

ASIAN CIVIL SOCIETY FORUM 2004

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SESSION	:	Key Challenges and Issues for Civil Society in Asia : Democracy and Human Rights
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Thank you Chair,

What are the key challenges and issues for civil society groups in Asia? The question that comes to my mind is whether human rights are international issues? In the post September 11th period, human rights issues have been turned into internal issues by the governments. There is increasing cooperation between the liberal democracies and illiberal democracies/authoritarian regimes on “security issues” in the war against terror. Human rights are no longer on the agenda of the bilateral dialogues but certainly sharing of information for countering terrorism is. Economic globalisation, increasing interdependence and stiff competition to capture markets have made human rights a domestic issue – at best to be promoted through technical cooperation projects, and not through censuring of human rights record of a country. The challenge for the NGOs is to keep human rights in international agenda

A cursory scrutiny of the critical issues at the forthcoming 61st session of the United Nations Commission on Human Rights will help to understand the emerging challenges.

Will the appointment of Condoleezza Rice as the Secretary of State of the United States lead to polarization at the 61st session of the United Nations Commission on Human Rights (CHR)? In my view, 61st session the CHR is likely to be less acrimonious than its previous sessions.

Why?

After the re-election of George W Bush as President of the United States, international community has come to terms with the fact that the world has to live with it. That Iraq had no Weapons of Mass Destruction, the main *raison d’etre* for the war, too has been accepted, as *fait accompli*. In the 1990s, the scrutiny of human rights record of Saddam Hussein was overshadowed by the impact of the embargo of the United States on Iraqi children. After the invasion of Iraq in 2003, the CHR has simply failed to intervene as if foreign occupation does no longer constitute a human rights violation. With the death of President Yaseer Arafat, West Asia peace process may take a new turn and human rights violations in the Occupied Arab Territories of West Bank and Gaza that dominated the

CHR since 58th session is unlikely to dominate the session. The elections in Palestine National Authority and Iraq in January 2005 are key events but unlikely to have significant impact on the proceedings of the 61st session of the Commission on Human Rights.

Contentious Issues at the 61st session:

There are many important thematic issues which will be contentious at the 61st session.

a. Thematic Issues:

i. Sexual Orientation:

Do the people having different sexual orientation have rights?

In its resolution 2002/31, the Commission on Human Rights decided to appoint, for a period of three years, a Special Rapporteur whose mandate will focus on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as reflected in article 25 (1) of the Universal Declaration of Human Rights (UDHR), article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 24 of the Convention on the Rights of the Child (CRC) and article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as on the right to non-discrimination as reflected in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Special Rapporteur was requested to:

- (a) gather, request, receive and exchange right to health information from all relevant sources;
- (b) dialogue and discuss possible areas of cooperation with all relevant actors, including Governments, relevant United Nations bodies, specialized agencies and programmes, in particular the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS, as well as non-governmental organizations(NGOs) and international financial institutions;
- (c) report on the status, throughout the world, of the right to health, including laws, policies, good practices and obstacles;
- (d) make recommendations on appropriate measures that promote and protect the right to health.

The CHR in its resolution (2004/27) on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health called upon “States to pay special attention to the situation of vulnerable groups, including by the adoption of

positive measures, in order to safeguard the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

The question is whether those who are persecuted because of their sexual orientation fall amongst the vulnerable groups? The Special Rapporteur in his report (E/CN.4/2004/49) to the 60th session of the Commission on Human Rights, Special Rapporteur clarified the following:

“38. As has been noted, discrimination on the grounds of sexual orientation is impermissible under international human rights law. The legal prohibition of same-sex relations in many countries, in conjunction with a widespread lack of support or protection for sexual minorities against violence and discrimination, impedes the enjoyment of sexual and reproductive health by many people with lesbian, gay, bisexual and transgender identities or conduct. Additionally, the Special Rapporteur recalls that the Human Rights Committee, in *Toonen v. Australia*, observed: “Criminalization of homosexual activity ... would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention.”

39. Arising from their obligations to combat discrimination, States have a duty to ensure that health information and services are made available to vulnerable groups. For example, they must take steps to empower women to make decisions in relation to their sexual and reproductive health, free of coercion, violence and discrimination. They must take action to redress gender-based violence and ensure that there are sensitive and compassionate services available for the survivors of gender-based violence, including rape and incest. States should ensure that adolescents are able to receive information, including on family planning and contraceptives, the dangers of early pregnancy and the prevention of sexually transmitted infections including HIV/AIDS, as well as appropriate services for sexual and reproductive health. Consistent with *Toonen v. Australia* and numerous other international and national decisions, they should ensure that sexual and other health services are available for men who have sex with men, lesbians, and transsexual and bisexual people. It is also important to ensure that voluntary counselling, testing and treatment of sexually transmitted infections are available for sex workers.”

Unfortunately, the Organisation of Islamic Countries and Holy See do not share the views of international law, as they have been in opposition to a draft resolution on the rights of persons having different sexual orientation. Sexual orientation will be a critical issue if Mexico continues with its efforts on a draft resolution on the rights of sexual orientation.

ii. Protection of human rights and fundamental freedoms while countering terrorism

Is there a need for a Special Procedure to deal with protection of human rights and fundamental freedoms while countering terrorism?

The Commission on Human Rights has been adopting a generic resolution on human rights and terrorism often sponsored by Algeria. The generic resolution continued in the post September 11th period and failed to take into account the complexities of the post September 11th situation. During the 60th session of the Commission on Human Rights, Mexico presented a draft resolution on the protection of human rights and fundamental freedoms while countering terrorism. The resolution, among others, called for appointment of an independent expert for one year in order to assist the UN High Commissioner for Human Rights to finalise the study pursuant to the General Assembly resolution 58/187 (2003). The GA resolution requested the High Commissioner for Human Rights, “taking into account the views of States, to submit a study on the extent to which the human rights special procedures and treaty monitoring bodies are able, within their existing mandates, to address the compatibility of national counter-terrorism measures with international human rights obligations in their work, for consideration by States in strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism, with regard to the international human rights institutional mechanisms”.

In her latest Interim Report to the 59th session of the United Nations General Assembly (A/59/428) after taking the views of the Independent Expert, the High Commissioner concludes the following:

“45. Many of the special procedures of the Commission on Human Rights have considered human rights aspects of counter-terrorism measures, within their existing mandates, in their reports and statements. However, owing to the wide range of rights coming under pressure from counter-terrorism measures, analysis by the special procedures has evolved in a dispersed and fragmented way. Yet counter-terrorism measures are often implemented as a legal package, implicating a wide range of rights. The existing special procedures have thus been unable to provide a coherent and integrated analysis of the compatibility of national counter-terrorism measures with international human rights obligations.

46. With respect to the treaty monitoring bodies, several (mainly the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture) have provided vital analysis of the human rights aspects of national counter-terrorism measures. However, their capacity to address such measures is limited by several factors. Many States have not ratified the treaties most directly relevant to counter-terrorism. In addition, the treaty bodies consider only a few State party reports per year, and consideration of many States is further delayed because their reports are overdue. The treaty bodies are thus able, in the course of a year, to address only a fraction of national counter-terrorism measures taken worldwide.

47. Overall, there are significant gaps in the consideration of national counter-terrorism measures by the United Nations human rights system. For all the reasons mentioned above, including limits in mandates and working methods, the

United Nations has been unable to address the compatibility of national counter-terrorism measures with international human rights obligations in a comprehensive and integrated way. To do so effectively, it may be necessary to consider taking steps that may affect mandates, processes and resources.”

The Interim Report of the High Commissioner for Human Rights clearly calls for the continuation of the Independent Expert with necessary “mandates, processes and resources”.

Many countries led by United States opposed the Mexican resolution at the 60th session of the Commission on Human Rights for appointment of the Independent Expert. Given the judicial setbacks in the United States on the detainees in Guantanamo Bay, the outrage against the crimes in Abu Ghraib prison and quagmire in Iraq, the proposal of the High Commissioner is likely to be contentious. As of 27 August 2004, the High Commissioner received 13 replies from Argentina, Azerbaijan, Chile, Colombia, Costa Rica, Cuba, Kuwait, Mexico, Morocco, Russian Federation, Spain, Switzerland and Syrian Arab Republic on the issue.

As the mandate of the Independent Expert comes to an end, will the 61st session of the CHR accept the recommendations of the High Commissioner for Human Rights?

iii. The rights of refugees

The rights of refugees have never been a favourite subject of the Commission on Human Rights. The CHR discussed refugee issues under agenda item titled “mass exoduses and displaced persons” which has been reduced to internally displaced persons. At the 60th session, the Commission on Human Rights considered only the reports (E/CN.4/2004/77 and Add.1-4) of the Representative of the Secretary-General on internally displaced persons.

Since the collapse of the Berlin Wall, there have been attempts to make refugee rights as an internal issue. Refugee rights continue to be considered within the four walls of the Headquarters of the United Nations High Commissioner for Refugees during its annual Executive Committee meeting and lack of public debate generally found in the functional Commissions of the Economic and Social Council have not helped to promote the rights of the refugees and asylum seekers.

In the post-September 11th, the plight of the refugees has become more vulnerable. The European Union, which promoted the rule of law including the rights of the refugees, has been adopting anti-refugee laws. Many European governments which were hitherto considered as leaders on human rights have started questioning the *absolute* nature of the prohibition against torture and principles of non-refoulement. The “balance” between legitimate security concerns and the protection of individual civil liberties has tipped decidedly in favor of security.

The resolution on protection of human rights and fundamental freedoms while countering terrorism recalled that the prohibition on torture is a non-derogable right that "must be protected under all circumstances, including in times of internal [or international] disturbance or armed conflict" and that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

There is a need for appointment of special rapporteur on the rights of refugees and bring the refugee rights issue within the framework of the Commission on Human Rights.

b: No naming and shaming through country resolutions:

“Naming and shaming” through country specific resolutions only serves to create acrimony in the Commission- Indian Ambassador Hardeep Puri in his intervention at the 60th session of the Commission on Human Rights.

The Bush administration will also continue its policy of targeting only the countries, which are part of the so-called “axis of evil”, in addition to America’s long term *betenoire*, Cuba. Over the years, the number of country resolutions adopted at the United Nations Commission on Human Rights (CHR) have drastically reduced. At the 60th session in March-April 2004, the CHR adopted country resolutions only on [Belarus](#), [Cuba](#), [Democratic People's Republic of Korea](#), [Democratic Republic of the Congo \(ex-Zaire\)](#), [Haiti](#), [Myanmar](#), [Palestinian territories occupied since 1967](#), [Sudan](#), [Uzbekistan](#) (1503 procedure) and the occupied Syrian Golan. The 60th session of the CHR also adopted resolutions on technical cooperation and advisory services for Afghanistan, Seirra Leone, Chad, Democratic Republic of the Congo, Liberia, Burundi, Somalia and Cambodia. The loss of moral authority by the United States because of the legally and morally untenable positions taken by Rumsfelds in the post September 11th and increasing cooperation for countering terrorism meant that there is more agreements on the illegal methods to be adopted by the States while countering terrorism. In the bilateral dialogues, human rights are no longer an issue.

To be fair, the United States cannot be solely blamed for this. The European Union led by the Big Three - United Kingdom, France and Germany - has changed its policy towards country resolutions at the CHR prior to the September 11th primarily to do “business”. Since Denmark burnt its fingers after sponsoring the resolution against China at the 55th session of the CHR in 1997, Scandinavian countries have not been taking the lead for sponsoring country resolutions. “Technical Cooperation” is the new mantra of the European Union for engagement on human rights issues. The National Human Rights Institutions, academic institutions and NGOs in Europe have become partners for implementing technical cooperation projects with Iran, China and many other countries as a part of the dialogue and technical cooperation programmes.

At the 61st session of the Commission on Human Rights, human rights situation in Myanmar, Nepal, Iran, North Korea and Maldives are likely to figure.

c. More Technical Cooperation: Sidelining the OHCHR

No naming and shaming means more technical cooperation. The key donors of the Office of the United Nations High Commissioner for Refugees (OHCHR) - the United States of America, Norway, United Kingdom, Netherlands, Sweden, Denmark, Ireland, France, Germany, Switzerland, Italy, Finland, Belgium, Spain, Japan, Canada, New Zealand and Luxembourg – are presently against scrutinising human rights record of the States and in favour of technical cooperation. The voluntary contributions to the OHCHR therefore imply more funds for Technical Cooperation Projects and less for human rights monitoring mechanisms i.e. UN Treaty Bodies and Special Procedures of the CHR. According to 2004 Annual Appeal, OHCHR required US\$ 14,270,999 for United Nations country teams and within United Nations peace missions against US\$ 3,992,942 to support the work of the Treaty Bodies and the CHR, and US\$ 3,116,500 to support the work of the Special Procedures. Technical cooperation projects also meant that the OHCHR is spreading too thin with skeleton field staff in comparison to other UN Specialised Agencies.

Unfortunately, the Office of the United Nations High Commissioner for Human Rights (OHCHR), the principal agency of the UN on human rights issues, finds itself increasingly competing with the institutions and organisations from Europe. The lack of support from consolidated fund of the United Nations is responsible for this trend. Funds for the OHCHR for the biennium 2002-2003 were 1.8 per cent of the United Nations regular budget for the biennium. Voluntary funds constitute two thirds of the budget for OHCHR. According to 2004 Annual Appeal of the OHCHR, the OHCHR required US\$ 54.8 million from voluntary contributions in addition to a requested allocation of US\$ 27.1 million from the United Nations regular budget. According to 2003 Annual Appeal, funding from the United Nations regular budget covered 33 per cent of OHCHR's activities during 2003 (expenditure of US\$ 25.8 million), while voluntary contributions covered 67 per cent of activities (expenditure of US\$ 52.5 million). In 2002 Annual Appeal, the OHCHR expected an allocation of US\$ 22,455,150 from the UN regular budget and an additional US\$ 55,778,746 from voluntary contributions.

Technical cooperation also implies more funds or rewards for the illiberal democracies and authoritarian regimes, which oppose any scrutiny of their human rights record, whether by NGOs, UN Chartered Based Bodies, UN Treaty Bodies and Special Procedures of the Commission on Human Rights.

d. Destroying the Commission on Human Rights: The agenda of the Like Minded Group

More technical cooperation projects suit the agenda of the Like Minded Group of countries at the Commission on Human Rights. The LMG consists of “who is who?” in the list of human rights violators - Algeria, Bangladesh, Bhutan, Cuba, China, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Sudan, Vietnam and Zimbabwe – have been hell-bent on destroying the Commission on Human Rights.

During the mid-term review of the Vienna Declaration and Programme of Action in 1998, the United Nations Commission on Human Rights started a process for rationalisation of the Commission on Human Rights. The LMG were able to excise country specific resolutions from the mandate of the Sub Commission on Human Rights since 2000. Since then effectiveness of the Sub-Commission on Human Rights has drastically reduced.

The LMG countries have been suggesting deletion of country resolutions under Agenda Item 9 of the CHR, triennialization of resolutions and, if appropriate, of the related reports and reduce the agenda items and of course, speaking time for the NGOs. Those who participate at the Commission on Human Rights are familiar with the tactics.

The Special Procedures of the Commission on Human Rights are the soul of the CHR. In order to destroy the Special Procedures, the Ambassador of China speaking on behalf of the LMG proposed the following:

“Firstly, mandate-holders of the special procedures are appointed by the chairperson of the CHR, while expert of the Sub-Commission and all treaty bodies are elected. This is in contradiction to the principles of democracy and transparency advocated by this body. We hope all candidates for the special procedures should go through the process of election by CHR in the future.

Secondly, there lacks a widely accepted code of conduct for the special procedures in discharging their mandate. And it leads to irresponsible behaviors of some of the mandate-holders. The LMG believes a code of conduct adopted by this body is relevant and highly necessary.

Thirdly, there are no criteria for mandate-holders to transmit communications to the states concerned, thus resulting in growing number and also duplications of communications for states. Some of the communications turned out to be groundless after investigation. Certain criteria for admissibility are needed, as is the case with regard to 1503 procedure”.

This despite the fact that Asian group will chair the 61st session of the CHR. If LMG has its way, the days might not be far when the CHR will adopt such measures. After all, African group and Asian groups have the majority at the Commission on Human Rights.

In addition, in order to destroy the monitoring mechanisms and dilute the work of the CHR and funds of the OHCHR, the LMG has been sponsoring “stating the obvious resolutions” such as on the role of good governance in the promotion of human rights (E/CN.4/RES/2004/70), human rights and international solidarity (E/CN.4/RES/2004/66), promotion of peace as a vital requirement for the full enjoyment of all human rights by all (E/CN.4/RES/2004/65), promotion of a democratic and equitable international order (E/CN.4/RES/2004/64), tolerance and pluralism as indivisible elements in the promotion and protection of human rights (E/CN.4/RES/2004/54), the incompatibility between

democracy and racism (E/CN.4/RES/2004/38), strengthening of popular participation, equity, social justice and non discrimination as essential foundations of democracy (E/CN.4/RES/2004/31), promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities (E/CN.4/RES/2004/20) etc. These resolutions cost scare resources of the Office of the High Commissioner for Human Rights.

3. The global challenge

Are human rights a domestic issue, no longer to be scrutinized in UN and other inter-governmental meetings? Are we to presume that with the return of semblance of democracy in Malaysia and Indonesia, it is no longer necessary to approach the United Nations and its procedures/mechanisms? At least the experience of Philippines is instructive. Since the overthrow of Marcos regime in the Philippines, very few NGOs from the Philippines have been scrutinising the government's human rights record at the United Nations.

At least that is what the Indian delegation has been preaching – that democratic countries, however illiberal they are, do not require any international scrutiny. The Permanent Representative of India to the United Nations in Geneva in his intervention on agenda item 11 relating to civil and political rights at the 60th session of the United Nations Commission on Human Rights stated:

“When human rights violations do occur, institutions in democratic societies ensure that corrective measures are taken. We are, therefore, disappointed to find that the Special Rapporteur on Torture in his report in document No 56 and 56/Add1 has expressed concern that the government has not extended to him an invitation to visit India. We are rather perplexed by the notion, evidently shared by some Special Rapporteurs, that the measure of a country's commitment to the protection and promotion of human rights is the alacrity with which they respond to a request for an invitation to visit the country. There might, arguably, be some basis for such a belief where human rights in closed and non-democratic societies are at issue. It seems to us rather presumptuous, however, that the Special Rapporteur on Torture should believe that absent his watchful eye democratic societies would fail to take corrective measures when human rights violations do occur”.

Most open and democratic countries in the world, however, have issued standing invitations to the Special Procedures of the Commission on Human Rights. Out of 50 countries from all over the world only two countries – Iran and Mongolia – have extended open invitation to the Special Procedures at the end of May 2004.¹

The challenge of the human rights groups in Asia, as it is for the groups elsewhere, is to find ways to confront the regime of technical cooperation with so-called democracies where holding of competitive elections is the only characteristic of democracy and

¹ . <http://www.ohchr.org/english/bodies/chr/special/invitations.htm>

cooperation with the United States in the war against terror is the sole yardstick to legitimise the military dictatorship.

Certainly, there is scope for critical engagement but “criticisms” are often the missing parts of all technical cooperation projects/programmes. The effectiveness of the NGOs and international community has been public censuring of human rights records of the governments. It is reflected from the attempts of the LMG to destroy mechanisms and procedures of the CHR. Yet, the shift in policy of the European countries to not to censure human rights records of the governments predates the September 11th. September 11th only accentuated the trend not to censure primarily to “do business and capture markets” which were hitherto closed.

The challenge is whether the civil society groups can continue to maintain the voices of dissonance to scrutinise human rights records of the governments or be coopted in the wave of technical cooperation projects and give more and more space to the Government Organised NGOs (GONGOs) at the Commission on Human Rights. Economic globalisation and war against terror has resulted into the confluence of the liberal and illiberal democracies. The challenge is to preserve the space for dissent and maintain the mechanisms developed since the adoption of the first Special Procedures of the Commission on Human Rights – Working Group on Enforced Disappearances in 1980. The destruction of CHR mechanisms will have serious implications at national level too.