

Commonwealth Human Rights Initiative

Newsletter

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CHOGM 2003: A historic opportunity

- Margaret Reynolds

Chair, International Advisory Commission, CHRI

As we approach CHOGM 2003 we need to consider how the Commonwealth is going to open up its processes to be more accessible to its citizens. While some of us may recognise the Commonwealth's historic contribution in assisting to develop democracy, the rule of law and human rights, there are many Commonwealth citizens who are isolated from this knowledge because they are not kept informed about decisions made.

In the current global climate of fear and insecurity, we need to negotiate our way through the fog of rhetoric which divides the world into good and evil. People want answers to the daily problems they face - hunger, illiteracy, discrimination and violence, to name just a few, continue to preoccupy the lives of too many Commonwealth citizens and demand immediate attention and priority.

CHOGM 2003 has the capacity and opportunity to adopt a leadership role in prioritising the United Nations Millennium Development Goals and starting to work for greater equity between people and nations. The so-called "war on terrorism" has become an excuse for increased military spending and restrictive policies rather than an opportunity to face the causes of extremism.

As Commonwealth leaders prepare to meet again they need to look closely at the progress they are making in implementing all the commitments made in successive CHOGM Communiqués. Who is responsible for monitoring these promises? How is the agenda set to ensure that leaders are fully accountable to their citizens? What is the program of action to guarantee specific targets are met?

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We will stop sending hard copies of the Newsletter unless you send us a specific request to continue providing the paper-based version.

Leaders need to bang the Commonwealth drum

Derek Ingram

Member, Trustee Committee, CHRI

Despite the Commonwealth's many activities across the world, the public profile of the association is probably lower than it has ever been. In this information-overloaded globe, a much greater effort is needed if its voice is to be heard.

In the 1950s and 1960s, when the modern Commonwealth took shape, international organisations were comparatively few. Today the field is crowded. From APEC and ASEAN to SADC and WTO the list is huge. Every region has its array of associations.

Notably, after the United Nations, the Commonwealth remains the only other global political organisation of nations, with rich and poor member countries in every continent. Its NGO network is vast and extremely active. Quite apart from the project work, more than 100 conferences, workshops and seminars take place every year. Almost every day, one or more such events take place somewhere in the Commonwealth. Yet the overall impression among the citizens of most member countries, especially the bigger ones like India, is that the Commonwealth does not do very much, except when Heads of Government meet every two years and argue about whatever is currently making the headlines.

This year it is Zimbabwe.

There is no way the journalists in Abuja can be persuaded not to focus on this troubled country. Nor should they be. Zimbabwe is a human rights issue central to the future of the Commonwealth. As I have written in the past: the Commonwealth is about human rights or it is about nothing.

But much more will be on the agenda in Abuja than Zimbabwe. The centrepiece is the report of the expert group, chaired by India's former Finance Minister, Dr Manmohan Singh, on Democracy and Development. Hopefully, adoption of the report will enable the Commonwealth to press on with the work on which it

has played a leading role – reduction of developing country indebtedness.

CHOGM should also talk about a topic currently of pressing concern in the wake of the Iraqi occupation – reform of the UN. One quarter of the UN member countries are members of the Commonwealth. They could provide a powerful lobby for change in New York. Unless the Security Council and other mechanisms are modernized, the UN will never be able to fulfil the ambitions of its founding fathers.

The Commonwealth needs to think bigger than it has in recent years, but this will not happen if its peoples do not have a better knowledge and understanding of it. But the breadth of the Commonwealth can make it a difficult sell. It is hard for the public to become conversant with even a fraction of its work. However, much more can be achieved to give them a broader picture than is at present the case.

What is required is a proactive and creative public relations and communications policy. None of this can happen unless governments themselves take a lead. In most of the larger countries, ministers or even the leaders themselves, do not trouble from one year to another to mention the Commonwealth in speeches or in their constituencies. MPs in smaller developing countries are usually better informed about the Commonwealth than most of their counterparts in bigger developed countries.

At the end of the day, in a democracy, the people need to be informed about what their government is doing in their name and if spending is required, then they need to know on what their money is being spent.

The Commonwealth is run on the cheap, yet there is a perception in some countries that it costs a lot of money. In fact, in terms of spending on international organisations, for any member government it is at or

near the bottom of their budgets. In any analysis, therefore, the Commonwealth is value for money. Yet the budget is continually being squeezed. In his pre-CHOGM report to governments for 2003, Secretary-General Don McKinnon points out that the value of the Commonwealth Fund for Technical Cooperation (CFTC) – in 2003-4 it is £23 million - has fallen by nearly 40 per cent in real terms since 1990.

The CFTC is a jewel in the Commonwealth crown. It is innovative and has pioneered the provision of small scale but vital technical help between the countries of the so-called South. Since it was started by the first Secretary-General, Canadian Arnold Smith in 1971, its project work has often been copied by other organisations. One of its triumphs, for example, has been the development of a package of debt management assistance using sophisticated software that has now been adopted by 50 countries, including some outside the Commonwealth in Eastern Europe. A lot of CFTC work is unspectacular and sometimes necessarily conducted behind closed doors, such as the advice and know-how its experts give to governments with limited resources that find themselves engaged in highly complex negotiations with multinationals on oil and other commodities. In this market-driven society companies can – and do all too often – try to sell developing countries short by taking advantage of their lack of negotiating expertise.

However, because most people have in their minds only a vague concept of the Commonwealth, governments are not lobbied hard enough to devote more time and attention to the organisation. If public support is lacking and MPs do not respond, governments will inevitably conclude that people are not interested in developing the Commonwealth. It is a downward spiral.

Crucial to the evolution of the Commonwealth is an understanding of it among the next generation – and that underlines the need for more to be taught in schools and universities about the Commonwealth. Currently, the Commonwealth gets a mention in the curricula of only a small number of its member countries. Even in Britain the subject has only recently been included in the curriculum.

It is noteworthy that from their meeting just held in Edinburgh, Commonwealth Education Ministers sent a message to CHOGM that says in its second paragraph: “We affirm that education is central to the Commonwealth and fundamental in developing democratic values and good governance. To this end we believe it would be important to provide young people with opportunities to learn about the Commonwealth...” An all-too-brief mention and even that had to be fought for. But it was up there in the second paragraph.

Will the Heads at Abuja listen? ■

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Critics of CHOGM argue that these meetings are remote and secretive with no opportunity for open dialogue with civil society. Obviously leaders are entitled to spend time meeting together in private, but it is time that leaders set aside one session in which they could listen to the voices of those who have direct contact with the more vulnerable members of their communities.

All governments attempt to develop policies which are responsive to community need but they cannot work alone. A Peoples Forum should become a standard item on CHOGM's agenda.

In addition, the preparations for CHOGM need to become more accessible. What priorities are set and how will these be implemented? Currently there is little opportunity for civil society to work with the Commonwealth to progress the agreed program of work for the following two years.

There has never been a time in the history of the Commonwealth when its leadership was more vital. Its unique strength of cultural and religious diversity combined with a shared inheritance gives Commonwealth leaders a privileged opportunity to creatively overcome barriers. But in order to achieve real reform and active promotion of a people centered agenda, CHOGM itself must discard some of its ancient rituals of power and privilege. ■

Human rights are our “common wealth”

Richard Bourne

Ex-Chair, Trustee Committee, CHRI

The significance of the Abuja CHOGM for human rights lies partly in the fact that it is taking place in Nigeria, and partly for the opportunities it presents for progress for the Commonwealth as a whole.

It is easy to forget that, for most of the 1990s, Nigeria's military dictatorship made the country a human rights pariah. The convenient death of General Abacha, and the election in 1999 of President Obasanjo, who had been a prisoner of the dictatorship, has made possible a serious attempt to give Nigeria a secure civilian democracy. The second CHOGM on African soil in four years means that, as was the case in South Africa in 1999, the Commonwealth will be celebrating a human rights victory, even if it is still incomplete.

What were the highlights of the contribution which Nigeria made to the struggle for human rights during the recent past?

First, the provocative execution by the Abacha regime of Ken Saro-Wiwa and eight other Ogoni people in 1995, on the eve of the New Zealand CHOGM, led to the first-ever suspension of a Commonwealth government from membership of the club. More significantly, it brought into existence the Commonwealth Ministerial Action Group or CMAG, a rules committee which could enforce minimum standards of accountability by governments to those they govern, as a condition of membership.

This incident sparked off a brutal struggle for human rights by Nigerians, and friends of Nigeria outside the country, which blazed a trail for the whole Commonwealth. Human rights groups, doctors, lawyers, trade unionists, “guerrilla journalists” who published in secret, all played a role, working together. The Commonwealth Human Rights Initiative, whose senior member Dr Beko Ransome-Kuti was in and out of jail during the period, was honoured to help. “Nigeria,

Stolen by Generals”, the report of a CHRI fact-finding mission in 1995, which revealed how little Abacha was doing to respect the commitments of the Harare Declaration, 1991, was in the bags of the delegates who flew to New Zealand.

However, memories in the Commonwealth are short, and many did not want to remember how the struggle for human rights and democracy in Nigeria galvanised opinion only a few years ago. At the Edinburgh CHOGM, in 1997, the CHRI ran a televised press conference, pushing for more action against the military regime. Among those on the platform were Wole Soyinka, the Nobel prizewinner, Soli Sorabjee from India, Flora MacDonald, former Foreign Minister of Canada, and Nike Ransome-Kuti, representing her imprisoned father, Beko.

Now it is of course wrong and misleading to see the Nigeria of today as a paradise of human rights. Inter-ethnic friction, the vagaries and cruelties of sharia law, and the grinding down of socio-economic rights mean that civilian authorities and civil society have plenty of problems to deal with.

It is possible that unexpected developments in Zimbabwe, like the Ogoni executions in 1995, may jump-start a new leap forward for Commonwealth human rights in Abuja.

But even without the unpredictable, there are two big opportunities for progress. One lies in the hands of Commonwealth leaders. A second is within the reach of NGOs.

The chance for Commonwealth leaders is to build into the CMAG process a role for a qualified Human Rights Adviser, not unlike the good offices envoys of the Commonwealth Secretary-General, or the rapporteurs in the United Nations. At present, CMAG, consisting of eight Foreign Ministers who rarely have specific

human rights expertise, suffers from a human rights deficit even though most of the issues it reviews have their roots in a breakdown in human rights.

A qualified Adviser, of the stature of a recently retired Supreme Court judge, could provide evidence prior to CMAG meetings, and could assist governments running into trouble, or emerging from CMAG suspension. It would be better still if, in addition to the help to be obtained from the tiny Human Rights Unit in the Commonwealth Secretariat, such an Adviser could call on the resources of accredited national human rights commissions. At present CMAG has, in some parts of the Commonwealth, the image of a policeman with a truncheon or lathi. Yet the Adviser could also play a more pastoral and supportive role. Recommendations on suspension, or the lifting of suspension of a government's membership of the Commonwealth would, of course, still be taken by CMAG on a political basis. But the Foreign Ministers would have the Adviser's opinion on paper, and could question him or her.

The effect would be to professionalise, and make more objective, one aspect of CMAG's work. A detailed outline of the Adviser concept has gone to governments, and deserves adoption. This would not have the range of the proposal for a Human Rights Commissioner, for which the CHRI and others have been advocating. A technical study on which I have been engaged has shown that a number of governments remain opposed to the Commissioner idea, and that it could also overlap with other instruments on the international stage. But because CMAG is unique to the Commonwealth, and it already has a scrutiny function, an Adviser to CMAG would not run into the same difficulties.

The second opportunity, which will arise at the Human Rights Forum in Abuja, is one for NGOs. The non-governmental resource for human rights in the Commonwealth far outweighs the two professionals and one support staffer who make up the Human Rights Unit at the Commonwealth Secretariat. The CHRI has offices in three countries and, through its supporting bodies, links to nearly all members. The Association of Commonwealth Amnesty International Sections is

linked to Amnesty sections in 34 states. The great majority of countries have national or regional human rights NGOs as well.

It has been a dream for over a decade that there could be an effective Commonwealth Human Rights Network, capable of providing country reports for all Commonwealth members on a regular basis. Such reports could monitor setbacks and progress according to consistent tests. In Abuja, where the Forum is being supported by a wide range of bodies including the Nigerian Human Rights Commission, it is hoped that such a network, with such a purpose, could come into existence.

The intergovernmental Commonwealth is simply not willing to indulge in such self-criticism and some existing monitoring reports, for instance by the US State Departments, are inevitably partial, often giving overriding precedence to civil and political rights issues. It is important that, in a Commonwealth where poverty is a continuing threat to socio-economic rights, a more balanced view is taken. Only the NGOs can do this, on a systematic basis.

The main theme for the Abuja CHOGM will be provided by the Manmohan Singh report on democracy, development and the reduction of poverty. This is bound to create space for those pressing for human rights and related issues. For example, the poorest of the poor in Commonwealth countries are often the Indigenous peoples, of whom there are around 150 million, marginalised, outvoted and oppressed. Addressing their poverty will also mean addressing Indigenous rights, and land rights in particular.

But all those engaged in the Abuja process, whatever successes may seem to be achieved, need to recall that governmental commitment to CHOGM outcomes is often erratic. For some delegations the next international meeting can quickly wash away the glorious rhetoric of the last. International meetings are ten a penny, and follow fast on each other's heels. Only dogged work by NGOs made the Harare Declaration, 1991, a Commonwealth landmark. Abuja, and the Nigerian struggle for human rights in the recent past, deserve similar commitment. ■

The Commonwealth and Human Rights

The promotion and protection of human rights are an essential part of the Commonwealth's philosophy and work – a mandate that has been given to the Commonwealth through the declarations made by the Heads of Government. Human rights concerns are also reflected in the work of the CMAG, in the programmes of the Secretariat and also in the work of many of the NGOs in the Commonwealth. The Commonwealth approach to human rights, like that of the UN, is based around the concept of rights being integrated and equal and so should not be ranked.

Commonwealth Declarations

Each CHOGM has a theme and at the end of the meeting, the Heads of Government produce a statement or declaration centered around that theme. These include statements like the 1979 Lusaka Declaration on Racism; the 1991 Harare Commonwealth Declaration; and the 1999 Fancourt Declaration on Globalisation and People-Centred Development. Human rights has been discussed in almost all of these, particularly in the Harare Declaration which updates the Commonwealth values and includes a programme of action which places priority on human rights and strengthening democracy.

Most of these statements are not enforceable, they are simply statements of the purposes and principles of the Commonwealth. The exception to this is the Harare Declaration. To be a member of the Commonwealth, countries must abide by the Harare Declaration and the Commonwealth Ministerial Action Group (CMAG) was established in 1995 to ensure this.

Commonwealth Ministerial Action Group (CMAG)

CMAG is made up of a rotating group of 8 Foreign Ministers (currently Australia, the Bahamas, Bangladesh, Botswana, India, Malta, Nigeria and Samoa), who look into “serious or persistent violations of the principles” contained in the Harare Commonwealth Declaration. While the Harare Declaration refers to a broader concept of human rights, it is mostly political values that under review, with a

focus on the unconstitutional overthrow of a democratically elected government. CMAG looks into the problem and recommends action. This is usually in the form of fact-finding missions and negotiations with the government and if changes do not occur, CMAG can recommend to the Heads of Government that the country should be suspended or expelled from the Commonwealth. Pakistan and Zimbabwe are both currently under the attention of CMAG – Pakistan was suspended from the councils of the association following the overthrow of the democratically elected government in 1999. In 2002, though elections were held, CMAG decided to maintain the suspension until there are further signs of democracy. In 2002, Zimbabwe was also suspended from the councils.

Commonwealth Secretariat

The main body responsible for human rights in the Secretariat is the Human Rights Unit (HRU). The HRU is a free-standing unit that reports directly to the Secretary-General. It's work is in the promotion of human rights as it has no enforcement or investigative role. Current activities include:

- Integrating human rights work into all areas of the Secretariat's work.
- Developing programmes related to the promotion and protection of human rights. Current projects include developing strategies to combat trafficking in women and children; and the compilation of case laws related to the unconstitutional overthrow of governments. Future projects include developing consensus on standards applicable to the concept of rule of law among Commonwealth members; a pan-Commonwealth workshops on refugees to develop best practice guidelines on treatment; strengthening and monitoring national human rights institutions; and increasing the number of ratifications of the Convention Against Torture by Commonwealth members.
- Publishing information on human rights developments, jurisprudence and so on for the information and use of member countries. Examples include the Commonwealth Law Digest,

which provides information on decisions related to interpreting international human rights standards in national courts for the reference of those in other countries who are interpreting similar provisions. The HRU also has a newsletter called the HRU Update which includes information on a wide range of human rights developments, projects, workshops and so on.

- Working on human rights issues with governmental and non-governmental organizations (Commonwealth and other) and interacting with the UN human rights system, following the signing of a Memorandum of Understanding with the UN Commissioner for Human Rights.
- Providing advice to the Secretary-General as needed, including on CMAG issues. CMAG has the power to suspend members for breaching the Harare Declaration, and so the involvement of the HRU potentially gives it a role in the enforcement of human rights, as well as in increasing the importance of human rights issues in CMAG's deliberations.

Other divisions of the Secretariat also have programmes that are directly related to human rights, such as the Gender Programme, which promotes gender integration in the Secretariat's work and promotes women's rights as human rights. Gender concerns are also incorporated into the Secretariat's debt management programme and the work of the Commonwealth Youth Programme. The Deepening Democracy programme is designed to implement parts of the Harare Declaration and activities have included workshops on formal democratic processes such as the role of the opposition and election observers. The Commonwealth Fund for Technical Cooperation is the Secretariat's main way to promote development and the alleviation of poverty in member countries, through the provision of technical assistance from one member country to another. This includes human rights training and advancing democracy in Commonwealth countries by providing specialist advisory services, training, experts and consultants to strengthen democratic institutions.

Commonwealth NGOs

As mentioned, there are thousands of NGOs, professional associations and civil society groups in the Commonwealth. These groups vary considerably in size,

structure and the work they do. Some of the professional associations are also active in the area of human rights, particularly the associations of journalists, lawyers, press, medics, trade unions and parliamentarians. ■

Human Rights Advocacy in the Commonwealth

The value of advocating for human rights in the Commonwealth system

Some reasons why the Commonwealth is an important locus for advocacy include:

- Due to the similarities in members' colonial histories, they share similarities in governmental and legal structure. This assists understanding across countries when discussing human rights issues and makes cooperation easier.
- Past successes: the Commonwealth has been successful in the past in influencing human rights conditions in member countries. Examples include the strong role played in the campaign against apartheid in South Africa – while many other groups were also involved in this campaign, the Commonwealth was a leader for instance in instigating sporting sanctions 6 months prior to the UN sanctions, as well as involvement in the peaceful dismantling of apartheid. Commonwealth governments and CMAG also played a significant role in bringing an end to military rule in Nigeria. Commonwealth membership confers respectability in many people's minds; this was seen in the manner in which Nigerians canvassed for an early return to full membership.
- The Commonwealth crosses other groupings such as the UN, ASEAN, EU and AU and members can therefore take messages further through these forums.
- Human rights are a key area of concern for the Commonwealth and have been included in most key Commonwealth statements.
- The Commonwealth consists of a third of the world's population with diversity of religion, wealth, culture, and geography and is consequently a significant forum to advocate and have one's voice and opinions heard.
- Each member has equal voting rights and therefore, in theory, the Commonwealth is an equal partnership for discussion and decision-making. ■

Advocate Heal Thyself

- Action Is Needed To Counter The Shrinking Space For Civil Society Advocacy

Charmaine Rodrigues

CHRI

The Commonwealth has, as an organisation and as individual states, affirmed its unambiguous commitment to democracy in numerous declarations over the years. What is essential is not just the formal expressions of democracy – regular elections and parliamentary processes – but substantive, *participatory* democracy. In practice, this means that democratic government needs to be not only *for* the people, but *of* the people and *by* the people. It is not enough that people are able to exercise their vote every few years. Meaningful democracy requires that people are supported and encouraged to actively engage in their own governance.

Civil society, that is, NGOs, the media, academics and many other community sector groups, have a vital role to play in this context. While it is true that many civil society groups focus primarily on providing services to the community, experience has shown that civil society groups have also often been key facilitators of government-citizen dialogue. This has been witnessed throughout the Commonwealth.

In Kenya, NGOs are heavily involved in the constitutional review process which will set in place the framework by which all future Kenyan governments will be bound; in the United Kingdom, civil society rallied huge numbers of people to lobby the government not to participate in the war against Iraq; and in the Solomon Islands, women's groups were recognised by government as having played a crucial role in peace-building.

Civil society groups' strength and importance to democracy stems from the fact that they provide a key means for channelling the views and needs of the broader public. This is especially useful because of the power that collectivity and solidarity can lend to

individual voices. Civil society groups often act as a medium for individuals, who may not be comfortable engaging directly with government, or may just not know how to have their views put forward to policy-makers.

Civil Society Is Being Undermined

Despite their inherent value to participatory democracy, in recent years there has been a tangible shrinking of the space in which civil society groups have been able to pursue their advocacy work. Although the Internet has opened up more and more opportunities for civil society groups to engage with each other, at the same time many governments have actually been restricting their capacity for engaging with policy-makers.

Resentful of the criticisms of their policies and activities and the fact that civil society groups operate as one of the few effective checks on the excesses of governments, governments have increasingly been using legislation to restrict civil society's advocacy capacity. Two recent cases, in two entirely different national contexts provide extremely troubling examples of this tendency.

Tanzania¹

The *Law on NGOs* 2002 was drafted by the Parliamentary Assembly of Tanzania without any prior consultation with national NGOs. Quick mobilisation by NGOs in a few small ways enabled the text to be amended, but the Act adopted by the Tanzanian Assembly in November 2002 still included serious restrictive measures which violate international and national human rights laws. In December 2002, the Act was officially signed by the President of the United

¹ Information for this case study was provided by the Legal and Human Rights Centre, Tanzania

Republic of Tanzania, but reports indicate that it has yet to be gazetted and therefore is not yet law.

The Act violates the UN Declaration on Human Rights Defenders. Key problems include:

- **Obligation to register:** Article 35(1) provides for criminal sanctions (a fine not exceeding 500,000 shillings and/or imprisonment for up to 1 year) against NGOs that are not registered. However, the cases in which registration can be refused, are not strictly defined and are determined by an NGO Board whose Director is appointed directly by the President. This provision is contrary to Article 1 of the Declaration on Human Rights Defenders, which provides that, “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international level”. It also contravenes Article 22(2) on freedom of association of the International Covenant on Civil and Political Rights.
- **Prohibition of national networks and coalitions of NGOs:** Article 25 establishes a National Council for NGOs (the Council), which is a collective forum of NGOs whose purpose is the co-ordination and networking of NGOs operating in Tanzania. Article 25(4) prohibits any NGO to, “perform or claim to perform anything which the Council is empowered or required to do under the act”. This provision denies the possibility for NGOs to form coalitions of their own and prohibits already existing coalitions of NGOs. This Article restricts the full enjoyment of the right to freedom of association among NGOs and contravenes with Article 5 of the UN Declaration of Human Rights Defenders, which provides that everyone has the right, individually and in association with others, “to form, join and participate in NGOs, associations or groups”.

- **Interference with NGOs activities:** The NGO Board will provide “policy guidelines to NGOs for harmonizing their activities in the light of the national development plan”. This is unworkable in practice. Issues around national development (such as privatisation or land acquisition) can be hugely controversial; NGOs must have the freedom to express their concerns.

Australia

The Australian Government has released a draft *Charities Bill* 2003, which has sounded warning bells within the NGO community because of its effective push to restrict the capacity for NGOs to pursue advocacy campaigns. The Act purports to regulate the charitable sector with a view to ensuring that only bona fide charities are entitled to tax concessions. (These concessions are important for NGOs reliant on fundraising to support their activities.) However, section 8(2) goes further than this, stating that organisations can be disqualified from being a charity if they undertake activities that ‘seek to change the law or government policy’ or ‘advocate a cause’ if they are more than ancillary or incidental to the dominant purpose of the organisation.

Section 8(2) has the potential to act as a deterrent to NGOs to engage in advocacy. It is unreasonable and unwarranted and violates the power of NGOs to legitimately and effectively criticize the government and its workings.

Action is needed

At Coolum in 2001, the Commonwealth Heads of Government called on “the many intergovernmental, professional and civil society bodies, which help to implement our Commonwealth values, to join with us in building closer Commonwealth “family” links, and strengthening consultation and collaboration. The Heads were convinced of the need for stronger links and better two-way communication and coordination between the official and non-governmental Commonwealth, and among Commonwealth NGOs.”

Despite such recent and specific recognition of the vital role of civil society in the Commonwealth, the rights of civil society groups continue to be violated by many governments and their work undermined.

The Commonwealth needs to use the opportunity presented by CHOGM 2003 to take concrete action to tackle this issue.

- The Commonwealth Heads of Government need to send a strong message to explicitly reiterate:
 - Their support for the role civil society plays, not only in providing services to communities, but in facilitating the effective operation of participatory democracy.
 - That every person's right to freedom of association must be protected and promoted.
 - That the principles enshrined in the UN Declaration on Human Rights Defenders must be entrenched.

The Commonwealth Foundation is already specifically mandated to promote the work of civil society and provide links between the official and the people's Commonwealth. The Commonwealth Foundation has already recognised that NGO governance is an important issue and in 1995 produced a document on the subject, *Non-Government Organisations: Guidelines for Good Policy and Practice*.

- The Commonwealth Foundation's work programme should include monitoring the regulatory regimes covering Commonwealth civil society groups with a view to drawing attention to inappropriate restrictions and constraints.
- The Commonwealth Foundation should make direct representations to the Commonwealth Heads of Government and individual member states on the importance of protecting the space for civil society advocacy.

CHRI welcomes Annie Watson as new Chair of CHRI's Trustee Committee

Annie Watson, Director, Commonwealth Trade Union Council (CTUC), replaces Richard Bourne as the Chair of the CHRI London Trustee Committee.

Annie Watson worked for the CTUC as Administrator from 1984 to 1990 and then for the British Trade Union Council as International Officer, responsible for relations with Commonwealth countries from 1990 to 1995. She was appointed as Acting Director of the CTUC in December 1997 and confirmed as a Director in June 1998.

Since then she has travelled widely throughout all regions of the Commonwealth and, in 2003, is looking forward to attending the CHOGM in Abuja, Nigeria.

CHRI will be moving soon. Please confirm your address/telephone/fax numbers/email by sending us an email at chriall@nda.vsnl.net.in so we can inform you of our new address.

CHRI welcomes volunteers from across the Commonwealth. Work usually entails writing for various audiences, researching - especially comparative research and analysis, working in the field to train and motivate groups and organisations, and advocating issues to governments, media and other audiences. Candidates must have strong comparative research, analysis and organisational skills and must be fully proficient in the English language (both oral and written). Qualifications in Law/Criminology/Social Sciences or NGO-sector experiences required. Only those with a strong commitment to and/or experience in the area of human rights and social justice need apply. Candidates must be able to work in a multicultural environment and be adaptable to often challenging working and living situations.

Candidates who are interested in working with CHRI at its Headquarter in New Delhi, India should send their curriculum vitae and two relevant writing samples along with references to chriall@nda.vsnl.net.in.

CHRI @ CHOGM

Commonwealth Human Rights Forum

CHRI, in collaboration with Legal Resources Consortium and the Nigerian Human Rights Commission, are organising a Commonwealth Human Rights Forum immediately prior to CHOGM. The event is supported by the British Council, the Commonwealth Foundation and other donors.

Representatives from human rights NGOs and National Human Rights Institutions (NHRIs), from across the Commonwealth are invited to participate at the Forum, which will be held at the Rockview Hotel, Abuja, from December 3-4th, 2003.

The CHRF will provide a platform for raising vital and urgent human rights issues facing countries in the Commonwealth and an opportunity to discuss the human rights work of the Commonwealth and make recommendations to the Heads of Government. It will also enhance the process of exchanging information and expertise among human rights groups in the Commonwealth. It is hoped that this will be the first of a regular event at future CHOGMs.

The Forum is linked to a new initiative, the *Commonwealth Human Rights Network (CHRN)*, aimed at enhancing the work of civil society groups working for human rights in Commonwealth countries. The CHRN is a joint NGO initiative being established by the Association of Commonwealth Amnesty International Sections (ACAIS), Commonwealth Policy Studies Unit (CPSU) and the Commonwealth Human Rights Initiative (CHRI).

This network will provide a forum for activities including:

- articulating and pursuing a common human rights theme for the Commonwealth.
- sharing of information and collaboration between diverse groups.
- combined advocacy efforts, for instance regarding monitoring of commitments made by

the Commonwealth and member countries.

- capacity building to increase use of the Commonwealth as a fora for human rights advocacy.

Right to Information seminar and report launch

On December 2nd at the Commonwealth People's Forum, CHRI will hold a seminar on the value and importance of the right to access information. Zimbabwe's regressive Access to Information and Privacy Act will be discussed, as well as advocacy activities of civil society groups, such as those in Nigeria promoting the Freedom of Information Bill. The seminar will provide an opportunity for right to information activists from across the Commonwealth to exchange information and share best practice on advocacy efforts.

The seminar will be followed by the launch of CHRI's 2003 report "Open Sesame: Looking for the Right to Information in the Commonwealth", on the evening of December 2nd. This will be held at the Commonwealth People's Forum at the Shehu Musa Yar'Adua Centre in Abuja. Media, civil society organizations, government representatives and the general public are invited to attend.

CHRI will be releasing statements on a range of issues while at CHOGM, including: the human rights situation in Zimbabwe, the importance of open governance to the success of the Commonwealth, and the need for a monitoring mechanism to ensure compliance with Commonwealth commitments. These statements can be viewed at www.humanrightsinitiative.org

For more information about CHRI's activities at CHOGM, please contact Clare Doube at clare@humanrightsinitiative.org. Maja Daruwala, Bernice Sam and Clare Doube can be contacted in Abuja at the Royalton Hotel at (234) 9 2344914-7.

Open Sesame:

Looking for the Right to Information in the Commonwealth

- Excerpt from CHRI's 2003 report to be launched at CHOGM

For more than fifty years now, the international community has recognised that the right to access information underpins the realisation of all other rights. At its inception the United Nations called the right to freedom of information, “*the touchstone for all freedoms to which the United Nations is consecrated*”¹. Later, enshrined in the Universal Declaration on Human Rights, its status as a legally binding treaty obligation was affirmed in Article 19 of the International Covenant on Civil and Political Rights which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*.” Over the years, the importance of the right to access information has been acknowledged again and again in myriad international agreements, including the African Charter on Human and Peoples Rights, the European Convention on Human Rights and the Inter-American Convention on Human Rights.

The right to information holds within it the right to seek information as well as the duty to give information, to create, store, organise, and make it easily available, and to withhold it only when it is in the best public interest to do so. The duty to enable access to information rests with government. Traditionally, the right was limited to getting information from government. However, the duty to release information is increasingly expanding to include multilateral organisations, international financial institutions, commercial and corporate bodies and civil society organisations, where their activities affect the rights of citizens.

Information Is A Precious Resource

Contrary to the belief of many public officials, governments do not own information. Rather, information is created as part of the legitimate and routine discharge of the

government's duties. It is gathered and stored for the benefit of the public. It is generated with public money by public servants paid for with public funds. Governments hold all this information solely as trustees on behalf of the people and cannot hoard it or unnecessarily keep it from the public.

Access To Information Is The Key To Democracy And Development

The Commonwealth recognised in 1991 in the seminal Harare Declaration “the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives”. More recently, at Coolum in 2002 the Commonwealth committed itself to “work to reduce the growing gap between rich and poor” and declared that “the benefits of globalisation must be shared more widely and its focus channelled for the elimination of poverty and human deprivation”. Guaranteeing the right to access information offers the desperately sought after key to deepen democracy, speed development and eradicate poverty that the Commonwealth is searching for. It lays the foundation upon which to build good governance, transparency, accountability and participation, and to eliminate that scourge upon the poor – corruption. As such, it should be embraced as much by the hard-headed economist as by the high-minded reformer.

The Commonwealth has recognised the Value of the Right to Information

To its credit, the Commonwealth has recognised the fundamental importance of the right to access information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared that “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access



¹ Res. 59(1), 14 December 1946, UNGA, 65th Plenary Meeting.

² Communiqué issued by Commonwealth Law Ministers, Barbados 1980

to official information.”²² Collective policy statements since then have encouraged member countries to “regard freedom of information as a legal and enforceable right.”²³ The Commonwealth Secretariat has even prepared guidelines⁴ and a model law⁵ on the subject.

But The Commonwealth Remains Closed

Despite strong commitments to openness and transparency, the Official Commonwealth itself has failed to lead member states by example in the area of information sharing. The Commonwealth Secretariat does not have a comprehensive disclosure policy in place – other than a rule requiring release of certain documents after thirty years. Despite some welcome good practice at recent meetings of its officials, the Official Commonwealth continues to hesitate to engage civil society in its working or functions.

Open government is notoriously absent in the majority of Commonwealth member states, and citizens suffer as a result. Many Commonwealth countries actually have guarantees of the right to information enshrined in their constitutions (usually as a part of the right to freedom of speech and expression, rather than as a separate right), but South Africa is the only one which has actually practically implemented the constitutional guarantee of freedom of information through enabling legislation. In fact, in total only 11 out of 54 Commonwealth countries have access to information laws (Australia, Belize, Canada, India, Jamaica, New Zealand, Pakistan, South Africa, Trinidad and Tobago, United Kingdom, Zimbabwe (although Zimbabwe’s law is so deficient as to be barely worth counting)).

People-Friendly Access Regimes Must Be Put In Place

The reality is that the development of a “culture of openness” is beneficial to the public *and* the government. The best way of achieving open government is by putting in place a people-friendly access to information regime. The first step is to design a legally enforceable access law which makes open government the norm and removes all obstructions that hamper the realisation of the right. Access laws must be based on the principle of maximum disclosure. International standards, guidelines and experience provide useful input on designing progressive laws.

Minimum Standards For Maximum Disclosure

Access to information legislation must:

- Begin with a clear statement that establishes the rule of maximum disclosure and a strong presumption in favour of access;
- Contain definitions of information and bodies covered that are wide and inclusive, and include private corporations and non-government organisations where their activities affect people’s rights;
- Strictly limit and narrowly define any restrictions on access to information. Any body denying access must provide reasons and prove that disclosure would cause serious harm and that denial is in the overall public interest;
- Override inconsistent and restrictive provisions in existing laws;
- Require governments to create and maintain records management systems that meet public needs;
- Include clear and uncomplicated procedures that ensure quick responses at affordable fees;
- Create powerful independent bodies that are mandated to review any refusal to disclose information, compel release, and monitor and promote implementation;
- Impose penalties and sanctions on those who wilfully obstruct access to information;
- Provide protection for individuals who, in good faith, provide information that reveals wrongdoing or mismanagement; and
- Contain provisions obligating the government to actively undertake training for government officials and public education about the right to access information.

Governments Have A Duty To Act Right Now!

In this interconnected, speeding information age, the combination of technology, coupled with guaranteed access to information, offers unprecedented opportunities for the radical overhaul of governance. Information must be harnessed to create short cuts to development and democracy. It must be shared equitably and managed to the best advantage of all members of society. The means are available, but sadly the will is often not. It is an indictment on the performance of the Commonwealth that so many states continue to fail to live up to the democratic ideals that are reflected in the commitment to the right to information. This must change. ■

³ Meeting of Commonwealth Law Ministers, Port of Spain, Trinidad and Tobago, May 1999

⁴ Annex 1, Communiqué issued by the Meeting of Commonwealth Law Ministers, Port of Spain, 10 May 1999

⁵ Freedom of Information Act [], Annex to Commonwealth Secretariat Document LMM(02)6, September 2002

Submission of the Commonwealth Human Rights Initiative (CHRI) to the Commonwealth Ministerial Action Group (CMAG)

Zimbabwe

1. It is with extreme concern and sadness that CHRI must again note the continued abuse of fundamental human rights and the principles of good governance and rule of law in Zimbabwe. A recent example of such violations is the closure of the Daily News, and the Media and Information Commission's subsequent rejection of its application for registration. This represents an abuse of law and a flagrant interference with freedom of expression.
2. CHRI would also like to draw CMAG's attention to ongoing violations, such as the infringement of freedoms of association, expression and assembly through the Public Order and Security Act (POSA) 2002. The selective use of this law, plus its inherent regressive nature, have led to abuse of human rights and poor governance, and associated negative economic consequences. This is one of the many examples of the Zimbabwean government's continued disrespect for the rights of its people and the principles upon which the Commonwealth is built.
3. It is positive that at its last meeting CMAG agreed to keep Zimbabwe on its agenda. However, CHRI believes that more action needs to be taken to return to the Zimbabwean people respect for their rights and welfare, and to ensure the credibility of the Commonwealth as an association.
4. CHRI believes that Zimbabwe must remain suspended from the councils of the Commonwealth until there is compliance with the Commonwealth principles.
5. Considering the ongoing suspension, CHRI believes that President Mugabe must not be invited to the CHOGM in December. To do so would be to make a mockery of the suspension and the plight of Zimbabweans.
6. CHRI recommends that prior to Zimbabwe's readmission to the councils of the Commonwealth, a specific human rights inquiry be conducted.

7. CHRI urges the Commonwealth, particularly CMAG, the troika and Secretary-General, to take all possible action to encourage Zimbabwe to implement its Harare Declaration commitments.

Pakistan

8. CHRI notes with concern that there has been little progress towards restoring democracy in Pakistan. Hostile and disruptive sessions of the national assembly have prevented any significant legislation being passed and prevented the President from addressing a joint session, which is a constitutional requirement. Of particular concern is that General Parvez Musharraf continues to hold two offices – that of President and Chief of Army Staff.
9. Minimal consultation is also of concern: the only political group the government is engaging in dialogue is the alliance of religious parties, known for their opposition to human rights principles. The mainstream political opposition is barely tolerated with reported occasional harassment of opposition members.
10. Democracy is therefore not functioning in Pakistan; and CHRI recommends that Pakistan remain suspended from the councils of the Commonwealth and on the CMAG agenda.

Fiji Islands

11. CHRI notes that the Secretary-General has welcomed the Supreme Court's ruling requiring the Fiji Labor Party (FLP) to be invited to form part of the Cabinet.
12. Since this ruling, there has been further disagreement between the ruling Soqosoqo ni Duavata ni Lewenivanua (SDL) Party and the FLP regarding the number of FLP parliamentarians entitled to Cabinet posts. This has been referred to the Supreme Court for determination.
13. CHRI recommends CMAG continue to monitor the situation in Fiji pending the outcome of the court case.

14. CHRI recommends that the Commonwealth encourage the SDL and FLP to maintain their commitment to genuinely implementing the power-sharing arrangements enshrined in Fiji's Constitution in the spirit of multi-ethnic harmony in which they were drafted. To this end, once the outcome of the court case is determined, the parties should commit to working cooperatively to ensure the efficient and effective functioning of Cabinet in the interests of the entire country.

Solomon Islands

15. CHRI notes the Secretary-General has welcomed the Regional Assistance Mission to Solomon Islands.
16. Stabilising law and order in Solomon Islands poses difficulties that must be dealt with immediately. At the same time, attention must be given without delay to assisting Solomon Islands to meet the long-term goals of locally-owned, peaceful, democratic and equitable development for all.
17. CHRI recommends that the Commonwealth monitor the Mission to ensure that Solomon Islanders drive the political, economic and bureaucratic reforms that are being undertaken. The meaningful participation of the people of Solomon Islands and cooperative rebuilding and reforms must be key principles of the Mission's operations.
18. CHRI recommends that the Commonwealth maintain its offer of technical assistance to Solomon Islands, to be drawn upon if and when required. This should ideally be provided from the Pacific region.

Anti-terrorism legislation

19. CHRI notes that in the two years since the September 11, 2001 attacks on the World Trade Center, anti-terrorism legislation has been introduced and updated in many Commonwealth countries. While it is important to implement measures that limit and deal with terrorism, these must not erode fundamental human rights and civil liberties.

20. Particularly concerning is legislation which removes basic rights such as to be informed of the reason for detention, access to legal counsel and the right to appeal. Limitations on freedom of speech, assembly and association have also been noted; as well as differential treatment for accused. There are also disturbing instances where such legislation has been used as a pretext to suppress minority groups and curtail responsibilities to asylum-seekers and refugees.
21. Terrorist legislation should only curb terrorism and not abridge the hard won civil liberties of the population at large. CHRI fears that in too many cases the excuse of terrorism is being used to suppress popular democratic voice wherever convenient for the government – a practice not in keeping with the Harare principles.
22. CHRI recommends that anti-terrorism legislation maintain respect for human rights; and furthermore believes that discussion and action in response to terrorism must focus on the causes of terrorism as well as the acts themselves.

Commonwealth commitments

23. As this is the final CMAG meeting prior to CHOGM, it is important to reflect upon human rights commitments made by Commonwealth members, both within the Commonwealth and other international fora. The Millennium Development Goals (MDGs) for instance, seek to realise the socio-economic rights to which the Commonwealth is committed; however progress toward these is far behind schedule in many Commonwealth countries. Without immediate action – especially by the more affluent members of the Commonwealth – many will fail to reach their agreed targets.

CHRI calls upon CMAG, as one of the most important mechanisms for the protection of human rights in the Commonwealth, to recommend that progress toward MDGs be discussed at CHOGM. All members must be encouraged to fulfill their promises to uphold the socio-economic rights of their citizens. ■

Solomon Islands: The Challenge of Democracy

Charmaine Rodrigues

CHRI

Lying to the east of Papua New Guinea, the Solomon Islands is a small south Pacific Island nation comprised of hundreds of coral and volcanic islands. The scene of fierce air and naval battles during World War II, the country until recently had a reputation as “the Happy Isles”. Unfortunately, the years since independence in 1978 have not been easy for the people of Solomon Islands, with dissatisfaction erupting finally in the coup of June 2000.

In the years preceding the coup, the failure of the state to provide adequate services and equal treatment for all Solomon Islanders resulted in increasing friction between ethnic groups over land and resources. Inadequate, inept and even incendiary political leadership saw the outbreak of violent conflict between the two major island provinces, Malaita and Guadalcanal. At the height of the conflict police armouries were ‘raided’ with the complicity of police officers - destroying the reputation of the police overnight - and the democratically-elected reformist government of the day was encouraged under the barrel of a gun to ‘step aside’.

When the worst of conflict finally abated - assisted by a peace agreement brokered by Australia in Townsville in October 2000 - Solomon Islands was left to rebuild its shattered economy, infrastructure and political systems. A discredited police force and a paralysed government of dubious legality were left in place – a situation which was ruthlessly exploited by armed thugs. Subsequent breakdown in law and order led to widespread view that the Solomon Islands was on the verge of becoming the regions first ‘failed state’.

External intervention has been the response. In July 2003, the Regional Assistance Mission (RAMSI) led by Australia but with the support of Pacific leaders, assembled at the explicit request of the Solomon Islands’ government – a last effort to stave off multiple imminent crises.

Interestingly, the arrival of Regional Assistance Mission has coincided with the shift in international relations policy which has seen some Western governments pursuing interventionist foreign policy strategies, allegedly premised on the notion

of “installing democracy” in nations in crisis. Regardless of one’s views on the appropriateness or viability of this approach, the intervention throws up many serious challenges for the people of Solomon Islands, their government and the Mission coordinators.

Unlike Iraq, the most recent and obvious example of so-called ‘democratic nation-building’, in Solomon Islands, the sovereign (arguably) democratically elected government actually requested outsiders to actively intervene in their domestic affairs. While the consent of the Solomon Islands’ Government, and apparently even the people, provides a positive foundation on which to premise any intervention, the fact remains that the country is not being re-colonised, but remains an independent and free nation. This needs to be kept in mind at all times by all parties – the Mission leaders, the Solomon Islands’ Government and the people, on whom the burden of rebuilding and the responsibility of participatory development and democracy ultimately rests.

It is vital that the Mission respects the sovereignty of the Solomon Islands’ people and works in cooperative partnership to support local people to achieve goals they set for themselves. Keeping this in mind, one views with foreboding the huge number of expatriate advisors and consultants that are currently engaged with the Mission to work on reforming Solomon Islands’ institutions. The Mission and the Government should be wary of assuming that Solomon Islands’ problems can be “fixed” by external “experts” ready to provide technical solutions. This oversimplifies the challenges facing the country and is reminiscent of outmoded development approaches, which often assume the only factor holding back development in poor countries is lack of expertise. This not only underestimates the abilities of local people – the fact is that Solomon Islands *does* have some level of capacity which must be tapped and nurtured – it also fails to recognise the significance that cultural norms can play in shaping a country’s political and bureaucratic institutions.

Notably, unlike the current democracy project in Iraq, Solomon Islands has supposedly been a democratic country for the last 25 years. While some would argue that this is a

good start for rebuilding, the perplexing question still remains: what went wrong with democracy in Solomon Islands that intervention was finally considered the only solution to the country's problems? If the Government and/or the Mission do not find an answer to this question, the risk looms large that money will be wasted on rebuilding institutions that will simply degenerate again once the Mission leaves.

Serious attention needs to be given immediately to the question of how democracy can be moulded to fit the unique cultural traditions and social mores of Solomon Islands. Although the situation deteriorated markedly after the June 2000 coup, it is simplistic to blame all of the country's current troubles on the conflict between the provinces of Malaita and Guadalcanal; Solomon Islands had been struggling to meet the challenges of democracy and development for a long time before that. Representative democracy was grafted – not very successfully – onto traditional governance systems dominated by chiefs and 'big men'. The result is a political system where members of parliament still maintain strong allegiances to their 'wantoks' (kin), rather than the broader constituency they are supposed to represent.

In recent years, the lawlessness that followed the coup exacerbated the criminalisation of politics that has increasingly characterised the country. Corruption became endemic and the economy was gutted. The direct result has been a marked decline in government-funded health services to the predominantly rural population, an education system in tatters and a people in serious need despite the abundant richness of its natural resources with which it is endowed.

Without innovative and appropriate responses, one has to query whether the same solutions – in particular, a technical approach to institution-building – will simply result in the same results: failure. 'State-building' and 'institutional-strengthening' cannot be the whole solution – these approaches to development gloss over the importance of *people* in making or breaking political, economic and social systems. Strategies need to be developed which harness the diversity of the Solomon Islands' people and ensure the effective representation of all sections of the population. There have been some suggestions that amending the Constitution could achieve this, but arguably this is an overly technical option. While rules of operation do need to be developed that will entrench more meaningful and representative democracy, this could occur through changes in the electoral system and/or the application of the current

constitutional provisions for provincial decentralisation. The key is that the *spirit* of cooperative governance needs to be entrenched in the political and socio-cultural framework before governance will improve. Mere changes to systems and institutions are cosmetic solutions, which are liable to fail in the long-run.

At this juncture, it is worth noting that one of the most fundamental guiding principles that must underpin every strategy for rebuilding Solomon Islands needs to be a serious, tangible commitment to good governance – that is, transparency, accountability, participation and equity. Importantly, the Mission itself must lead by example and explicitly apply the principles of good governance to its own operations. It should be accountable to the Solomon Islands' people and cannot be allowed to operate as an entity apart.

In practice, it is crucial that the Mission actively encourage and value the participation of all Solomon Islanders. The Mission needs to be wary of slipping into the easy habit of consulting Government and accepting that as de facto public participation. People have the right to participate meaningfully in the decisions that affect them – particularly in a context of such huge changes – and should be at the centre of development strategies intended for their benefit. In Solomon Islands, this has even greater importance because the Government has been notoriously unrepresentative. Although the Mission is reliant on the acquiescence of the Government for its mandate, it needs to maintain an active awareness that many of the governance problems that have plagued the country for so long were caused by the very politicians they are working with. Care needs to be taken not to compromise the integrity of the long-term development of Solomon Islands for short-term reasons of political expediency.

It is important to note that while there are many difficulties still facing the people of Solomon Islands, they have an exciting opportunity to take control of their own development destinies and demand the rights they have been denied for far too long. Democratic governance institutions need to be built which take into account not only the political elite but every section of the population. The Mission needs to support the Solomon Islands people to find their own solutions, assisting and guiding where appropriate, providing expertise and resource where necessary, but in the end, simply providing sufficient space and time for the people themselves to forge their own destinies. ■

Human Rights Monitor

Deepti Kapoor & Charmaine Rodrigues
CHRI

CHRI's Human Rights Monitor tracks small and large incidents of human rights violations across the Commonwealth. The accent is not on political or constitutional crises which are covered by mainstream media publications regularly, but small incidents that often go unreported and unnoticed amid the larger issues that crowd the media space.

In this issue, we focus on three vastly diverse Commonwealth countries: Sri Lanka, where a human rights defender went to jail for his fight to defend basic rights and freedoms; Australia, where 8-year-old Shayan Badraie's story exemplifies how asylum-seekers continue to face daily assault and discrimination at the hands of the Australian government; and finally Jamaica, where continued impunity over unconstitutional police killings finally gets some long-deserved attention by the state.

Sri Lanka

On 5 October 2003, the Board of Directors of the Asian Human Rights Commission decided to present its inaugural Human Rights Defenders Award to Mr Michael Anthony Fernando, a Sri Lankan human rights defender who was in jail for eight months as a result of his fight to protect basic rights and freedoms. He was released only recently; conveniently for the Government, only a very short time before Sri Lanka's submission of its periodic report to the UN Human Rights Commission.

Mr Fernando brought two fundamental rights petitions to the Supreme Court of Sri Lanka relating to a rejected worker's compensation claim. The petitions were consolidated and then rejected, after which Mr Fernando submitted a further petition appealing the judgment. This petition named the Chief Justice of Sri Lanka and the two other judges, among other persons, who had decided against him, and so Mr Fernando sought that the new petition not be brought before these judges.

Astonishingly, on 6 February 2003, the Chief Justice sat on the bench that heard Mr Fernando's motion that the Chief Justice not be allowed to hear the petition. The court then summarily sentenced Mr Fernando to one-year rigorous imprisonment for contempt of court, without providing a reason or giving Mr Fernando an opportunity to put up a defence. He was sent to jail

immediately and given no recourse to appeal against the sentence.

While in jail, Mr Fernando was subject to cruel and inhuman treatment. During his first days, he succumbed to serious illness that was not adequately addressed by the authorities, and his family was not informed of his whereabouts when he was transferred to hospital. On his discharge from hospital on 10 February 2003, during his removal to prison, he was assaulted several times, causing damage to his spinal cord. Back in prison he was stripped naked and left near a putrid toilet for over a day, after which he began to urinate blood. He was finally returned to hospital with serious injuries.

D'ato Param Kumaraswamy, the United Nations Special Rapporteur on the independence of judges and lawyers, visited Mr Fernando when he was in hospital and reported that he had been severely assaulted while in prison custody. In a press conference in Colombo in February 2003, Mr Kumaraswamy remarked that, "The Supreme Court of Sri Lanka has done an act of injustice. A man who came to seek justice was served with injustice."

The sacrifice that Michael Anthony Fernando made in the name of fundamental freedoms in Sri Lanka is a wake-up call for all lawyers, and indeed society and the international community more broadly. The serious degeneration of Sri Lanka's judiciary is now a matter of public record, both within the country and

internationally. On Mr Fernando's case in particular, D'ato Param Kumaraswamy, the United Nations Special Rapporteur on the independence of judges and lawyers commented that, "The Supreme Court of Sri Lanka has done an act of injustice. A man who came to seek justice was served with injustice."

Source: Asian Human Rights Centre article in Jana Sammathaya weekly e-newsletter, 17 October 2003.

Australia

Australia's policy towards asylum seekers has come under increasing attack from human rights activists since the Government adopted an increasingly harsh stand towards refugees in 2001. In particular, the Government's mandatory detention policy and its application of that policy to children in contravention of the Convention on the Rights of the Child has recently been the subject of legal battles in the national courts. Most recently, in October 2003, a case was lodged on behalf of one of the children detained under the Government's policy, Shayan Badraie, describing Shayan's treatment in detention as "child abuse" and stating that he had suffered "catastrophic harm". A report in *The Australian* detailed the following:

Shayan was born on January 5, 1995. His family arrived in Australia as unlawful non-citizens in March 2000, and were immediately sent to Woomera. The family, which is Ahl-i-Haq, members of a persecuted religious minority in Iran, arrived at Woomera at a time of riots, threats of suicide, violence and the use of batons, water cannon and tear gas. Shayan saw and experienced all of these things. He began to suffer panic attacks, developed a fear of his guards and became withdrawn.

By January 2001, he had been diagnosed as suffering from Post Traumatic Stress Disorder. By February 22, after witnessing another "self-harm incident", Shayan was suffering "bed-wetting, nightmares, anorexia, insomnia and tearfulness". In March, the family was transferred to Villawood and a psychologist later reported that Shayan was waking up to 10 times a night, crying and fearful that his family was about to be taken away and harmed. The psychologist concluded that

Shayan "remains at risk of suffering a prolonged stress syndrome while he remains in the detention centre".

In May 2001, after seeing a detainee who had cut his wrist in an attempted suicide, Shayan stopped speaking, refused to eat, had nightmares about the incident and had to be forced to take fluids. He was admitted to Westmead Children's Hospital where reports stated that he was acutely traumatised after more than a year in detention. In this period, Shayan was hospitalised for a total of 86 days on eight separate occasions. Psychologists warned of the dangers of long-term psychological damage and even chronic mental illness.

Seven healthcare professionals advised that Shayan should not be returned to Villawood. On May 31, the head of psychological medicine at Westmead wrote directly to the Minister for Immigration, Phillip Ruddock, asking for an urgent intervention and again on June 29 when it was being suggested that Shayan should be placed in foster care, stating that removing Shayan from his parents would be "highly inappropriate" and "very traumatic" for the child. But Ruddock - who had described Shayan during a television interview as "it" - had also received a letter, apparently from the Villawood medical officer, stating that the family had been heard to coach Shayan not to eat or drink.

On August 23, Shayan, by then six, was placed in foster care. As she remembers the day he was taken into foster care, Zahraa, who has looked after Shayan since his parents divorced when he was 16 months old, wipes away tears. "He start crying and said, 'Please mum, dad, help me, I don't want to go'," she says. "He many times says to me, 'Why mum you let them take me away, why they do these things with me?' He many times ask me, but I don't have any answers."

The foster care broke down in January 2002. Ruddock relented and exercised his discretion to grant bridging visas and Shayan was placed in the community with his mother and sister. In August 2002, after 29 months, the Refugee Review Tribunal found in favour of the Badraie family and they were granted three-year temporary protection visas.

Late last year, Alice Tay, former president of the Human Rights and Equal Opportunity Commission, found that the Commonwealth had “failed to treat Shayan with humanity and respect” and had breached the UN Convention on the Rights of the Child. She found Shayan had witnessed events no Australian would wish their children to witness. She urged the Commonwealth to apologise to Shayan. The Government, however, rejected the commission’s findings and recommendations.

Source: Stuart Rintoul, “Detainee wants childhood back”, 28 October 2003, *The Australian*.

Jamaica

While March 14, 2001 will be remembered in the tiny island nation of Jamaica for the infamous and unlawful police killings of seven young men at Braeton, on the outskirts of its capital, Kingston, it is the apathy displayed by state institutions after and continued extra-judicial killings amid a growing climate of police impunity, that merit attention and condemnation of the international community.

Jamaica, a non-entity in the global political arena, is recalled often for its pristine beaches and laidback culture of reggae and the good life. Few are aware of the growing urban poverty and civil unrest, or that a huge 34.2 percentage¹ of the population live below the poverty line. A Commonwealth country that gained independence from British rule in 1962, Jamaica’s state institutions, particularly the police force, have acted on numerous occasions in an extra-constitutional manner, in complete disregard for international humanitarian law.

A high number of police killings in dubious circumstances is inarguably its most disturbing trend. According to Amnesty International, Jamaica has the highest number of police killings per capita in the world: an annual average of 140 civilians over the past 10 years in a population of 2.6m. In 2002, for example,

the police killed 133 people, a shocking figure for a population of only 2.6 million. Many of these killings are suspected to be extrajudicial executions. Further, prosecution of police officers on charges related to such killings are virtually nil, with only one conviction in 1999 bucking the trend. In fact, despite mounting evidence of the complicity of police officers in the Braeton Seven incident, the authorities have failed to take any effective action to hold those responsible to account.

Recently, positive steps taken by the Jamaican government to strengthen the investigation of police officers involved in fatal shootings have been welcomed by human rights groups in particular and the international community in general.

Some of these steps include: commitments by the government to improve autopsies on those killed by the police; making explicit public statements that unlawful killings by public officers will not be tolerated; receiving expert assistance from the governments of the United Kingdom and Canada with the investigation of the killing of four persons in Crawle by officers from the Crime Management Unit on May 2003; publicly requested that the Director of Public Prosecutions make a decision on whether to prosecute members of the Crime Management Unit implicated in the unlawful killings of the Braeton Seven; and disbanding the Crime Management Unit, which has been implicated in the past for numerous abuses of human rights.

Is this mere rhetoric or an actual u-turn in government policy? Most state governments are notoriously fickle in carrying out the promises and commitments they make on human rights issues.

While the steps introduced by the government are certainly welcome, real justice will only prevail once there is police accountability for unlawful killings and justice for the families of the victims killed in dubious and unlawful circumstances. ■

¹ CIA factbook

Excerpt from CHRI's Submission to the POTA Review Committee

The Prevention of Terrorism Act (POTA), enacted on March 28, 2002, replaced the Prevention of Terrorism Ordinance (POTO) 2001. The Act came into force after the President of India gave his assent. POTA however was misused by the state to intimidate Indian citizens completely divorced from terrorist activities. After sustained pressure by the media and human rights groups in particular, the Government of India created a Review Committee to look into the enforcement and implementation of the Act. The following is an excerpt from CHRI's submission to the Review Committee.

I. Loose Definitions with Extremely Wide Ambit

a. Terrorism and Terrorist Activity

The definition of terrorist activity is extremely wide in its ambit and has the potential to cover activities conveying political and ideological dissent. CHRI recommends that apart from other changes that the Government may deem relevant to tighten the ambit of the definition of terrorist activity, a proviso should be added to the definition that states that a "terrorist act" does not include an act, if such act is lawful advocacy, protest, dissent or industrial action.

b. Membership of a Terrorist Organisation

The law makes membership of a terrorist organisation a punishable offence without defining what constitutes membership. CHRI strongly recommends that the law must clearly specify the criteria for determining whether a person is a member of an organisation or not. These may include, *inter alia*, attending the meetings of a terrorist organisation, collecting funds for the same, arranging meetings for the same, mobilizing public support or facilitating its terrorist activities,

c. Support to a Terrorist Organisation

The law mandates that providing support to a terrorist organisation is a punishable offence. POTA clearly makes it an offence to address, arrange or manage a meeting to support or further the activities of a terrorist organisation or inviting funding for terrorist activities and also punishes a person who harbours, advocates, abets, advises, incites or facilitates the commission of a terrorist act. In that case, the meaning of the term "support" that covers a separate category of acts is not clear and CHRI

recommends that the Act should either clearly indicate the same or delete this provision.

d. Possession of Unauthorised Arms etc.

POTA provides extremely harsh punishment for possession of unauthorized arms etc. in a notified area unconnected with any terrorist activity. This implies that a person whose license to own a firearm expires is exposed to prosecution under POTA. CHRI recommends that keeping in mind the directions of the Supreme Court, POTA should be amended to make the possession punishable only where it is connected with the use thereof.

II. Wide and unguided power of the executive

Government

Declaration of a terrorist organisation

POTA empowers the Central Government to declare an organization as a terrorist organisation "if it believes that it is involved in terrorism". Clearly no guidelines are laid down for the Executive to ensure fairness of procedure. CHRI recommends that the procedure prescribed under the Unlawful Activities Prevention Act, 1967 be followed under POTA also. An organisation that is to be declared a terrorist organisation should be given a notice and the court of law should decide whether to declare it so. However, if the Government is unable to do so because of the existence of an extraordinary situation, the Act itself should provide clear guidelines on the basis of which an organisation may be declared a terrorist organisation. It was further recommended that the power of judicial review of the executive action should not be taken away from the courts keeping in view the observations of the Supreme Court¹. ■

¹ *State Of Madras V. Union Of India & State Of Travancore Cochin* AIR 1952 SC 196

Highlights of CHRI's Submission to the Kenyan National Constitutional Conference (NCC)

After the Roundtable Conference on Police Reform held in Nairobi, Kenya in April this year, CHRI and the Kenya Human Rights Commission (KHRC) sent a submission to the delegates of the National Constitutional Conference, the forum which is debating the Draft Constitution developed by the Constitution of Kenya Review Commission. Below are the salient points raised in the submission.

The ongoing constitutional review process represents a historic opportunity to break with the past practice of policing in Kenya. By defining the principles according to which law enforcement will be conducted in the new Kenya, by ensuring that police leaders will be able to make operational decisions free of illegitimate interference from outside the chain of command, by establishing new channels for holding the police accountable, and by strengthening existing channels of accountability, the National Constitutional Conference can create a legal and institutional environment in which reform can take place.

The National Constitutional Conference needs to ensure that the following priority areas are enshrined in the new Constitution.

1. Define the government's obligation with respect to police service. There is no statement in current law that describes the kind of police service to which Kenyan citizens are entitled or that imposes any particular obligation on the government to provide police service. The Draft Constitution can correct that deficiency and, in so doing, define the standard against which the police will henceforth be judged. CHRI proposes the following language: It is an obligation of the government of Kenya to maintain a police service that provides security to the people of Kenya, that protects the fundamental rights recognized in this Constitution, and that adheres to the rule of law at all times.
2. Establish a broad-based process for the appointment and removal of the Commissioner of Police. Under current law, the President has unbounded authority to appoint, and to dismiss, the

Commissioner of Police. The President can change the leadership of the police force at any time and for any reason. This has resulted in the police leadership having to prioritise, above all else, the task of maintaining the patronage of the President and the ruling party. The Draft Constitution proposed by the CKRC begins to correct this problem by requiring the approval of Parliament before any individual can be appointed to the office of Commissioner. The Draft Constitution might also establish a role for Parliament in any attempt to remove the Commissioner before the conclusion of his or her term of office. In other countries, like South Africa, the President is also required to convene a commission of inquiry prior to seeking the removal of the head of the police force.

3. Provide security of tenure and a fixed term of office for the Commissioner of Police. With some amount of job security, the Commissioner of Police would be able to prioritize the rule of law and the interests of the Kenyan people over the demands of powerful individuals outside the regular chain of command. The Draft Constitution proposed by the CKRC achieves this by establishing a fixed term of office for the Commissioner of Police and by providing that he or she may only be removed "for good cause."

Many police officers and observers of the police have argued that the duration of the term of office that the Draft Constitution would establish —ten years— is too long. These critics have said that such a long term of office might retard the process of change in the police force and demoralize junior officers by slowing down promotion through the ranks. They have advocated for a term of office lasting three to five years, renewable once.

4. Establish institutions of civilian oversight. There is a worldwide trend toward the establishment of independent institutions that allow citizens from outside the government to participate in overseeing the functioning of police force. These institutions have

been embraced by citizens and police officers alike for a number of reasons. First, they can help the police become more efficient and fair in certain aspects of their operations. Second, they can make administrative processes, like the promotion and transfer of officers, more transparent. Third, by making police processes more efficient, transparent, and fair, they can render the police more credible in the eyes of the public and thereby improve the relationship between the police and the public. This improved relationship, in turn, strengthens the capacity of the police to enforce the law.

Broadly speaking, two kinds of institutions have been established in other countries for the purpose of making the police more directly accountable to the people.

The first type of institution exerts actual supervisory power over the police force in certain areas of police functioning. One such supervisory institution, Nigeria's Police Service Commission, has disciplinary control over the Nigerian police force, and has power to appoint all of the officers in the police leadership below the rank of Inspector General, the top officer in the force. Nigerian law mandates that the members of the Police Service Commission shall be prominent citizens from outside the government and the police force. The members of the Commission serve fixed terms of office and have security of tenure.

The second type of civilian oversight institution does not have supervisory powers but instead has responsibility for handling the investigation of certain categories of citizen complaints against the police and other allegations of police misconduct.

Both types of institutions were established by the UK Parliament when it reorganized the Northern Ireland police in 2000 after decades of violence between religious communities in that country: a supervisory entity, the Northern Ireland Policing Board, and a complaints entity, the Police Ombudsman.

Some have argued that the Draft Constitution should establish a single entity for civilian oversight of the entire Kenyan Government, rather than specialized

entities for oversight of individual agencies. According to this argument, having too many civilian oversight entities dilutes the impact and institutional prestige of each one. Even accepting this argument, however, a stronger case can be made for establishing specialised entities for the oversight of the police than for other agencies of government. As discussed above, the police are more present in the lives of ordinary Kenyans than other agencies of government. Moreover, unlike other agencies of government, the police are authorized to use physical force against Kenyan citizens. For these reasons, the volume and sensitivity of complaints against the police are particularly high, and the need for civilian oversight of the police is particularly great.

5. Create a unitary police force. Whatever arguments may once have existed for maintaining both the regular Kenyan police force and the Administration Police, the purpose of the dual structure of policing in Kenya is no longer clear. Not only are most Kenyan citizens uncertain of the relationship between the two police forces, it appears that police officers themselves are often confused about the division of labor and about their answerability to provincial and district authorities. Moreover, it appears that the Administration Police have been more vulnerable to illegitimate political control, and consequently more implicated in past abusive practices, than the regular Kenya police. The National Constitutional Conference should seriously consider the creation of a unitary police force under the command of the Commissioner of Police.

At the very least, the division of labour between the two police forces must be clarified, their lines of command and responsibility must be disentangled, and the Kenyan people must be made better aware of their relationship.

By addressing the five priorities listed above, the National Constitutional Conference can lay a foundation for deep, sustainable police reform. Constitutional provisions that define the Government's law enforcement obligation, that protect the police from illegitimate influence, that create accountability mechanisms to restore and maintain public trust, and that clarify the institutional structure of policing are the first steps toward a renaissance in the relationship between the Kenyan police and the Kenyan public. ■

CHRI Calendar

CHRI New Delhi Office

August 8, 2003

Meeting on Delhi Election Watch with Delhi University Teachers at Delhi University.

August 12, 2003

Delhi Election Watch meeting at Centre for Media Studies, New Delhi.

August 21 - 23, 2003

3 day meeting on Electoral Reform and Right to Information at Bhubaneswar.

September 12 & 19, 2003

Half day meetings on Delhi Election Watch at Centre for Media Studies.

September 20, 2003

Media meeting on Delhi Election Watch at India International Centre (IIC).

September 21, 2003

Half day meeting on Delhi Election Watch with Resident Welfare Association at IIC.

September 24, 2003

State Level Election Watch meeting at Jabalpur, Madhya Pradesh.

September 27, 2003

State Level Election Watch meeting at Raipur, Chhattisgarh.

November 1, 2003

Training of Trainers Camp in Bhilai on Legal Literacy and Good Governance.

November 3, 2003

Sensitisation and Training of Chhattisgarh State Human Rights Commission in Raipur.

November 14 - 16, 2003

State Level Judicial Exchange on Access to Justice in collaboration with INTERIGHTS.

CHOGM 2003, Abuja, Nigeria

December 2 - 4, 2003, CHRI Report Launch on RTI followed by Seminar; Commonwealth Human Rights Forum (CHRF).

CHRI London Office

September 19, 2003

CHRI Book Launch: Human Rights and Development in Africa.

CHRI Ghana Office

October

Presentation of review of draft Ghana FOI Bill, in collaboration with the British Council.

Sensitisation seminars and radio discussions to promote RTI among the general population.

The Commonwealth Human Rights Initiative (CHRI) is an independent international NGO mandated to ensure the practical realisation of human rights in the Commonwealth. It was launched in 1987 and is currently constituted by the Commonwealth Journalists Association, Commonwealth Trade Union Council, Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Medical Association, Commonwealth Parliamentary Association and the Commonwealth Press Union, Commonwealth Broadcasting Association. The funding organisations felt that while Commonwealth countries had both a common set of values and legal principles from which to work, they required a forum from which to promote human rights. It is from this idea that CHRI was born and continues to work.

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