). The US administration requested another \$10 million in FMF for FY2004 to "continue funding training and equipment programs" for the RNA. The US State Department refers to the FMF aid and to additional assistance of 20,000 M-16 rifles to the RNA as "help to counter a brutal Maoist insurgency".

Provision of substantial "military assistance" by the US to the RNA for the purpose of countering the "Maoist insurgency" indicates that the US considers that the internal hostilities require a robust military response. The United Kingdom, India and Belgium also provide military assistance to the Nepalese Government to counter the Maoists. The resort to a military response by the international community demonstrates that the hostilities are not "mere acts of banditry" but are an organised, protracted and intense application of force that constitutes an "armed conflict" under CA3.

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GUANTANAMO BAY

US: Time to stop choosing principles

"Thus we have reached a time for choosing. Over the next several weeks, we can choose either to take seriously the mandate we have been given and stand up for those around the world who yearn for liberty...or we can choose to find reasons for inaction or silence."

- Paula J. Dobriansky, US Department of State Under Secretary for Global Affairs.

IT is difficult to read these words of the US delegation at the High Level Segment of this year's Commission on Human Rights (CHR) without recollecting Guantanamo Bay, Cuba. Where, since January 2002, the US authorities have been transporting men allegedly seized in connection with hostilities, principally in Afghanistan. Some 660 detainees have been held for two years at the hands of the US authorities, most without charges, access to counsel or courts, or recourse to any legal process. The detention regime has been described by the English Court of Appeal as a "legal black hole". Even the International Committee of the Red Cross (ICRC) has broken its usual silence to condemn the Guantanamo policy.

Can the seemingly laudable sentiments of the US delegation have any credibility at the CHR, whilst the situation at Guantanamo remains?

Rasul v Bush

Later this month, the legal status of Guantanamo Bay is to be scrutinised by the US Supreme Court. In early 2002, lawyers on behalf of a small number of non-US nationals held at Guantanamo Bay filed petitions in the US courts seeking to challenge the legality of detention under President Bush's Executive Order of 13 November 2001, which authorised indefinite detention without due process. Three legal actions were brought in the District Court for the District of Columbia; the cases of *Rasul v Bush*, *Al Odah v United States* and *Habib v Bush*. The detainees in question are British, Australian and Kuwaiti nationals, all countries with friendly relations with the United States. The petitions were rejected by the District Court.

On appeal, the Court of Appeals rejected the petitions, relying on a 1950 US Supreme Court ruling in the case of *Johnson v Eisentrager*, which it interpreted to mean that US courts do not technically have jurisdiction to consider the due process rights of foreign nationals detained outside the "sovereign territory" of the US.

Guantanamo Bay was leased from Cuba by the US in 1903. The lease provides that Cuba keeps "sovereignty" over the territory, but that the US authorities have "complete jurisdiction and control". As Guantanamo Bay is not sovereign territory under the terms of the Lease, the Court of Appeals ruled that it could not hear the petitions of any foreign nationals held at Guantanamo Bay. As all detainees at Guantanamo are foreign nationals, this means that to date none of the detainees has any legal rights before the US courts; or, indeed, before any other legal forum, as the US does not accept the jurisdiction of the Inter American Commission of Human Rights and has not ratified the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The three sets of petitioners have appealed to the US Supreme Court, which is to hear their cases in a consolidated action under the title, *Rasul v Bush*. The US Supreme Court

is asked to answer a very narrow question but with far-reaching implications for international human rights. The question is whether the US courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and detained at Guantanamo Bay.

Court briefs have now been lodged on behalf of the detainees and on behalf of the US Government. In addition, there are numerous amicus curiae briefs in support of the petitioners; the list of amici reads like a who's who of international human rights NGOs, as well as including the Association of the Bar of the City of New York, The Law Society of England and Wales, the International Bar Association, and former US diplomats.

Bush v Rest of the World

In the context of Guantanamo, the US Government has not chosen to 'stand up' for the principles of the ICCPR. On the contrary, it is practising the "inaction" or "silence" that it so freely criticises in others.

The US Government's case is exclusively centred on technical jurisdictional arguments arising from *Eisentrager*. Nowhere in the US Government's brief is there any reference to international human rights law. Thus, in the context of Guantanamo, the US Government has not chosen to "stand up" for the principles of the ICCPR - the mandate of the CHR. On the contrary, it is practicing the "inaction or silence" it so freely criticises in others.

There should be no doubt, however, as to the overwhelming weight of international legal authority against indefinite detention without independent legal review. Wherever detention may take place and in whatever circumstances, and whether it may be under international humanitarian law or international human rights law, detainees are entitled to the right to due process.

In the context of humanitarian law, the US continues to avoid its obligations under the 1949 Geneva Conventions. The Conventions require all detainees to be promptly classified, to allow detainees to be given the rights and privileges appropriate to their status (article 5, P.O.W. Convention). In any event and whatever their status, detainees are entitled to proper due process (see common article 3 and article 75, First Additional Protocol).

All the principal international and regional human rights instruments, including the ICCPR (Articles 9(1) and 9(4)), provide

for legal review of detention before an independent tribunal without delay, usually in the form of the writ of *habeas corpus* or *amparo*.

The right to legal review of detention is non-derogable. It exists in time of peace, war, or states of emergency; including the so-called 'global war on terror', although no such concept is recognised in law. The right to *habeas corpus* or *amparo* has been upheld in such circumstances by the UN Human Rights Committee (General Comments 8/16, 1982 and 29/1950, 2001, and *Vuolanne v Finland*), the UN Working Group on Arbitrary Detention (UN Doc E/CN.4/2003/8 at 19-21), the UN Special Rapporteur on the independence of judges and lawyers (Dato' Param Kumaraswamy, March 2003), and regional human rights mechanisms (the European Court of Human Rights in *Ocalan v Turkey*, 2003, and the Inter-Am. C.H.R. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay), 2002).

The amicus curiae brief on behalf of the Commonwealth Lawyers Association concludes emphatically that indefinite detention without legal review is illegal in all Commonwealth countries. Moreover, the Restatement (Third) of the United States (para. 707, n.6 (1987)) recognises the right to legal review of detention as part of customary international law.

Thus, the situation at Guantanamo Bay constitutes a "deviance from world practice and opinion"; not least the practice of the United States itself.

Similarly, the practice of international and regional institutions leaves no doubt that the US courts should, under principles of international human rights law, have jurisdiction to review the detention of foreign nationals at Guantanamo Bay. As the International Bar Association submits in its amicus curiae brief, under international law the duty to respect the right against arbitrary detention applies when a state exercises "authority and control" over a person, regardless of where the detention occurs. This view is supported by the UN Human Rights Committee (*Lopez Burgos v Uruguay* and U.N. Doc. CCPR/C/74/CRP.4/Rev 4, para. 9, 3 Nov 2003), the European Court of Human Rights (see *Cyprus v Turkey* and *Ocalan v Turkey*), and the Inter-American Commission (see *Coard v United States*).

In sum, as the coalition of national and international NGOs put it in their amicus curiae brief: "International law does not allow the creation of an island outside of law where people are without rights."

Military commissions

Of over 700 detainees who have been held at Guantanamo over the last two years only six have so far been charged with any offence. The accused are to be tried before military commission, pursuant to President Bush's Military Order of 13 November 2001. Human Rights Watch, among many others, criticise the rules of the proposed commissions as President Bush, through his officials, will effectively act as "prosecutor, judge, jury". No appeal is permitted to a civilian court and the normal rules applying to lawyer-client relationships are to be seriously curtailed. In short, universally accepted standards of international law are to be ignored, denying the accused of basic human rights and fundamentally undermining the legitimacy of the commissions' verdicts.

Torture or Cruel, Inhuman or Degrading Treatment

It is clear from the accounts of those few detainees who have

been released and from media reports that claims of torture or cruel, inhuman or degrading treatment will be brought against the US authorities. It is reported that many inmates are held in solitary confinement, restricted to 6' 8" x 8' cells (approx. 2m x 2 1/2 m) 24 hours per day, except for 30 minutes of exercise three times per week. Recently released detainees have reported guns held to their heads during questioning in Afghanistan by American soldiers, physical abuse and beatings. The ICRC has also expressed concern as to the psychological affects of indefinite detention. Thirty-four suicide attempts have been reported.

These kind of so called "stress and duress" techniques have been regularly condemned in US State Department annual reports. The pattern of treatment reported at Guantanamo constitutes a clear breach of the provisions of the Geneva Conventions and/or Article 7, ICCPR.

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Thirty-four suicide attempts by detainees in Guantanamo have been reported. These kinds of 'stress and duress' techniques have been regularly condemned in US State Department annual reports on other countries.

CUBA

903 reasons for a resolution on Cuba

SOMETIME in the coming weeks, the Commission on Human Rights (CHR) will once again take up the annual debate of whether or not to continue their support of a resolution condemning Cuba's human rights record.

During the discussion, opponents of the resolution will give numerous reasons as to why Cuba doesn't deserve this dubious distinction. They will point to Cuba's high literacy rate, their universal health care programme, and the increased participation of women in government. They will argue how, in the wake of an intensely unfair embargo, Cuba has achieved their goal of creating a paradise on earth.

But Cuba's defenders won't mention Enrique Copello Castillo. Last April, while the CHR met, Mr. Castillo and two friends attempted to leave this "paradise" by commandeering a ferry and setting sail for the United States. When they ran out of fuel, they were apprehended by the Cuban Coast Guard, brought back to Cuba, and executed as terrorists. The entire process took nine days. The trial's brevity and unfairness left them with little hope of defending themselves; but it did warn others who might seek to embarrass Castro through escape attempts from his "paradise."

They also won't talk about Raúl Rivero Castañeda. Mr. Castañeda, director of the Cuba Press, who wrote in 1999: "I am certain that informing others objectively and professionally and writing my opinions about the society in which I live cannot be a serious crime..." He was wrong. Last March, even as the CHR met to decide whether to re-elect Cuba as a member, Cuba rounded up more than 75 journalists, economists, doctors, pro-democracy leaders, and other activists for their "subversive activities." Mr. Castañeda's subversive activities consisted of speaking with foreign press agencies such as the *Agence France Presse* and the *Reporters sans Frontières*. Mr. Castañeda is serving a 20-year prison term for his "crime"...

Officially, not much is known about Cuban prisons. Cuban officials, embarrassed by their conditions, have denied international

human rights groups access to their prisons. However, dissidents' letters and essays which escape the Cuban censors describe a system of "inadequate medical care, poor food, and darkened cells where toilets are little more than holes in the ground".

Once imprisoned, non-violent dissidents such as Mr. Castañeda are mixed with hardened, violent crime inmates in maximum security facilities. Most dissidents suffer malnourishment and languish in overcrowded cells, where they endure repeated physical and sexual abuse, often with the full approval of their guards. They are required to attend regular "re-education" seminars for political indoctrination and are subject to solitary confinement for the mildest of offenses, such as refusing to wear a uniform. "The purpose is to make one surrender," says dissident leader Hector Palacios.

Lastly, you won't hear much about Jorge Brito. Mr. Brito is a psychiatric nurse at an HIV sanitarium outside Havana. Cuba's solution for people who suffer from the AIDS epidemic is to lock them up. All people found to be infected with HIV undergo mandatory detention. Once detained, they may leave only with the permission of the staff. Says Brito, "[t]he moment you are diagnosed, you are very vulnerable and feel a lot of fear...When you enter, you lose your privacy. You feel like a prisoner."

Although Cuba provides these people with medical coverage, many Cubans say that the necessary vitamins, antibiotics, and other drugs are unavailable or exorbitantly expensive. These measures are considered even more drastic considering the news that, despite these draconian efforts, AIDS rates in Cuba have continued to climb in the past few years.

As oppressive and unnecessary as the US blockage may be, it should not serve as a guise for Cuba's unremitting repression of its people. Cuba's actions in the past year, coupled with its refusal to allow visits by the UN Special Representative constitute grave violations of basic human rights principles.

Last year, Cuba rounded up more than 100 advocates for democracy and condemned them to prison for their beliefs. Last year, 800 HIV-positive individuals were interned solely for the crime of being sick. Last year, three people seeking a life of freedom were executed. That is why a tougher stance on Cuba is required.

Cuba should not be rewarded for its consistent disregard for the rights of its citizens. Significant advances in providing universal education and health care must never be justified when those advances come at the expense of the individual. The world must not reward social progress that tramples on individual rights and dissenting opinions. Removal of the resolution from the Commission's agenda would send a message of implicit approval by the very world body specifically created to combat these evils.

Rather than reward Cuba for its behaviour by abandoning its resolution, the CHR needs to adopt stronger measures to ensure Cuba's compliance with international laws. As oppressive and unnecessary as the US blockade may be, it should not serve as a guise for Cuba's unremitting repression of its people. Cuba's actions in the past year, coupled with its continued refusal to allow visits by the Personal Representative of the High Commissioner on Human Rights for Cuba, Christine Chanet, constitute grave violations of basic human rights principles.

The CHR has a responsibility to ensure that all human rights violations, regardless of where they occur, are categorically condemned. As a member of the CHR and the world community, Cuba has an obligation and a duty to comply with accepted human rights principles. Until now, the Commission's actions have consisted of little more than mildly worded reprimands.

The CHR's continual reluctance to adopt a tougher stance on Cuba represents a grave obstacle in the struggle towards fortifying the legitimacy of the CHR and the worldwide human rights movement as a whole.

Last year, Cuba rounded up more than 100 advocates for democracy and condemned them to prison for their beliefs. Last year, 800 HIV-positive individuals were interned solely for the crime of being sick. Last year, three people seeking a life of freedom were executed. If the CHR needs a reason for a tougher stance to be taken against Cuba, it should ask one of these people.

...from page 4

Guantanamo Bay: Time for US to stop choosing...

Implications for international human rights

The US Supreme Court in *Rasul* will focus solely on the issue of jurisdiction. However, the issue of jurisdiction permeates all others, because if the Supreme Court upholds the Court of Appeal ruling, then the US authorities will be subject to no legal restraints in their actions at Guantanamo. This would be unprecedented.

Guantanamo would be unique in being beyond the reach of both national law and international law. Whilst the Court's opinion would not be legally binding outside the United States, it would, as the International Bar Association have observed, tend to alienate America's human rights allies and show a green light to other countries wishing to act outside any effective legal scrutiny (see box).

'Time for choosing'

The practice of indefinite detention without trial or independent legal scrutiny, the imposition of military commissions, and the alleged ill treatment of detainees all serve to "stain" the United

"The case is however exceptional because of the basic nature of the right involved and the leadership role of the US in world affairs. Friendly nations watch the US with expectations based on widely accepted international law and shared legal traditions. Unfriendly nations look for an opportunity to accuse the US of violating minimal standards of international law or to seize upon an American precedent to justify or obscure their own violations."

- International Bar Association, Amicus brief in Rasul

States' proud history as upholders and promoters of human rights and the rule of law.

In its last report to the HRC in 1994 (CCPR/C/81/Add.4) the US stated that: "the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law". In the shadow of Guantanamo, this claim - questioned by the HRC at the time - sounds increasingly hollow.

If the US is "serious" about the CHR's mandate to promote and protect the rights contained in the ICCPR for all individuals, then it is time for the US to stop choosing.

It is time for the US to stop choosing which human rights principles to apply where, when, and for whom. Instead, the US should lead the Commission and the international community by respecting the universal and inalienable rights contained in the international bill of rights, without discrimination, including the right to *habeas corpus* for foreign nationals held at Guantanamo Bay.

If the US Government will not do so, one can only hope that the US Supreme Court will choose to preserve the United States' hard-earned reputation as promoter and protector of international human rights.

How about the duty to reply?

States are quick to exercise rights of reply at the CHR; it's time now for some answers, to serious questions raised by the Special Rapporteur on extrajudicial executions

EXTRAJUDICIAL, summary and arbitrary executions are among the most violent and deplorable human rights violations. This year will mark the sixth annual report of Ms. Asma Jahangir, the Special Rapporteur on extrajudicial, summary or arbitrary executions, presented to the Commission. The Special Rapporteur receives an "overwhelming" amount of information, and considers the cases brought to her attention to be a mere fraction of the increasing number of extrajudicial, summary or arbitrary executions. Simultaneously, there is a serious lack of information from countries where civil society is weaker and isolated, thereby confirming that a lack of information on a country does not inevitably indicate that the situation of human rights is satisfactory.

In the past year, Ms. Jahangir has transmitted urgent appeals on behalf of several hundred individuals to 35 countries and sent 61 letters detailing violations of the right to life of a large number of individuals and groups to an alarmingly large number (42) of governments. More worrying is the fact that a considerable number of Governments, including Israel and the Russian Federation did not reply to any of the Special Rapporteur's communications during the reporting period.

The Special Rapporteur's report concisely details action taken in connection with various forms of violations of the right to life, "including deaths in custody, deaths due to excessive use of force by law enforcement agents, killings by security forces or paramilitary groups, and death threats". The report also discusses the issue of capital punishment.

Ms. Jahangir has done remarkable work; her account of extrajudicial executions during the period under review has been exhaustive and it is clear that the report was carried out in a meticulous and diligent manner.

Since early 2003, a very large proportion of cases the Special Rapporteur has received relate to deaths in custody. In this context, the Special Rapporteur transmitted allegations to the Governments of 24 countries. Unsurprisingly, the information received by the Special Rapporteur indicates that deaths in custody result from severe ill treatment or neglect. The report describes that suspects held in pre-trial detention are tortured by enforcement agents, who are seeking to obtain self-incriminating confessions.

The report confirms that the number of deaths in custody in China continues to be alarming. Traumatic scenes in which detainees, most of whom are supporters of the Falun Gong movement, die as a result of severe ill-treatment, neglect or lack of medical attention, were reported. Ms. Jahangir states that, "the cruelty and brutality of these alleged acts of torture defy description". In relation to these disturbing reports the Special Rapporteur reaffirmed her request to the Government of China, voiced in so many letters of allegation and urgent appeals, to act immediately to protect the lives and integrity of detainees.

The situation in Colombia where the entire civil society is affected by similar death threats, "including State officials working on human rights issues" is of particular concern. The Special Rapporteur notes that trade unionists, human rights defenders or indigenous leaders are particularly at risk. Furthermore, entire rural communities, comprising hundreds of individuals, are also reportedly at risk after death threats from paramilitary groups that accuse them of collaborating with guerrilla groups.

Ms. Jahangir emphasised that under all circumstances, it is essential that the death penalty be regarded as an exception to the fundamental right to life, and is obliged as such to be interpreted in the most restrictive manner possible. To attain accurate statistics on the death penalty is virtually impossible, mainly due

to the fact that many countries do not release official figures. In this context, the Special Rapporteur contacted nine governments with regard to capital punishment and sent an urgent appeal to the Palestinian Authority.

The Special Rapporteur is deeply concerned that in a number of countries the death penalty is imposed for crimes, which do not fall within the category of the "most serious crimes". In a bid to highlight the seriousness of the situation, Ms. Jahangir referred to death penalty cases in Saudi Arabia, Iran and Singapore in which she has interceded in response to reports that the sentences had been determined in violation of international restrictions and human rights standards.

Having sent urgent appeals to the United

In other words, murder

The Special Rapporteur's mandate stipulated that she apply a gender perspective to her work and in doing so she addressed reports received of "honour killings" of women. In relation to these reports, the Special Rapporteur contacted the Government of Pakistan in connection with the murder of some 200 victims. The Special Rapporteur presented the Government of Pakistan with shocking cases "where women and young girls are set ablaze, strangled, shot at, clubbed, stabbed, tortured, axed or stoned to death. Their bodies are found mutilated with their throat slit, or they are chopped into pieces and thrown in a ditch".

Ms. Jahangir was especially troubled by the case of a 16-year-old girl who was reportedly drugged with sleeping pills and tied with iron chains to a wooden bed before being electrocuted to death by members of the Rajput Toors, a powerful community in Duniyapur, supposedly for having married outside her community.

States on behalf of four individuals who were facing execution, even though there were strong indications that they were mentally ill or disabled, the Special Rapporteur stated that she abhorred the fact that in addition, the Government of the United States has only replied to five out of the 35 communications transmitted over the last two years.

Country visits are a vital element of the Special Rapporteur's mandate, since they allow her to work in an atmosphere of cooperation with governments. The acquisition of direct information is more manageable and visits make it possible to capture the tone of the situation.

Since her appointment, the Special Rapporteur has written to a number of Governments expressing her interest in visiting their countries. At the time of writing, the Government of Sierra Leone had agreed to her visit request. The Special Rapporteur has requests pending with the Governments of Algeria, Liberia, Nigeria, and Turkmenistan.

The report additionally includes a section devoted to follow-up in relation to missions undertaken by the Special Rapporteur. The Special Rapporteur conducted a mission to Jamaica in February of 2003 (E/CN.4/2004/7/Add.2). The visit was prompted by a number of reports over the years alleging extrajudicial executions by Jamaican security and police forces as well as by information received regarding Jamaica and the international standards on safeguards and restrictions relating to the imposition of capital punishment.

At the invitation of the Government, the Special Rapporteur conducted a mission to Brazil from 16 September to 8 October 2003 (E/CN.4/2004/7/Add.3). The visit was aimed at allowing the Special Rapporteur to investigate *in situ* allegations she had received over the last few years relating to violations of the right to life, including extrajudicial executions by the police, and death in custody. The Special Rapporteur acknowledged the exceptional coop-

eration afforded to her by the Government of Brazil during the mission.

The Special Rapporteur has continued to follow the situation in the occupied territories and Israel with deepening concern. The allegations transmitted to the Government of Israel describe the arbitrary killing of civilians. According to the information received by the Special Rapporteur, civilians as well as clearly identified aid workers were allegedly targeted by Israeli Armed Forces either while taking refuge in their homes, or when trying to provide medical aid to persons hors de combat.

The Special Rapporteur also received reports of civilians, including children, shot in the streets by snipers or shot from helicopters when they were trying to restock vital supplies. This occurred despite the fact that the curfew was officially lifted. Another worrying practice is the demolition by bulldozers of family dwellings in so called "pre-emptive" strikes by Israeli military, regardless of warnings by residents to wait until homes were evacuated. In this regard, the Special Rapporteur sent several communications to the Government of Israel.

The Special Rapporteur also discusses the situation of a number of specific categories of victims, who are particularly vulnerable or have been directly targeted for extrajudicial execution, specifically, human rights defenders, lawyers, journalists, demonstrators, members of national, ethnic, religious or linguistic minorities, internally displaced people, women, children and members of indigenous communities.

Since the legitimacy of Ms. Jahangir's report is largely dependent on first hand information communicated by observers, she was strongly condemnatory of the killing of two of the witnesses she interviewed during her visit to Brazil from 16 September to 8 October 2003. These individuals offered her invaluable information relating to her directive, in response, the Special Rapporteur articulated serious concerns over what may be interpreted as acts of reprisals and accordingly encourages the Government of Brazil to act to protect victims and witnesses of human rights abuses, in conformity with agreed terms of reference for fact-finding missions by Special Rapporteurs.

During the period under review, the Special Rapporteur took action on behalf of human rights defenders in the following countries: Colombia, Côte d'Ivoire, Democratic Republic of Congo, Gambia, Haiti, India, Islamic Republic of Iran, Israel, Mexico, Myanmar, Nigeria and Sudan.

Finally, the Special Rapporteur recommends the following: she urged the UN to strengthen early-warning mechanisms so that acts of genocide and crimes against humanity can be avoided; emphasised that governments must not resort to aerial bombing, use of snipers or pre-emptive strikes; stated that law enforcement personnel should receive in-depth training on human rights; asserted that governments should respect the people's right to freedom of association and expression.

The Special Rapporteur also suggests that governments: maintain data banks with precise information on reports of extrajudicial killings; end systematic and institutional impunity for those who kill women in the name of honour and so-called morality; and respect the safeguards and restrictions contained in international guidelines and customary law in each and every case when imposing or executing the death penalty.

Ms. Jahangir has produced an exceptionally incisive and thorough report, concentrating on the most severe and pressing violations. Her tireless efforts to ensure state accountability must be commended. It would be an added bonus if States would actually respond to her communications and follow up on her recommendations.

MEDIA FREEDOM

Pakistan: Promises, then, a crackdown

IN Pakistan, being an independent journalist is becoming increasingly difficult and dangerous. Members of Pakistan's media have found themselves caught in a cycle of escalating violence and intimidation as the Pakistani authorities demonstrate a growing intolerance of criticism. Although the President, General Pervez Musharraf would have the world believe that his government staunchly advocates press freedom, the repressive press laws, the failure of the Pakistani authorities to protect journalists, the arbitrary arrests of journalists on trumped-up charges and the blatant and public encouragement of attacks on journalists (including by the President himself), clearly demonstrate that the concept of media freedom in Pakistan is a farce.

Empty promises, repressive policies

In October 1999, after years of repression and pressure at the hands of Pakistani politicians and businessmen, the Pakistani media held high hopes for reform in the immediate aftermath of General Musharraf's bloodless and unconstitutional coup. General Musharraf propagated a new policy for Pakistan, including freedom of the media, as an example of an alternative political direction and conviction. In his address to the nation following the coup, General Musharraf declared that he was "a firm believer in the freedom of the press" and held a "great regard and respect for the media" which he trusted to play a positive and constructive role. General Musharraf later assured members of the press that "you do not have to worry that this unparalleled freedom will be snatched by my government at any stage".

Although the press did enjoy a brief period of increased freedom, the situation deteriorated in the lead up to the referendum and parliamentary elections in 2002. Since then, there has been a growing trend of intimidation and harassment of the press, with increasing restrictions being placed on media freedom by the Government. In Pakistan today, the repression of press freedom is a severe nationwide problem, affecting national and regional media, as well as local and foreign journalists.

In August 2002, the Government promulgated three new press laws which were billed as necessary reform measures. In reality, these new laws imposed profound restrictions on the Pakistani media and represented a major setback for freedom of the press. The Press Council Ordinance created a government controlled press council with regulatory powers over the press, the Defamation Ordinance increased the penalties for defamation (which now include imprisonment) and placed the burden of proof on journalists charged with defamation, and the Press, Newspapers and News Agencies Registration Ordinance imposed a system of prior authorisation for news media.

Culture of Intimidation

The image of media freedom in Pakistan has been tarnished by increasing reports of attacks on journalists in order to "keep them in line". Threats, violence, and harassment of journalists by the military, religious fanatics and intelligence services have become increasingly common. Since the beginning of 2004, NGOs have already reported the murder of a journalist in broad daylight by a politician in the North West Frontier Province in January, the bombing of the office of the *Jang* newspaper in Quetta in February and the subsequent torching of the same offices by Shiite demonstrators in March, the ransacking of part of the Press Club in southern Karachi by Shiite demonstrators in February (an incident in which a security guard was also beaten), the kidnapping of a reporter by bandits in Sindh province in March and the arrests of at least four journalists attempting to report on the Pakistani army's offensive against the Taliban and Al-Qaeda in South Waziristan in March.

Journalists who publish critical reports regarding the authorities are often the subject of

arbitrary arrests. National security, defamation, blasphemy, public order and 'anti-terrorism' laws are often used as the basis of trumped up charges and excessive sentences.

The Government has failed to fulfil its obligation to provide protection to journalists from fundamentalists and outlawed groups. In September 2003, two journalists were detained by an outlawed fundamentalist group in the Khyber Agency Region of Pakistan's Tribal Areas in September 2003 after reporting on the abduction of two people by that group. Other journalists from the area have reported harassment from members of the Taliban and Al-Qaeda. In October 2003, Ameer Bux Brohi, a

large Sindhi language newspaper, the *Sindhi Hyderabad*, had to cease operations in February 2003 as the Government cut financial ties by reducing the advertisement quota by 50 percent so that staff salaries, telephone bills and expenditures could not be paid. At the end of February 2004, the Government imposed an advertising ban on the newspapers of one of Pakistan's major media groups, which have published reports critical of the Government. The International Federation of Journalists has condemned the move as a "scandalous abuse of power driven by a desire to stifle independent media voices".

Double Standards

In December 2003, three journalists were arrested after travelling to the Pakistan-Afghanistan border where they were reporting on Taliban groups for the French weekly *L'Express*. Two of them, Marc Epstein and Jean-Paul Guilloteau, being French nationals, were charged with visa violations for travelling to Quetta without permission. After first being sentenced to six months in prison in Pakistan, intense diplomatic pressure from France led to the reduction of the penalty to a fine. On 13 January 2004, the French journalists returned home.

However, their Pakistani colleague Khawar Mehdi Rizvi was secretly detained for more than 40 days. Rizvi is well respected in his field and has worked for the *Chicago Tribune*, *The New York Times* and *Le Monde*, among others. A *habeas corpus* petition was lodged by a lawyer for Rizvi's family; however, Pakistani Government officials repeatedly denied holding Rizvi. The authorities finally admitted detaining Rizvi on 25 January 2004. Rizvi, who has reportedly been tortured whilst in detention, has been charged with "sedition" and "conspiracy" charges before an anti-terrorism court. However, no serious evidence to support the charges has been presented.

All the way to the top

What is particularly disturbing is that, despite his self-professed "belief" in press freedom, General Musharraf himself has, on more than one occasion, made public threats against members of the press. It has been reported that in September 2003, he publicly threatened two senior Pakistani journalists, Shaheen Sehbai and Hussain Haqqani, who were then living in the United States, in front of several hundred expatriates in New York.

It has also been reported that Musharraf made threats against Amir Mir, senior assistant editor of the *Herald*, at a reception for newspaper editors in November. It is alleged that Musharraf accused the *Herald* of being "anti-army" and working against the "national interest". Mir's car was set on fire by unidentified persons two days later. Mir claims that he also received a telephone warning that "this is just the beginning".

Time for Reform

The culture of intimidation of the press has resulted in a general decline in investigative journalism in Pakistan. There is hope, however, largely due to the efforts of courageous members of Pakistan's press who are fighting back and continuing to draw attention to the abuses.

As the number of human rights violations perpetrated against journalists and members of the media grows in Pakistan, it is time for the international community to closely monitor the situation, and to call on General Musharraf to deliver on his promises. As stated by Brad Adams, the Executive Director of the Asia Division of Human Rights Watch, "[i]t is time for General Musharraf to show the world whether he is a reformer - or no different from other military rulers. How he deals with press freedoms is a big test. As of now he and his government are failing".

Pressing concerns

Already this year NGOs have reported the murder of a journalist in broad daylight by a politician in the North West Frontier Province, the bombing and subsequent torching of offices of a newspaper in Quetta, the ransacking of part of the Press club in southern Karachi, the kidnapping of a reporter by bandits in the Sindh province and the arrests of at least four journalists attempting to report on the Pakistani army's offensive against Taliban and Al-Qaeda forces in South Waziristan.

"We have not tried to place any curbs on the press too, and newspapers are free to write and comment on events and mirror opinion so that the government remains aware of it. We welcome criticism of every kind, and look forward to the fact that our journalists, columnists and commentators will play their due role in building up an atmosphere of mutual understanding and tolerance and unity within the country."

- Prime Minister Mir Zafarullah Khan Jamali, 11 March 2003.

reporter for the largest Sindh daily newspaper, was killed by unidentified gunmen. He was the second journalist to be killed in Sindh in 2003.

In March 2002, Shaheen Sehbai, editor of the English-language newspaper *The News*, suddenly resigned from his work and fled to the United States. Sehbai's departure followed the publication of a story about the kidnapping and murder of Daniel Pearl, a journalist for the *Wall Street Journal*. It has been reported that Sehbai implied in a letter to colleagues 'that the publisher had charged him with policy violations and professional misconduct to sack him under pressure from the military government.' Sehbai subsequently set up an investigative online news site, the South Asia Tribune, which was blocked by the Pakistani Telecommunications Company in May 2003.

Security forces, such as the Inter-Services Intelligence (ISI), practise an ever-growing influence on newspaper editors in what has been described as giving 'advice'. Further, according to a US Department of State report, in some cases governmental and non-governmental bodies pay for positive coverage within the media sphere. Self-censorship often appears in relation to the reporting on sensitive issues, such as the military, and since 2001, the Ministry of Information has warned the Pakistani media not to criticise either the US or the Pakistan Government about their anti-terror efforts.

The Pakistan Ministry of Information controls and directs the Associated Press of Pakistan, the Government's news agency and official transmitter of international news to local media. The Government controls most of the broadcast media through the Pakistan Broadcasting Corporation and Pakistan Television. Foreign books and magazines are censored, and in July 2003 the Government imposed a ban on an issue of the US magazine *Newsweek* due to an article on the Koran.

The Government also exerts power through advertising revenue and public interest campaigns. According to the Human Rights Commission of Pakistan, a prominent NGO, a

Common standards, contested principles

Are the Norms on the Responsibility of Business Entities an issue for the 60th CHR?

NILS ROSEMANN

MUCH has been said about the evolution, content, and means of implementation of the Norms. This article focuses on what should and might happen after they are transmitted by Sub-Commission Resolution 2003/16 to the Commission on Human Rights for consideration and adoption, in conjunction with the recommendation to invite Governments, United Nations bodies, specialized agencies, NGOs and other interested parties to submit to it comments on the Norms and its Commentary at its 61st session in 2005.

Furthermore, the Sub-Commission recommends that the Commission, after having received comments on the Norms, consider the establishment of an open ending working group to review the Norms and the Commentary.

In addition, the Commentary on the Norms suggests that country rapporteurs and thematic procedures of the Commission should monitor implementation by "using the Norms and other relevant international standards for raising concerns about actions by transnational corporations and other business enterprises within their respective mandates", and that the Commission should consider "establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms."

The Norms as a Common Standard

Taking into account that the Charter based human rights protection mechanisms are in general only able to make recommendations and that the primary role of the Sub-Commission is as an advisory body, the Norms are in the first instance a restatement of existing international law. International human rights protection can be seen as the institutionalization and codification of three obligations: to respect, protect and fulfil human rights.

But although States are the single creator of international law, they are not the only subject and object of international relations, nor of international law. Concerning the impact of business entities (particularly transnational corporations), the Norms clarify states' obligations to protect its people from violations of human rights by non-state actors.

The Norms are also an explanation of states' obligations to fulfil human rights. Governments have already clearly committed themselves at the World Summit on Sustainable Development to "actively promote corporate responsibility and accountability, based on Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures [...]". The Norms provide an important instrument to fulfill this commitment.

Yet rather than simply being a collective restatement, the Norms are secondly a clarification of corporate human rights obligations to respect the human rights of others and to protect and fulfil human rights in their respective spheres of influence. These obligations arise from the moral duties expressed in Article 29 of the Universal Declaration on Human Rights, and are restated as responsibilities in the Preamble of both the ICCPR and ICESCR.

Following from this, the General

Assembly has declared that "[each] State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms [...]" but "[No] one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms [...]". This is a clear general obligation addressing direct obligations and individual responsibility of non-state actors, and is reflected in other developments, such as the Optional Protocols of the Convention on the Rights of the Child and the Rome Statute of the International Criminal Court.

Responsibility as a reaction to power and influence

The introduction of the general concept of corporate accountability into the debate of human rights responsibilities as part of the Charter based human rights protection mechanisms is also an attempt to encourage the progressive development of

international law. Yet it is on this basis that the Norms are facing major criticism from the neo-liberal approach, where the only obligation for business is to make profit.

According to this perspective, since human rights have no market value, it is highly questionable if the invisible hand of the market can provide that a good human rights record creates a competitive advantage. Voluntary approaches - such as thousands of Codes of Conduct, and initiatives such as the Global Compact - have only proven that they do not provide an obstacle to human rights violations. Furthermore, recent developments like the WHO Convention on Marketing Breast Milk Substitutes or the Kimberly Process on the sale of blood diamonds still suffer from corporate misuse and misinterpretation, and lack independent monitoring.

The Norms are a step forward in generalizing and clarifying the emerging human rights obligations placed on businesses, as a result of their increasing economic and political power. Since sovereignty is the core concept of responsibility, it is clear in certain cases, such as in Export Processing Zones, that corporations exercise de facto sovereignty, either through collaboration with armed forces or by exercising overwhelming economic power.

In this regard the Norms are supplementary to the General Assembly resolution "Responsibilities of States for internationally wrongful acts", where it is stated that, "[the] conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".

By this, responsibility emerges as a new relationship of accountability between the violator and victim, and is of concern to the international community in general in the protection of human rights. It should be time for the Commission to raise this concept of liability to an international level of accountability, as

human rights protection is not only a concept applicable to domestic jurisdiction, such as tort claims.

The Role of the Norms at 60th CHR

The sole "transmission" of the Norms to the Commission without the accompaniment of a Draft Resolution or Decision can be seen as an effort to keep the discussion as open as possible. But this lack of formalizing the discussion that has already caused problems between supporters and objectors of the Norms. Some, such as the Business Leader Initiative, show favour, whilst others, such as the International Chamber of Commerce, stand in opposition. There is a large NGO coalition, led by Amnesty International, Rights and Accountability in Development and ESC-Net, in support of the Norms, but other NGOs in the environmental, anticorruption and consumer protection sectors, as well as unions, have yet to explore the specific use of the Norms since they remain widely unknown.

It is the same with Governments. Only those few delegations that actively participated in the discussion on the Norms in the Sub-Commission have a position. To the majority of delegations at the Commission the Norms are still new. It is therefore the responsibility of the Commission to disseminate the Norms.

As the main body of human rights protection under the UN Charter, the Commission has to find its role in elaborating effective new ways of human rights protection. The Commission should avoid the ignorance it showed in 1996 regarding transnational corporations, when it paid no attention to proposals made by the Sub-Commission to establish a working group and recognize various reports and background documents.

There are many possibilities for the Commission to do so. First of all, member states of the Commission should welcome the Norms expressly under Item 16 when debating the report of the Sub-Commission and the report of the Chairperson of the Sub-Commission. The latter includes a reference to the work of the working group as well as a link to the concluding remarks of the Special Rapporteur on Globalization. It should be kept in mind, in accordance with Draft Decision 14, that the work of the Sub-Commission has to be recognized as a whole and considered jointly with the Norms.

Secondly the Commission should apply its own special mechanisms in order to appropriately address the impact of corporations on human rights. The references made by Special Rapporteurs at the 59th session of the Commission were mainly ignored. In this year's reports to the 60th Commission, Special Rapporteurs again raised their concerns. The Special Rapporteurs on "Toxic Waste", Education, and the Right to Health address the role of business and private actors respectively. The Special Rapporteur on the Right to Food takes the Norms as basic principles to address corporate impact to his mandate and called for their consideration. Furthermore, the report of the High Commissioner on Human Rights on the Right to Development makes explicit reference to the Norms and the calls for applicable principles for private actors.

The Commission should consider a clear incorporation of the Norms in enlarging and

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NGOs in the environmental, anticorruption and consumer protection sectors, as well as unions, have yet to explore the specific use of the Norms, since they remain widely unknown. It is the same with Governments. Only those few delegations that actively participated in the discussion on the Norms in the Sub-Commission have a position. It is the responsibility of the CHR to disseminate the Norms.

The Commission should consider a clear incorporation of the Norms in enlarging and clarifying the mandates of special rapporteurs, experts and working groups. Since many references in reports by Special Rapporteurs were made concerning the conduct of corporations in general, and a few to the Norms in particular, Item 10 may be an appropriate place to debate the Norms.

Profiting from UN Norms on TNCs

These standards represent an encouraging prospect for the thematic expansion of international human rights law

INTERNATIONAL bodies have tried to bring corporations into the arena of international human rights law in the past, with limited success. The adoption by the Sub-Commission of the 'U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' in August 2003, as well as the Commentary, which is expected to be read in conjunction with the Norms, offers an entirely new and more substantive set of provisions than any which have preceded it. Sub-Commission resolution 2003/16 also transmitted the Norms to the Commission on Human Rights for consideration, and requested comments and recommendations for improvement, aiming towards eventual adoption by the Commission.

Substantive Provisions of the Norms

These Norms constitute the first non-voluntary initiative at the international level. Unlike its predecessors, the Preamble to the Norms makes specific reference to the UN Charter, and the proclamation of the Universal Declaration of Human Rights that "governments, other organs of society and individuals" strive to secure universal and effective recognition of human rights. They proceed to offer a "succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights." This, according to commentator Surya Deva, "provides a stronger and more widely accepted basis of human rights responsibility generally, and a *jus cogens* basis regarding some human rights."

The Norms provide for equal opportunity and non-discrimination; the right to security of persons; the rights of workers, including the right to collective bargaining and the right to a safe and clean working environment; respect for national sovereignty and policies in the economic, social and cultural fields; respect for all economic, social and cultural rights as enshrined in international law, including the right to health; respect for all civil and political rights, including freedom of movement and assembly; and consumer and environmental protection. These are more extensive than any other draft norms or guidelines.

The Norms do not limit their application to "transnational corporations" in the protection of these rights, but also include "other business enterprises", meaning "any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity."

The Norms distinguish human rights responsibilities in the positive and negative. This means, according to commentator Claire Dickenson, that: "multinationals subject to the concomitant duties must both avoid certain actions and affirmatively take others". The Norms do not differentiate between domestic and international enterprises, or their size, in the negative sense, but rest on the principle that the Norms should be respected by all businesses in their internal operations. However, in the positive sense, the Norms have deftly established what working group member David Weissbrodt refers to as a "system of relative application based on the strength, size, and other varying factors of a business that bear on its ability to affect human rights." Paragraph 1 of the Norms provides that "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable

groups."

This does not address the nature of operations, but the positive responsibility of businesses. In essence, the larger the corporation, the larger its sphere of influence, and therefore the larger its responsibility.

The Norms also address in robust terms the issue of external compliance and the responsibility of businesses towards subcontractors, suppliers and so forth. Whereas the Guidelines of the Organisation of Economic Co-Operation and Development called on enterprises to "encourage, where practicable...partners...to apply principles of corporate conduct", the

The Norms do not hold any threat to the functioning of TNCs, as some of its detractors would have stakeholders believe. Rather, they align the operations of TNCs with firmly established international legal standards and provide a valuable and clear foundation for developing an active human rights approach to business.

Norms require that transnational corporations and business corporations "shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors...or other legal persons who enter into any agreement."

Yet perhaps the Norms' greatest strength can be attributed to its specific provisions on implementation, monitoring, and effective remedy. Firstly, enterprises are called upon to adopt codes of conduct that incorporate the substance of the Norms, and additional mechanisms for creating accountability within the company. These rules must be disseminated so that their meaning is understood by employers, staff, stakeholders and the general public alike. The Norms must also be incorporated into contracts with business partners, and the Commentary calls upon businesses to monitor the performance of these partners compliance with the Norms.

Secondly, businesses "shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created", "conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms", and make periodic reports and assessments accounting for the input of stakeholders. In cases where lack of compliance has arisen, the Commentary requires that businesses establish a plan of action for reparation and redress.

Present Status of the Norms

The Norms still rest very much in the realm of "soft law". However, the Commentary points to means by which the Norms can be utilised as they presently exist, and gives suggestions for their future application. The most notable advancement in the broader framework is in the role the UN may be expected to play. As the entity best equipped to define human rights standards for corporations, the importance of these developments cannot be understated.

Whereas the Global Compact posits the UN as a mere mediator in voluntary initiatives undertaken by businesses, the Norms declare that businesses "shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms." The Commentary suggests that the Norms could presently be used by human rights treaty monitoring bodies to cre-

ate additional reporting requirements by States, and as the basis for future general comments and recommendations. Special Rapporteurs could, and have, used the Norms in commenting on the actions of businesses relative to their specific mandates. It is even possible to consider the Norms as the basis of a mandate for a Special Rapporteur on Transnational Corporations.

This represents a very encouraging and exciting prospect for the thematic expansion of international human rights law. While certain broad terminology has raised suspicions that the Norms, according to one prominent business lawyer, "could give free-range to those more interested in corporation bashing rather than in working to improve performance", it should be kept in mind that the Norms are at a stage of infancy, and open to modification by recommendations from the Commission on Human Rights, the General Assembly and other organs of the UN, including comments suggested by NGOs, businesses, and all other interested parties. The Norms are designed to "incorporate and encourage further evolution", and are "by no means the last step in relation to corporate social responsibility and human rights."

These beginnings do not hold any threat to the functioning of transnational corporations, as some of its detractors would wish stakeholders to believe. Rather they align the operations of transnational corporations with firmly established international legal standards and provide a valuable and clear foundation for developing an active human rights approach to business, in the process creating a stable working environment and improving corporations' images and reputations.

If the Norms are seen as "expressing the expectations of public opinion and civil society regarding the conduct of enterprises", then, at the very least, this approach makes good business sense.

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Common standards...

clarifying the mandates of the special rapporteurs, experts and working groups. Since many references in reports by Special Rapporteurs were made concerning the conduct of corporations in general and a few to the Norms in particular, Item 10 might also be an appropriate place to debate the Norms.

Thirdly the Commission should serve as a forum for discussing concerns about and benefits of the Norms, as well as their relationship to existing standards, including the ILO Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy, the Global Compact, and other cooperation policies with private actors in procurement, development assistance and investment.

Fourthly the Commission should endorse the mandate of the Sub-Commission and their working group to continue with their work on the Norms, especially in elaborating means of implementation and monitoring.

Finally the Commission should acknowledge that the first step towards a better human rights protection is by disseminating information about the Norms and presenting an unbiased and objective debate. Such a debate should take into account the willingness of business to incorporate the Norms into their corporate praxis, the acceptance of regulation by the International Organisation of Employers (see joint statement on the Global Compact with Secretary General Kofi Annan on April 26, 2002) and the wide support of the Norms by NGOs.

- Nils Rosemann is an attorney and consultant in Berlin and Geneva.

Whittling away at liberty?

Canada's anti-terror response is itself a threat to the underpinnings of a liberal democracy

IN the wake of 11 September 2001, the Canadian government introduced sweeping anti-terrorism legislation. Bill C-36, the Anti-Terrorism Act (Act), was passed with alarming haste in December 2001, despite concerns by civil rights advocates regarding the necessity for such extraordinary action given the adequacy of existing domestic and international laws. The Act involved the passage of the Charities Registration (Security Information) Act, as well as amendments to existing laws, including the Canada Evidence Act, the Official Secrets Act (renamed the Security of Information Act), the Proceeds of Crime (Money Laundering) Act, the Criminal Code, and the Income Tax Act.

The goal of fighting terror is laudable, but the Act and related measures enfeeble rights central to a democratic society, as well as international human rights law, in exchange for a false sense of security. Canada's anti-terror agenda undermines one of the central declared aims of the government in passing the Act: the right of all persons to live in "peace, freedom and security". Furthermore, the Canadian government has not availed itself of the right to derogate from the protections of the International Covenant on Civil and Political Rights (ICCPR), provisions which threaten to be violated by the Act.

The Act contains a dangerously overbroad definition of terrorism, criminalising any act or omission, in or outside Canada, motivated "in whole or in part for a political, religious or ideological purpose, objective or cause", that is committed "in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or person, government or organization is inside or outside Canada...".

Such an act must be intended to cause death or serious bodily harm, endanger a person's life, occasion a serious risk to public health or safety, produce significant private or public property damage that is likely to cause death or serious bodily harm or cause a serious risk to the health or safety of the public, or cause "serious interference with or serious disruption of an essential service, facility or system". Disruptions are exempted from the provision if they are "a result of advocacy, protest, dissent or stoppage of work" that is not intended to cause death or serious bodily harm or cause a serious risk to the health or safety of the public. Such activities may still be punished if they are intended to cause a "serious risk to the public health or safety of the public", which is undefined by the Act.

A broad interpretation of "serious risk to the public health or safety of the public" threatens to have a chilling effect on acts of civil disobedience and other protests at the heart of a democracy. As the Canadian Bar Association (CBA) has argued, "[e]ven when protests become unlawful, violent, or destructive most Canadians would view it as political expression gone too far, not terrorism". By potentially sweeping such actions into the category of terrorist activity, with its concomitant stigma and increased punishment, the Act threatens to unjustifiably restrict the right to freedom of association guaranteed by Article 22(1) of the ICCPR. Indeed, a 2001 publication of the Royal Canadian Mounted Police (RCMP), entitled "The Hands of Terror", identified those engaged in advocacy regarding genetically modified foods and forest preservation as "potential terrorists operating under ideology as opposed to affiliation". Surely this is not the proper scope of anti-terror legislation.

One of the most disconcerting provisions of the Act concerns the labelling of individuals and organisations as terrorists, or "listed

entities". The Governor in Council, upon the Solicitor General's recommendation, is authorized to establish a list of entities suspected of involvement in terrorist activity. The Solicitor General's recommendation is to be based on "reasonable grounds", but no hearing is required before listing to determine whether such recommendation is warranted. In addition, the law forbids others from dealing with the listed person's property. This may occur even though a person on the list has not been convicted of an offence, thus raising concerns about the right to a pre-

Canada's anti-terror agenda undermines one of the central declared aims of the government in passing the Anti Terrorism Act: the right of all persons to live in "peace, freedom and security". One of the Act's most disconcerting provisions is the labelling of groups or individuals as "listed entities".

sumption of innocence guaranteed under Article 14(2) of the ICCPR. While a listed entity can make an application for judicial review of their listed status within 60 days of being listed, meaningful judicial review is lacking. A judge may examine information relied on by the government in the absence of both the applicant and counsel for the applicant if so requested by the Solicitor General. This lack of disclosure denies an applicant the right to be informed of the case against him and to adequately prepare a defence.

Moreover, the use of secret evidence makes a mockery of the fundamental right to counsel, for it paralyzes a lawyer from effectively representing his client. A statement summarising the information available to the judge is to be provided to the applicant, but this summary may also omit any information on the broad grounds of "national security". In addition, the judge's decision may be based on evidence that is otherwise inadmissible under Canadian law.

The cumulative effect of such practices is to threaten to diminish the right to liberty and security of the person and the right to a fair hear-

The International Civil Liberties Monitoring Group reports that it has received notice from Arab and Muslim community leaders regarding hundreds of instances of Canadian security forces threatening use of the preventative detention power to obtain "voluntary interviews" of men of Arab or Muslim origin.

ing enshrined in Articles 9(1) and 14(1) of the ICCPR, respectively.

The discretion afforded to the Solicitor General and the Governor in Council, the danger of error and abuse by such officials, and the drastic impact on the lives of accused persons, is too high a price to be paid for mere suspicion of terrorist activity. The ordeal of Liban Hussein is a case in point. In the fall of 2001, the Somali-born Canadian citizen learned that he had been placed on the list. Hussein was subsequently arrested, had his assets frozen and was the subject of US-instigated extradition proceedings. The CCLA reports that, according to Hussein's lawyer, by the time Hussein was cleared of any connection to terrorism in June of 2002, he had lost his business, and his livelihood and reputation were destroyed.

The Act also sanctions forced testimony during "investigative hearings". Individuals summoned before a judge for such hearings can-

not refuse to answer a question or produce evidence on the grounds that the answer or production would constitute self-incrimination. While a witness enjoys general use and derivative use immunity from criminal prosecution for such testimony or evidence produced, the Act does allow for subsequent prosecution under sections 132 (perjury) and 136 (giving contradictory evidence) of the Criminal Code. Significantly, the Act does not protect against the use of such testimony or evidence in civil proceedings. It appears, therefore, that such testimony could subsequently be used in deportation hearings and tort actions.

The investigative hearing process further threatens abrogation of the protection of confidential client-solicitor information and the freedom of the press. The Federation of Law Societies of Canada, citing the importance of the confidentiality of solicitor-client communications and its inclusion in the Code of Professional Conduct, has expressed concern that "lawyers will be compelled to give testimony against their clients" that violates that confidence. The CBA has expressed apprehension that such hearings could also be used to force journalists to disclose sources and information without the advantage of a proceeding to determine if such a divulgence is necessary. As the CBA notes, "[t]he activities of the media in gathering and disseminating information are vital to the proper functioning of a democratic society".

The use of investigative hearings would fundamentally impede the press' ability to gather information, as "[m]any sources will provide information only on the basis that their identity will not be disclosed". The use of investigative hearings against journalists, therefore, could abrogate the press' ability to ensure a public that makes informed decisions, and threatens abrogation of Canada's obligations under Article 19(2) of the ICCPR, guaranteeing the freedom of the press.

The Act also allows officers to arrest persons without a warrant and detain them if "by reason of exigent circumstances, it would be impracticable to lay an information" before a provincial court judge if the officer "suspects on reasonable grounds that the detention of the person in custody is necessary in or to prevent a terrorist activity". While an officer is required under the Act to lay an information or release the person within 24 hours of the person's arrest, or as soon as possible if a provincial judge is not available within 24 hours, the threat of this 24-hour grace period is open to abuse. The International Civil Liberties Monitoring Group (ICLMG) reports that it has received notice from Arab and Muslim community leaders regarding hundreds of instances of Canadian security forces threatening use of the preventative detention power to obtain "voluntary interviews" of men of Arab or Muslim origin. Thus, the Act has helped undermine Canada's commitment to a multicultural society and has exacerbated the problem of racial profiling.

Canada has given undue emphasis to national security by increasing the powers of law enforcement and senior government officials to unnecessary levels. At a minimum, there is need for an independent agency with powers to audit RCMP anti-terrorist operations in order to provide the Canadian public with information that will otherwise be lacking. Such an agency could determine if the RCMP is targeting legitimate democratic activity or if it is reaching beyond the bounds of the Act.

As the CCLA has noted, the creation of such an agency would not be unprecedented, given the auditing performed by the Security Intelligence Review Committee of the Canadian Security Intelligence Service. Absent such a check on potential abuses, Canada's anti-terror response is itself a threat to the underpinnings of liberal democracy.

SUDAN

Darfur: 'The world's greatest humanitarian crisis'

ON 18 March 2004, H.E. Ali M. O. Yassin, Minister of Justice and Chairman of the Advisory Council for Human Rights of Sudan, stood before the member states of the Commission on Human Rights (CHR) and declared that in Darfur "the government has engaged in remedial measures to uplift the level and quality of services in the region. After the termination of the military activities, the president of the Republic has declared amnesty to all those who carried arms, access for humanitarian relief is granted to all affected people. Voluntary repatriation for internally displaced persons and refugees is now underway". This, indeed, must have been welcome news to the 70,000 displaced persons of Darfur that have fled from their homes, 11,000 across the border to Chad, as a result of attacks on villages by government-backed militia and government soldiers.

Alas, it seems Mr. Yassin is sorely misinformed. The day after Minister Yassin's speech before the Commission, Mukesh Kapila, UN Resident Coordinator for Sudan, told the Associated Press that Darfur represented "the world's greatest humanitarian crisis and possibly the world's greatest humanitarian catastrophe".

Humanitarian Assistance Denied

While the BBC reports that the Sudan Humanitarian Affairs Ministry subsequently called Kapila's statement a "heap of lies", there is ample support for Kapila's concern. Atrocities continue to be committed and the refugee problem shows little sign of abating.

The UN Office for the Coordination of Humanitarian Affairs (OCHA) reported on 16 March that Arab militias, commonly referred to as Janjawid, had been carrying out daily attacks in Chad for the previous six weeks, stealing livestock from refugees who had fled the conflict in Darfur. One such incident of cross-border attacks involved the killing of a refugee and the theft of 100 cattle.

OCHA has also reported that it received information regarding an 11 March attack on several villages carried out by government and militia forces. Militias attacked the village of Alaki, setting houses on fire and driving away cattle. The militias were supported by nearby government forces in gunboats, who themselves later attacked the village of Nyilwak. In his 19 March comments to the Associated Press, Kapila stated that "[t]here has been systematic burning of villages and displacement of the population."

Kapila advised the BBC of a horrific attack by militias in Tawila that occurred within the last month. In addition to the looting of the health centre and burning of the market, 75 people were killed, 100 women were raped, and 150 women and 200 children were abducted. The Sudanese government has admitted to arming such Arab militias in order to combat the Darfur rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement. Amnesty International has reported that the Sudan government has also encouraged the actions of the militias; not a single member of the Janjawid was arrested for an unlawful killing in the past year.

In addition to these ongoing atrocities, which have in total led to the deaths of approximately 3,000 civilians, there continues to be inadequate humanitarian aid access to the enormous numbers of displaced people. As recently as 19 March, Kapila reported that aid agencies could only reach small parts of Darfur. Amnesty International reported on 16 March 2004 that 5,000 villagers were gathered near Gokar without food, shelter and medicine, while in the town of Mornay, crowded with refugees, between five and 10 people are dying per day. Amnesty estimates that al-Jeneina is currently occupied by 100,000 displaced people.

The Office of the UN Resident and

Humanitarian Co-Ordinator for the Sudan, in its 14-21 March report, states that "[t]he security situation in the Darfur region remains tense and volatile". Aside from the ongoing military and Janjawid attacks, a humanitarian vehicle, bearing the markings of an international NGO, was attacked, and a World Food Program truck was attacked and looted.

Slippery road ahead

OIL has recently been discovered in southern Sudan, and in the words of Jemera Rone, researcher on Sudan in Human Rights Watch, "[o]il development in southern Sudan should have been a cause of rejoicing for Sudan's people. Instead it has brought them nothing but woe."

The government has used the roads, bridges and airfields built by the oil companies as a means to launch attacks on civilians in southern Sudan. Many people were displaced as a result of the conflict between the government and the rebel SPLA forces in the oilfields. This armed conflict has led to the continued flight of local people but establishment of government garrisons has prevented those displaced from returning to their homes. The government has produced and purchased better weapons with its new oil money instead of using that money to improve the lives of the people. The oil companies operating in Sudan are well aware of the killings, bombings and looting that takes place in the name of oil but they choose to turn a blind eye to the conflict and continue to reap profits from the devastation in the region.

The Machakos Protocol signed between the Sudanese government and the SPLM/A on 20 July 2002, promising a future peace agreement, gave new hope to the people of Sudan. However, as talks continue to restore peace in the region, gross human rights violations continue under the patronage of the government.

Systematic government repression

The discovery of oil in southern Sudan has exacerbated the conflict in Darfur. The government has produced and purchased better weapons with its oil revenues instead of improving the lives of the people. Part of this upgrade included the purchase of 16 attack helicopters from Russia. Human Rights Watch also reports that the Sudanese government has tried to use southern militias, previously engaged against the Sudan People's Liberation Movement/Army, to fight against the rebel movements in Darfur.

The Sudanese government has further resorted to a permanent emergency law to control the situation in Darfur. It has conferred upon the army, police and government-backed militias extra-judicial powers to confiscate property and carry out house inspections in all villages and cities of Darfur. The Sudan Human Rights Organization reports that any person in Darfur who is suspected of being a member of the warring SLA is arrested by government troops.

Human Rights Watch reported on 9 March that the Sudanese government had arrested two human rights defenders: Dr. Mudawi Ibrahim Adam, director of the Sudan Social Development Organization, and Saleh Mahmud Osman, a human rights lawyer and member of the Sudan Organisation Against Torture. While Adam has been charged with a variety of capital offences, Human Rights Watch reported that Osman was being held without charge.

According to Human Rights Watch, child soldiers continue to be forcefully recruited by the state and non-state armed groups. A special court in Darfur sentenced child soldiers aged 14-15 years to detention and death for raiding a village. An unconfirmed number of children were kept in custody for having deserted

the military and received sentences of up to 20 years in prison.

The press in Sudan has also been subjected to severe limitations. The Sudanese government has imposed restrictions on the reporting of politically sensitive issues by independent newspapers. Many of these newspapers are confiscated after printing, which not only affects their freedom of speech and expression, but also affects their economic well-being. Recently the editor-in-chief of the Sudanese daily, *Al Ayam*, was arrested, and the publication of his newspaper suspended, as a result of alleged tax arrears. He was later released on bail of 200 million Sudanese pounds (60,000 euros).

While the European Union has reported that government and Darfur rebel leaders have agreed to engage in peace talks, those talks have got off to a rocky start. The BBC reported that neither party showed up for the planned 26 March meeting in Chad. While there are hopes to begin talks on 30 or 31 March, the situation clearly remains dire.

Failure of the Commission

On the conclusion of the 59th Session of the Commission, the Sudanese government emerged victorious. Sudan was, unfortunately, promoted from an Item 9 state (abuser of human rights) to an Item 19 state (respector of human rights).

Last year's Draft Resolution L35 on human rights in Sudan, submitted by the EU, endorsed the view that the government of Sudan should lift the state of emergency, make efforts to promote democratisation and ensure that rule of law prevails by bringing their legislation in line with the Constitution and international human rights instruments. The resolution was eventually defeated, with 26 votes against. An analysis of the voting pattern on the Sudan draft resolution last year reveals that it lacked any support from the African group, including South Africa and Kenya, who had previously actively decried human rights abuses in Sudan.

According to Prof. Eric Reeves, an expert on the human rights situation in Sudan, the blame for the failure of the 59th session resolution should fall on the US State Department's Africa Bureau, which failed to use its leadership and resources to push through the Item 9 status for Sudan.

Will Sudan be excused again?

Despite rampant human rights violations, Sudan was rewarded with a human rights status "upgrade" at the 59th session of the Commission. This upgrade essentially absolved a regime of accountability and responsibility for human rights violations.

The 60th session of the CHR must be considered an opportunity for the international community to wake up to the reality in Sudan, a reality that Kapila has described as "an organised attempt to do away with a group of people". Despite some initial promising prospects, it seems that the guarantee of failure has encouraged the German delegation not to submit a resolution at the 60th session. The African group, instead of demonstrating a commitment to the value of African life and the need for peace in Sudan, looks on with complicity. The US State Department, in what appears to be a consistent pattern of behavior in the 60th session, has failed to undertake any diplomatic efforts to support a draft resolution.

Relegating Sudan to the status of a human rights abuser (Item 9) could have proven to be the beginning of a much needed improvement in the human rights situation in Darfur, and at the very least a means of encouraging the faltering peace talks. Unfortunately, political complacency, and acceptance of the undervaluation of African life, has again won the day.

EVENTS

International Commission of Jurists (ICJ) parallel events

- **Tuesday March 30:** Human Rights Violations on the Ground of Sexual Orientation (with International Service for Human Rights)
Room XXVII, 1-3 pm.
- **Thursday 1 April:** "Zimbabwe: Deterioration of the Rule of Law. Human Rights Violations in 2003" (this event was originally planned on Friday 26 March). It will be held jointly with FIDH and OMCT.
Room E-3023, 1-3 pm
- **Friday April 2:** Human Rights Situation in Nepal
Room XXVII, 1-3 pm.
- **Monday April 5:** Counter-terrorism and Human Rights
Room XXVII, 1-3 pm.
- **Thursday April 15:** The Independence of the Judiciary in Turkey (with FIDH)
Room XXVII, 1-3 pm.

2nd Geneva Consultation of the Interfaith Network on West-Papua (2-4 April)

The 2nd meeting of the interfaith network on West-Papua shall take place in Geneva in the 'Maison des Associations' (Geneva House of NGOs) 15, Rue des Savoises, 1205 Geneva (Plainpalais district, public transport lines 4, 1, 13).

The sessions of Saturday 3 April (from 9 a.m. to 6 p.m.) are opened for human rights NGOs as well. Organisation and registration : **'Geneva for Human Rights'** 14, Avenue du Mail, 1205, Geneva, tel. 022-320.27.27 - 022-340.37.78 and 079-345.82.00, E-mail : info@gdh-ghr.org

All participants in the 60th session of the U.N. Commission on Human Rights are invited to a reception to meet the West Papuan representatives on **Friday 2 April from 6:30 to 8:30 pm** in the premises of APT, 10, Route de Ferney, 1202 Geneva (near the Place des Nations).

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Recognising a problem...

Taken in sum, the case for application of CA3 is conclusive. Recognition of the applicability of the Geneva Conventions has important legal and practical consequences. First, CA3 imposes obligations on all parties to the conflict that are part of customary international law (*Tadic*). Criminal violations of these obligations can be enforced against individuals as war crimes. This is important in the context of Nepal where the judiciary has been seriously compromised and is no longer independent. Second, CA3 provides for direct international supervision of the protections it guarantees. Third, CA3 provides judicial guarantees of non-derogable due process rights which could significantly enhance the prospect of securing human rights for all Nepalese.

Contradicted by the record

The (mis)statement by Foreign Minister Thapa in the High Level session was full of inaccuracies and illusion. Minister Thapa suggested Nepal "adhere[s] to [its] commitments" as a "party to all the major international conventions." Although Nepal has formally ratified many important human rights conventions (e.g., CERD, CCPR, CESC, CEDAW, CAT, and CRC), it repeatedly fails to respect and ensure the rights guaranteed by these conventions. Indeed, Nepal appears to merely use treaty ratification as a shield from criticism, providing a gloss on its poor human rights record that the US (as chief military financier) is more than ready to support.

If Nepal is earnest about its commitment to human rights it would allow State and individual communications under the treaties, and it would adopt measures to develop an independent judiciary to adjudicate complaints. Currently, the admirable but under-funded National Human Rights Commission of Nepal (NHRC) is left as the sole audience for complaints of grave human rights violations, of which it receives over 1,200 each year. Regarding its reiterated promises of free and fair elections, the government must be called upon to reinstall full democratic governance, rather than merely pay lip-service to far-off plans (first communicated to the UN in May 2002 promising elections in November 2002).

And so the cycle continues. Nepal fails to control its abusive security forces at home,

but makes the right diplomatic gestures in Geneva. In full complicity, the US whitewashes Nepal's abuses while employing hyperbolic extremes to describe Maoist abuses so that it can maintain high levels of military financing while placating voters at home. Meanwhile, Asian and African states ensure that any attempt to censure a State, such as Nepal, is either blocked or enfeebled by being addressed under Item 19.

The proposed Resolution on Nepal

The Swiss delegation is circulating elements of a proposed resolution on the situation in Nepal. The draft is commendable on several counts. If passed, it will be the first acknowledgement by the Commission that the Nepal Government has not respected its obligations under CA3. Further, the draft proposal calls for effective measures to combat impunity in a broad range of contexts, and for support of the NHRC. In this vein, the resolution should endorse the Minimum Immediate Steps required for compliance with human rights obligations recently published by the NHRC.

However, on several important points the draft proposal needs to be amended to remedy critical limitations. First, the draft does not explicitly call for Nepal to issue Standing Invitations to the Commission's special procedures. Second, the draft resolution rightly calls for ratification of OP 1/CRC on the involvement of children in armed conflicts; however, the resolution should also call on Nepal to recognise the full measure of international humanitarian law obligations, including recognition of the Geneva Conventions and ratification of the AP II of the Geneva Conventions. Third, the resolution should call for the government to sign the Human Rights Accord drafted by the NHRC and endorsed by Acting High Commissioner for Human Rights Bertrand Ramcharan in September 2003. Fourth, the resolution must demand that Nepal fulfil its obligations under the 1951 Refugee Convention (Art 33) and CAT (Art 3), and condemn Nepal for the refolement of Uighurs and Tibetans to China, which has resulted in their persecution and execution.

Because the majority of human rights violations are tied to the armed conflict, the resolution must make explicit reference to the existence of an internal armed conflict and call upon Nepal to fulfil its humanitarian law obligations. By comparison with previous resolutions on situations of internal armed conflict, such as the situation in Colombia, the Swiss draft proposal is insufficient and should be amended.

...from p2: Growing support

now, there have been a number of changes. In particular, we have been able, from New York and with the help of our colleagues here, to organise a number of Arria Formula informal briefings by Special Rapporteurs for members of the Security Council. Now, this has become almost routine; whenever [the Rapporteurs] arrived or when they had come from a mission, and when they wanted, we made sure there was an invitation for an informal briefing by Rapporteurs to the Council. In addition, there is now also a proposal by the Secretary General to have a special rapporteur, or maybe a special advisor, on genocide who will liaise with the Security Council and recommend measures if he or she feels that a genocide may be brewing.

I realise that it is difficult sometimes to characterise genocide before it happens; usually when you recognise it, it is already too late. The question is not to lock ourselves in the legal definition, but to realise that in all situations of mass human rights violation - because genocide cannot happen without preparation - usually, there will be some hate propaganda, which is one of the most important indicators, because you need to dehumanise the victim before you victimise him. And there will be also preparation in arming civilians, because usually there is not just the army, but also militias and civilians who are involved. You will also see other measures like very discriminatory laws; the fight against racial discrimination is therefore very important. I believe people have been traumatised by what happened in Rwanda; the trauma [will be a protection against] future genocides.

Whether or not we are in a position to do it now, and I cannot say, but I believe that important steps have been taken, specially in terms of raising awareness within the UN system of the need for alerting mechanisms - we have some informal ones going on - but the decision to move from awareness to action is still difficult. Some years ago there was a proposal from the former Secretary General, Mr. Boutros Ghali, to have a kind of rapid deployment force; it has been 11 years now. In many cases like in Ituri last year, you had countries with a well-trained and a well-equipped army deciding to go, pending the deployment of a fully fledged peacekeeping operation. But it does not always happen, and that is the worry.

But I believe that we will take the opportunity of the commemoration of the tenth anniversary of this terrible tragedy of Rwanda, to come up with some suggestions to make sure that another Rwanda will not happen.

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