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TORTURE

ASIAN AND GLOBAL PERSPECTIVES

Tinkling democracy

HONG KONG SEVENTEEN YEARS AFTER THE HANDOVER

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Cover photo

Tens of thousands of people fill in a street during a march at an annual protest in downtown Hong Kong Tuesday, July 1, 2014. Hong Kong residents marched through the streets of the former British colony to push for greater democracy in a rally fueled by anger over Beijing's recent warning that it holds the ultimate authority over the southern Chinese financial center. *Photo by Amila Sampath*

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Letter to the editor

All letters to the editor must include name and location. Letters may be edited for space and clarity, and may appear in online version of *Torture: Asian and Global Perspectives*

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Cartoon by Awantha Artigala

"Alas, the gates of life never swing open except upon death, never open except upon the palaces and gardens of death. And the universe appears to me like an immense, inexorable torture-garden… What I say today, and what I heard, exists and cries and howls beyond this garden, which is no more than a symbol to me of the entire earth."

— Octave Mirbeau
The Torture Garden

SAY IT LOUD AND CLEAR

say no to torture and impunity

JUST a few short weeks after this year's the commemoration of The United Nations International Day in Support of Victims of Torture yet another heartbreaking piece of news was reported from Pakistan, where a 10 year old boy lost both of his arms due to a viscous act by a landlord in Punjab. A petty issue over a land dispute led the perpetrator to mutilate the child in a senseless act of cruelty.

The report published by the Asian Human Rights Commission, reads as follows,

"On 21 July 2014, at 10:30 am, the child, Shahzad, went to his family's fields. The accused, landlord Mr. Ghulam Mustafa, was standing in his fields. The landlord called Shahzad over to the tube well (a peter engine installed in the open). When the child arrived the accused, caught him, over powered him, forcibly tied the hands of child from front side with a scarf, and put both hands in the running belt of a harvesting machine. The boy was stuck to the running belt and both of his arms were crushed, cut, and separated from his body.

"Soon after, the perpetrator, Ghulam Mustafa, panicked, picked the unconscious and bleeding boy out of the machine and rushed him by motorbike to a private hospital of Gujrat, Punjab, 8-10 Km away from the town. It took half an hour to get to the hospital. Ghulam Mustafa told the hospital administration that it is just an accident. The boy underwent surgery. Meanwhile the parents, relatives, and other local people arrived with the separated, ruptured limbs, but doctors said the arms cannot be reattached.

"When the child regained consciousness after the operation, Ghulam Mustafa came back to the hospital; the child started screaming and told his parents that Mustafa was responsible, but before he could tell more details, he again lost consciousness. Later that night he again narrated the story to the parents."

However, news of the incident went viral. It received extensive coverage from the media and became a bonus for politicians who made public statements to express their "sincere" condolences to the child and his family, and vowed to seek justice for the victim. Like other cases reported in Pakistan, though, there is uncertainty over any remedy and the entire matter, the victim, and his family, will simply be forgotten.

This is yet another incident in Pakistan where thousands of innocent women are being stoned to death by relatives each year in the name of traditional norms, and where unarmed civilians are being subjected to forced disappearances and extrajudicial killings in the name national security and territorial integrity. It is hard to understand the complicated societal web which has led to crises within the crises, which have normalized torture and violence. Like many other countries in the developing world, Pakistan is also facing societal deterioration. A case in point is that of the innocent child who lost both his arms due to the cruelty of a man who believed it was his right to commit such a heinous act. What is significant in this case is that no members of the police or security services were involved. That an ordinary person could commit such an act on another ordinary person shows the deterioration of Pakistan's social system.

When the citizens see the police, security, and armed forces commit atrocities with impunity it sends a clear message to all that there is no criminal justice system in the country. Instead of rule of the law there is impunity. And all the trumpeting by the politicians that justice will be done is meaningless when the laws do not apply to them as well.

When the majority of people justify violence it will become a part of the culture. When the violence becomes a part of the culture (daily life) then the law enforcement agencies are able to, not only break the law, but undermine the basic rights of the people. Therefore the criminal justice system is nothing but a mockery of humanity. The mockery will create a higher degree of confusion and this confusion will lead to greater crimes within the community. This is a real threat that Pakistani society is facing.

Ascertaining the facts and figures and carefully observing the facts prevailing within a society is necessary to understand the real structural collapse of that society. Tearing the arms off of a 10-year-old boy is a prime example of our cultural behaviors and complicity in crimes that occur under the surface of our societies. This shows a systematic failure and deep rooted social disorder.

A society suffering from poverty can be easily dragged into the nightmare described above. It can create a social dilemma where meaningful personal liberty is unattainable. The poor have neither justice nor the opportunity to fight for justice.

Who will stand up to find justice for those who are subject to social violence? This is especially important where the perpetrators of violence enjoy the patronage of members of the ruling party. Any victim seeking justice against such people is chasing a dream.

There cannot be an impartial investigation on torture victims without understanding the hidden violence within the communities which have less access to public resources. It can be easy to take selected victims out of the community and treat them with well-trained professionals. But changing cultural behaviors, which are derived from poverty, requires tremendous effort and a well-articulated plan to address the causes of violence. The main cause of violence is nothing but poverty.

Eradication of torture must be based on the concept of eradicating poverty in each community. So it is time for all of us to raise our voices and call out loud and clear to end poverty in order to end violence.

TINKLING DEMOCRACY

Seventeen Years after the Handover Hong Kong Values Remain a Force

by BOB BEATTY

Interestingly, among the Hong Kong political elites who agreed that there was validity to the concept of distinct Asian values, there was significant disagreement as to what such values actually meant. The affirmative sample broke into three groups.

by BOB BEATTY

IN late spring of 1997 I ventured to Hong Kong from Arizona State University, decamping for several months to try to understand what might happen to Hong Kong after it was handed over to the People's Republic of China. Most scholars at the time were pessimistic, including one well-known political scientist who wrote, "Little of what the world has come to associate with Hong Kong will survive intact." The thinking was that the leadership in the PRC, along with many Hong Kongers, subscribed to an "Asian Values" approach to Hong Kong that would not only forestall democratization, but would also erode the civil liberties and pluralism in Hong Kong society which could pressure the mainland for democratization.

I spent parts of 1997 and the following years talking to Hong Kong elites; 128 interviews done with 89 Hong Kong political elites to be specific. As a barometer of the representativeness of the entire sample in terms of ideology, 56% I would classify as "conservative/ Pro-China" while 44% I would classify as "liberal/ pan-democratic."

The results of this research eventually ended up as a book, ("Democracy, Asian Values, and Hong Kong" Praeger Press), but seeing Hong Kong now, and looking back to 1997, while I understand the immense frustration many Hong Kongers have at the glacial pace of electoral reform, I also see that the importance of "Hong Kong values," rather than "Asian Values," has been a key element of its unique capacity to maintain its identity under PRC rule and continue the push for democratization.

CONFUCIANISM AS ANTI-DEMOCRATIC

In *The Third Wave* (1991), Samuel Huntington summarizes the role of culture as an obstacle to democratization. Says Huntington, "It has been argued that the world's great historic cultural traditions vary significantly in the extent to which their attitudes, values, beliefs, and related behavior patterns are conducive to the development of democracy. A profoundly antidemocratic culture would impede the spread of democratic norms in the society, deny legitimacy to democratic institutions, and thus greatly complicate if not prevent the emergence and effective functioning of those institutions. The cultural thesis comes in two forms. The more restrictive version states that only Western culture provides a suitable base for the development of democratic institutions and, consequently, that democracy is largely inappropriate for non-Western societies. A less restrictive version of the cultural obstacle argument holds that certain non-Western cultures are peculiarly hostile to democracy. The two cultures most frequently cited in this regard are Confucianism and Islam."

The idea that Confucianism and traditional Chinese culture are undemocratic has been widely propagated. Noted author Lucien Pye identified several characteristics of Chinese traditional culture, including conformity and anti-individualism, as unchanging and explanatory of its authoritarian nature. For his part Huntington describes the "Confucian ethos" as the "values of authority, hierarchy, the subordination of individual rights and interests, the importance of consensus, the avoidance of confrontation, 'saving

face', and in general, the supremacy of the state over society and of society over the individual."

In the debate over Confucianism and how it should be interpreted in regards to democracy, anti-democratic Confucian writings can be countered with pro-democratic Confucian writings. Amartya Sen cites Confucian passages which he says show that Confucius did not recommend blind allegiance to the state, and that "Confucius provides a clear pointer to the fact that the two pillars of the imagined edifice of Asian values - loyalty to family and obedience to the state- can be in severe conflict with each other." However, what proponents of Asian values have taken Confucius to mean - irrespective of what he really advocated - is what possesses true political significance in practical debate.

Thus, for our purposes, we must clarify what "Asian values" mean for those who advocate them. Author Jim Rowher offers a good summary: "The need for self-sufficiency has been the greatest spur to the creation, and retention, of what have come to be called "Asian values": the family rather than the individual as the paramount unit of society; a preference for order over freedom and the common good over individual fulfillment; hence, considerable deference to authority; frugality; and a belief in the virtues of education and hard work."

THE PROPONENTS OF ASIAN VALUES

The argument that Confucian and even other Asian societies are unlikely to produce an open political system largely for cultural reasons was trumpeted initially on the world stage by Lee Kuan Yew, Singapore's former President, and Dr. Mohomad Mahathir, former Prime Minister of Malaysia. However, over the years they have been joined by leaders from the PRC, Burma, and even Japan. The then-Prime Ministers of China and Japan, Li Peng and Morihiro Hosokawa, made a joint statement in 1994 in which they warned the West against forcing their type of democracy upon others, a refrain that continues even today in the speeches of some PRC leaders.

Lee Kuan Yew's arguments fell into two general veins. The first is the link between "stability" and economic growth, or the claim that non-democratic systems are better at bringing about economic development. Lee argues that democracy features too many special interests clashing over necessarily limited benefits and that decisions can't be made for the good of the whole community in that context. He says that a strong leader with no disruptive opposition is needed to ensure economic and social prosperity. Lee's successor as Prime Minister in Singapore, Goh Chok Tong, remarked that political opposition is not a good idea: "If able people are divided into two groups contending all the time for support over policies, you are stressing society every day." Lee added, "Americans believe that out of contention, out of the clash of different ideas and ideals, you get good government. That view is not shared in Asia."

The second theme vital to Lee Kuan Yew's views on Asian values is the primacy of culture. Lee believes that the political forms which develop in a country depend very much upon that country's culture and society - and that these deep and often immutable traits predetermine success or failure of the political systems set up in a given country. Lee Kuan Yew argues that thousands of years of different developmental paths have made humans inherently different from each other. As Lee has said, "To have the kind of democracy Britain or America has developed, you need certain cultural impulses in a people…But China has always had an autocratic center. The king emerges; he makes himself emperor by knocking out all the other chieftans and all the other kings. Then he sends you his magistrate, a superior being. He sends the magistrate to look after this village in this prefecture. And if you disobey the magistrate, that's damn foolish…You cannot break out of your culture altogether…Culture is very deep rooted."

Lee Kuan Yew stated in his numerous visits to Hong Kong that the SAR would do well to copy Singapore and that Hong Kong should stop its "flirtations" with democracy. Lee was unabashed in his views, remarking in a 1992 speech at Hong Kong University with then-Hong Kong Governor Chris Patten in attendance that "I have never believed that democracy brings progress. I know it to have brought regression. I watch it year by year, and it need not have been thus"

The possibility of Hong Kong heading down the Yewian path was raised by Hong Kong's first Chief Executive, Tung Chee-hwa, in 1997. Tung gave numerous interviews to both local and international media in which he announced that his three "political heroes" were Deng Xiaoping, Lee Kuan Yew and Margaret Thatcher. More importantly, Tung gave a speech to the Asia Society's Annual Dinner on May 15, 1997, a speech entitled "Pride in Being Chinese".

The speech focused on the "values" of Hong Kong, with Tung saying that Hong Kong was a blend of Chinese and Western values, and that "much of the success of Hong Kong today is attributable to the rule of law, western systems of governance and the freedoms we enjoy." Yet most of the speech emphasized Hong Kongers as holders of Asian values foremost, and then Chinese values. In Yewian fashion he emphasized the "Chineseness" of Hong Kongers.

Tung began the speech by saying that "Asian people can and will hold on to their values and beliefs but at the same time absorb values and beliefs of other people. The combination has made you remarkably successful wherever you go." Then Tung waxed philosophical, saying that with the impending handover looming, it was time for Hong Kongers to "…ask who we are. What are the values we stand for? And what is the social fabric that ties us together? These points need to be crystallized in order for our community to move forward with clarity of direction and unity of purpose."

Tung placed himself firmly in the Confucian camp by listing what he considered "the values we hold dear." They included "trust, love and respect for our family and elders, integrity, honesty, and loyalty towards all, commitment to education, a belief in order and stability, an emphasis on obligations to the community rather than rights of the individual, and a preference for consultation rather than open confrontation."

Did Hong Kong political elites have a clear idea, like Tung Chee-hwa, about what Asian values were? Did Hong Kong political elites see Asian values as having political consequences? Do these values, like in Singapore, necessitate the limitation of certain freedoms for the good of the community? Was there a preference in Hong Kong among political elites for the Singapore model?

For Emily Lau, current Democratic Party Chair, the debate was linked wholly to stalling democracy in Hong Kong, remarking "I don't agree with that, the Asian values idea. There is nothing inherently Western about democracy, and I think it is very demeaning to say that democracy belongs to the West."

Former Democratic Party legislator K.S. Tsang responded to the question in similar fashion, saying that "Democracy is the same whether it is in the East or West. Human rights do not have any national borders." Independent legislator and business executive Ambrose Cheung was equally succinct in his dismissal of the concept, noting that "Values in a society are always changing, always developing, as that society changes and develops." Union activist and Legco member Y.C. Leung framed his answer in terms of control, saying that, "I think when they are talking about Asian values they are talking about a high degree of control. They are talking about controlling society from the top. On the one hand, they talk about people being individually responsible, yet they are patriarchal, they want to manipulate everything. They want to copy the patterns of Singapore and Lee Kuan Yew. They're so conservative, they just don't understand."

One interviewee argued that Asian values are difficult to take seriously when the differences between the Hong Kong Cantonese Chinese and mainland Chinese are so marked. He called the idea of separate Asian values "a big crock." He went on to say, "I'm an Asian and I don't feel any different from non-Asians," and asked "Is jailing somebody a value? Is taking away somebody's rights a value? Look at the people who stress Asian values: Lee Kuan Yew in Singapore, Communist leaders in China, Mahathir in Malaysia, Suharto in Indonesia. If Asian values are supposed to be consultative and Western values competitive, who's being consulted in these countries? Asian values are really what is convenient for these people to hold onto power. What kind of civilization are we talking about that advocates subversion of rights and crackdowns? I don't know of any."

Some Hong Kong politicians felt that Asian values are used by rulers to maintain power rather than to promote some sort of cultural identity. C.K. Sin, a Legco member from the Democratic Party, said "I am Asian, I don't know what Asian values are!" For Sin, it all came down to power politics, and only the Asian leaders, not the people they rule, have distinct values: "I think Asian leaders, they do have Asian values, but I don't think Asian people have particular Asian values. I think these are excuses for them not to change their status, they are excuses. If you talk about freedom for people, it is the same everywhere. If you talk about the rule of law, if you talk about freedom of speech, human rights, I cannot see any differences between Western people and Asian people. If you shoot a Westerner, he will die. If you shoot an Asian, he will die also. If you hit a Westerner in the face, he'll feel pain and if you hit an Asian, also pain. What's the difference? If you locked an Asian and a European in prison they both want freedom. Asian values are for the political leaders in Asian countries because this is an easy way to retain power. This is the cheapest way I can see for power elites to stay in power, the safest way for them."

Former Legco member Fred Li put it more succinctly: "They push Asian values in order not to follow the type of democracy the Western countries enjoy because they have direct elections." For current Legco member Albert Chan, also of the Democratic Party, the use of Asian values goes back in history, saying "When a leader wants to take control over the citizens, traditionally they talk about something from the past, something from the old days. When you look back at Chinese history, every time a new dynasty wanted to tighten up control of the people then they would bring back Confucius. They would tell them that they have to obey the King, that they have to obey the ruler. These tactics have been used for thousands of years and they were effective."

A common refrain among those who disagree with the Asian values argument is that the values that are purported to be Asian are found among all cultures and civilizations, and that Asians have no special claim to uniqueness. Christine Loh, now Under Secretary for the Environment in Hong Kong, said she was perplexed: "They've never spelled out any values which I can't detect in other cultures. So I think they're just saying all this because they want to choose certain types of values that aren't as prevalent everywhere for their own convenience. Hard work? Good God, the Chinese aren't the only people who are hard working. Taking care of families? That's not something that is peculiar to Chinese people. Authoritarianism? What, do we want that? I'm not sure Asians want that more than anybody else."

Anthony Cheung, an academic and former Democratic Party legislator, said that within Chinese history and culture there is division about what should be stressed: "I think it is all a matter of interpretation. I mean, certainly you can find very authoritarian values in the so-called Asian culture. There's the idea of the patriarchal system, the history of an emperor who is sort of supreme and so on. But equally you can find very populist writings among ancient Asian scholars. Even in Confucius, in Mencius, you can see writings which say, OK, if you're the emperor of the King you have to be enlightened and you have to respect the view of the ordinary people. So it depends on which part of Asia's culture and writings that you pick on when you define Asian values. They can be used to support any ideas. Among the so-called Western Christian values you can find democratic sentiments as well as authoritarian ones. I mean, in the Bible you can find everything! So I think it would be too simplistic to suggest that any Asian values favor a more authoritarian type of system."

For some opponents of Asian values the concept strikes them as simply ridiculous and outdated. Former Democratic Party chair and Legco member Martin Lee said about CE Tung, "He (was) always saying to me, 'Now Martin, you have to think of the big picture. When China gets better, then Hong Kong gets better.' Then I say, 'What happens if China gets worse?' I tell him that we have to have safeguards, and democracy is a safeguard. When I tell him that he is eroding the rule of law in Hong Kong, he tells me, 'Oh, don't be so legalistic.' But I tell him, 'That's exactly the point.'"

A close friend of Tung's, former Liberal party chairman and Legco member Allen Lee, rejected Asian values outright, saying, "Asian values? Naw. When you talk about Asian values, well, they can't be used to slow

down democracy. If you look at Taiwan, Japan, South Korea, anywhere in Asia - even the Philippines or the ASEAN countries - you see that many have democracy and elections. Asian values, Western values, there's no difference on the matter of human rights, on the matter of democracy. So, I think when you say Asian values, I say, who are the people who understand what Asian values really mean?"

Many of those I talked to who did not believe in Asian values believed that the invocation of such values by leaders is done for political reasons, not cultural. For those - mostly from the liberal camp - the focus was upon the universality of the values Tung and others ascribe to Asians. Further, they linked their criticism of the concept of Asian values not with Tung's list of attributes - hard work, thrift, and consensus - but in Yewian terms, with the suppression of human rights and non-belief in Western democratic institutions and processes. For many of these respondents, as they indicated in their answers, Asian values cannot be evaluated or discussed in a political vacuum but rather are so laden with the baggage of authoritarianism and undemocratic rule as to be clearly a tool of the generic Asian dictator.

THOSE WHO BELIEVE

Interestingly, among the Hong Kong political elites who agreed that there was validity to the concept of distinct Asian values, there was significant disagreement as to what such values actually meant. The affirmative sample broke into three groups. The "Political" group included those who said that Asian values do indeed exist and that there were some political ramifications because of them, although in some cases loosely defined. Terms associated with Asian values for this group included "stability," "respect for authority," "community over individual," "political apathy," "a different system than democracy," "different ideas of human rights," "not copying blindly what America has," and also "individual responsibility rather than individualistic concerns."

The second group was the "Yes, but…" group, in which respondents denied that Asian values had anything to do with political concerns, democracy, or human rights. For this group, Asian values were personal, familial values that had more to do with how one lived one's life and nothing to do with establishing a governmental system or political model. This group included members of pro-democracy parties as well as conservative businessmen and legislators. The third group was the "We're not Westerners or Mainlanders" group, in which respondents would admit to certain Hong Kong values, even spelling some of these out explicitly, but didn't recognize particularly unique cultural traits Hong Kongers shared with China or other Asian societies.

GROUP ONE: VALUES ARE POLITICAL

The most outspoken advocate of Asian values in his zeal to indict the West and hail the "Eastern way," was businessman and former Legislative Councilor David Chu. Chu argued that because of cultural differences, the type of political and economic systems that Asian nations (but especially China and Hong Kong) embrace will make them more efficient than Western systems because there will be no large government, nor a welfare state, labor unions, strikes, or a societal safety net. He felt that Asians will not copy the one-man, one-vote model of Western democracy, a model that Chu says makes it very difficult to cut government and social welfare because, "Most people, even educated people, vote on their short term benefits, and almost by definition welfare systems and more welfare will receive more votes."

Specifically, Chu identified Asian values as individual honor and individual responsibility. But when talking generally he described the "Asian way" as a system in which consultation is preferred over political competition, societal consensus stressed over individual freedoms, and elite participation in governing seen as crucial so that decision making isn't relegated to the "lowest common denominator." Chu said that Asian values have definite political system ramifications: "In Hong Kong we don't want to copy blindly what America has. To me the simple one-man, one-vote democracy alone has proven to be not the idea solution. I think a one-man, one-vote system coupled with a system of appointed representatives - or coupled with the participation of the elite in society - I think this model will be much more successful and competitive and I think the world will learn this in the next half or one century"

SHOW OF FORCE. Protesters take part in a pro-democracy rally in Hong Kong, China, 01 July 2014. Amila Sampath

Two other former Hong Kong legislators and a Liberal Party official in the sample made an implicit link between Asian values and elite democracy, with one former conservative independent legislator noting that Asians are "politically apathetic" and "don't like to be bothered with politics, they want to be left alone to do what they do best, which is work." Former Legco member Edward Ho argued, "People are not so interested in politics as long as they know that the government is managing the society in the right way, that the government is giving them the freedoms that they want and the rights we enjoy, and that there is a good thriving economy…So I think that what Mr. Tung meant in his speech was that as long as there is a good government then it really isn't necessary that you have to proceed in the same way that a Western society does politically."

A former official from the Liberal Party party noted that Asians expect to follow their leaders without question, as they are molded from childhood to follow orders from their fathers; "As Asians we're more closed in on ourselves and we expect our subordinates to be very dutiful and obedient."

"Stability" was also mentioned by some respondents as an Asian value. Former DAB legislator Kam Chan Ngan indicated that for Asians nothing was more important than "leading a stable life and avoiding chaos," while for former Legco member S.K. Ngai, stability in a non-politicized environment is his definition of the Asian ideal so that "All of us, from all walks of life, including our children and the next generation, can live a very humble, prudent, useful, and free life in the same way, in the same pattern, that we've always had."

Former Hong Kong Progressive Alliance Chairman and Legco member Ambrose Lau was one of the rare interviewees who spoke of Asian values in the context of human rights impact. Lau indicated that "we must acknowledge that there are cultural differences" in regard to interpretations of human rights, "because some people take the view that human rights are an absolute right while others take the view that human rights, in certain respects, are relative."

GROUP TWO: FAMILIAL, NOT POLITICAL

The second group, who said that they believed there were Asian values but that these had little to nothing to do with democratization and human rights, had some difficulty explaining what Asian values were. Upon further probing, some respondents even retracted their initial agreement with the concept.

David Li, a former independent member of Legco from the Finance functional constituency, said, "Do I believe in Asian values? I basically believe there is such a thing as Asian values. I think the emphasis in Asian values is based on self-help and family, and I think that given the structure of Chinese families it does play a part…But, Asian values might also be universal values too, in terms of talking about family, talking about education, talking about respect for elders. I mean, those are basically in any civilized society…I think there can be an overemphasis by some about Asian values."

Less confused were Hong Kong political elites who clearly affirm the existence of Asian values but just as clearly distinguish them from undemocratic rule. This is evident in the comments of one former Legco member, saying, "There are some shared values between China, Hong Kong, and Taiwan, but they are traditional values such as honoring your family, honor, trust and hard work. They have nothing to do with whether democracy is suitable here or not."

A former independent legislator remarked "I think there are certain Asian values different from the West, but they don't necessarily preclude democratization. Regarding freedom and democracy, those are certainly not East or West concepts - it has become a universal desire to take part in your own rule, the rule of people, the ability of the people to be in charge."

Members of the Democratic Party could be expected to deny anything which might contraindicate democratization in Hong Kong, since that is their key party goal for the territory. Given the anti-democratic connotations inherent in the Asian values debate, interestingly, some of these legislators admitted to Asian values, but did so in a way that denies the political implications. And, in some responses, the Asian values issue becomes a springboard to further the argument for democracy in Hong Kong. Andrew Cheng, a former Democratic Party Legislative Councilor said, "Of course Western and Eastern civilization has some basic differences, of course I understand that. But in respect to human rights and freedom and democracy I can't see any differences. I don't see the Asian who is happy to be oppressed or copped into prison by their government who is saying

"Oh, I am happy because I can give up my liberty for social stability! OK, prosecute me, tie my hands because I'm Asian!" That's stupid, come on! If Asians are given the right to vote for their leaders, do you think they will say "No, no, I give up my vote, please have the government choose for me." Will they say this? Of course not. Everyone wants their freedom and a way to express it democratically. In this sense there's no difference between Western and Asian values at all."

Long-time Legco member Albert Ho described a Chinese aversion to the welfare state, but only as a prelude to an argument for democracy, saying "I think the Chinese culture is somehow different. I think in the Chinese community people do not traditionally have a dependency mentality. They would rather choose to work and ask the government to leave them alone. You know, they say, we don't need help from you, don't come to us, I think that is the traditional Chinese mentality, and I think you can see that with the overseas Chinese everywhere, when they are left alone they will prosper. But I think that when you are talking about democracy, when you're talking about human rights, I mean, we're talking about some values that are universal. We cannot say that in Asia human rights should be understood differently and that people should employ human rights in a certain particular form. Human rights are universal."

Thus, a number of elites I talked to turned the arguments of Lee Kuan Yew around by indicating that there are Asian values but using that admission as a forum to describe the universal values of human rights, rule of law, and democracy. And, as shown above, even those respondents who did not want to use the debate for a defense of democracy ultimately focus upon universal values after contemplating what Asian values might really mean. There was therefore an unintended similarity in responses between two types of interviewee, the liberal and the conservative. Both types ended up their comments, usually upon further probing by the interviewer, by moving farther away from specific Asian values and closer to ideas stressing universal human values.

GROUP THREE: HONG KONG VALUES

The third group of respondents who affirmed Asian values were those political elites who framed the debate in terms of "Hong Kong values" rather than values more broadly common to Asia or even to Chinese people from other countries, including the mainland. It is intriguing that in the context of the Asian values debate these Hong Kong political elites from my sample chose to identify Hong Kong values rather than explicate general Asian values. This is problematic for the argument of Asian values, as it is based upon the supposition that all

Asian societies (or at the very least, all East Asian societies) share elements that distinguish them from the West. However, numerous Hong Kong political elites, including politicians from both the liberal and conservatives camps took this singular approach to the question of values.

Two self-described conservative business people and former legislators focused only upon Hong Kong values when asked about Asian values. One, a managing director of a very large property development firm in Hong Kong, said "There are some values that are peculiar to Hong Kong. Hong Kong is culturally bound to a strong belief in entrepreneurship, a strong work ethic. There's a value in self-sufficiency. This has created a confident, successful cosmopolitan territory that believes in the free market economy."

A similar comment was elicited from a businesswoman and political activist who was one of the most pro-PRC and anti-Democratic party elites interviewed in the sample. While she did not want to see democracy introduced into Hong Kong now or even in the short-term future, she also did not link this desire to any cultural value within the Chinese. Instead she focused on crucial and unique Hong Kong values and how those values can influence China: "Our values can change China. Things such as hard work, entrepreneurship, and a certain element of wiliness and craftiness. An ability to get things done and not want something from the state, to do things on your own."

Dr. C.H. Leong, a former independent legislator representing the medical functional constituency, put forth a view that others also mentioned: That Hong Kongers are proud to be unlike mainland Chinese. Leong's view was one that transcends party lines, as this attitude was found across political affiliation. Said Leong, "Hong Kong Chinese are very much different from mainland Chinese. To have Hong Kong running successfully you must ensure that any Asian values, or Chinese values, are from Hong Kong Chinese, and not Chinese Chinese. Having said that, that does not mean that we should not try to understand what the mainland Chinese think. But all we should do is understand what they think instead of changing ourselves completely to the way they think. Because that would be a retrograde step for us."

HONG KONG UNIQUE THEN, MORE UNIQUE NOW

An important part of my original task was to gauge Hong Kong elite beliefs in Asian values, which have been used by some Asian leaders to stifle democracy, civil liberties, and free expression. Despite CE Tung Chee-hwa's efforts to appeal to these Asian values, Hong Kong elites, both conservative and liberal, showed little agreement or enthusiasm for both the general theory behind Asian values and the Singapore model of government on which it is based.

In contrast to Lee Kuan Yew and some other Asian leaders and elites, Hong Kong politicians largely endorsed the importance of civil liberties, freedom of the press, freedom to protest, and the rule of law for Hong Kong. They also articulated a democratic vision for Hong Kong which featured competitive political parties, full universal suffrage and the direct election of all Legco members and the Chief Executive. Most importantly, my interviews showed that there political elites of all stripes do not debate the ultimate goal of full democracy for Hong Kong. The democratic debate in Hong Kong is over pace, not suitability. This important finding meant, and means, that it is unlikely that Hong Kong's democratization process will stop before full democracy is attained. Hong Kong politicians differ greatly on Hong Kong's democratization pace, but not that it should be done. In short, Hong Kong values have only been strengthened in the last seventeen years, and those values, despite Beijing's recalcitrance – maybe because of it – will continue to demand that Hong Kong remain a unique and become more democratic.

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John Roosa, Professor of History at the University of British Columbia in Vancouver, Canada, and a well-known scholar on South East Asia. He is a member of Inside Indonesia's editorial team and the author of Pretext for Mass Murder: The September 30th Movement and Suharto's Coup d'État in Indonesia (2006). He is coeditor of The Year that Never Ended: Understanding the Experiences of the Victims of 1965: Oral History Essays (Jakarta: Elsam, 2004). Prof. Rossa recently communicated with Answer Styannes of our editorial team.

THE PAST ISN'T REALLY IN THE PAST

1965-66 & Today's Indonesia

Answer Styannes (AS): Your book, *Pretext for Mass Murder*, offers an alternative explanation on what actually happened from the 30th of September to the 1st of October 1965. Unlike the version of the story spread by Suharto, you do not believe that the 30th of September movement was the responsibility of the Indonesian Communist Party (PKI).

John Roosa (JR): My argument as to who was responsible for the September 30th Movement is based on a critical evaluation of the entire corpus of existing documentation on the movement and oral interviews with a number of people who were either involved in it or had direct knowledge of it. The chain of reasoning presented in the book culminates in the conclusion that the chairman of the PKI and a select handful of Politburo members – not even the full Politburo – were the leaders of the movement. They believed, however, that their allies in the military would be able to organize a military action on their own; they saw themselves as merely the political advisors to "progressive revolutionary" officers. The dual structure of the movement's leadership, the split between the PKI leaders and the military officers, combined with the lack of clear communication between the two sides, resulted in a strange action on October 1, 1965, that was highly vulnerable to counterattack. The transcript of the conversation between Aidit and Mao on August 5, 1965, recently discovered by Chinese historians, is confirmation of the argument I presented in *Pretext for Mass Murder*. Suharto's army blamed the millions of party supporters and sympathizers for being complicit in this small-scale conspiratorial action that they knew nothing about. Suharto and his generals wanted some kind of justification, no matter how flimsy, for repressing the PKI and overthrowing Sukarno, who had become, in their opinion, too close to the PKI.

AS: The anti-communist purge has often been called the worst atrocity in Indonesia's history. How do you think the purge has affected Indonesian society?

JR: The repression of the PKI was particularly traumatic. It was not just a matter of mass arrests and incarceration without trial. It involved mass killing in villages and towns throughout the country. And those killings were usually not ones committed in public, where the identities of the killers and the killed could be known by the public. Most of the killings were disappearances. Detainees were taken out at night in batches and trucked to remote fields, forests, riverbanks, beaches, and bridges, where they were executed. Hundreds of thousands of people – we have no idea of the exact number – just disappeared. Their loved ones were not informed as to what had happened to them.

This kind of terror was unprecedented in Indonesian history. Neither the Dutch nor the Japanese colonial states ever massacred so many people in the archipelago. General Suharto was responsible for these massacres, largely of peasants and workers, that were meant to benefit a small elite of the country and Western investors, such as the companies involved in oil (e.g. Caltex and Shell), mining (e.g. Freeport), and plantations (e.g. Goodyear). Suharto sold off the country's resources for cheap without building a strong state infrastructure to manage the economy.

I think the difference between pre and post-1965 Indonesia is so great that the country might as well change its name. In building an army dictatorship mortgaged to Western capital, Suharto killed off the ideas of a whole generation of nationalists who fought against the Dutch imperialists. [*The year*] 1965 introduces a fundamental discontinuity in Indonesian history. One can't just treat such traumatic violence, to which even the perpetrators perpetually return, as another event in the timeline of national history.

AS: In the last few years, many studies, books, and documentaries, detailing and analysing Indonesia's anti-communist purge in the '60s, have been released. *Pretext for Mass Murder* is one such, and the recent documentary The Act of Killing is another. Are there changes in how Indonesians think of the issue today – after the release of such studies and documentaries?

JR: The increase in writings and films about the violence of 1965-66 has certainly had a positive effect. For those who want to know and have access to books, magazines, and films, much more information is now available. But the prejudices ingrained for 32 years do not change quickly. Knowing these prejudices, many victims, when speaking to the public, have insisted that they had nothing to do with the PKI and that they had become victims in 1965-66 because of some personal feud or administrative mistake. Even those who were committed communists before 1965 want to pass themselves off as apolitical bystanders who just so happened to become victims. The result is that many Indonesians continue to see the tragedy of the violence as lying in its lack of discrimination; the tragedy seems to be that many non-PKI people were victimized, as if the extra-judicial killing and long-term detention without trial of PKI members were legitimate. It has been hard to argue that these human rights violations are inexcusable.

The censorship still continues. The army's territorial command (consisting of the Kodams, Korems, Kodims, etc.), an ill-defined, superfluous, and outdated institution for internal policing, still focuses on its original reason for existence: suppressing communism. The army continues to intimidate anyone who makes an issue of the 1965-66 violence. Human rights activists wishing to hold public discussions or openly conduct research on the violence are immediately treated as communists who want to revive the PKI.

AS: My grandfather, who lived in Pekalongan, was killed in the '60s due to his association with the Indonesian Communist Party (PKI). Yet, my mother was very reluctant to speak about it until recently. It was almost like an embarrassment for her to be an *anak* PKI (the daughter/son of PKI members). I am aware that, as part of your study, you met and interviewed hundreds of survivors of the 1960s abuses in early 2000, only 2 years after *reformasi*, when discussion on the anti-communist purge was not as open as today. How did you convince them to speak up?

JR: We didn't try to convince anyone to speak up. If a person didn't want to be interviewed by us, we didn't try to convince them to be interviewed. We understand that people have many reasons for keeping quiet. We found that many ex-political prisoners didn't want their name to be publicized for fear of the repercussions on their family members. Many of them had relatives who had managed to get government jobs and they feared their relatives would be fired in retaliation. The 'cleanliness' laws of the early 1980s allowed the government to dismiss public sector employees just for having a family member who had been a political prisoner.

In some ways the 2000-2002 period was just as free as today, if not freer. The mass movement of 1998, especially the militant student demonstrations against the military, really spooked the political establishment. And then the referendum in East Timor in 1999. The military generals were quite confused and anxious in those years.

AS: There were many other gross human rights abuses that took place during the New Order regime, but due to their secretive nature and the oppressive character of Suharto's administration, it is difficult to gather more information and to convince the public that these abuses indeed happened. Take the example of abuses in the Central Highlands of West Papua in 1977-79. In that case, human rights workers have to rely on statements and recollections of survivors and witnesses. As a historian, what do you think are the values of such statements and recollections?

JR: Those statements are very valuable. Each one should not be taken at face value. One has to put together different statements, preferably by a variety of people interviewed separately, and reconstruct the basic outlines of each event. Oral sources are, of course, unreliable, but then many written sources are unreliable too. Moreover, many written sources, such as newspaper reports, are themselves constructed from oral sources.

AS: In 2012, the Indonesian Coordinating Political, Legal, and Security Affairs Minister Djoko Suyanto told the media that the mass killings of the 'communists' in the '60s were justified. It has been over 40 years since the abuses took place, more than 20 years since the Cold War ended, and 16 years

since reformasi. Why is the Indonesian government still reluctant to talk about and apologise for what happened in the '60s?

JR: I think there are a variety of reasons for the continuing refusal to open up a discussion about the 1965-66 violence, much less hold a truth commission about it. One reason is that officers like Suyanto, drilled in Suharto-era propaganda, are not sure what happened, and are worried that any open discussion will reveal the inconsistencies in the stories of the perpetrators. The Suharto regime was silent on the killings and never issued a clear official story; there was no party line. The default position which Suyanto knows is to claim that civilians did the killings on their own, outside of army control. But he also knows that many of the civilian militias who did the killing have stories about how they followed the army's lead. Deep down, both the military and civilian perpetrators know that the killings were unjustifiable atrocities. All along, they have not wanted people to question their claim that "it was a time of kill or be killed." They have not wanted people to investigate precisely what happened.

AS: The argument often put on the table by the government, as well as those who do not support the legal and reconciliation processes of the anti-communist purge and other gross human rights violations that took place in the past, is that there is no use of looking back, and that we should focus only to the future, to the development of the country. What do you say to those who believe so?

JR: If only the past really was in the past. In the case of the violence of 1965-66, it is very much with us in the present. One can hardly understand the political economy and the culture of contemporary Indonesia without reference to that violence. Few Indonesians even have a good grasp of what happened and they are already being told to forget about it. We hardly know what we are supposed to forget.

The people who would like to consign the violence to the past are being hypocritical. They just want the victims to be quiet. If they were consistent in that position then they would also call for an end to the state propaganda about the 1965-66 events. One

side has been speaking non-stop in the most vulgar, vicious, and mendacious manner; the other side peeps up for a moment and is told just to forget all about it. The advocates of forgetting haven't called for the monument to the seven army officers killed by the September 30th Movement, with its falsified history carved into metal on the bas-relief, to be taken down. They haven't called for the Museum of the PKI's Treason to be shut down.

AS: In your article, "The Truths of Torture", you argue that torture was practised by the Indonesian military against so-called PKI members in order to fulfill their "fantasy" on the mass uprising plotted by the party. Now Suharto has gone, the New Order has crumbled, yet torture perpetrated by the military – and now the police too – remains. Do you think the torture perpetrated by the military under Suharto regime has any relationship with that practised today?

JR: Having practiced torture as standard operating procedure on such a mass scale in 1965-68, the Indonesian military has developed a sense of entitlement: officers think they have the right to torture Indonesians. Just consider what a presidential candidate said last week during the debate with his rival candidate. Prabowo, a former army general, admitted to having 'disappeared' prisoners in 1998 and claimed that it was to defend society against bomb-making terrorists. The survivors of that operation, such as Nezar Patria, have reported the torture that they and their fellow prisoners experienced. No one has been punished for those cases of torture and disappearances, which, of course, cannot be justified in the name of security. Their arrests and detentions can be justified but not their torture and disappearance. Prabowo's "punishment" was an honourable discharge from the army. And now he's back running for president as the candidate who is "tough" (*tegas*). Even the retired generals who have been criticizing Prabowo, such as Agum Gumelar, haven't called for any accountability for the tortures and disappearances for which he was responsible. If the prisoners were killed, then Prabowo should have to reveal the location of the corpses.

AS: One of the aspects of the 60s abuses, often highlighted, is the involvement of the United States, which is also discussed in a separate chapter in your book. In your view, what is the least and the best the United States' current administration should do in order to address the damage they have caused to many Indonesians?

JR: First, the United States government should follow the call by Senator Mark Udall (D-Colorado) to declassify all of the US government records pertaining to the events in Indonesia in 1965-66. Udall issued the call earlier this year after watching the film The Act of Killing. He arranged for it to be screened at the Library of Congress. The CIA's records, for instance, on the events, have not been completely declassified. Secondly, the US government should hold its own version of a truth commission about its involvement in the events, thereby setting a good example for the Indonesian government to follow. Such a commission should include an examination of the torture and killing of workers at US-owned businesses.

AS: The Presidential Election is approaching so I just have to ask you this: are you confident that there is hope for legal and reconciliation processes for the abuses in the '60s under the new administration, whether it is led by Joko Widodo or Prabowo?

JR: I think there will be some progress if Joko Widodo becomes President. At the very least, we can expect that he support [*sic*] the victims when they speak up and defend the rights of human rights activists to hold public forums. Under Prabowo, we can expect celebrations of Suharto as a national hero and the continued suppression of all forms of dissent.

AS: Thank you very much for your time and valuable insight. Will we see any more studies on the '60s abuses or on Indonesia from you anytime soon?

JR: Yes. My colleagues and I have a large number of articles and books that we're working on. At least some of them will appear before the 50th anniversary of the start of Suharto's murderous takeover, in October 2015.

exclusive interview

ebullience of WHISTLEBLOWING

JESSELYN RADACK

"International asylum law supports Snowden", says a former ethics adviser to the United States Department of Justice who came to prominence as a whistleblower Jesselyn Radack in an exclusive interview with Torture magazine. While commenting on importance of privacy, Radak says . "In a democracy, the people should know more about government than the government knows about people. "

Jesselyn Radack is the national security and human rights director of the Government Accountability Project, which represents whistleblowers. Jesselyn Radack recently communicated with Natalie Yeung.

NATALIE Yeung (NY) : What is the difference between a whistle-blower and a 'leaker'? What role does a whistle-blower have? What do you think when whistle-blowers are being referred to as traitors?

Jesselyn Radack (JR) : Whistleblowing has a public interest value. Determining who is a whistleblower depends on the substance of the disclosure. A whistleblowing disclosure reveals a gross fraud, waste, abuse of power, mismanagement, violation of law rule or regulation, or a danger to health and public safety. A "leak" - such as revealing CIA operative Valerie Plame's name to retaliate against her husband, Ambassador Joe Wilson - reveals no misconduct and is often done for political reasons. Calling a whistleblower a "traitor" is a transparent attempt to deflect from the whistleblower's message, and an all too typical a response from powerful institutions who want to avoid accountability.

NY: What do you think about the significance of information leaked by whistle-blowers? What change do they bring?

JR: Whistleblowers provide an invaluable public service and bring accountability to countless government agencies and corporations. Especially in areas - like the intelligence community - plague by too much secrecy and too little oversight, the public needs whistleblowers to hold wrongdoers accountable.

NY: How was your experience being a whistle-blower?

JR: It's a tremendous strain to have the entire weight of the federal government come down on you, and it was surprising to find out the lengths to which the government would go to punish me. For example, I was put on the "selectee" portion of the No-Fly list and the government interfered with my non-government employment. A whistleblower needs tremendous support from lawyers, advocates and in personal life, which I was lucky enough to have.

NY: How well do you think the US constitution protects privacy and personal liberty?

JR: The U.S. Constitution embodies strong protections for privacy and liberty. Unfortunately, since 9/11, many U.S. government agencies have abandoned the constitutional principles under the guise of protecting national security.

NY: Comparing privacy and personal liberty, which element do you think is more crucial? Do you think loss of privacy is a way that one loses personal liberty?

JR: Yes, privacy and personal liberty are inextricably intertwined. In a surveillance state, people may appear "free" but if the government is spying on the population, the people lose liberty and the right to privacy - the right to be left alone. Illegal surveillance violates the Fourth Amendment's protection against unreasonable searches and seizures, and chills the freedoms of speech, the press and association.

NY: How is privacy important and how can it be derived?

JR: In a democracy, the people should know more about government than the government knows about people. The essence of privacy is the right to be free from unnecessary government interference.

NY: With technological advancement it is much easier to obtain information, how can one secure own privacy and personal liberty?

JR: Using encryption is a good start. Participating in the surveillance reform process and supporting efforts to reign in the NSA's mass surveillance operations, which make the internet less secure for everyone, would also contribute to greater individual privacy.

Using encryption is a good start. Participating in the surveillance reform process and supporting efforts to reign in the NSA's mass surveillance operations, which make the internet less secure for everyone, would also contribute to greater individual privacy.

NY: Are there any specific policies or laws that protect whistle-blowers in the US; are current laws sufficient in protecting human rights from torture and surveillance?

JR: There are laws that protect whistleblowers, but many of the laws have national security exceptions so they are not sufficient in their current form. There have been recent advances, but the new laws are far from ideal - they are just baby steps - and it remains to be seen if the new laws will be implemented and operated in a way that actually protects whistleblowers.

NY: Do you consider there is correlation between hacktivists and whistle-blowers?

JR: Absolutely, both are concerned with freedoms of speech and association and often both are vilified and retaliated against for exercising those rights.

NY: What could be the solutions to current situations on deprivations of personal liberty in name of espionage and intelligence gathering related to changes of technologies since 911?

JR: Rolling back the NSA's ability to undermine individual privacy protections like encryption and righting the U.S. intelligence community's focus on legitimate targets rather than conducting mass surveillance on entire populations.

NY: What do you think of the immunity that secret agencies enjoys? Is it compatible with the constitution? Is the current system replying too much on the president's decision?

JR: Generally, sovereign immunity is a long-standing constitutional principle in the US. However, the Executive branch should not use secrecy and national security to shut down legitimate lawsuits challenging surveillance and torture or use secrecy to hide wrongdoing or embarrassment. Since 9/11, many courts and members of Congress afforded the Executive branch too much deference in the arena of national security - particularly with regard to surveillance - but in the wake of Edward Snowden's revelations, we are finally seeing some movement toward accountability.

NY: How does the secret agencies work when they collect information through surveillance? With existence of FBI and CIA, do you think it is possible to have the NSA abolished? Who to decide what information that the public should or should not know?

JR: The inner workings of difference collection programs and who gets to see that information are complicated and still plagued by too much secrecy. The CIA and NSA are supposed to be operating overseas and the FBI operates largely domestically, so there is - in theory - a function for all of the agencies. But since 9/11, we've seen the agencies move away from their traditional roles. The FBI has become focused on intelligence gathering rather than criminal investigation; the CIA has become focused on military operations rather than intelligence gathering; and the NSA has focused on mass surveillance and domestic surveillance rather than targeted foreign surveillance. As far as what information should be secret, the Executive Order on classification lays out very clearly what the legitimate secrets are, but those legitimate government secrets have been undermined by massive over-classification.

NY: What challenges are Snowden likely to face, given that his permission of staying in Russia will soon expire? According to the UN high commissioner for human rights, Navi Pillay, 'those who disclose human rights violations should be protected:we need them.' How do you think can Snowden be protected in current situations? Are there any international laws that aid with Snowden's situation?

JR: International asylum law supports Snowden. He still qualifies for asylum because he has a valid fear of persecution from the U.S. based on his political beliefs and speech.

Natalie Yeung *currently studies Law in University of Warwick with interests in promotion of protection and awareness of human rights issues and international conflicts. She is an intern in Asian Human Rights Commission.*

BEYOND THE TIEWIG

Time to End

The reality is appointments, transfers, and disciplinary actions against police officers are still made based on political affinities. Not all states have constituted the Police Complaints' Authority. In places where the authorities were established, they are non-functional or are lacking resources, and the authority remains only on paper.

by BIJO FRANCIS

IN a writ petition[1] filed before the High Court of Kerala, the petitioner, Mr. Sajith, has requested the court to direct the Central Bureau of Investigation (CBI) to investigate the infamous Payoli Manoj murder case. The petitioner has sought that the court should direct the Government of Kerala to hand over the case diary to the CBI, and has alleged that the investigating officer in the case, a Sub-Inspector of Police, is in fact the local committee leader of the Communist Party of India (Marxist), the political party that is accused of conspiracy to murder Manoj. Manoj was murdered on 12 February 2012.

While hearing the case, the presiding judge, Justice K. Ramakrishnan, expressed concerns that politicisation of the police has potential to damage discipline within the force and further destroy it. The judge further said that ordinary people are fast losing faith in their police due to crimes officers commit with impunity and the political bias police display as an institution, often favouring the political party in power.

Strictures against the police by the judiciary, pointing out deep wilt within the institution, is not new. An early instance, where the judiciary has made adverse remarks against shoddy and corrupt policing, was in 1978. Justice V. R. Krishna Iyyer, in the *Nandini Satpathy* case[2], said that the practice of summoning women witnesses to the police station for questioning is prohibited under Section 160 (1) of the Criminal Procedure Code, 1973 (Cr.P.C.). The court further ruled that the prohibitive sweep of Article 20 (3) on self-incriminating evidence in the constitution applies from the stage of investigation and not just at the trial stage.

The Supreme Court has subsequently reaffirmed this position on at least two-dozen occasions. The

1 Sajith v. State of Kerala and others.

2 All India Reporter 1978, Supreme Court p.1025.

Hollow Rhetoric

principle of the burden of proof laid down in English criminal law "… [i]s a golden thread always to be seen, that it is the duty of the prosecution to prove the guilt against the accused …"[3] is the law in India. This has been re-affirmed by the 180th report of the Law Commission of India,[4] submitted to the Union Law Ministry in 2002.

However, custodial torture and confession extracted through torture remains the foundation of police criminal investigation in India. On custodial torture, in 1981, the Supreme Court of India said:[5] "[n]othing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights."

Evolving further into a position of absolute prohibition of torture, the Supreme Court, in 1996, laid down mandatory procedures that a crime-investigating agency must follow, while executing arrest, detaining a person in custody, and further questioning detainees or witnesses[6].

These procedures include:

> the police personnel carrying out the arrest and handling the interrogation of the arrestee should wear accurate, visible, and clear identification and name tags with their designation. The particulars of all such police personnel who handle interrogations of the arrestee must be recorded in a register;
>
> the police officer carrying out the arrest shall prepare a memo of the arrest at the time of the arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest;
>
> a person who has been arrested or detained and is being held in custody in a police station or interrogation centre or another lockup shall be entitled to have one friend or relative or another person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless an attesting witness of the memo of arrest is himself such a friend or relative of the arrestee;
>
> where the next friend or relative of the arrestee lives outside the district or town, they must be notified, telegraphically, of the time and place of arrest and venue of custody of an arrestee

3 Per Viscount Sanky in Woolmington vs. DPP, 1935 AC 462, p.481.

4 Report of the Law Commission submitted on 9 May 2002 reaffirming that any dilution of the principle of the burden of proof and the right to remain silent will violate the fundamental rights guaranteed under Article 20 (03) of the Constitution.

5 All India Reporter 1981, Supreme Court p.625.

6 All India Reporter 1997 SC 610.

by the police through the legal aid organisation in the district and the police station of the area concerned, within a period of 8-12 hours after the arrest;

the person arrested must be made aware of the right to have someone informed of his arrest or detention as soon as he is arrested or detained;

an entry must be made in the diary of the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest, and the names and particulars of the police officials in whose custody the arrestee is;

the arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if present on his/ her body, must be recorded at that time. The inspection memo must be signed by both the arrestee and the arresting officer, and its copy provided to the arrestee;

the arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody, by a doctor on the panel of approved doctors appointed by the Director of the Health Services of the concerned state or union territory. The Director should prepare such a panel for all tehsils and districts;

copies of all the documents including the memo of arrest referred to above should be sent to the local judicial magistrate for his record;

the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation;

a police control room should be provided to all the district and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the arresting officer within 12 hours of the arrest. In all police control rooms, this information should be displayed on conspicuous notice boards.

The law interpreted and laid down by the Court is binding throughout the country. Any violation of these directions is not only a violation of the law but also a direct contempt of the Supreme Court of India. Unfortunately, 18 years since the judgment and 8 years after the comprehensive amendment to the Cr.P.C., the Supreme Court, or any other Court in India, has yet to take action against a police officer that has violated these mandates. Thus, the directive has not become effective. And, it is not as if the Court has been unaware of such violations. The violation of the law and of the Court's directive is brazen and is practiced across the country by police officers.

The fundamental question is why do the police continue violating the law concerning arrest and detention? The answer lies in the appalling reality that India's police is neither equipped nor trained to undertake investigation as mandated by the law.

The police force across Indian states gets too little financial allocation for serving the people of a democracy to be able to follow the law. Therefore, police officers who arrest and detain a person on suspicion, due to lack of training and resources, resort to torture and other forms of custodial violence in their attempt to prove the case. It is state policy not to reform the police. And so the police continue violating law.

For the past 64 years, it has been the policy of the Indian state to keep the police under absolute political control. This control starts from the point of recruitment to appointments, promotions, transfers, and disciplinary actions taken against officers. As long as such servitude is expected, the police officers within the establishment keep their political masters, rather than ordinary people, as their priority. The police in India can, by no means, function according to the law.

In the prevailing culture of demoralisation and political servitude, it is only natural that corrupt police officers exploit the situation, selling their uniform and authority. This includes the use of torture or the threat of extrajudicial execution for extracting bribes. In fact, many police officers carry out targeted assassinations for the rich and powerful.

Pompous declarations like "executive elimination is against the constitution …" by the judiciary will not end such actions.[7]

Police officers also allow themselves to be used by political masters for laundering or whitewashing crimes committed by people in power. The investigation officer in Manoj's murder case has also allegedly done so.

It was a police officer that approached the Supreme Court of India seeking the Court's direction to salvage the police as an institution from unwarranted political control.[8] Mr. Prakash Singh approached the Supreme Court, like Sajith approached the High Court of Kerala, seeking the Court's direction to set down procedures that the government must follow to end the political servitude of his fellow officers.

Allowing Singh's petition, a division bench of the Supreme Court, in September 2006, directed the government that it shall no more be the government's privilege to transfer, promote, or take disciplinary actions against police officers purely based on political affinities. The Court directed the government to form independent bodies in each state that would be empowered to deal with these procedures.

The Court further said that the government must constitute a Police Complaints' Authority in every state, headed by a former judicial officer, who will be empowered to accept, inquire, and recommend to the government remedial measures if any citizen has a complaint against the police. As expected, the government objected to this judgement and filed a review petition claiming that the Court had exceeded its mandate by intervening in administrative matters of the State. The Supreme Court did not even admit the petition, stating that all Chief Secretaries of state governments must report to the Court regarding complaints of the Court's direction.

However, the reality is appointments, transfers, and disciplinary actions against police officers are still made based on political affinities. Not all states have constituted the Police Complaints' Authority. In places where the authorities were established, they are non-functional or are lacking resources, and the authority remains only on paper.

For example, of the 418 complaints filed against the police before the Police Complaints' Authority in Kerala, in only 17 cases has the Authority initiated an inquiry. The complaints relate to cases of custodial violence, including torture, custodial deaths, and of demands of bribe and protection money by the police. Yet, despite being put to notice, the Supreme Court, and other Courts in India, have failed to take any action against the government that has violated the Court's directive.

In light of the above, it could be argued that the High Court of Kerala has lost a grip on reality. The people do not believe the police and judiciary are impartial and can deliver justice. In India, where torture, extrajudicial executions, and other forms of custodial violence, are rampant, police officers are seen as criminals in uniform, paid by the exchequer.

The observation by Justice Ramakrishan, that politicisation of the police has the potential to destroy the institution, is an understatement. Indian police is an institution that has been destroyed, and has reduced itself to a criminal enterprise that only serves the powerful and the rich. The Court keeps giving directions to the government and state institutions, and these directions continue to be violated. It is about time the Indian judiciary stopped its empty rhetoric.

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7 Per Aftab Alam and C. K. Prasad, JJ, in writ petition filed by Mr. Javed Akthar, Mr. B.G. Varghese and others for a direction to order a CBI investigation into the 22 fake encounters that had taken place in Gujarat between 2002 and 2006. The case is pending final disposal.

8 (2006) 8 SCC p.1.

IS TRC A FALSE PROMISE?

CONFLICT VICTIMS STILL AWAIT JUSTICE

by MANDIRA SHARMA

Introduction

THE use of torture, and the impunity for those involved in it, is a major hurdle in promoting human rights and rule of law in Nepal. Thousand of victims suffering from torture during Nepal's conflict (1996-2006) continue their quest for justice and hope for reparations. During the conflict, torture was widespread.[1] Thousands and thousands of people were subjected to illegal arrest, detention, torture, killings, disappearances, and sexual violence, among other violations.[2] The whereabouts of more than 1,500 people are still unknown and their families continue to suffer from pain and anguish, not knowing the fate of loved ones.[3]

Recently, the government enacted a law to set up Truth and Reconciliation Commission (TRC) and Commission of Enquiry on Disappearances (COID) with the objective of addressing the atrocities committed during the conflict. This article analyses the TRC Act of Nepal and exposes the false promises of providing justice and reparation to the victims of torture of Nepal's internal armed conflict.

Background

Torture in Nepal predates the conflict. Historically it was used as a form of punishment. Use of torture as a form of punishment for lower castes was especially common. It has also been used as a tool of investigation in the criminal justice system, to destroy the reputation of political opponents, and to spread terror – the latter seen time and again during the internal armed conflict.

Though Nepal's 1990 Constitution prohibited torture, it continued. The UN Committee against Torture[4] and

1 United Nations, *Report of the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Mission to Nepal*, UN Doc. E C/CN.4/2006/6/Add.5, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/101/19/PDF/G0610119.pdf?OpenElement.

2 OHCHR, *Nepal conflict report*, October 2012, available at http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx.

3 *Ibid*.

4 United Nations, *Report of the Committee against Torture*, 1994, UN Doc. A/49/44, page 22, para 149, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/

the UNSR on torture, among others, continued to raise concerns about the widespread practice of torture in Nepal.[5] More recently, the Committee against Torture has found that torture remains widespread and systematic in Nepal.[6]

Nepal has a Torture Compensation Act, which does not criminalise torture. It provides for compensation to the victims up to USD $1,000 if a court finds a person has been subjected to torture. The Supreme Court of Nepal issued a directive to the government in 2008 ordering the criminalization of torture. Civil society organisations and the UNCAT have also been making this recommendations since 1991. However, these calls have not resulted in the criminalisation of torture.

The TRC Act

After many years of struggle by victims and human rights activists, and rulings from the Supreme Court, the major political parties finally passed the Act to establish a TRC and COID, approved by Parliament on 25 April 2014. However, it was enacted without consultation with the major stakeholders, i.e. the victims and civil society organisations. A number of victims' groups, lawyers, and civil society organisations have raised concerns in relation to the Act, as the Act provides space for amnesty even to those involved in torture and disappearances. Furthermore, the Act also provides powers to the commission to undertake mediation between victims and perpetrators, even in serious human rights violations cases, including torture. As it currently stands, the Act is in breach of international human rights law and a 2 January 2014 Supreme Court ruling. Unless key provisions are amended, the TRC and Commission on Enforced Disappearances will not meet international standards and will promote impunity.

What the TRC Act says on torture

Can the TRC, enacted under this Act, be a tool in providing remedies for survivors of torture in Nepal. The main objective of the TRC Act, as stated in the preamble, is to "investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society." However, the Act adopts a very narrow understanding of what reconciliation is.[7] Reconciliation in this Act is used and understood synonymously with mediation between victims and perpetrators.

Mediation between victims and perpetrators in the name of reconciliations: Section 22 of the Act empowers the commission to mediate between victims and perpetrators, including those involved in torture. It states, "if a perpetrator or a victim files an application to the Commission for mediation, the Commission may mediate to reconcile mutually between them".[8]

The OHCHR described this provision (as it appeared in an Ordinance promulgated in 2013, but then ruled unconstitutional by the Supreme Court), as "highly problematic and inappropriate".[9] While mediation can be used as part of restorative justice processes in civil maters and some criminal matters (usually involving property crimes and minor assaults), there are strong concerns about such processes being used in relation to serious crimes, such as those under the jurisdiction of the TRC. These concerns are heightened

Download.aspx?symbolno=A%2f49%2f44(SUPP)&Lang=en.

5 United Nations, *Report of the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Mission to Nepal*, UN Doc. E C/CN.4/2006/6/Add.5, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/101/19/PDF/G0610119.pdf

6 Committee against Torture, *Summary account of the results of proceedings on the inquiry into Nepal*, October 2012, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f67%2f44&Lang=en.

7 B. Harber & G. Kelly, *Reconciliation, a Working Definition*. Reconciliation can be defined as "the process of addressing conflictual and fractured relationships, covering a range of activities such as: developing a shared vision of an interdependent and fair society; acknowledging and dealing with the past; building positive relationships significant cultural and attitudinal change and; substantial social, economic and political change", available at www.democraticdialogue.org.

8 Section 22 (1).

9 OHCHR Comments on TRC Ordinance, above n. 3, p. 2.

where there are power imbalances between the victim and the perpetrator, as are apparent in this context (where alleged perpetrators are often members of the police, military, political parties, or are protected by them, and victims are often from vulnerable and marginalised communities).[10] UN human rights treaty bodies have stated that mediation should not be used in such cases.[11]

International human rights principles establish that mediation should never be used in criminal matters without the consent of both parties. The *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* make it clear that "[n]either the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes".[12] As the OHCHR noted in relation to the same provision as it appeared in the Ordinance, reconciliation "is more appropriately addressed at an inter-personal level and should not be forced upon people".[13]

The Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence has stressed that reconciliation should not be seen in isolation, without initiatives that promote justice, truth, reparations, and guarantees of non-recurrence. In the words of the OHCHR, "[r]econciliation at the societal level is more than just one-to-one encounters but requires the establishment of institutions that are trustworthy and that genuinely embody the idea that victims as well as all others are rights holders". [14]

Prohibition of future prosecution in the cases of Torture: An even more problematic provision is section 25.2. (a), which forecloses prosecution in cases where mediation is done. When read in conjunction with section 25.2 (a), the provision on mediation is extremely problematic. This provision will, given the power imbalances at play, almost certainly result in victims feeling and being pressured to mediate with perpetrators.

It is the duty of the state to investigate and prosecute those involved in crimes that are recognised as crimes under international law and gross human rights violations.[15] These include grave breaches of the Geneva Conventions, crimes against humanity, torture, rape and other forms of sexual violence of comparable gravity, enforced disappearance, and extrajudicial executions.[16] Nepal has accepted this duty by signing core international humanitarian law and human rights-related treaties.[17] It is also in the greater interest of the society to end the culture

10 See *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, adopted by Economic and Social Council 2002/12 (E/2002/INF/2/Add.2, Annex), Principle 9 ('Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.')

11 In relation to violence against women see, Committee on the Elimination of Discrimination Against Women, Concluding Observations on Côte d'Ivoire, CEDAW/C/COD/CO/6-7 (2013), para. 12; Angola, CEDAW/C/AGO/CO/6 (2013), para. 20; Lesotho, CEDAW/C/LSO/CO/1-4 (2011), para. 23; Finland, CEDAW/C/FIN/CO/6 (2008), para. 174; Czech Republic, CEDAW/C/CZE/CO/5 (2010), para. 23. In relation to violence against children see, Committee on the Rights of the Child, Concluding Observations on Costa Rica, CRC/C/CRI/CO/4 (2011), para. 54; Nicaragua, CRC/C/NIC/CO/4 (2010), paras. 58-59.

12 *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, adopted by Economic and Social Council 2002/12 (E/2002/INF/2/Add.2, Annex), Principle 13. See also Principle 7.

13 OHCHR Comments on TRC Ordinance, p. 6.

14 OHCHR, OHCHR *Analysis of the Nepal Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2012*, December 2012, http://www.ohchr.org/Documents/Press/Nepal_OHCHR_Analysis_TJ_Ordinance_Dec_2012.pdf, p. 3.

15 See Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E.CN.4/2005/102/Add.1 (2005) ('Updated Impunity Principles'), Principle 19. See also the four Geneva Conventions, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Articles 5-7 ; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004), para. 18. See further OHCHR, 'Rule of Law Tools for Post-Conflict States: Amnesties', available at www.ohchr.org/Documents/Publications/Amnesties_en.pdf, pp. 11ff.

16 Updated Impunity Principles, *ibid*., Definitions, B ; OHCHR, 'Rule of Law Tools: Amnesties', *ibid*., p. 11.

17 Including the Geneva Conventions (party since 1964), UNCAT (party since 1991), Arts. 5-7, and the International Covenant on Civil and Political Rights (ICCPR) (party since 1991), Arts. 2(3), 6 and 7.

of impunity and maintain the rule of law, which is a prerequisite for a democratic society.

Amnesty for torture cases: TRC Act further empowers the TRC to recommend amnesty even to those involved in torture. Under Section 26 of the Act reads "the Commission shall not recommend the perpetrators involved in cases of serious human rights violation that lack sufficient reasons and grounds for amnesty following the investigation of the Commission and in cases of rape for amnesty." It is therefore open to the Commission to recommend amnesty for all of the crimes under the jurisdiction of the Commission except rape, and given the wide discretion allowed there is the clear potential for amnesty to be granted to many perpetrators in an arbitrary way.

This is contrary to international law, which prohibits the granting of amnesty for crimes under international law and gross violations of human rights as set out above. All of these crimes and violations fall within the Commissions' jurisdiction. That amnesties for such serious crimes are unlawful is a position consistently endorsed by the United Nations,[18] international treaty bodies[19], and regional human rights courts.[20]

18 In his 2004 report on 'The rule of law and transitional justice in conflict and post-conflict societies' (UN doc. S/2004/616), the UN Secretary-General reaffirmed that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights". In 2007 the new Secretary-General expressed the same view: "...the Organization cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor should it do anything that might foster them", Spokesperson for Secretary-General Ban Ki-moon, 24 July 2007. See also OHCHR, *OHCHR Comments on the Nepal Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013)*, 3 April 2013 ("OHCHR Comments on TRC Ordinance"), available at http://www.ohchr.org/Documents/Countries/NP/OHCHRComments_TRC_Ordinance.docx, p. 4.

19 See, eg. Human Rights Committee, *General Comment No. 31*, above n.26, para. 18, Human Rights Committee, *General Comment No. 20: Article 7*, 44th session (1992), para. 15 and numerous concluding observations including eg. Uruguay, CCPR/C/79/ Add.19 (1993); El Salvador, CCPR/C/79/Add.34 (1994). See further Committee Against Torture, *General Comment 2, Implementation of article 2 by States Parties*, CAT/C/GC/2/CRP. 1/Rev.4 (2007), para. 5.

20 See, eg. Inter-American Court of Human Rights, *Case of Barrio Altos v Peru*, Judgement of March 14, 2001, para 41.

No recognition of victims' right to reparation: So far, survivors of torture and rape have been denied "interim relief" (monetary compensation that was provided to "conflict victims"), as they have not been included in the government's categories of conflict victims. The Torture Compensation Act also does not recognise the longer-term impact these crimes have on survivors and fails to provide reparation accordingly. As a result victims of torture and sexual violence, continue to suffer in silence.

Section 2(e) and 23 of the Act deal with reparation to victims. While Section 2(e) defines reparation, Section 23 elaborates it.

Section 2(e) provides that "'Reparations' means the compensation, facility or concession to be made available to the victims as stipulated in Section 23". According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the General Assembly in 2005, reparation should consist of, as appropriate, measures of compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.[21]

Section 23 states "the Commission shall make recommendations to the Government of Nepal to provide any type of compensation, to provide restitution or rehabilitation or any other appropriate arrangement, as per necessity, to the victim through inquiry and investigation carried out in accordance with this Act".

Under international law, victims of serious violations of international humanitarian law and gross violations of human rights have the right to "full and effective reparation" for the harm they have suffered, as "appropriate and proportional to the gravity of the violation and the circumstances of each case".[22] It

21 *Ibid.*

22 See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 16 December 2005 ('UN Basic Principles on the Right to Remedy and Reparation'),

is extremely important to many victims that the fact that reparation is their right, not something to be granted at the government's discretion, is explicitly recognized in the Act, and framed in such a way that they may make a claim in court if they are denied the reparation.

No criminalization of torture and enforced disappearances: Given the obligations outlined above to investigate and prosecute crimes under international law and gross violations of human rights, it is imperative that criminal laws are appropriate for the task. For many years, expert bodies of the UN and many national and international organisations have urged the government of Nepal to criminalise such violations. Most recently, the Human Rights Committee, the expert body established under the ICCPR, recommended that Nepal should ensure that "all gross violations of international human rights law, including torture and enforced disappearances, are explicitly prohibited as criminal offences under domestic law".[23]

Despite this, the government did not use the opportunity of introducing the TRC bill in Parliament to criminalise war crimes, crimes against humanity, torture or enforced disappearances, none of which are currently crimes under Nepali law. Nor is there any sense that the government is taking measures to proceed with criminalization of torture or enforced disappearances through other means.

Statutory limitation in torture cases: In addition, there are concerns about statutory limitation for prosecution of rape and other violations such as murder, which remains in force despite the Supreme Court ordering the government to amend the law,[24] and recommendations from treaty bodies to repeal the provision.[25] For instance, there is a statutory limitation of 35-days for the filing of complaints in cases of rape. This provision is very likely to bar investigation and prosecution of conflict-era rapes, even if they are recommended for action. Under international law, limitation periods should not apply to the prosecution of crimes under international law or gross violations of human rights,[26] and this must be clarified.

Conclusion: It is clear that the TRC Act does not meet international standards. As requested by the victims groups and civil society, the Act has to be amended before the commissions are set up.

Torture should not be seen as a crime where victims and perpetrators can mediate to avoid any accountability. The possibility of amnesty in torture needs to be prohibited. The TRC should look into wider aspects of conflict, what made torture to be practiced so widely in Nepal, analyse the patterns, objectives and methods, and recommend a range of reforms that are needed for these crimes to be addressed.

Torture needs to be prevented by criminalizing it and requiring transparency in pre-trial detention. The legal frameworks need to be developed so the investigations and prosecutions are possible in cases of human rights violations including torture. Ratification of OPCAT and development of national preventive mechanism could be a good ways of preventing torture.

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para. 18. See further UNCAT, Art. 14 ; ICCPR, Art. 2(3) ; Committee Against Torture, *General Comment No. 3 : Implementation of Article 14 by States Parties*, CAT/C/GC/3, para. 6; Human Rights Committee, General Comment No. 31, above .26, para. 16.

23 Human Rights Committee, Concluding observations on Nepal, CCPR/C/NPL/CO/2 (2014), para. 10.

24 *Sapana Pradhan Malla v. Government of Nepal*, Nepal Law reporter 2065, volume 11, p. 1358-1366.

25 See, CEDAW, Concluding observations on Nepal, CEDAW/C/NPL/CO/4-5 (2011), para. 20; Human Rights Committee, Concluding observations on Nepal, CCPR/C/NPL/CO/2 (2014), para. 13.

26 See further UN Basic Principles on the Right to Remedy and Reparation, above n. 36, para. 6.

WAR, GENOCIDE, AND RESISTANCE

From Cambodia to East Timor

by BEN KIERNAN

Cambodia, East Timor, and the United States

ON July 5, 1975, two months after the communist victories in Cambodia and Vietnam, Indonesia's President Suharto visited Washington for his first meeting with U.S. President Gerald Ford and Secretary of State Henry Kissinger. The conversation ranged over Southeast Asian affairs. Suharto assessed the U.S. defeat in Vietnam: "It is not the military strength of the Communists but their fanaticism and ideology which is the principal element of their strength"—something he said Vietnam's anticommunists had not possessed. Suharto continued: "Despite their superiority of arms in fighting the Communists, the human factor was not there. They lacked this national ideology to rally the people to fight Communism." But Indonesia was different, he said: "We are fortunate we already have this national ideology [Panca Sila]. The question is, is it strong enough?"[1]

1 Memorandum of Conversation between Ford, Suharto, and Kissinger, July 5, 1975, in W. Burr et al., eds., East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, National Security Archive, Electronic Briefing Book 62, December 6, 2001, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62.

On December 6, Ford and Kissinger in turn called on Suharto in Jakarta. Ford told him that "despite the severe setback of Vietnam" seven months earlier, "[t]he United States intends to continue a strong interest in and influence in the Pacific, Southeast Asia and Asia. . . . [W]e hope to expand this influence." Ford was returning from China, where, he said, "we made it clear that we are opposed to the expansion of any nation or combination of nations." The United States aimed this message not at China but at its rivals. Kissinger informed Suharto: "We believe that China does not have expansionist aims now. . . . Their first concern is the Soviet Union and their second Vietnam." Ford agreed, saying, "I had the impression of a restrained Chinese foreign policy." Suharto asked whether the United States believed that Cambodia, Laos, and Vietnam would "be incorporated into one country." Ford replied: "The unification of Vietnam has come more quickly than we anticipated. There is, however, resistance in Cambodia to the influence of Hanoi. We are willing to move slowly in our relations with Cambodia, hoping perhaps to slow down the North Vietnamese influence although we find the Cambodian government very difficult." Kissinger then explained Beijing's similar strategy: "the Chinese want to use Cambodia to balance off Vietnam. . . . We don't like Cambodia, for the government in many ways is worse than Vietnam, but we would like it to be independent. We don't discourage Thailand or China from drawing closer to Cambodia."[2]

Even as Ford and Kissinger aimed to strengthen the independence of Pol Pot's Cambodian communist regime, another Southeast Asian humanitarian disaster was in the making. In that same December 1975 conversation, Suharto now raised "another problem, Timor." He needed U.S. support, not condemnation, for planned Indonesian expansion into the small Portuguese colony. "We want your understanding if we deem it necessary to take rapid or drastic action." Ford replied, "We will understand and will not press you on the issue." Kissinger then added:

"You appreciate that the use of U.S.-made arms could create problems. . . . It depends on how we construe it; whether it is in self-defense or is a foreign operation. It is important that whatever you do succeeds quickly. We would be able to influence the reaction in America if whatever happens happens after we return. This way there would be less chance of people talking in an unauthorized way. . . . We understand your problem and the need to move quickly. . . . Whatever you do, however, we will try to handle in the best way possible. . . . If you have made plans, we will do our best to keep everyone quiet until the President returns home."[3] U.S. policy opposed Vietnamese expansion and supported Indonesian expansion. Washington

2 Ford–Kissinger–Suharto discussion, Embassy Jakarta Telegram 1579, December 6, 1975, in W. Burr et al., eds., East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, National Security Archive, Electronic Briefing Book 62, December 6, 2001, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62.

3 Ford–Kissinger–Suharto discussion.

Young children at the "Killing Fields" memorial, located on the outskirts of Phnom Penh. Large numbers of teachers, academics, artisans and professional workers were killed when the country was under the rule of the Democratic Kampuchea regime between 1975 and 1979.
14 March 1993 | Phnom Penh, Cambodia | UN Photo/John Isaac

approved the independent existence of the Khmer Rouge regime, but not the independence of East Timor. It was prepared to sacrifice that independence to strengthen U.S. influence in Jakarta.

Suharto saw the green light, and Indonesian paratroopers landed in Dili the next day. The Cambodian genocide had already begun, and the Timor tragedy now commenced. The death toll from the Indonesian invasion and occupation of East Timor from 1975 to 1999 would reach approximately 150,000, a fifth of the territory's population.[4] This is much lower in absolute numbers but proportionately comparable to the 1975–79 Cambodian toll of 1.7 million in a population of 7.9 million.[5] There are other similarities. In each country, an initial, small-scale civil war preceded major international interventions. The two genocides that began in 1975 were also each

4 John G. Taylor, East Timor: The Price of Freedom (London: Pluto, 1999).

5 Ben Kiernan, The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975–1979 (New Haven, Conn.: Yale University Press, 2002), 458.

in turn followed by extended foreign occupation and, finally, by United Nations intervention.

War and Genocide in Cambodia and East Timor

The first Cambodian civil war, from 1967 to 1970, had pitted a few thousand insurgents of the Communist Party of Kampuchea (CPK, or "Khmer Rouge") against the independent regime of Prince Sihanouk. The war became internationalized after Lon Nol's coup of March 18, 1970, when the Vietnam War smashed across the border. Vietnamese communist and anticommunist forces, and U.S. ground troops and air fleets, turned Cambodia into a new battleground. More than 100,000 Khmer civilians were killed by U.S. B-52 bombardments alone.[6] Sihanouk joined forces with the now rapidly growing Khmer Rouge in a wider civil and international war. The Khmer Rouge defeated Lon Nol's Khmer Republic and entered Phnom Penh in April 1975, two weeks before the Vietnamese communists took Saigon.

Pol Pot's victorious Khmer Rouge immediately attacked into Vietnamese territory, only to be rebuffed there by the newly triumphant communists. Cambodia renewed its border attacks in January 1977 and escalated them over subsequent months.[7] Phnom Penh declared war at year's end and rejected the Vietnamese offer of mutual pullback and negotiations. In mid-1978, the Khmer Rouge regime put down a mutiny in Cambodia's Eastern Zone, and its massacres of Cambodians and ethnic minorities reached their peak. In December 1978, Vietnam invaded and quickly drove the Khmer Rouge army across the country to the Thai border. Hanoi's occupying forces established a new Cambodian government and army, headed from 1985 by Prime Minister Hun Sen. Khmer Rouge troops continued their attacks from sanctuaries in Thailand. Vietnam's withdrawal in 1989 was followed by the UN-sponsored elections of 1993. These brought to power an uneasy coalition of Hun Sen's People's Party and the royalist Funcinpec, led by Sihanouk's son Prince Ranariddh. This coalition, dominated by Hun Sen, finally defeated the Khmer Rouge insurgency in 1999.

Two months later, a UN-appointed Group of Experts concluded that the surviving Khmer Rouge leaders should be prosecuted by an International Tribunal "for crimes against humanity and genocide."[8] The events of 1975–1979, the legal experts reported, fit the definition of the crime outlawed by the UN Genocide Convention of 1948. In addition to committing "war crimes" against Vietnam and Thailand, the Khmer Rouge regime had also "subjected the people of Cambodia to almost all of the acts enumerated in the Convention." Did it carry out these acts with the requisite intent and against groups protected by the Convention? According to the UN experts,

> "[T]he existing historical research justifies including genocide within the jurisdiction of a tribunal to prosecute Khmer Rouge leaders. In particular, evidence suggests the need for prosecutors to investigate the commission of genocide against the Cham, Vietnamese and other minority groups, and the Buddhist monkhood. The Khmer Rouge subjected these groups to an especially harsh and extensive measure of the acts enumerated in the Convention. The requisite intent has support in direct and indirect evidence, including Khmer Rouge statements, eyewitness accounts and the nature and numbers of victims in each group, both in absolute terms and in proportion to each group's total population. These groups qualify as protected groups under the Convention: the Muslim Cham as an ethnic and religious group, the Vietnamese communities as an ethnic and, perhaps, a racial group; and the Buddhist monkhood as a religious group."

The UN legal experts added that "the intent to destroy the Cham and other ethnic minorities appears evidenced by such Khmer Rouge actions as their announced policy of homogenization, the

6 Kiernan, "The Impact on Cambodia of the U.S. Intervention in Vietnam," in The Vietnam War, J. Werner et al., eds. (Armonk, N.Y.: M. E. Sharpe, 1993), 216–29.

7 Kiernan, Pol Pot Regime, 103–11, 357–68.

8 United Nations, AS, General Assembly, Security Council, A/53/850, S/1999/231, March 16, 1999, Annex, Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 19–20, 23, 57.

Hands belonging to Mirko Fernandez, forensic anthropologist of the United Nations Integrated Mission in Timor-Lester (UNMIT), examining the human bones and skull found on a beach. 16 May 2008 Dili, Timor-Leste (UN Photo/Martine Perret)

total prohibition of these groups' distinctive cultural traits, their dispersal among the general population and the execution of their leadership."[9] Of the Cham population of 250,000, for example, approximately 90,000 perished in four years, many of them deliberately killed because of their ethnicity. Under such conditions, combined with utopian Maoist forced labor programs and Stalinist exterminations of "class enemies" among the majority Khmer population, 1.7 million Cambodians perished.[10]

While recognizing these crimes against humanity, some legal experts doubt that the legal definition in the UN Genocide Convention—attempted destruction "in whole or in part" of "a national, ethnical, racial or religious group, as such"—covers either the Khmer Rouge mass murders of Cambodia's noncommunist political groups and defeated officer class or Indonesia's mass murder of political groups in East Timor from 1975 to 1999.[11] Objections to a legal interpretation protecting "political groups" also exclude the Indonesian army's mass extermination of its domestic Communist Party (PKI), over half a million of whose members were killed in 1965–66.[12] But the crimes committed a decade later in East Timor, with a toll of 150,000 in a population of 650,000, clearly

9 Report of the Group of Experts, 19–20. S. Heder says this Report "cautioned that it might be a 'difficult task' to prove that the CPK carried out acts 'with the requisite intent' to destroy such ethnic and religious groups 'as such.'" S. Heder, "Seven Candidates for Prosecution" (Washington: unpublished manuscript, 2001), 14 n. 24.

10 Kiernan, Pol Pot Regime, 458.

11 R. Clark, "Does the Genocide Convention Go Far Enough?" Ohio Northern Law Journal 321 (1981): 8; B. Saul, "Was the Conflict in East Timor 'Genocide'?" Melbourne Journal of International Law 2 (2001): 477–522.

12 Robert Cribb, ed., The Indonesian Killings, 1965–66 (Clayton, Australia: Monash Centre of Southeast Asian Studies, 1990).

meet a range of sociological definitions of genocide used by most scholars of the phenomenon, who see both political and ethnic groups as possible victims of genocide.[13] The victims in East Timor included not only that substantial "part" of the Timorese "national group" targeted for destruction because of their resistance to Indonesian annexation—along with their relatives, as we shall see—but also most members of the 20,000-strong ethnic Chinese minority prominent in the towns of East Timor, whom Indonesian forces singled out for destruction, apparently because of their ethnicity "as such."

As in Cambodia, a small-scale civil war preceded the Timor tragedy. In Mid-1975, a short conflict in the Portuguese colony led to unexpected victory for its independence movement, Fretilin. Jakarta's armed forces invaded the territory on December 7. Full-scale war raged until 1980. The occupation continued to take lives for another 20 years, even after a 1999 UN-organized referendum demonstrated that 79% of East Timorese wanted independence. Then, in a preplanned operation, Indonesian occupation forces sacked the territory, destroying 80% of the homes, deporting hundreds of thousands of people to West Timor, and killing possibly 1,000. U.S. President Bill Clinton insisted that Indonesia "must invite" an international peacekeeping force to take over East Timor. Australian troops led in the UN forces, as Indonesian soldiers left much of the territory in ruins. In UN-organized parliamentary elections in 2001, Fretilin won 57% of the vote. In the April 2002 presidential elections, Fretilin's former leader, Xanana Gusmao, won 79% and its founding president, Xavier do Amaral, won 17%.[14] On May 20, 2002, after more than two years of transitional rule, the UN handed over responsibility to the new independent state of East Timor.

The two cases of genocidal mass murder in Southeast Asia thus share a roughly contemporaneous time frame and a combination of civil war, multiple international intervention, and UN conflict resolution. But ideological cross-currents abound. Jakarta pursued anticommunism; the Khmer Rouge were communists. In East Timor, the major Indonesian goal was conquest. In Cambodia, the Khmer Rouge goal was revolution. Maoism influenced Pol Pot's CPK regime, but it also influenced the Fretilin resistance to Indonesia. U.S. policy makers supported the invading Indonesians in Timor, as well as the indigenous Khmer Rouge in Cambodia. Both perpetrator regimes exterminated ethnic minorities, including local Chinese, as well as political dissidents. How did Indonesian anticommunist counterinsurgency and Cambodian communist revolution both lead to such horrific results?

As I will argue, the genocides were in part products of international alliances and impositions. But they also reflected and provoked indigenous divisions, both ideological and regional. Were these divisions in both cases also ethnic? Domestic coalitions formed and ruptured over time. The CPK's Maoist ideology combined explosively with its virulent Khmer racism and expansionism, leading it to seek to eliminate both political and ethnic enemies and to launch attacks on all neighboring states. Fretilin Maoists, by contrast, fought Indonesian aggressors, but they also fell out with other Fretilin leaders, local elites, regional coalitions, and military professionals. Was this in part for ethnic reasons, as in Cambodia? Regional and political differences plagued the Khmer Rouge, too. The 1978 rebellion by the Eastern Zone CPK forces against the Party Center constituted the major armed resistance to the genocidal regime.[15] In East

13 Leo Kuper, Genocide (New Haven, Conn.: Yale University Press, 1981), 174–75, 186, 241; F. Chalk and K. Jonassohn, History and Sociology of Genocide (New Haven, Conn.: Yale University Press, 1990), 408–11; I. W. Charny, ed., Encyclopedia of Genocide (Oxford: ABC-Clio, 1999), 191–94; James Dunn, "East Timor", in Genocide, ed. G. Andreopoulos, 171–90 (Philadelphia: University of Pennsylvania Press, 1994).

14 New York Times, April 17, 2002.

15 On the Eastern Zone, 1970–78, see Kiernan, Pol Pot Regime, 14–15, 46–47, 65–68, 205–10, 323–25, 369–76, 392–405; M. Vickery, Cambodia 1975–1982 (Boston: South End, 1984), 131–39; Ben Kiernan, How Pol Pot Came to Power (London: Verso, 1985), 270–84, 310–12, 320–21, 340–41, 358, 363–68; Ben Kiernan, "Wild Chickens, Farm Chickens and Cormorants: Kampuchea's Eastern Zone," in Revolution and Its Aftermath in Kampuchea, ed. D. P. Chandler et al. (New Haven, Conn.: Yale Southeast Asia Council, 1983), 136–211; Ben Kiernan, Cambodia: The Eastern Zone Massacres (New York: Columbia Center for the Study of Human Rights, 1986); S. Heder, "Racism, Marxism, Labelling and Genocide," Southeast Asia Research 5, no. 2 (1997), 117–23.

Timor, from the start, political and regional divisions also debilitated the pro-Indonesian cause, not just the Fretilin resistance. But to understand fully the conditions in which these divisions emerged, and to what extent they were comparable, it is first necessary to examine the international forces that abetted both the Suharto and Pol Pot regimes.

Green Lights from Ford and Kissinger

Suharto had first raised the issue of the Portuguese decolonization of East Timor at his July 5, 1975, meeting with Ford and Kissinger at Camp David. Describing Indonesia as "a unified nation without any territorial ambition," which "will not commit aggression against other countries . . . [or] use force against the territory of other countries," Suharto nevertheless pointed out that for East Timor, "an independent country would hardly be viable," and that "the only way is to integrate with Indonesia." However, "The problem is that those who want independence are those who are Communist-influenced." Suharto concluded that "Indonesia doesn't want to insert itself into Timor self-determination, but the problem is how to manage the self-determination process with a majority wanting unity with Indonesia." [16]

In this way, six months before ordering the December 1975 invasion, Suharto secured U.S. acquiescence in the territory's prospective incorporation by Indonesia. The expansionist impulse would be denied; the excuse, the communist threat. While the U.S. Department of State called the Timorese independence movement, Fretilin, "a vaguely leftist party,"[17] 17 Kissinger labeled Fretilin "a Communist government in the middle of Indonesia."[18] Suharto considered its members "almost Communists."[19] Jakarta saw a "Communist wing" of Fretilin in Timorese Maoist students educated in Lisbon during the 1974 revolution there.[20]

From March to July 1975, the Portuguese authorities organized local village elections throughout East Timor. Fretilin won 50–55% of the vote. Its main rival, the Timorese Democratic Union (UDT), favoring gradual progress toward independence, received slightly fewer votes.[21] Apodeti, a small party favoring union with Indonesia, came in a distant third. Fretilin had managed to bring a nationalist message to a population of 650,000 divided into possibly 30 ethnic groups speaking 14 distinct languages.[22] This multicultural success, which included members of Dili's 1,000-strong Muslim Arab community in Fretilin's largely Catholic ranks, would remain one of the party's strengths.[23] Fretilin did remain suspicious of the local Chinese, a largely urban entrepreneurial community that failed to find a voice within Fretilin, which cited reasons of class but not race.

Suharto announced following his return from the United States on July 8, 1975, that East Timor lacked the economic basis for viable independence.[24] This was the backdrop to an attempted coup in Dili by Fretilin's rival UDT on August 11.[25] In Washington the next morning, Philip Habib told Henry Kissinger that authorship of the coup was still unclear: "[I] f it is an Indonesian move, or the Indonesians move

16 Conversation between Ford, Suharto, and Kissinger, July 5, 1975, in W. Burr et al., East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, National Security Archive, Electronic Briefing Book 62, December 6, 2001, at www.gwu.edu/~nsarchiv/ NSAEBB/NSAEBB62.

17 State Department, "Indonesia and Portuguese Timor," c. November 21, 1975, W. Burr et al., East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, National Security Archive, Electronic Briefing Book 62, December 6, 2001, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62.

18 Memorandum of Conversation, December 18, 1975, Washington, D.C., "Departmental Policy," at www.etan.org/news/kissinger/secret.htm.

19 Conversation between Ford, Suharto, and Kissinger, July 5, 1975, in W. Burr et al., East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, 6, National Security Archive, Electronic Briefing Book 62, December 6, 2001, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62.

20 Jill Jolliffe, East Timor: Nationalism and Colonialism (St. Lucia, Australia: University of Queensland Press, 1978), 84, 115; Xanana Gusmao, To Resist Is to Win! (Melbourne: Aurora, 2000), 28 n. 51; Helen Hill, Stirrings of Nationalism in East Timor: Fretilin 1974–1978 (Sydney: Otford, 2002), 66.

21 James Dunn, Timor: A People Betrayed (Milton, Australia: Jacaranda, 1983), 88; Taylor, East Timor, 45 n, 52.

22 Dunn, Timor, 3; G. Gunn, Timor Loro Sae (Macau: Oriente, 1999), 4041; R. Tanter, et al., eds., Bitter Flowers, Sweet Flowers: East Timor, Indonesia, and the World Community (Lanham, Md.: Rowman & Littlefield, 2001), 254–56.

23 Jolliffe, East Timor, 70, 220; Hill, Stirrings, 36, 133–35.

24 Dunn, Timor, 166.

25 UDT leader Joao Carrascalao acknowledged responsibility for the coup. Gusmao, To Resist, 23 n. 36.

against it . . . we should just do nothing. It is quite clear that the Indonesians are not going to let any hostile element take over an island right in the midst of the Indonesian archipelago." Only if the coup proved to be a pro-independence move would the U.S. act—that is, against independence. Kissinger said, "[T]he Indonesians are going to take over the island sooner or later," ensuring merely "the disappearance of a vestige of colonialism." Habib added that "we should not get ourselves sucked into this one by having opinions."[26]

Civil War

In mid-June 1975, Fretilin forces led by a former Portuguese soldier, Hermengildo Alves, had briefly seized power in Oecusse, a small enclave of Portuguese territory within West Timor. Jill Jolliffe reports that "the Portuguese regained control after sending a negotiating force from Dili as a result of which Alves was gaoled for 20 days and UDT and Fretilin agreed to rule jointly." This coalition prevailed in the Oecusse enclave for the next few months.[27]

However, within four days of their August 11 coup in the capital, UDT leaders arrested more than 80 Fretilin members, including future leader Xanana Gusmao. UDT members killed a dozen Fretilin members in four locations. The victims included a founding member of Fretilin, and a brother of its vice president, Nicolau Lobato.[28] Fretilin responded by appealing successfully to the Portuguese-trained East Timorese military units.[29] UDT's violent takeover thus provoked the three-week civil war, pitting its 1,500 troops against the 2,000 regular forces now led by Fretilin commanders.

By the end of August, UDT remnants were retreating toward the Indonesian border. A UDT group of 900 crossed into West Timor on September 24, followed by more than a thousand others, leaving Fretilin in control of East Timor for the ensuing three months. The death toll in the civil war reportedly included 400 people in Dili and possibly 1,600 in the hills.[30] In the aftermath, "numerous UDT supporters were beaten and jailed" by the Fretilin victors.[31]

Indonesia stepped up its plans for invasion. In early September, as many as 200 special forces troops launched incursions, which were noted by U.S. intelligence, and in October, conventional military assaults followed.[32] Indonesian forces murdered five Australian journalists in the border town of Balibo on October 16.

In September, the leader of the pro-Indonesian Apodeti party, Osorio Soares, remained "freely able to move about,"[33] but as Indonesian incursions escalated, Fretilin took Soares and several hundred other Apodeti and UDT members into custody.[34] Political positions had hardened. Fretilin had begun as the Timorese Social Democratic Association, led by Jose Ramos Horta and former Jesuit seminarian Xavier do Amaral. Since the UDT coup, however, what Jolliffe calls "a discernible shift in power" had brought the ascendancy of a more "inward-turning" nationalist Fretilin faction led by Nicolau Lobato. They blended notions of "revolutionary African nationalism, pragmatism and conservative self-reliance," but, according to Jolliffe, "operated from a solely nationalist framework with the stress on meeting local needs by whatever means necessary, whether socialization or foreign investment." Fretilin's left wing, too, "did

26 State Department, "The Secretary's Principal's [sic] and Regional Staff Meeting, August 12, 1975," 2–4, in W. Burr et al., East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, National Security Archive, Electronic Briefing Book 62, December 6, 2001, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62..

27 Jolliffe, East Timor, 273.

28 Gusmao, To Resist, 29, 26.

29 Dunn, Timor, 177; Gusmao, To Resist, 22–31.

30 Dunn, Timor, 177–80, 321; Denis Freney, Timor (Nottingham, England: Spokesman, 1975), 24; Gusmao, To Resist, 30–31.

31 Sarah Niner, "A Long Journey of Resistance," in Bitter Flowers, Sweet Flowers: East Timor, Indonesia, and the World Community, ed. R. Tanter, M. Selden and S. R. Shalom (Lanham, Md.: Rowman & Littlefield, 2001), 17.

32 Dunn, Timor, 181–82.

33 Australian Senator Arthur Gietzelt reported meeting Apodeti secretary general Fernando Osorio Soares in Dili in September 1975. Hansard, April 7, 1976, 1171. Fretilin killed Soares two weeks after the invasion. Dunn, Timor, 305.

34 Jolliffe, East Timor, 156.

not regard themselves as Marxists but as nationalists who believed they could draw on Marxism and adapt it to nationalist ends." As Jolliffe puts it, "The consequence of the marriage of these two streams was a Timor-isation of the leadership following the coup period, accompanied by an emphasis towards black nationalism rather than social democracy."[35] Helen Hill suggests this meant African-style politics rather than "black nationalism." Beyond an anti-Chinese or anticapitalist undercurrent, evidence of indigenous racist ideology is sparse.[36]

A full-scale Indonesian invasion loomed. Portugal had evacuated its officials offshore. Fretilin formally declared East Timor's independence on November 28, 1975, and a Fretilin cabinet took office. Its 18 members included a Portuguese and two Arabs, all members of the party's Central Committee (CC). Jolliffe writes of the new government's leadership, Xavier do Amaral, Nicolau Lobato, and Mari Alkatiri, that "The two principal figures were practicing Catholics, the third a practicing Moslem."[37] There were no ethnic Chinese members.

TO BE CONTINUED

(Second part of this paper will be published in next issue)

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35 Jolliffe, East Timor, 152–53, 72.
36 Hill, Stirrings.
37 Jolliffe, East Timor, 219–20.

INDIA & DENMARK
CONTESTED PERSPECTIVES

The relationship with its neighbours has not always been based on equality, non-interference, peace, and understanding. I will not dwell on the Indian intervention in Pakistan, which led to the formation of Bangladesh, but India certainly has been asserting its power regionally and has involved itself in neighbouring states like Sri Lanka and Nepal, at times with disastrous negative consequences for India itself.

by JAN OLE HAAGENSEN

1. INTRODUCTION

DURING the summer of 2013, the Danish Foreign Policy Yearbook 2013 was launched. According to the flyer, the publication is about Danish foreign policy and the role of Denmark internationally[1]. Besides the reproduction of speeches of relevant ministers, the highest public official in the Foreign Ministry, the Permanent Secretary, has provided an outline of the Danish foreign policy in 2012. It is one of the most important formal publications on Danish foreign policy.

For about three decades the struggle against torture has been a central issue in Danish foreign policy[2]. As

1 Danish Foreign Policy Yearbook, 2013 edited by Nanna Hvidt & Hans Mouritzen. Copenhagen, Denmark

2 See Claus Grube: *The International Situation and Danish*

former Director of the International Department of DIGNITY: Danish Institute Against Torture, I had a professional interest in the publication. Upon reading the flyer, my interest rose when noticing that Professor Ravinder Kaur from University of Copenhagen had a contribution stated to be "the first academic study of the causes to the Danish-Indo diplomatic deadlock after the Niels Holck case" (my translation), because DIGNITY, for obvious reasons, had a keen interest in the case. It involved Danish authorities wanted to extradite a person, Niels Holck, accused of terror to India. He had allegedly undertaken the action in India where he could face a criminal trial and where he could be at risk of torture. Niels Holck challenged the extradition in court[3] .

Two Danish courts, the Low Court in Hillerød and the Eastern High Court respectively, decided that Holck could not be extradited, as he would risk being tortured and suffer from inhuman prison conditions. After two similar verdicts, the Danish prosecutor, according to Danish legal practice, opted not to appeal to the Supreme Court. The verdicts and the decision not to appeal angered the Indian Government, as a person accused of terrorism in India could not be prosecuted. Thereby, Denmark could be seen as undermining the so-called war against terror. As a consequence, India froze diplomatic relations with Denmark. India halted direct co-operation with Denmark, by avoiding official functions involving Danish representatives[4], by making it much more difficult for Danish business people and tourists go to India, and by *de facto* banning Danish journalists from going to India. At the same time, export from Denmark to India dropped considerably[5]. This seemed as rather harsh measures against a friendly country[6].

For Kaur, "the nature of the deadlock is as much a product of judicial intricacies as political and cultural misgivings about India" (Cit. Kaur cit. p. 70)[7]. According to her, Denmark is entirely to blame for the severing of the relationship between the two countries. In brief, she claims that Denmark does not understand India; the media is being one-sided, depicting India as a poor, aid-dependant, chaotic, uncivilised country; the Danish government and the courts are applying double standards; and the courts are, furthermore, creating a racial difference between a "brown justice" and a "white justice". She finds the judgement of India unfair because, according to her, India is a country that bases its foreign policies on high ideals, such as, among other things, non-alignment and peaceful coexistence, and it has shown this since independence, by acting peacefully with its neighbours. Finally, she finds that India is really restraining itself in this case, one in which Denmark has upset the Indian Government. This article will look into these gross accusations.

2. JUDICIAL INTRICACIES

The Holck case is a special one or "historic", not as Kaur states (p. 63), because the High Court came to a unilateral decision, but because the High Court bench was expanded from three to five judges to presumably strengthen its judgement in relation to human rights and international law. After the High Court had ruled similar to the Lower Court that Holck could not be extradited, the legal case ended there, as per the Danish

Foreign Policy 2012 p. 47 in Hvidt & Mouritzen.

3 Niels Holck is a Danish Citizen who, under the alias Kim Davy, along with other accomplices, dropped approximately four tons of weapons in Purulia District of the Indian state of West Bengal in 1995. He was caught, along with his accomplices. But, mysteriously, he managed to escape. Being a Danish citizen, he returned to Denmark and lived a peaceful life. After Indian authorities found him in Denmark and Denmark changed it laws in 2002 making it easier to extradite people who has been involved in terror, India officially requested to get Niels Holck for trial in India. The Danish government acceded to the demand, but first the lower court and afterwards the high court rejected the extradition due to the risk of torture. The Indian government has put a lot of pressure on Denmark in this case and it was utterly dismayed by the verdict and the fact that the prosecutor did not bring the matter to the Supreme Court.

4 Making the work of Danish representatives in India extremely difficult.

5 "Niels Holck-sag rammer dansk eksport hårdt", in Politiken 2 May, 2013, http://politiken.dk/erhverv/ECE1959312/niels-holck-sag-rammer-dansk-eksport-til-indien-haardt/

6 India's relationship with a country, like for instance North Korea, seems to be more cordial. See, for instance, http://www.ibtimes.com/why-does-india-have-relations-north-korea-213592

7 Kaur, Ravinder: 2013. "In the Shadow of the Kim Davy: India-Denmark Relations in the Early 21st Century" pp. 53-77 in Hvidt & Mouritzen.

legal tradition, where cases given the same verdict twice are not generally brought to the Supreme Court. This is contrary to the Indian tradition, where cases can more easily go all the way from lower courts to the Supreme Court. Seemingly, Indian representatives expected, similarly, that the prosecutor would take it to the Danish Supreme Court.

According to Kaur, the Danish Court did not take the Indian guaranties seriously, "as judicial experts have pointed out, the Danish court's conclusion on the 'risk assessment', that Niels Holck might be subjected to torture is largely based on generalities and theoretical possibilities rather than any concrete threat in this particular case" (Kaur Cit. p. 65). Although she refers to experts in the plural, she is only referring to one, namely Jacques Hartmann[8] who is an E.MA Fellow at the European Inter-University Centre for Human Rights and Democratisation in Venice, as well a recent employee of the Danish Foreign Ministry[9]. As Kaur is basing the argument on Hartmann's article, I will dwell a little on this article.

2.1 The "Judicial Experts"

Hartmann informs that: "Any real risk for a violation of the absolute rights will in itself be sufficient to prevent an extradition…." (Hartmann Cit. p. 259. My translation) and according to the European Court for Human Rights, the risk shall be real and not merely on theoretical possibility[10]. Freedom from torture is one of these absolute rights. The Danish High Court found the risk to be more than theoretical. Hartmann questions the court, thereby implying that torture was only a theoretically possibility. He does this based on two arguments.

Firstly, Hartmann puts emphasis that Peter Bleach, an accomplice in the arms drop case did not complain about torture, only about food given to the British representatives in 2002 while in Indian Prison (Hartmann p. 261). It must be fair to assume that Bleach was careful of what he was saying, still being in the Indian prison. He was pardoned in 2004 and came out looking like a "concentration prisoner", had contracted tuberculosis in prison, and was considerable more talkative after his release, coming with the claim that Holck would die if sent to an Indian prison[11].

Secondly, Hartmann refers to court rulings in Germany and Portugal that came to a different conclusion. In the German fraud case from 2003, the court ruled that the person could be extradited to India (Hartmann p. 261). The Portuguese case, however, seems far more relevant to the Holck case, as it also involves accusations of terrorism. It deals with Abu Salem, a Portuguese citizen accused of being part of the 1993 bombings in Mumbai. In 2005, the Portuguese High Court ruled that Abu Salem could be extradited and, as a consequence, he was. In a footnote, Hartmann admits that the Portuguese High Court revoked the extradition in 2011[12]. There had been continuous accusations that Abu Salem had been tortured in Indian custody[13], and on September 10, 2010 the Indian Supreme Court ruled that Salem could be tried for offences entailing death penalty (Times of India 10-9-2010[14]). In 2012, the

8 Jacques Hartmann is in the article wrongly given the middle name Venedig, which is Venice in Danish. P. 75. Hartmann, Jacques: Udlevering – Hvordan og Hvorfor? In Juristen 09.2011 Pp. 253- 262. The article was not in the Danish publication *DJØF bladet* as Kaur writes in reference number 64 p. 75, but in the Danish periodical *Juristen*, as she correctly writes in the references (p. 77)

9 Despite the caveat that the article Hartmann expresses his own opinion, it is not in contradiction with the view of the Danish Government and can be seen as an argument for his extradition.

10 Here Hartmann p. 260 Source: European Court of Human Rights., *Shamayev and others v. Russia*, Appl. No. 36378/02, 12 April 2005 (27 May 2008).

11 See the Independent, UK 19 May, 2011 http://www.independent.co.uk/news/world/europe/danish-terrorist-fights-indian-extradition-2286147.html,

12 Footnote 52 in Hartmann p. 261.

13 See for instance BBC 25 November, 2005, http://news.bbc.co.uk/2/hi/south_asia/4471172.stm and although investigations were undertaken by Indian authorities on the request of the Maharashtra Human Rigths Commission See for instance Outlook India & Decemeber, 2005, the stories continued to come up see for instance The Hindu 13 january 2006, http://www.hindu.com/2006/01/13/stories/2006011305221600.htm. Portugal followed up on in see for instance Indian Express 10 May, 2006, http://www.indianexpress.com/news/salem-s-torture-treaty-violation-portugal/4138/.

14 http://articles.timesofindia.indiatimes.com/2010-09-10/india/28260082_1_portugal-government-death-penalty-

Portuguese Supreme Court questioned the legality of Indian authorities challenging the above-mentioned cancellation of extradition order (Times of India 11-07.2012[15]). This was clearly a violation of the agreement with Portugal[16], but the Indian Supreme Court had accepted the argument of the prosecution "that the Portugal government cannot impose any precondition on Indian courts"(Cit. Times of India 10-9-2010).

Thus, the Indian Supreme Court does not find itself bound by diplomatic assurances! It will therefore be difficult for India to honour the agreement. The independence of courts seems here to be in the way of such agreements. India has a very independent court, clearly honouring the separation between the state and the courts. It is also acting more proactively than the courts in the Danish tradition, coming with rulings on broader issues like the right to food, etc. (see among many Madsen 2011[17] and Kaur 2013).

The strong independence of the Indian Supreme Court also means that the assurance that Holck could get a speedy trial is questionable. Controversial or high profile cases in India can easily go on for a decade or more and with the Abu Salem case in mind the Danish Government cannot rest assured that the charge sheet would not be expanded to include capital punishment the day that Holck puts his foot on Indian Soil.

The ongoing Abu Salem case is a crucial piece of information and it is objectionable that Hartmann is providing this in a footnote and only gives it cursory attention, as it provides important information on the status of guarantees in India. In addition, Hartmann could have referred to the European Court for Human Rights ruling in the *Chahal v. UK* case from 1996, which states that extradition could not be justified by a diplomatic assurance, as it was commonly known that Indian security forces constantly violated human rights. Extradition would constitute a violation of article 3 in the European Human Rights Convention. The ban against torture is absolute whatsoever actions the person in question had undertaken[18]. The UN Committee against Torture, the UN Human Rights Committee, and the European Court of Human Rights all argue strongly against the use of diplomatic assurances, as they do not provide the necessary protection against torture. This is particularly true when the guaranties come from states with a track record of using torture and cruel, inhuman, or degrading treatment, or punishment[19]. The European Court of Human Rights later accepted diplomatic assurances in the Othman case where it accepted the very detailed assurances provided by the Jordanian state and signed by the King of Jordan[20].

India is, regrettably, one of the states with a negative track record in relation to the prevalence of torture. One just has to see the regular reports of National Human Rights Commission of India, the US State Department, Amnesty International, Human Rights Watch, and the web sites of People's Vigilance Committee on Human Rights, the Asian Human Rights Commission, and

portugal-authorities

15 http://articles.timesofindia.indiatimes.com/2012-07-11/india/32631470_1_salem-extradition-abu-salem-constitutional-court

16 Portugal is in their right to do that as India is violating the agreement. Then Abu Salem shall be sent back to Portugal where after India can submit a new request for extradition. If capital punishment is a risk then Portugal will not extradite him. The latest part in the long story of Abu Salem is, that he was hit by a bullet inside the prison in June, 2013. See for instance the Indian Express. http://www.indianexpress.com/news/gangster-abu-salem-shot-at-inside-mumbai-jail/1134849/ Accessed 31.08.13.

17 http://infocus.asiaportal.info/2011/10/03/a-dane-in-distress/– Accessed 20.07.13

18 See the ruling of the European Court of Human Rights in the Chahal v UK case, accessed 31.08.13. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{"itemid":["001-58004"]}

19 An overview of the different sources and the arguments can be found at DIGNITY: Danish Institute Against http://www.dignityinstitute.dk/viden/aktuelle-temaer/diplomatiske-garantier.aspx, and http://www.dignityinstitute.org/topics/torture/diplomatic-assurances.aspx. See also Human Rights Watch http://www.hrw.org/news/2006/11/10/diplomatic-assurances-against-torture.

20 The Othman case, see http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{"itemid":["001-108629"]}. Accessed 31.08.13. The Court had, nevertheless, denied the extradition to Jordan as it would be a violation of the right to a fair trial in Jordan. The Jordanian government then assured he would be tried under the civilian court system, whereupon Othman was extradited to Jordan in July 2013.

Asian Centre for Human rights[21]. The data is often anecdotic with individual cases, as it is difficult to get systematic data. The most comprehensive study on the topic until today is an Indian EU funded study undertaken by Peoples Watch India[22]. It covered 47 districts in 9 Indian states. Based on the collected data, it assumed that the number of cases of torture easily amounted to 1.8 million a year just in police custody (p. 3)! Following this, the claim from AHRC that torture is institutionalised and widely accepted in India seems to have some merit[23].

Torture is widespread in India and the Indian Government may find it difficult to adhere to the agreement. Therefore, when Kaur is certain that it "seems highly imaginative" that someone will torture and murder Holck if he is sent to India (Kaur Cit. p. 50), the risk of torture is much less imaginative or "'theoretical'" than if he was to be sent to a country with a better record than India. This gives some validity to the Danish expert that stated that Holck may "risk" being tortured if he was to be sent to India[24].

Based on all this, the ruling of the Danish Courts cannot come as a surprise. Furthermore, when taking into account the Abu Salem case, where capital punishment was included in the charge sheet after extradition, the value of the India guarantees, may not be worth much. It gives validity to the UN Special Rapporteur on Torture Manfred Nowak, who stated on guarantees in general that "these guarantees are not worth the paper they are written on" (Here from Kaur p. 62)[25].

3. THE BIASED DANISH MEDIA OR THE BIASED KAUR

Kaur criticises the Danish media for portraying India as "a chaotic aid-dependent nation in need of developmental interventions…" like it was on "a public trial in the Danish media…." And she continues, that "in retrospect, it seems that it was as much the court judgment that led to the diplomatic deadlock as the aggressive public debate outside the courtroom that dismissed India as a pre-modern nation pretending to be civilised" (Cit. p. 62). These are hard words and in my recollection I do not recognise it as the main picture presented on India. That some Danes aired such views in blogs or comments to newspaper articles and that Holck had an interest in presenting it in this way are true, but to imply that it should be the general view and that it should have an impact on the verdict of the courts are highly questionable. By doing so would be to ignore the heterogeneity of Denmark, and not to qualify the difference between the courts, the state, the media and "among the people". Seen in the larger media picture, the case did get some coverage, and it

21 See http://nhrc.nic.in/srcArchive.asp, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper, http://www.amnesty.org/en/region/india/report-2013, http://www.hrw.org/asia/india, http://pvchr.asia/?id=180, http://www.humanrights.asia/countries/india Accessed 28 July 2013 and http://www.achrweb.org/reports.htm

22 Peoples Watch (2008) Torture and Impunity in India, Tamil Nadu.

23 See the following from AHRC: "Torture is practiced as a routine and accepted as a means for investigation. Most police officers and other law enforcement officers consider torture as an essential investigative tool, rather than an unscientific and crude method of investigation. Policy makers and bureaucrats believe that there is nothing wrong in punishing a criminal in custody, not realising the fact that a person under investigation is only an accused, not a convict and further, that even a convict cannot be tortured. This is due to the lack of awareness about the crime, its nature and about its seriousness. Torture is practiced by the all sections of the law enforcement agencies, the paramilitary and military units. Torture, as a form of violence is used for social control. India has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but has signed the Convention on 14 October 1997. A draft Bill against torture is in consideration by the government". Cit. http://www.humanrights.asia/countries/india Accessed 28 July 2013. See also Human Rights Watch 2009, India: Broken System-Dysfunction, Abuse, and Impunity in the Indian Police, US.

24 She writes that if extradited to India the expert "believed that Niels Holck would be subjected to torture …". (Cit, Kaur p. 63). Reading the article one can see that Kaur is missing the word "risk" (See the original Danish article in Politiken http://politiken.dk/indland/ECE950744/fn-advarer-torturgaranti-duer-ikke/.

25 See also The United Nations Convention against Torture, A commentary, Manfred Nowak and Elizabeth McArthur, Oxford Commentaries on International Law, university Press, 2008, p. 212-217

did have the attention of those professionally engaged with torture and India[26].

For some days, a few things appeared on the television news and some articles in the newspapers, but the case did not swamp the media, and Kaur seems to put more into the idiosyncratic speeches of Niels Holck when defending himself and his actions than the Danish government and all the powers it put behind the extradition of Holck. To illustrate, one can, as an example, listen to a radio programme before the court rulings, where Holck discussed his possible extradition with Karsten Laursen, the speaker in foreign affairs for the main government party, Venstre[27]. For Laursen and the Government, the matter was clear and simple. Holck was a terrorist and not a liberation fighter or the like. As a criminal character he should face the consequences. It was the Danish government that decided to extradite Holck upon the request of India after it had been given certain guaranties from the Indian side. From communications between the Minister of Justice Lars Barfoed, the head of the Foreign Affairs Committee, and Peter Skaarup from *Dansk Folkeparti* (DF) that supported the right-wing government, it is also clear that they believed in the Indian guarantees[28]. Niels Holck challenged the decision by bringing the case to court. Thus, Kaur fails to see the whole picture and she fails, furthermore, to see the political differences on fundamental principles in this case.

3.1 The Holck Case - Part of Political Discussion on which Laws & Rights Prevail

The Government's position was not only challenged in court, but also by the opposition in Parliament, who questioned the safety of the accused if extradited. To the question how Denmark could be certain that India would stick to the agreement, Peter Skaarup (DF) claimed that India would not dare to disregard the agreement, indicating that it would cause a diplomatic crisis between the two countries. DIGNITY countered it by stating that "(t)he risk for a diplomatic crisis would not keep the Indian Government awake during night" (Politiken 19 April 2010[29]). Paradoxically, this is what happened after the Indian side stepped up the conflict (see later).

Kaur seems to ignore human rights as a political issue in Denmark being debated in the public and the Government's position. In fact, the right-wing Government tended to be more nationalistic/anti-foreigner, pro-radical-anti-terror remedies, and pro-US than the opposition. The Government's parliamentary support in the form of the DF had a strenuous relationship not only to immigration and foreigners, but also to human rights. In this light, the Government and DF had less concerns in trying to extradite a Danish citizen accused of terrorism to India. The Government pictured itself as playing a very active part in the so-called global war against terrorism fight. Furthermore, it had no interest in irritating a country which had become an economic growth house and which had great potentials for further economic co-operation.

26 It caught the attention of Kaur as she is working with Danish-Indo relations. And had the attention of the organization that I work with as it deals with torture and it deals with torture in a country where it is widespread and the country has still not ratified the Convention against Torture.

27 14th April 2010. http://www.dr.dk/P1/P1Debat/Udsendelser/2010/04/14150724.htm

28 See Jyllands-Posten 16.10.2010 where the Minister of Justice Lars Barfoed is confident that the Holck will be treated humanely despite the warnings. In Infomedia 13.04.2010, Chairman of the Danish Parliament's legal committee, Peter Skaarup from Dansk Folkeparti (DF) is quoted that he "cannot imagine that anything will happen to Niels Holck"(my translation). Ritzaus bureau refers 22.9.2010 to a debate in Parliament where it is shown that the extradition is dividing the Parliament. Peter Skaarup (DF), as well as the leading government party *Venstre*, have no concerns regarding extraditing Holck while the radical left party, *Enhedslisten*, demands that extradition can only go to countries that respect human rights and the Socialdemocrates emphasize that India has still not ratified the UN Convention Against Torture. See also Politiken 13.04.2010. *Politikere til Niels Holck: Du kan stole på Indien*. Here government politicians claim that Holck can trust the guarantees of India. Already in 2008 former Minister of Justice, Frank Jensen from the Socialdemocratic party aired that he did not believe that one would not succeed in extraditing Holck as: "We are talking about a country situated very far from Denmark and which has completely different legal traditions". (Terrorpakke: Frank Jensen: Indien kan ikke leve op til udleveringskrav in Berlingske Tidende 20.05.2008). All accessed 28 July, 2013.

29 FN Advarer: Torturgaranti virker ikke in http://politiken.dk/indland/ECE950744/fn-advarer-torturgaranti-duer-ikke/ accessed 23 July.

So, from a Danish angle, the issue is the centre of a political struggle on the role of human rights, which the Danish government and in particular DF from time to time challenge, and did challenge since the coalition started to rule in 2001. In that case it highlights the dilemma between the (individual) rights versus the need. Do suspected criminals have rights? And which laws prevail in this case, the human rights conventions or the Convention Against Terrorism? This point is completely lost in Kaur's article. Instead, Denmark and its court system are racist.

3.2 Acquitted due to Denmark being Racist?

Kaur is, in this argument, referring to an article by the Indian journalist Praveen Swami in the Indian newspaper the Hindu, 24 July 2012[30]. Kaur argues that the reason for the verdict and the development in the Indo-Danish relations is that Denmark and the courts should be acting due to racism and applying double standards. When reading the following it is easy to see why she conveys this perspective.

"The decision was said to be historic in nature as this was the first time in fifty years that the entire bench of five judges had agreed. The reason for this unusual unity, the newspaper report suggested was the seriousness of the case as 'it was the first time a Dane was being extradited to a non-Western nation'. The last point is significant, as the problem is deemed to be one of dealing with a nation outside the Western sphere of shared values." (Cit. Kaur p. 63).

This may be far from the truth. It is based on misunderstandings and bad translations. First, the High Court has normally 3 judges, but it had 5 for the first time in 50 years. The reason for having 5 was that it was a serious case[31], due to its involvement of human rights and international law, and it involved the dilemma between upholding human rights and punishing terrorists in the fight against terrorism. According to the main high court judge it was "legal unexplored terrain that has a very significant interest, also for future cases"[32]. Secondly, judges in the high court often agree in cases, like in other countries. Thirdly, the suggestion that it was because it was related to a non-western country is something the journalist seems to add. It comes in a separate part of the article and it is not a quote by the President judge[33]. Thereby, the point that race, or that it deals with a country like India, is the reason for the decision can be said to be shot down and the issue becomes more a matter of principle.

Swami is playing the easy card of bad conscience of racism and colonialism, where India is the victim and Denmark is the perpetrator. To show that Denmark is applying double standards, he links the American misuse of Danish airspace in cases of renditions, where the Danish government denied any knowledge or acceptance of the American violations[34]. The morality of the perceived (non-) actions of the Danish Government can be and is being discussed, but it has little to do with the Holck case. Furthermore, Kaur's claim that the Danish Government took an "active" part in the rendition and kidnapping of people by the American may be stretching it too much (p. 64). Even if it had been true that it has taken an active position it would just support the argument that the Government once more prioritized the fight against terrorism over the human rights of individuals by not letting alleged terrorists hide behind human rights or any other forms of individual protection! But that would also imply that the Danish Minister of Foreign Affairs at the time

30 See Praveen Swami "A lesson in the White Man's Justice" in the Hindu 24 July 2012 http://www.thehindu.com/opinion/lead/a-lesson-on-the-white-mans-justice/article3675465.ece. The article was later reproduced in extenso in the Danish newspaper Information (27 July 2012) http://www.information.dk/306970 accessed 23 July 2013.

31 http://jyllands-posten.dk/indland/ECE4548317/niels-holck-skal-ikke-udleveres/.

32 Cit. Jyllandsposten 30.6.2011. http://jyllands-posten.dk/indland/krimi/ECE4548167/speciel-retssag-kraever-fem-dommere.

33 http://jyllands-posten.dk/indland/ECE4548317/niels-holck-skal-ikke-udleveres/?page=2.

34 The Government did afterwards undertake an internal investigation on the matter, but US did not produce the requested information. The Foreign Minister at the time went out publicly criticizing this. He distanced himself forcefully from the report revealed by Wikileaks that Danish top government officials assured the Americans that it was okay if they did not want to release the requested information. See, for instance, the Danish National broadcasting DR http://www.dr.dk/Nyheder/Indland/2011/11/09/174912.htm

was lying in public on the issue[35]. The case was an embarrassment to the Danish Government, however, there was nobody to bring the case to the Danish courts, as, for instance, in the Niels Holck case[36].

If the Danish Government at the time was misleading the Parliament and the public in this case, it would show that the so-called war against terror was very important to it, which can also be seen in its actions in Iraq/Afghanistan, it's claim of little interest in bringing proper light on the rendition flights, and with its firm stand on extraditing Niels Holck.

To further highlight the racist issue and the double standard, Kaur refers to the Camilla Broe case. Broe was the first Danish citizen to be extradited to a country outside the European Union. She was handed over to the US authorities for drug traffic offences. "In this case the court chose to overlook the practice of capital punishment prevalent in the USA, the long prison sentences and solitary confinement as well as conditions in 'supermax' prisons which earned severe criticism from international human rights organisations". (Kaur Cit. P. 64).

Contrary to what Kaur is writing, guarantees were given! One of these was related to capital punishment, another that, she should, at maximum, serve 6 months in the US[37]. So in that aspect it has nothing to do with a matter of double standards. On the contrary, India risks being accused of applying double standards as it provides guarantees to give a Danish Citizen conditions that it is not capable of providing its own citizens.

35 See for instance DR 9 January, 2001 "Per Stig Møller: Selvfølgelig spillede jeg ikke dobbeltspil": http://www.dr.dk/Nyheder/Politik/2011/01/09/152654.htm

36 The courts in Denmark are not as proactive as in India. Cases of general interests are dismissed, if the claimants do not have a direct interest. This was the case when the Supreme Court dismissed a court case where 25 citizens filed a case against the Danish government for violating the constitution by entering war without a mandate from The United Nations. See "Irak-krigen sluttede I Højesteret" in Information, 18 March 2010http://www.information.dk/227555

37 http://en.wikipedia.org/wiki/Camilla_Broe. Accessed 23 July.

There has been a constant criticism of some prisons in some states of the USA, but the Danish authorities seemingly were not objecting to the specific prison in Miami, Florida, that Broe was sent to. And, to make it a point of "brown justice" and "white justice" seems to be diverting from the topic.

Praveen Swami (and Kaur) acknowledge that India does have a great problem in its criminal justice system and related to prison conditions. Although, according to Swami, "Its record isn't, however, the real question here." (Cit. Praveen Swami, The Hindu 2012). It is difficult to conceive why the real question is not that torture is rampant and systemic, and that India has not ratified the central convention on torture. If India had ratified the convention and undertaken some real changes, then the situation could have looked different. A guarantee that the person would not be tortured would have been unnecessary. But it is easier for Swami and Kaur to talk about racism and double standards involving other issues hardly related to the issue. But the Danish courts have in recent years been very stern about not sending people to countries where they risk being tortured, irrespective of citizenship, colour, or religion[38] , thereby following the principle of "non-refoulement" (See United Nation's Convention Against Torture Article 3).

4. KAUR ON INDIA

While putting Danish actions into a consequently negative light, Kaur does not do so in relation to India. This is very visible in the way she deals with three issues: the so-called Italian Marine Case, India and

the UN Convention Against Torture, and the India foreign politics in general.

38 The previous case DIGNITY was involved in was the extradition of a Tunisian citizen suspected of being a terrorist, but risked being tortured if sent to Tunisia. Also, here the Government was in favour of the extradition and the Supreme Court ruled against extradition due to the risk of torture. See Dokumentation: Tuneserloven begyndte med tre terrormistænke in *Information* 19 December, 2009. http://www.information.dk/177556 and http://www.dignityinstitute.dk/viden/aktuelle-temaer/diplomatiske-garantier/tunesersagen.aspx

4.1 The Italian Marine Case [39]

To show that the Danish Court is wrong in its verdict and to show how magnanimous India behaves in foreign policies towards European countries and in treating foreign prisoners, Kaur is referring to an ongoing controversial case between India and Italy.

The Italian case deals with the shooting of two Indian fishermen by two Italian marines (military personnel hired by the company that runs the ship) on an Italian ship in what is claimed to be international waters. The marines mistook the fishermen for being pirates. The Indian navy brought them up [sic] and the ship was – depending on the source – forced or lured into the harbour of Kochi, Kerala, India. Italy argues that India does not have jurisdiction as the marines were officials on an Italian ship in non-territorial waters and therefore under Italian jurisdiction. This is contested by India[40]. The Indian Supreme Court has now taken over the case from the court in Kerala, which had tried to finish the case after the relatives of the deceased fishermen had withdrawn their complaint after being paid compensation by the Italian side[41]. It has stirred up nationalist sentiments in both Italy and India, where politicians on both sides play in murky waters, and caused the resignation of one Italian foreign minister. Italy wants the case moved to an international court.

India permitted the two marines to go home to Italy for Christmas and later to vote in the national election in Italy. When they did not to return the last time, the Indian Supreme Court, on March 14, restrained the Italian Ambassador from leaving India, thereby attempting to violate the Vienna Convention on Diplomatic Relations, which made the EU interfere[42], as this undermines the rules behind diplomacy in general[43]. The two marines have returned to Delhi, where they reside in the Italian embassy compound[44]. Italy does not see this as a case where India has been able to act with moderation and tried to solve this matter quickly, and the Indian Supreme Court has even challenged the most sacred convention in international co-operation, the Vienna Convention on Diplomatic Relation, which is a cornerstone in international relations. It protects diplomats, but it is also protects heads of state. The Indian Supreme Court's actions show that it does not hold international laws in high regard. The Italian case is far from similar and it further emphasizes the independence of the Indian Supreme Court.

4.2 India and CAT

Among the guarantees, it was stated that India should adhere to International Covenant[45] on Civil and Political Rights (ICCPR), which India ratified in 1979 and which makes freedom from torture an absolute right, i.e. it cannot be derogated from (see ICCPR article 7). However, the UN Convention Against Torture (CAT) from 1984 is considered a much stronger instrument for the prevention of torture. Although India signed the Convention Against Torture in 1997,

39 For an overview of the case see http://en.wikipedia.org/wiki/2012_Italian_shooting_in_the_Laccadive_Sea Accessed 23 July, 2013.

40 The case until February 2013, see http://www.thehindu.com/news/resources/timeline-the-italian-marines-case/article4538162.ece. Accessed 23 July, 2013.

41 http://www.thehindu.com/news/national/kerala/enrica-lexie-case-materials-transferred-to-supreme-court/article4756565.ece Accessed 23 July, 2013.

42 "Marines row: European Union warns India over bar on Italian ambassador" in http://www.ndtv.com/article/india/marines-row-european-union-warns-india-over-bar-on-italian-ambassador-344494. Accessed 25 September 2013. See also http://en.wikipedia.org/wiki/2012_Italian_shooting_in_the_Laccadive_Sea Accessed 29 July 2013.

43 In Denmark there was in 2001 the so called Gillon case. It was an Israeli ambassador to Denmark who on Danish television confessed that he, as head of the Israeli intelligence Shin Beth, had ordered Palestinians tortured. DIGNITY, along with other human rights organisations, tried to get a case filed against him. The move did not succeed as such an act is a violation of The Vienna Convention on Diplomatic Relations. See more about the case at Kessing, Peter Vedel (2001) Diplomatic immunity is protecting Human Rights in No 4 of Nordic Journal of Human Rights, Norway.

44 This is the first case in an area of wanting international regulations: anti-piracy in international waters, so many observe it closely, See Reuters, Insights: Murder trial of Italian marines in India navigates in murky water, http://www.reuters.com/article/2013/06/09/us-india-italy-marines-insight-idUSBRE9580GB20130609. It is also of utmost importance for a country like Denmark having one of the world's biggest commercial fleets and actively engaged in the combat against pirates.

45 It is titled a covenant and not a convention as Kaur writes (p.61)

it has still not ratified it[46] . Although many Indian organisations have urged the Indian Government to ratify the convention[47], Kaur takes the official Indian perspective at face value: "The question of ratification of the convention has been the subject of a long-delayed law-making process that requires the domestic laws of India to be in tune with the Convention before ratification can take place" (Cit. 63-4). However, there are no demands that domestic laws have to be in place before ratifying CAT. Denmark has, for instance, still not written torture into its national laws. Furthermore, ratification would empower the Indian courts, the human rights institutions, and NGOs in their struggle against torture. The draft law presented in 2010 far from lived up to the minimum requirements of CAT. The reasons for not ratifying could be that the problem is so huge and it will demand so many resources to deal with the problem, and that torture seems to be so entrenched and accepted in the Indian society[48], and thus the necessary political will is lacking, and/or that India may not like external supervision, because as a signatory to CAT, India can possibly be visited by the UN Committee Against Torture, which requires access to all places where people are deprived of their liberty.

4.3 India's Foreign Policy – Contested Perspectives

According to Kaur, India has, in the Holck case, acted in a very restrained manner, as "(t)he Indian Government has not publicly raised the stakes by issuing ultimatums on the issue..."(Cit. p.69) and it took place outside the "public gaze" and held a "non-committal stand" and finally the "(d)iplomatic maneuvering at a more subterranean level suggest a will to seek solutions while maintaining a public face…." (Cit. p. 69). And for the Denmark, it does not understand these "'subtle cues". What these should mean, she does not indicate. That, the Danish Government should disregard its court system or that it should take up the case again?

Kaur tries to give us a rosy picture of Indian foreign politics by referring to the ideal of *panchsheel*[49] – the five principles of (among others) peaceful co-existence, non-alignment as well as non-interference in each other's internal affairs. She claims that India has been "non-aggressive" the last 70 years (p. 68). In Bangladesh, India only intervened for humanitarian reasons and in Sri Lanka it helped to "counter the Tamil liberation" (p. 68). This does not tally with the picture that India's neighbours have of India.

The relationship with its neighbours has not always been based on equality, non-interference, peace, and understanding. I will not dwell on the Indian intervention in Pakistan, which led to the formation of Bangladesh, but India certainly has been asserting its power regionally and has involved itself in neighbouring states like Sri Lanka and Nepal, at times with disastrous negative consequences for India itself.

Before the LTTE, also known as the Tamil Tigers, became a force to be reckoned with in Sri Lanka, they were trained and supported by India. Sri Lanka became collateral damage in the internal struggle for power, which included appeasing Tamil nationalist sentiments, which were strong at the time in Tamil Nadu[50]. To what extent was the deployment of

46 Only the African countries Sudan and Gambia have signed before India and not ratified.

47 See for instance articles from the Hindu in 2013 http://www.thehindu.com/news/cities/Madurai/india-should-ratify-un-convention-against-torture/article4424781.ece and http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/india-should-ratify-un-prevention-of-torture-bill/article4855594.ece. Already in 2000, the National Human Rights Commission of India urged the Indian Government to ratify the convention see the Hindu 26 June 2000 http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/india-should-ratify-un-prevention-of-torture-bill/article4855594.ece

48 This is supported by a survey covering 19 countries showed India to be the country with by far the highest support for the use of torture. Only 28% was against torture at all times. See World Public Rejects Torture, 24 June 2008. http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/496.php

49 See wikipedia for a description of *Panchsheel*. http://en.wikipedia.org/wiki/Five_Principles_of_Peaceful_Coexistence. Accessed September 15, 2013.

50 See BBC interview with former LTTE Commander Karuna, Training the tigers - http://www.bbc.co.uk/news/world-south-asia-11985478. See for instance also The Sunday Times (India) 19 January 1997 http://sundaytimes.lk/970119/plus4.html Accessed 29 July, 2013, http://www.hardnewsmedia.com/2006/05/464, and Indian Express December 12, 1997. http://expressindia.indianexpress.com/ie/daily/19971212/34650923.html. Finally, see also

peacekeeping forces to curb the Tamil separatist forces in Sri Lanka and to what extent was it to appease Indian Tamil sentiment, by intervening in a humanitarian crisis, as the Sri Lanka Tamil forces were being overrun by the Sri Lankan Army, can be discussed elsewhere. Afterwards, the assassination of Rajiv Gandhi by LTTE cooled the relationship with the LTTE and the separatist forces in Tamil Nadu continued to lose momentum.

In 1989 India made a virtual economic blockade of Nepal for one year, due to, among other things, Nepal having bought weapons from China[51]. It seems that it is particularly in geo-political issues related to China where India tends to bully its neighbours or support dictators to keep out Chinese influence[52]. So, India's commonly shared picture of a harmonious relationship that Kaur provides does not fit with the picture that its neighbours have of India.

4.4 From Regional to a Global Power

India has changed tremendously since independence in 1947. The population has grown from 450 million in 1961 to 1.2 billion today. The economy has grown, making India the world's 9th largest economy. Many have been taken out of poverty, but it is still the country with most people in absolute poverty. More inequality has been created, and more of its territory is being contested either by nationalist or separatist groups in Kashmir and the North Eastern states, or Maoist and *Naxalite* ones in Central India. During this time, Indian foreign policy has also changed from what may appear as a more idealistic policy under Nehru, where India was a central representative of the group of non-aligned states. With the lost war against China in 1962, over the disputed area Aksai Chin, this has changed, with India having to match not only Pakistan but also China.

The Indian atom bomb test in 1998 - after a test undertaken by Pakistan - aroused Indian nationalist feelings in the country and marked the difference between being a regional power asserting itself to becoming a global one. At the same time, India phased out development assistance from most donor countries. It has to be understood that foreign development assistance to India has never played a big role in the larger economy of India, contrary to most other developing countries. Afterwards, India only accepted assistance from major countries such as UK, US, Japan, and Germany, and the EU. There were rational arguments for the move, as India earlier had many smaller donors, all requiring attention from the Indian bureaucracy. It took up a lot of their time and some countries had embarked on what can be seen as the value sphere, emphasising India's challenges in the human rights areas. So from a cost-benefit analysis, India found that it, from then on, got too little out of the co-operation. Denmark was just one of the many "casualties". At the same time India was starting to provide development assistance to other countries itself. It was a new situation where countries like Denmark and other Scandinavian countries previously may have been given special attention, because they had been around for many years and because the Scandinavian model was admired in a country that tried to combine socialism with capitalism. This preferential position vanished with the new self-assertiveness coming to the fore in India, which now saw herself as a global power and aligned itself with other global powers in the BRIC(S) group of countries.

In this light it can be argued that what India has done for years regionally it is now trying to assert globally and the Niels Holck/Kim Davy case shows this. For Denmark, it is of little interest who pushed the Holck case in India[53] as it has little effect on the

Madsen, Stig Toft 2011. A Dane in distress. in Asia Portal, InFocus, Posted 3.10.13. Accessed 31.8.13.

51 See about the blockade in Wikepedia http://en.wikipedia.org/wiki/India–Nepal_relations. In 1994, I was in Kathmandu when Indian police arrived without notifying the local authorities of the city to apprehend some suspects. The incident caused political tension in Nepal. See among others the Human Rights Watch report on Nepal in 1995 http://www.hrw.org/reports/1995/WR95/ASIA-07.htm.

52 See the contested descriptions of the relationship with Myamar in Wikepedia http://en.wikipedia.org/wiki/Burma–India_relations.

53 Kaur informs that it was not the Indian state that was actively pursuing the case in the beginning, but a legal activist who filed a case prompting the court to order the state to get to the bottom of this (p. 59). The reason for doing it was not to bring Holck to court, but to get to the bottom of something bigger: that political forces in India,

relational consequences for Denmark. For Denmark it is a lose-lose situation. If it extradites, it will lose out on an important principle of its rule of law and it will undermine the work for having common standards that all countries shall abide. If it does not extradite, it is punished by the big power, India. Kaur cites a DIGNITY employee for saying that "the risk of a diplomatic crisis with Denmark would not keep the Indian Government awake at night." (Here from Kaur P. 59). The repercussions of the Holck case in India serve proof to that, as does the Abu Salem case. It is not keeping the India decision makers awake at night. It is of little to no political importance in India, as Kaur writes herself, as nobody is pushing politically in India in relation to the Holck case. It is, seemingly, the Indian state machinery itself, which is at work.

5. CONCLUSION

In short, according to Kaur, Denmark does not understand India portrayed as the poor victim, and Denmark as a country applying double standards, only because India was once receiving development assistance, was previously a colony, and is inhabited by "brown" people. It is not about content – by, for instance, relating it to the Danish High Court ruling and the information available for the court. It is not about the magnitude of torture in India or the track record in the field of providing diplomatic assurances. And, it is not about Indian double standards in this field.

She sees Denmark in a monolithic sense, and not in the way that power is contested in Denmark. She fails to differentiate between the government, the opposition, the state, the judiciary, the media, and the public at large (whoever they are). The Danish government cannot dictate the rulings of the courts for good and for bad. It is called rule of law. She is indeed misreading, misunderstanding, and misinterpreting central parts of the Danish society. The Danish institutions are not acting racially in this case. Instead, one can see it as an indication that human rights are alive, being actively debated, and playing an important role in Denmark. In this perspective, the Danish Courts are independent, standing up against the Danish Government, giving due recognition to human rights for everyone.

Instead, Kaur provides a picture of Denmark acting derogatorily towards India, and of India as a victim, being unjustly treated. The article is biased, only seeing the case from a narrow official Indian perspective, to the extent that Kaur runs the danger of being accused of being part of what she herself describes as "subterranean" tactic, as part of the pressure strategy that India is putting on Denmark and on its court system[54]. It is missing any nuances, is selective in the use of sources, providing a one-sided picture of the debate in Denmark, and it has crucial mistakes. Some of these take away from her arguments[55]. It is difficult to see how such an article can improve the relationship between Denmark and India. On the contrary, the latter will feel vindicated by this article showing their position is a just one, although the arguments are built on quicksand. India can afford having a tough uncompromising attitude towards Denmark. For the latter, there is more at stake. Denmark is a small, open trade related economy, which needs to have good relations, and the Danish Government is trying to find a solution[56].

with the support of foreign powers, tried to topple a democratically elected state government. In this case, Holck and Bleach are only pawns in a bigger plot. Needless to say, this does not take away their guilt. Then the case goes from just dealing with some foreign fantasts to something more crucial. There are so many mysterious things which happened which should not have been possible. There are quite a lot of loose ends in this case, which, of course, competent independent Indian journalists are pursuing. To get an impression, see the following Indian television debate (http://www.timesnow.tv/Debate-The-truth-about-Purulia-3/videoshow/4371745.cms), which Kaur criticises for its focus on the state official side and security and violation of territorial sovereignty rather than seeking retribution" i.e. going after Holck (Kaur p. 61).

54 That the Indian perspective dominates is expressed already in the title where she uses Niels Holck's Indian alias, Kim Davy in the Danish publication.

55 Her way of dealing with the sources was rather sloppy, which made it rather difficult to deal with the article. The central article dealing with her legal argument is put into a wrong publication p. 75 note 64. The article in the Hindu is moved one year to 2011 from 2012 (p. 75 note 62). She is not presenting the view of the Danish government, which strongly wanted the extradition. She is translating important articles wrongly. She is excluding important words, so that meaning becomes distorted.

56 An official team went without luck to India to appease the authorities airing that the case perhaps could start all over. See *Politiken* 14.03.13. Accessed 15 September 2013. It is

Although the flyer of the yearbook mentioned above includes the caveat that the author is "solemnly" representing her "own professional expertise" (my translations from flyer), it is still surprising to find an article of this sort in this official publication. Shall the article be seen as a means to get Denmark to sell out its fundamental principles on the rule of law and international law, and to succumb to the actions of India for the improvement of the (financial) relations between the two countries? If this is the case then it is indeed worrying. Because that would imply that Denmark obeys the demands of India, the new global power[57], contrary to international law related to human rights, and bends the rule of law in Denmark. Are we then witnessing the beginning of a new appeasement in Danish foreign policy[58]? If this is the case then Denmark will - in the multi-polar world with still more global powers - have more work for our diplomatic corps and there will come more examples where Denmark will be pressurised to bend basic principles. Instead, one could wish that countries adhered to common standards or conventions that all have to follow, and not, as it is now, where global powers seem to be permitted to pick and choose among which conventions to ratify and which to implement.

It could have softened the India stand if the Danish prosecutor had appealed the case to the Supreme Court, but that would have required the permission from a specific legal committee (procesbevillingsnævnet), which, as per the Danish legal tradition, would be very unlikely after two courts had come to similar rulings. Even if the committee had given its permission, it is difficult to imagine a different outcome and it may not even have appeased the Indian side. With the development of the Abu Salem case, the courts will even have stronger arguments for not extraditing Holck as the Supreme Court of India has stated that it is not bound by these diplomatic assurances. The fact that the Supreme Court of India is even challenging the Vienna Convention may be bad news for the present world system.

In the era of the so-called war on terror we have witness the increased will to extradite criminals who have undertaken crimes in other countries. Here, it will be important to ensure that in future the cases can be tried in the home countries of the accused or at an international court, when there are - like in the Holck case – severe risks implied with extradition. People accused of severe crimes shall be investigated, taken to court, and receive a fair trial. Criminals shall not be allowed to hide. Here the Holck case is a little bit muddy, as the Danish prosecutor does not see how it can do it and the Indian part does not seem in favour that the case will take place in Denmark.

To ensure that India avoids the same situation again, the solution is clear. It has to ratify the Convention Against Torture, get it written into Indian law, and (not the least) get the law implemented. As the problem is huge in India, it is a tremendous task. So, it is not because India is "chaotic" and used to receive development assistance that Holck is not extradited to India for trial. It is because there is so much torture in India!

***Jan Ole Haagensen**, Chairman of NUNCA MAS – International Network on Human Rights and Psycho-Social Response, Denmark. He has worked in India for more than two years in the 1990s, respectively employed by the International Labour Organization and visiting fellow at the Institute of Rural Management, Anand, Gujarat, collecting data for his doctoral thesis on indigenous peoples and the Indian State. From 1999-2014 he was employed as department head at DIGNITY: Danish Institute against Torture.*

difficult to comprehend how this could be possible without twisting the Danish Court System.

57 Kaur, Ravinder presented previously the main arguments in a chronicle in the Danish daily, *Politiken* with the title; "Danish Caricatures of India: Does Danish not understand that India today is a global and democratic power and not a relic from a distant colonial time?" "Danske vrangbilleder af Indien. Fatter danske medier ikke, at Indien i dag er en global og demokratisk magt og ikke et levn fra en fjern kolonitid?" Politiken, Kronik. 16.09.2011. http://politiken.dk/debat/kroniken/ECE1394112/danske-vrangbilleder-af-indien/. Accessed 22.07.2013

58 This would not be the first time where Denmark is appeasing global powers.

A RIGHT TO TRUTH

VICTIMS & THE ICC

Neither the Rome Statute nor the accompanying documents include express reference to the right to truth. Nevertheless both judges and the Prosecutor have clear truth seeking obligations under the Statute and these warrant an exploration of the extent to which they should be developed so as to give effect to the victim's right to truth.

by MELANIE KLINKNER AND HOWARD DAVIS

MASS graves were the key topic of the Feb-April issue of this magazine. It was pointed out then, how important it is for families of victims to know what happened to their loved ones. This need to know the truth is mirrored in international law through the emergence of "the right to truth"; this right is the focus of the following contribution. In particular, the question is whether victims participating in the proceedings at the International Criminal Court (ICC) in The Hague can argue for the realisation of this right. Originally based in the Geneva Conventions and relating specifically to the issue of missing persons during both international and internal armed conflict, the right to truth was developed in the 1970s through the case law of the Inter-American Commission on Human Rights and the work of intergovernmental bodies as a response to the problem of enforced disappearances, and in particular, to the need of the families of the missing to know the fate or whereabouts of relatives or loved ones.

The right of victims and their families within this context has been widely recognised by regional and international bodies, including the Inter-American Court of Human Rights, the UN Human Rights Committee, the UN Working Group on Enforced or Involuntary Disappearances, and the Parliamentary Assembly of the Council of Europe. The International Convention for the Protection of All Persons from

ICC premises in The Hague (Photo courtesy: ICC)

Enforced Disappearance, which entered into force in December 2010, affirms the right to truth in the specific context of forced disappearance.

The right to truth was initially developed as an aspect of human rights law. In this context, its point is to impose a duty on the state authorities to hold a full and independent inquiry into well-grounded allegations of human rights abuses. The first cases in which the right was expressly invoked involved missing persons and those subjected to enforced disappearance. Since then its application has been broadened to encompass other serious violations of human rights law, including torture and extrajudicial killings.

These developments raise the question whether the right to truth should have a broader remit. In particular, does it have an effective place in international criminal justice, specifically the functioning of the ICC? This is a very different context from human rights. There is no state to be put under a duty to investigate and there is a criminal trial to be conducted which must be fair and focused on particular defendants and particular offences.

This article seeks to clarify the issues that arise when the possibility of an effective right to truth in the context of a criminal procedure is considered. It is based upon an empirical study into stakeholder attitudes towards the right to the truth at the ICC that was conducted in 2012-2013. After outlining the nature of the right, the article will summarise some of the findings of this study.

What is the material scope of the right to truth?

The right to truth encompasses the right of a person to acquire information concerning the particular events which led to their becoming victims. This includes the right to information concerning the particular circumstances in which specific violations took place, including the facts of those violations themselves and, in the event of death or enforced

disappearance, the fate and whereabouts of those involved. But it goes further and encompasses the right to seek information relating to the reasons for and causes of those events together with the prevailing conditions and circumstances which led to or otherwise facilitated the gross violations of human rights involved. Finally, the right encompasses knowledge as to the progress and results of the State investigation into the matter, together with the identity of the perpetrators.

Why does this right matter?

The right to the truth about gross human rights violations reflects a fundamental need for victims and their families, and arises as a result of the State's positive duty to protect and guarantee their rights. At a societal level, the right to truth exists as a means of ensuring transparency, ending impunity, and protecting human rights. In a recent decision of the European Court of Human Rights, the Court acknowledged the societal relevance of the right to truth, noting its significance in strengthening public confidence in the workings of State institutions and the rule of law more generally. In addition, the Court found that knowledge of the truth was instrumental in breaking down what it described as "the wall of silence and the cloak of secrecy"[1] that prevented victims from understanding what had happened to them and hindered their recovery.

Normally it is the State who should enforce this right by providing a full and comprehensive investigation, for example. But it has also been recognised as having a place in the criminal justice context of transitional justice. According to an early decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY), "[i]nternational criminal justice … must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility".[2] The truth-seeking function of an international criminal court begins prior to the commencement of any trial, and includes a period of investigation, evidence-gathering, and verification of charges. For the purpose of conducting its investigation into alleged offences, international criminal law mechanisms, unlike their human rights counterparts, operate within the territories of the states where the abuse took place (and, in some cases, is still on-going), and as such, have first-hand access to evidentiary materials, including those which might assist in answering the many questions that victims and their families have in the aftermath of atrocities. Despite the truth-seeking function of the international criminal tribunals, however, their primary goal remains the determination of the guilt or innocence of the defendant. So the question is: to what extent can the right be realised as a secondary goal at the ICC?

The right to truth and the ICC

Operational since 2002, the ICC is the first permanent institution for conducting trials of international crimes. Importantly, apart from being permanent and attempting to close the impunity gap across the world for crimes committed at the times that the Court already existed, the ICC builds upon the respect for international human rights. Articles 21 and 67 of the Rome Statute, for example, build upon accepted standards of human rights for the conduct of a trial. In addition, the ICC has two innovative features: firstly, it allows for victim participation during the proceedings and secondly, it has a mandate to develop reparative principles.

The relevance of the right to truth to the ICC is justified for a number of reasons.

Firstly, the Rome Statute provides for victim participation. This right is vested in the victims, although it should be noted that victims do not become a party to the proceedings. Furthermore, the rights and powers of victims, and the modalities of their participation, are not expressed with clarity and so are left to the judges to develop. Also relevant is the Prosecutor's investigative duty which comprises an obligation to seek to establish the truth, and in particular, to consider whether there might be

1 *El-Masri v. The former Yugoslav Republic of Macedonia*, ECtHR, Application no. 39630/09, 12 December 2012, Joint concurring opinion, para 6.

2 *Prosecutor v. Karadžić and Mladić*, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R6, IT-95-18-R61, 11 July 1996, 3.

criminal responsibility under the terms of the Statute. In addition, Article 69(3) includes a truth-finding provision for the judges.

Secondly, the law applicable to the ICC arguably includes the right to the truth in some sense. Article 21(1), through its hierarchical list of applicable law, does permit recourse to "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict" and through this may take the right to truth into consideration.

Thirdly, Article 7(2)(i) of the Rome Statute defines enforced disappearances as a crime against humanity. The failure to provide information in the case of those missing is named as an element of the crime itself, rather than as an aspect of the remedy.

Fourthly, a decision concerning the procedural rights of victim participants, suggests that the topic of a victim's right to the truth is of relevance, with a single judge noting that the victim's "core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility" formed the basis of the right to truth in respect of serious human rights violations.[3]

And finally, the reparation mandate of the ICC leaves room to contemplate whether the right to truth could influence reparations decisions: The first reparations decision confirmed the non-exhaustive nature of the possible reparations, noting that "[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate."[4]

There are, however barriers to the emergence and realisation of the right to truth at the ICC. This includes the role of the Prosecutor: her selection of situations, cases, and charging itself can be perceived from the victims' points of view as arbitrary. Since some investigation decisions may limit the emergence of truth it has been suggested that victims should have stronger rights to be consulted at this stage than currently exist. Similar concerns over charging decisions (the selection of offences and modes of offending) exist. The argument is that victims should have enhanced legal rights to seek some degree of control or influence over charging. The lack of a possibility of challenging the prosecutor is a great hindrance to victims in their attempt to learn the truth. This is particularly true when victims seek an explanation from the prosecutor for why a decision which resulted in a negative outcome was taken. Fair trial concerns have been voiced: Any attempt to expand the breadth of truth-seeking activity and disclosure by the Court is likely to result not only in practical and jurisprudential difficulties, but risks impinging upon the defendant's right to a fair and expeditious trial.

Given these barriers, there might be room for the better realisation of the right to truth through the second innovative feature of the ICC, namely the reparation phase. Pursuant to Article 75, reparation may be awarded to victims with reparation including restitution, compensation, and rehabilitation. In the final report of the focal point on stocktaking exercise of international criminal justice at the Review Conference in Kampala, it was expressly recognized that with regards to victim participation and reparation a key challenge was:

> (ix) Developing mechanisms to address reparations at the national level and help to facilitate victims' rights to truth, justice and reparations, with a particular focus on ensuring access and benefits for women and children.[5]

Identifying the advancement of the right to truth as a challenge implies that it is linked to, if not forming part of, the Court's mandate, remit, and objectives with regards to reparation. Numerous submissions to the Court on the issue of reparation are in

3 *Prosecutor v. Katanga and Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para. 32.

4 *Prosecutor v. Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August, 2012, para. 222.

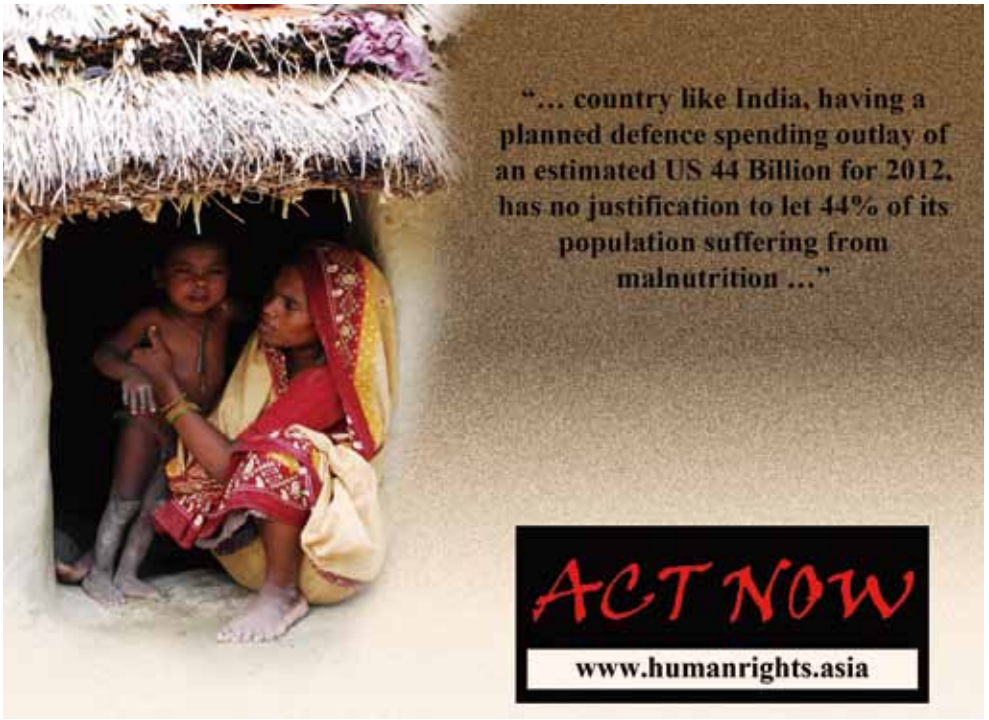
5 RC/11, annex V(a) Stocktaking of international criminal justice, The impact of the Rome Statute system on victims and affected communities, Final report by the focal points (Chile and Finland), Appendix III Discussion Paper, at 101.

agreement with this suggestion. However, without a conviction there can be no reparation. To date the decision in the *Lubanga* case is the first regarding reparations. It is clear from this decision that during the reparations proceedings the Court's primary concern are the victims, whilst prosecution and defence remain parties to the proceedings, and that here the chamber is determined to read the Statute in a flexible and broad manner to allow for the widest possible remedies.

The current situation

Neither the Rome Statute nor the accompanying documents include express reference to the right to truth. Nevertheless both judges and the Prosecutor have clear truth seeking obligations under the Statute and these warrant an exploration of the extent to which they should be developed so as to give effect to the victim's right to truth. Furthermore, it is worth stressing that one of the key findings of the empirical study is that the issue of the place of the right to truth at the Court is not an empty, abstract, issue. Real dialogue as to what, how, and to what extent victims' rights to truth should feature at the ICC is taking place. Different, strongly held, views are emerging. Without doubt the importance of victims being able to ascertain the truth is recognised at the Court. But whether an international criminal justice mechanism is a good and viable means to achieve this aim is questioned by some practitioners. To some extent, this dialogue within the Court can be linked to the fundamental question of what the point and purpose of a criminal trial is. There are conceptual and intellectual differences amongst practitioners which are also illustrated in dissenting judgments and in different approaches taken by the chambers. There is no reason to think these differences are negative factors. Rather, they appear as effective points of dialogue and debate within the Court through which the most appropriate realisation of victims' rights to the truth in the context of a criminal process can emerge. This debate complements, perhaps, the emergence of the right to truth through other legal processes such as human rights law.

For now, despite the fact that the right to truth is firmly embedded within human rights law and the transitional justice discourse, the Statute obligations may only lead to a limited realisation of this right at the ICC. Given the Prosecutor's current preliminary investigations in Honduras, Colombia, and Guinea expressly referring, inter alia, to enforced disappearance, the issues surrounding the right to truth are likely to be subject to future judicial analysis and decision at the Court.



Dr. Melanie Klinkner and Dr. Howard Davis *both teach Law at Bournemouth University.* *They conducted a joint study on the implications of integrating a victim's right to truth at the International Criminal Court, which received funding from the Nuffield Foundation.*

WHO DUNNIT?
ISRAELI & PALESTINIAN CEASEFIRE VIOLATIONS

In November 2012, Israel and Palestinian factions in Gaza entered into an Egyptian-brokered ceasefire in which both would cease hostilities, and in which Israel would relieve restrictions on the Gaza Strip. Both sides violated the agreement, but one side did so more frequently and more brutally than the other.

CAN YOU TELL WHICH ONE?

SOURCES bit.ly/vp-violations

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THE **FIVE STAGES** OF **GRIEF**

THE PEOPLE OF NEW YORK CITY HAVE PASSED THROUGH FIVE STAGES OF GRIEF TOWARDS HEALING, WHILE THE PEOPLE OF GAZA ARE TRAPPED IN A CYCLE OF VIOLENCE.

DENIAL

VICTIMS' FRIENDS AND FAMILIES POST AROUND 90,000 FLIERS OF THEIR MISSING LOVED ONES AROUND NYC.

2,823 CIVILIANS KILLED

ANGER

90% OF AMERICANS SUPPORT THE INVASION OF AFGHANISTAN AND 59% THE INVASION OF IRAQ.

BARGAINING

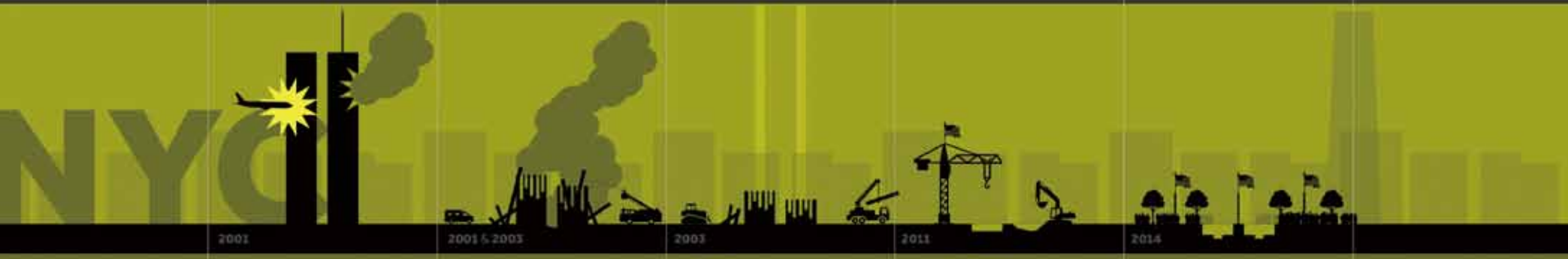
US GOVERNMENT PAYS AN AVERAGE OF $2.1 MILLION AS COMPENSATION TO EACH VICTIM'S FAMILIY.

DEPRESSION

MANY OF THE 10,000 PEOPLE WHO SUFFERED POST-TRAUMATIC STRESS HAVE NOT RECOVERED A DECADE LATER.

ACCEPTANCE

PRESIDENT OBAMA DEDICATES 9/11 MEMORIAL AND MUSEUM AS **"A SACRED PLACE OF HEALING AND HOPE."**



2005 ISRAELI DISENGAGEMENT

DESPITE DISENGAGEMENT, ISRAEL CONTINUES TO CONTROL GAZA'S BORDERS, AIRSPACE AND COASTAL WATERS, **DENYING** PALESTINIANS THEIR RIGHTS TO FREE MOVEMENT AND TRADE.

2006 OPERATION SUMMER RAINS

ANGERED WITH THE CORRUPTION OF FATAH AND THE TIGHTENING OF ISRAELI RESTRICTIONS, PALESTINIANS IN GAZA AND THE WEST BANK ELECT A HAMAS GOVERNMENT.

2008–09 OPERATION CAST LEAD

VARIOUS ATTEMPTS SINCE 2006 TO **NEGOTIATE** A UNITY GOVERNMENT BETWEEN HAMAS AND FATAH ARE UNDERMINED BY ISRAELI AND INTERNATIONAL INTERFERENCE.

2012 OPERATION PILLAR OF CLOUD

WITH 40% OF CHILDREN SUFFERING **DEPRESSION** AND 69% SYMPTOMS OF POST-TRAUMATIC STRESS, A NEW GENERATION IS GROWING WITH PSYCHOLOGICAL TRAUMA.

2014 OPERATION PROTECTIVE EDGE

PALESTINIANS ARE STUCK IN A REPEATING CYCLE. THEY CANNOT HEAL, NOR CAN THEY **ACCEPT** THE CONTINUATION OF ISRAELI VIOLENCE AND BLOCKADE.

2,847+ CIVILIANS KILLED, INCLUDING **1,242+** CHILDREN

SOURCES
Data aggregated from B'tselem, Bronson, Gallup, The Guardian, New York Times, OCHA, Open Democracy, Palestinian Medical Relief Society, PCHR, White House. Estimates of Gaza civilian deaths up to 25 July 2014.

NYC deaths http://bit.ly/guardian-911 | **NYC facts** http://bit.ly/bronson-911 | http://bit.ly/gallup-afghanistan | http://bit.ly/gallup-iraqinvasion http://bit.ly/nyt-post-911 | http://bit.ly/whitehouse-911 | **Gaza deaths** http://bit.ly/btselem-killedgaza | http://bit.ly/ocha-killedgaza | http://bit.ly/pchr--gaza **Gaza facts** http://bit.ly/btselem-restrictions | http://bit.ly/guardian-fatah | http://bit.ly/odi-fatah-hamas | http://bit.ly/pmrs-depression

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GROUND REPORT

BEYOND THE WORLD CUP

WRITTEN BY VIK BIRKBECK
ILLUSTRATION BY LUCIANO CUNHA

RIO DE JANEIRO

A STORY OF OCCUPATIONS AND EVICTIONS

The Homeless Worker Movement occupied a building in Rio, helping to shelter thousands — but in the run-up to the World Cup the members were violently evicted.

IT'S been five years since Brazil celebrated its selection by FIFA to host the 2014 World Cup. The announcement was made in grand style on Copacabana Beach, packed with thousands jumping, dancing, and, in many cases, partying all night in what many would consider to be true Brazilian style. FIFA clearly thought that this was the safe choice in its gradual march around the globe, bringing recalcitrant nations and continents into its orbit. Brazil, after all, is the prototype football-crazy nation, where the whole country grinds to a halt to watch its squad in action. So who could possibly imagine that four years later millions of people would be marching through the streets not only of Rio and São Paulo but also Brasília, Belo Horizonte, Recife, Salvador, Goiania, shouting "Não Vai ter Copa!" ("There won't be a World Cup!").

The original impetus for the massive demonstrations of 2013 was a nationwide rise in bus fares, but with the upcoming Confederations Cup, FIFA's dress rehearsal for the World Cup, public attention quickly focused on the vast sums being invested in stadiums and the infrastructure for the tournament. The "FIFA standard" of the new stadiums was contrasted with the recurrent problems of public transport, health and education. The additional responsibility of being selected to host the 2016 Olympics engendered a wildly ambitious restructuring and development plan in Rio de Janeiro.

On December 5, 2009, the Strategic Plan of the City Government, announced by Mayor Eduardo Paes presented, as one of its core aims, the reduction of the total surface area occupied by *favelas* (shanty towns) by 3.5%, purportedly because they were located "in areas at risk of landslides or flooding, conservation areas, or areas of public utility." But as a banner carried by a protesting victim of this eviction policy read: "When rich people live in the South zone, it's called a noble area, when poor people live there it's called an area at risk."

Even the beloved Maracana stadium, an international icon of Rio's identity, had to be entirely reconstructed in line with FIFA directives. In the process, the *geral* (the cheap standing area occupied by Rio's most ardent football fans) has been abolished, effectively excluding the poorer part of the population from attending games. Watching live football is now the privilege of the "whites", the upper and middle-class spectators, who are able to pay more for the right to watch the game sitting down. In the process

of reconstructing Maracana, the developers hit on a perfect scheme for earning more money, by knocking down the surroundings as well to make space for a massive parking lot and shopping mall.

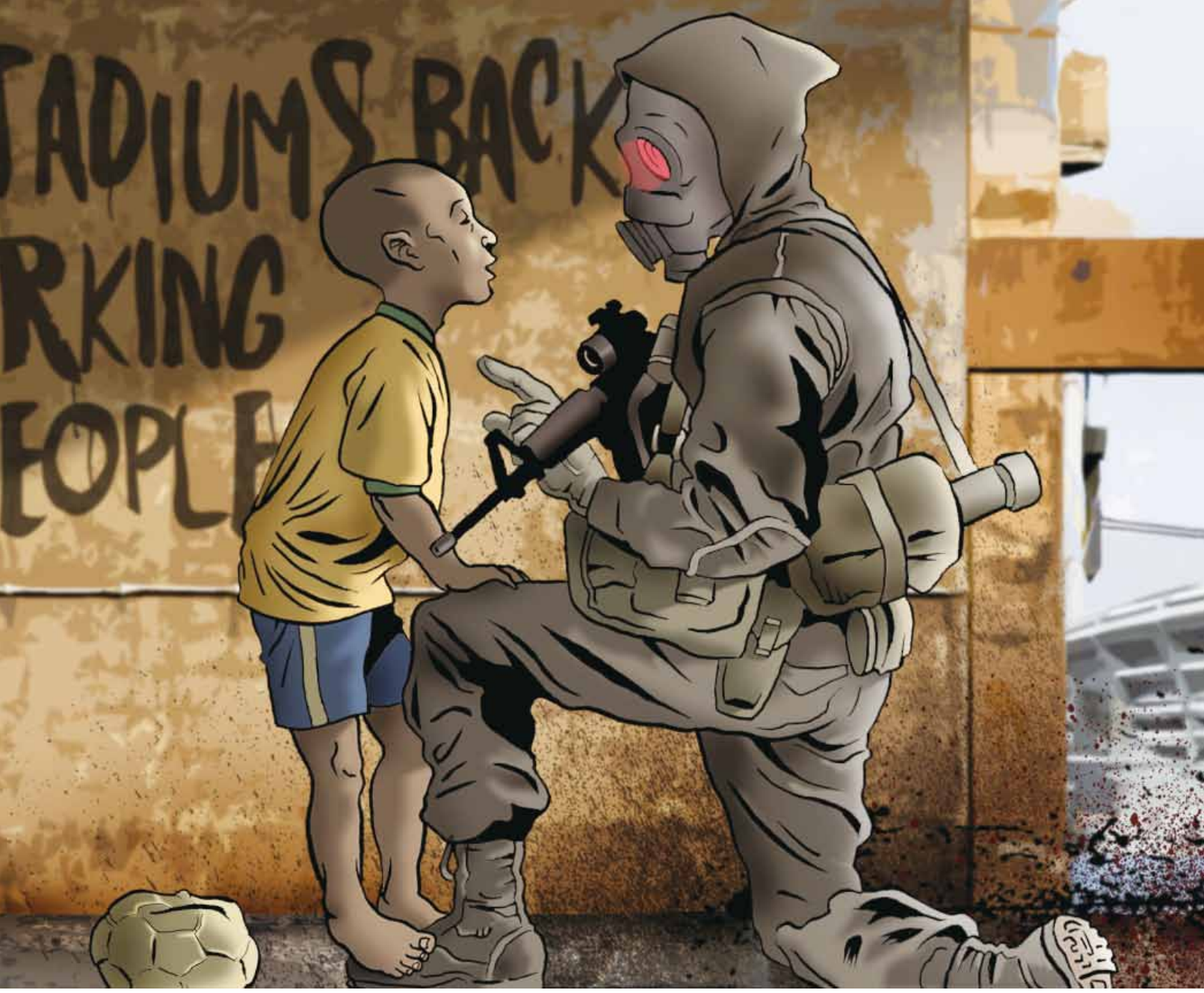
The destroyed surroundings of the stadium included Friedenreich School, one of Rio's best municipal schools (in a country which ranks 78th for quality of education); LANAGRO, Rio's only laboratory for analyzing foodstuffs (while Brazil has the highest consumption of pesticides in the world and all corn and soy plantations are genetically modified); the Olympic-standard Celio de Barros athletics complex and Julio de Lamare water-sports complex (both newly reconstructed at vast expense for the 2007 Pan-American Games and used for training Rio's Olympic athletes); Metro Mangueira, a poor community built 34 years ago by the construction workers of the Rio underground (hence its name); and finally Aldeia Maracanã, a multi-ethnic community created in 2006 around the abandoned 19th century building, which had long been associated with indigenous culture and which housed the Indian museum for over 20 years.

Metro Mangueira is emblematic of the many evictions carried out or planned in the lead-up to the World Cup and the Olympics. It was once an orderly, close-knit community and, although poor, the houses were solidly built by construction-workers. In October 2010, employees of the City Council started informing the inhabitants that their community was "at risk", marking their houses with crosses and numbers, reminiscent of the Nazi practices in Jewish ghettos. The 107 families who accepted were moved to Cosmos, some 45 miles away, causing enormous hardship for those with jobs or schools nearby. The City Council tractors then moved in to demolish the newly abandoned homes, leaving huge holes and piles of broken masonry, opening the community to drug dealers, prostitution, and a plague of rats and mosquitoes.

As a result, the official explanation used to justify the eviction became a self-fulfilling prophecy. With families and individuals occupying the ruins and rubble of the demolished homes, the area was soon transformed into a risk zone. Finally, at the beginning

Illustration by Luciano Cunha, creator of O Doutrinador.

of 2014, with the World Cup in sight, the demolition trucks moved back into the community. Instead of a real option for those about to be evicted, the city council proposed to register them in the federal programme Minha Casa, Minha Vida (My House, My Life) which subsidizes low income families to acquire houses. Although federal, this program is administered by city councils in each state. There have been no new public housing developments in the central area of Rio, so the register is just a piece of paper. Popular resistance to the demolition of Metro Mangueira lasted several days and led to a large contingent of military police attacking young and old alike with pepper spray, bombs, and rubber bullets.



Before the advent of Google Maps, maps of Rio de Janeiro depicted the older, more traditional areas of the city and the newer expansions towards Barra and Recreio, while the rest of the area was apparently uninhabited space. Google maps dealt a serious blow to this bucolic image of the Cidade Maravilhosa ("Wonderful City") by revealing that all available space in the urban area — hills, valleys, rough ground — was occupied by favelas. The reaction of much of the elite was a sense of betrayal, but it's impossible to sweep these satellite images under the carpet. Suddenly, everyone was forced to admit the favelas' existence.

After the draconian austerity measures and structural reforms imposed by the IMF during the debt crisis of the 1980s, the favelas had spread rapidly as more and more people were driven to the cities by the expansion of industrial agriculture. In their new urban dwellings, the inhabitants lingered in a sort of limbo-state, as an auxiliary labor force at wages insufficient to adequately feed their families, let alone pay for housing. Signs of the acute housing crisis in Rio are reflected in the number of people – even entire families – sleeping in the streets in the city center, while new favelas continuously spring up in every available space.

Graffiti on the walls of Metro Mangueira by the Moroccan-French artist Pleks Kustom.

So when at the beginning of April 2014 some of the leaders of the Movement of Homeless Workers identified a large building and surrounding yard and out-houses, which used to belong to the former telephone company Telerj, and which had been abandoned for nearly 20 years, they quickly set about occupying the area. Thousands of families invested their minimal resources into buying planks to construct huts in the area, which in the space of a week, was occupied by ten thousand people. Although the occupants of the Telerj building included pregnant women, elderly people and thousands of children from babies to adolescents, no real attempt was made to identify the occupants or investigate their necessities.

TV Globo, Brazil's biggest television network, was quick to denounce the "invaders" as criminals, flying over the area for aerial shots of the "invasion." The telephone company that took over from Telerj – Oi – had never occupied the building, which was going to be sold to the city government, and which was destined for the My House, My Life program. However, with the impasse of the occupation, the owners soon appeared and a suit for reintegration of the property was rushed through the courts. On Wednesday, April 9, Mayor Eduardo Paes announced that the occupation had been carried out by organized professionals, implying criminal intent. He declared that the area should be "disoccupied" and returned to its owners. The mayor went as far as stating that "really poor people who need houses don't stake out their plots with planks and construction materials."

So what was the solution for all this "criminal activity"? At dawn on April 11, 1,600 heavily armed military police invaded the area. Sleeping women were kicked awake, huts were knocked down, everyone was sprayed with chemical spray – not from the usual hand-held canisters but from massive cylinders the size of fire extinguishers, which the police carried in backpacks. All members of the press, whether corporate or independent, were expelled from the area and even one of the Globo reporters was arrested by police on the spurious charge that he was "throwing stones." Occupants allege that four infants succumbed to the chemical spray and rumors circulated that one of the reasons for keeping reporters out was to prevent them from witnessing the fatalities.

The sheer number of people involved, the fact that no one had time to create a real register of the occupants

Resistance during the final eviction of Metro Mangueira (photo by Paula Kossatz)

of the building, and the pandemonium that ensued makes it impossible to corroborate the facts. Nonetheless, the photographs and videos of independent reporters on the scene bear witness to the terror of the "disoccupation." Testimonies of many of those involved reveal that these are people who have already been evicted from other areas in recent demolitions and evictions, while others are victims of the rising prices engendered by the militarization of the favelas.

The occupation and subsequent eviction of the Telerj building, just as the destruction of the Metro Mangueira community, is exemplary of the complete disregard for right to housing of Brazil's poorest people. On the one hand, entire neighborhoods are demolished to make space for parking lots and shopping malls, and, on the other hand, many favelas have been occupied by militarized police forces (UPPs). This means that communities lacking any form of public services are basically placed under permanent curfew, which goes under the dubious title of "Public Security," and any kind of protest is treated as a criminal uprising.

The contagious spirit of the mass protests that have been rocking Brazil over the past year has also found fertile soil in the favelas, where the death of every young person murdered by police is another rallying cry for popular resistance. As the current wave of anti-World Cup protests shows, the genie is out of the bottle – and it will take a lot more than violent evictions and police repression to silence the awakened and indignant multitude.

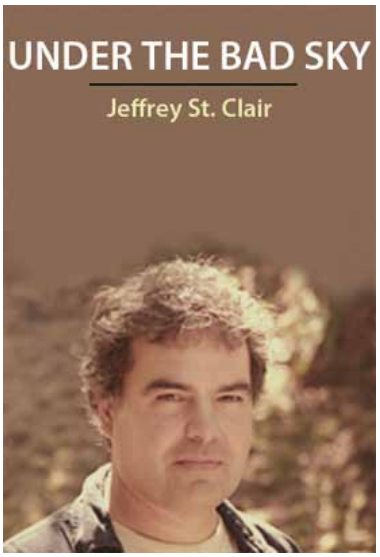
Vik Birkbeck *is British by birth, and a long-time resident of Brazil. As a media activist, she has been filming and photographing popular culture and street movements since the eighties.*

Luciano Cunha *is a Brazilian author, cartoonist and graphic designer. His latest creation is the anti-hero O Doutrinador ('The Indoctrinator'), who – dressed in black, sporting a Sepultura t-shirt, carrying a machine gun and with his face covered by a gas mask to avoid identification – has set out on a mission to rid the country of its corrupt politicians. The comic has drawn a lot of attention from infuriated Brazilians who in some way feel connected to the anti-hero's mission. The popularity of O Doutrinador has sky-rocketed in the past year, drawing attention not only from those who support Cunha's work, but also from government figures who attempt to muzzle him via lawsuits, violating his freedom of expression.*

A VIEW TO A KILL

The Death Penalty and the American Mind

SHORTLY after 5 a.m. on April 29th, a prison SWAT team arrives at Clayton Lockett's cell on death row in the Oklahoma State Penitentiary in McAlaster, the very prison from which Tom Joad was released in the opening pages of Steinbeck's The Grapes of Wrath. The burly guards unlock Lockett's door and order him to the ground to be cuffed and shackled for a trip to the prison infirmary, where the prisoner is to be x-rayed prior to his execution by lethal injection. Lockett, who has been incarcerated for 14 years, largely in solitary confinement, refuses to comply.



As the SWAT team prepares to forcibly enter Lockett's cell, the prisoner jabs his wrist with a crudely-fashioned tool. The guards storm the cell and repeatedly taser Lockett as his body spasms on the floor. Incapacitated by the jolts of electricity, Lockett is restrained and hauled to the prison medical unit, where he is left in a cell, bleeding and semi-conscious for an hour and 15 minutes, before his wounds are examined by a physician's assistant.

The raid on Lockett's cell is witnessed by Charles Warner. Warner is locked in the adjacent cell, awaiting his own execution, scheduled for two hours after Lockett has been put to death. That April night was meant to be a macabre double-header, staged by the state's Governor Mary Fallin, whose neck is usually adorned by a necklace with a dangling golden cross. Fallin, who had brazenly defied two court injunctions halting the executions, was eager to show the nation the cheerless efficiency of Oklahoma's death machine in the face of lingering questions over the efficacy of its experimental cocktail of lethal drugs.

For the next 10 hours, Clayton Lockett is kept shackled in an observation cell. Still dazed and bleeding, Lockett refuses food and an opportunity to visit with his attorneys.

At 4:10 p.m., armed guards once again enter his cell and march him to the shower in the prison's H-Unit. Showing a perverse sense of historical irony, Oklahoma officials use the prison showers as the holding cell for the execution chamber. Thirty minutes later, "mental health personnel" enter the room and talk with Clayton Lockett for 10 minutes. No mention is made in the post-execution documents of what these prison shrinks concluded about the mental state of a man who is only minutes away from being put to death.

Ten minutes later, the prison's new warden Anita Trammell enters the shower cell and, surrounded by prison guards, leads Lockett into the execution chamber. At 5:22 p.m., guards strap Clayton Lockett to the death table. Five minutes later a phlebotomist appears and begins probing Lockett's veins for the best place to insert an IV. The phlebotomist is not a doctor, but a technician specializing in the drawing of blood. In Oklahoma, as in most states, phlebotomists do not need to be licensed and their training, such as it is, is often done in online courses.

The prison's blood man pokes at the veins in Lockett's arms and legs, without finding a "viable insertion point." Next he pricks both of the condemned man's feet and then his neck, without locating a willing vein. Finally, the technician "went to the groin area" and at 6:18 p.m., after 50 minutes of repeated poking and prodding, an IV is jabbed into a vein in Lockett's groin. A sheet is draped over the needle and tubes, to "prevent witnesses" from viewing Lockett's genitals. And the phlebotomist leaves the killing chamber.

At 6:23 p.m., Warden Tramell is ordered to begin the execution by Robert Patton, director of Oklahoma's Department of Corrrections. The shades to the execution chamber are raised. In front of a gallery of witnesses, Trammell asks Lockett if he wants to make a final statement. Lockett declines. Then Midazolam, a sedative meant to knock Lockett out, begins to flow through the tube and into his bloodstream. Ten minutes later a doctor determines that Lockett is unconscious and two killing drugs are pumped into his system: vercuronium bromide, a suffocating agent, and potassium chloride, which is meant to paralyze the heart.

Within seconds, Lockett, who is supposed to be unconscious, begins to shake and gasp. In agonizing pain, he attempts to rise up and screams out: "Oh, man!" The shades are suddenly lowered and over the next crucial 12 minutes the attending physician examines Lockett and determines that his vein had ruptured and the "line had blown."

At 6:56 p.m., the prison director Patton calls off the execution. Lockett is now unconscious and has a faint pulse. No attempt is made to revive him. At 7:06 p.m., the death room doctor pronounces Lockett dead. The cause of death is recorded as heart failure.

These gruesome events prompted a national uproar for a few days and a rare scolding from the President, who, naturally, called for a review. But why? Yes, Lockett's execution was badly botched. But it was not all that different than the 1348 executions that had preceded it since the reinstitution of the death penalty in 1976. The outrage was focused on the incompetence of the execution, rather than the corrupt and morally repugnant system itself.

Gov. Fallin's mistake, as she might have learned had she fully absorbed her Aeschylus, was her hubris. Her fanatical grandstanding at the chemical gallows only drew unwelcome attention to a deed most Americans support (60 percent in a post-Lockett poll), but don't really care to know too much about.

As Obama the drone warrior could have advised her, the death industry feeds on silence and secrecy. When Clayton Lockett resisted those guards in his cell, the veil began to lift on the hideous machinery of death. Given a view to a kill, many Americans seemed momentarily unnerved by the casual savagery being done in their name. Americans want their killing done quick and clean–so that they can call it humane.

Jeffrey St. Clair *is editor of CounterPunch. His new book Killing Trayvons: an Anthology of American Violence (with JoAnn Wypijewski and Kevin Alexander Gray) will be published in June by CounterPunch Books. He can be reached at: sitka@comcast.net.*

MONSTROUS DEEDS ORDINARY DOERS & DESERVING VICTIMS

"The deeds were monstrous but the doer….quite ordinary, commonplace….."
Hannah Arendt (Eichmann in Jerusalem – A Report on the Banality of Evil)

Hell is a place of cruel and unusual punishments.

Most human beings are born into and raised with some religion. Though heavenly delights may change quite substantially from religion to religion, there is an amazing degree of constancy in the torments prevalent in various hells. Most human beings therefore grow up being taught that monstrous punitive measures, considered not just illegal but also beyond the pale in their lived lives, are the norm for bad people in their particular hereafters.

Hell, like heaven, is only for the deserving. It's a place for sinners. And sinners are undeserving of any human sympathy because they are sinners. Kind and considerate living beings have little sympathy to spare for souls suffering indescribable torments in hell.

Does this attitude of metaphysical ruthlessness bordering on metaphysical sadism play a role in making ordinary people commit, approve, or tolerate monstrous crimes? Does sympathy die when the victim is seen as deserving of his/her fate?

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In June, Sri Lanka almost descended into another violent conflict. A disagreement between some Buddhists and some Muslims was allowed to become an anti-Muslim riot which left four dead and many properties destroyed.

The riots were preceded by a politico-religious meeting organised by extremist Buddhist elements. A radical monk made an incendiary speech attacking Muslims. His attentive and approving audience consisted mostly of ordinary men and women, some of them middle-aged, many of them dressed in white. They did not rant or rave; many listened to him with their hands clasped together, in the traditional gesture of respect.

They did not look as if they were capable of approving a riot. And, yet, hours later quite a few of them participated in one.

Why?

Sri Lanka is no stranger to outbreaks of anti-minority violence. Perhaps one of the darkest moments in modern Lankan history was the Black July of 1983. When the then fledging LTTE attacked an army patrol in Jaffna killing 13 soldiers, marauding Sinhala mobs attacked Tamil men, women, and children in every part of the country. For almost a fortnight, violence raged. During that reign of murder, arson, and pillage, any act of kindness or decency had to be committed in secrecy, often under cover of darkness.

In riots, unlike in wars, the killers are not soldiers who are trained to kill, but ordinary citizens who are not trained to kill.

Humanity will always have its sadists. But allowing or disallowing torture is ultimately a political decision. And that decision will be taken – or not taken – by men and women who are in no way out of the ordinary, in a psychiatric sense. Torture is still a problem in the 21st century, because it is tolerated by countless ordinary, decent, human beings without a sadistic bone in their bodies.

Why?

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Historians speak about the role played by the "teaching of contempt" in the Holocaust. The practice of denigrating and demonising Jews was deeply embedded in Christian Europe; it found its justification in parts of the New Testament itself. In the Nazi lore and praxis, Jews were treated as both figures of evil and of ridicule; demons or buffoons but never ordinary people. This depiction probably made it easier for many Germans to see Jews as not-quite-human and to be indifferent to their fate.

Creating negative stereotypes is inherent in this "teaching of contempt". Ancient prejudices, such as the "avaricious Jew", the "lascivious Jew", or the "treacherous Jew" became standard Nazi tropes. In the popular Sinhala discourse, the term "para" (alien) is used for all minorities. A fast growing invasive and parasitic vine, which is uprooted as soon as it is noticed in a garden, is called "*demala val*" (Tamil vine); "*demalichcha*" (Little Tamil) is the name given to a bird, which is considered to be both ugly and loud, a nuisance and an irritant. Such depictions help create/ sustain what Chaim Kaplan, the diarist of the Warsaw ghetto, termed "hatred of emotion" a hatred which is beyond political ideology and is sourced in 'some psychopathic disease' (*Scrolls of Agony: The Warsaw Diaries of Chaim A Kaplan*).

The Aluthgama riot was preceded by almost two years of abusive anti-Muslim propaganda by extremist Sinhala-Buddhists, of constant referring to Lankan Muslims as avaricious money grabbers and sexual predators. Demonic or buffoonish, they were depicted as deserving of any monstrosity.

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In hell, there is no sense of the proportionality. Punishment is always far in excess of the crime. Compared to hellish notions of justice, even "an eye for an eye" looks both tame and humane.

The approbation of cruel and unusual punishments, of disproportionality, of torture, is thus deeply embedded in the collective human psyche, from orient to occident. By teaching us that hell, with its absence of humanity, is a good place, religions inculcate in us a sense of indifference bordering on ruthlessness when the victim is "deserving".

The battle against torture, against cruel and degrading punishments is also a battle against two deeply held human beliefs – that monstrous deeds lose their monstrosity when the victim is "deserving"; and there are some victims who do deserve even the most monstrous of treatments.

WATCHING THE WHEELS GO AROUND UKRAINIAN VERSION

EMPIRES are often challenged by other powers hoping to build their own empires. If this competition rises to a certain intensity, it can turn into war. Human history is full of such scenarios. Indeed, the twentieth century featured two such conflagrations—one that began in July 1914 and another that began in 1939.

Since the fall of the Soviet Union, Washington D.C.'s empire had been fairly successful in keeping Moscow at bay. However, with the events in the Ukraine, that equation is being refigured. The Ukrainian government now in Kiev was installed with the support of US intelligence agencies and capital. Like other similar "revolutions," it replaced a corrupt regime that opposed the western poles of neoliberal capitalism and preferred the Russian version. There were overt fascist individuals and parties involved in the overthrow of the previous government. Some of the individuals and groups are involved in the new Kiev government. Like most nationalist movements, the Ukrainian nationalist movement is composed of a multiplicity of political philosophies, even some that could be considered leftist. Given each nation's history, whenever Russia and Ukraine are discussed charges of anti-Semitism and fascism are bound to arise. However, the history of Ukrainian nationalism, with a few exceptions (Nestor Makhno perhaps), is a history of rightwing, even fascist movements, all tinged with a fair amount of anti-Semitism and anti-Islamism, not to mention anti-Vatican [sic] and anti-protestant religiosity.

The government in Moscow led by Putin as the second and fourth Russian president since the fall of the Soviet Union continues the tradition of the previous post-Gorbachev governments. It is extremely nationalistic, ridden with corruption and crony capitalism. Putin's government also seems intent on restoring Russia to its former glory, calling up the ghosts of its Tsarist past and Empire [sic], especially that prior to World War One. That history, like the Ukraine's, is tinged with a fair amount of anti-Semitism, anti-Islamism, and anti-Romanism [sic].

In 1991, after the Soviet Union collapsed, Washington told Moscow that it would not expand its agent of empire called NATO eastward. [But] [t]hen, it did so. As numerous commentators have pointed out, one of the biggest prizes in the struggle for control of Europe is the Ukraine. Up to this point, Washington and its NATO bulwark have been unable to take that prize. Through a series of economic and political manipulations Kiev had remained in Moscow's orbit until the events in Maidan Square resulted in the overthrow of the Ukrainian government in February 2014. This overthrow of the elected government in Kiev by nationalist forces, supported by Washington and western capital, precipitated a desperate response from Moscow resulting in the annexation of Crimea by Russia and the occupation of Ukrainian government buildings by pro-Russian Ukrainians (aided by Russian agencies) across Ukraine's eastern portion. That is where things seem to be on the ground right now.

The western media are having a ball breaking out anti-Russian propaganda that was mothballed since the 1980s and Ronald Reagan's evil empire obsession. Liberals and conservatives alike are calling out Russia for its bellicosity and prejudices. Like other conflicts in the current era of humanitarian interventions, Putin (who was once a friend of the power structure in Washington, D.C.) is made into the new bogeyman. To be sure, his government's homophobic legislation and persecution of various opponents is reprehensible and deserving of censure, but in all honesty is not that different from similar reactionary policies practiced by some of Washington's biggest clients and even in the United States itself. Gross human rights violations of the Putin government, like the invasion of and destruction of major Chechnyan cities, are being pointed to by liberal hawks and even some western leftists, as proof of Putin's bloodthirstiness. Meanwhile, the most recent US version of Putin -- former president George W. Bush -- is given positive airtime on major media outlets while his new found painting hobby becomes the subject of front page human interest stories in newspapers across the nation.

After the flurry of articles regarding fascists in the Kiev government diminished, most likely because such news makes the US and EU look bad, an anonymous leaflet calling for Jews to register themselves with the anti-Kiev occupiers of the Donetsk city government received an excessive amount of airtime in anti-Russian media despite its legitimacy being challenged by almost everyone. As was pointed out to me shortly after the story about the leaflet appeared, however, certain media outlets in Russia were playing the anti-Semitic card in some of their broadcasts regarding the current Kiev government. The broadcast I was shown was a crude attempt to paint some of the female Maidan protesters as "Jewish whores." Reprehensible in every which way, this broadcast is obviously representative of a certain element of the Russian polity, just like the racism, sexism, anti-Islamism, and homophobia on Fox News and similar outlets represents a segment of the US polity.

Now, to the meat of the matter. Other writers and analysts continue to do a fairly complete job of examining the economic and geopolitical reasons informing the current situation. These perspectives offer a variety of possibilities and raise multiple questions if one has the time to read them. The simplest reasoning I can come up with (and it is far from complete) is this: Washington wants a client (or at least very friendly) regime in Kiev. This has been the case since at least the 1990s. Currently, the map of European countries that are part of NATO shows Albania, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Lithuania [sic], Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, and the UK.

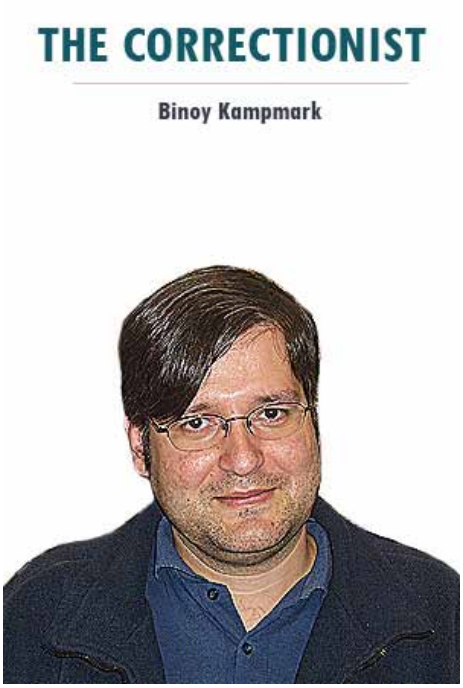
The goal of every empire in Europe has been to have every nation in its alliance. Three other nations are in the process of joining NATO (Bosnia and Herzegovina, Macedonia, and Montenegro). The Ukraine was in the process of becoming part of the alliance until 2010, when the recently overthrown government stopped the process, preferring to keep open the possibility of continued Russian aid and trade. With Ukraine in its alliance, Washington, through NATO, will have essentially surrounded Russia with military and commercial foes. Such an encirclement has been one of the understood keys to a European empire since at least Napoleon's time.

Reading the news about the Ukraine and the response to events there is a bit like watching a show when one really doesn't know how it will end. Unlike the US build up to war in Iraq in 1990 and 2002, when everyone knew war was inevitable, it is difficult to guess what exactly will happen in Europe. Among other things, the takeover of municipal buildings in eastern Ukraine by separatist forces, the massacre of anti-coup protesters in the trade unions building in Odessa by pro-coup forces, and the military strikes by both sides, are all symptoms of a potential greater conflict. Naturally, one hopes that the groups and nations involved back off and reconsider their positions some. However, as the events of that August one hundred years ago prove, such hopes can be bloodily destroyed.

Ron Jacobs *is the author of The Way the Wind Blew: a History of the Weather Underground and Short Order Frame Up and The Co-Conspirator's Tale. Jacobs' essay on Big Bill Broonzy is featured in CounterPunch's collection on music, art and sex, Serpents in the Garden. His third novel All the Sinners Saints is a companion to the previous two and is due out in April 2013.*

Apologias for the Surveillance State

THE BRITISH FORMULA



UK Home Secretary, Theresa May, is adamant to let us in on the secret of all secrets. None of us know it and even if we did, we were deceiving ourselves. "There is no programme of mass surveillance and there is no surveillance state." These remarks came at an address by the Home Secretary at the Lord Mayor's Defence and Security Lecture at Mansion House, in London.

The position of the Cameron Government has never been one of admitting fault for the intelligence practices being conducted by the signals outfit GCHQ and its affiliate agencies. US President Barack Obama did, at least, acknowledge the problem of the National Security Agency (NSA) instituting a range of mechanisms reviewing the culture of the intelligence community, and even proposed reforms against warrantless surveillance. The reform battle in the US, while not satisfactory for privacy advocates, is certainly of a more vigorous nature than it is in the UK.

Listening to May, who denies that the British intelligence services engage in that unsavoury business of hacking, one is tempted to think that Edward Snowden's revelations were just another blimp on the policy map, an inconspicuous prod against acceptable conduct. His disclosures about mass surveillance programs, apart from making him liable to be punished, were greeted with an exaggerated shrug by the Oxbridge clubbers in the halls of signals intelligence. What was that silly lad on about anyway, telling all of us what we already knew?

"Some people," according to May, "have alleged that GCHQ is exploiting a technical loophole in legislation that allows them to intercept external communications – that is, communications sent or received outside the UK – at will and without authorisation…. This is… nonsense."[1] Furthermore, the very idea of an "over-mighty state" beyond the control of law is exaggerated. The problem is that "the state is finding it harder to fulfil its most basic duty, which is to protect the public." Idealism and paternalism lock horns in the battle over liberty and security.

The usual argument on May's part is being made about modicum, proportionality, decency. We would rather not do it, but when we do, we keep things clean, are mindful of limits, and stick to the letter of the law however obtuse it might be. Nor, according to May,

1 BBC News, "Theresa May: There is no surveillance state," June 24, 2014.

is Britain urging other powers to conduct unlawful activities for its benefit in the realm of surveillance. No cutting corners, no outsourcing. Pretty decent, really.

May's spectacularly ill-informed remarks were made notwithstanding the observations by Charles Farr, director general of the Office for Security and Counter-Terrorism, that CGHQ can legally snoop on the use by British citizens of social media platforms − Facebook, Google, and web-based mail – without warrant because of their location outside the UK. Privacy International, which has brought a complaint to the Investigatory Powers Tribunal, sees the modern surveillance state as the awful, if more subtle extension, of search and seizure. Such behaviour is sublimated snooping.

Eric King, deputy director of Privacy International, is convinced that, "Arbitrary powers such as these are the purview of dictatorships, not democracies. Unrestrained, unregulated government spying of this kind is the antithesis of the rule of law and government must be held accountable for their actions."[2] His views are the stuff of wind, passing May by with scant regard. They are not so much at cross purposes as operating in parallel dimensions. In such dimensions, democracy fractures, splitting along false assumptions.

There has been some meek opposition within the fragile, and very temporary coalition government. The Deputy Prime Minister, Nick Clegg, was not in agreement, finding May's desire to expand the umbrella of surveillance problematic. In his words, Britain would be "setting a worrying international precedent" with such a policy.[3]

The problem of nourishing the surveillance culture is bound to be compounded given the recent spate of emergencies being thrown in the direction of the British security establishment. Current waters are proving choppy, with such groups as the Islamic State of Iraq and Syria (ISIS) making a play for power in Iraq even as it savages its rivals in the Syrian conflict. All the more need, argue such individuals as the former UK Secretary of Defence, Liam Fox, for greater surveillance, rather than less. "That is a real question that we are going to have to ask – whether the security services have adequate resources for an increased threat."[4] There are enemies everywhere, and these, according to Fox, are of the hating, insensible sort, who are determined to take a good dump on British values.

Fox, lacking the slightest bit of irony on this, leaves little room to reflect that the creation of such groups as ISIS have as much to do with a distinct program, and rationale, as they do with influence and inspiration from Western sources. ISIS, according to European powers and the US, is worth backing in Syria but destroying in Iraq. The same beast can double up as both menace and blessing. All, it seems, have taken of the root of insanity when it comes to the region.

It is worth noting that such militant and ferocious adventurism, often in pursuit of enemies that supposedly stalk the land, spell the end of any democratic sensibility. It is such states that justify abuses in the name of defeating abuses. It also encourages grotesque denials in the name of the broader, if ill-defined good. Threats such as ISIS come and go, but winding back the security state will be quite another matter.

Dr. Binoy Kampmark *was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne.*

2 BBC News, "Theresa May: There is no surveillance state," June 24, 2014.

3 Ben Farmer, "Theresa May: New Surveillance powers 'question of life and death'," *The Telegraph*, Jun 24, 2014.

4 Nicholas Watt, "ISIS threat justifies greater surveillance powers in UK, says Liam Fox," *The Guardian*, Jun 22, 2014.

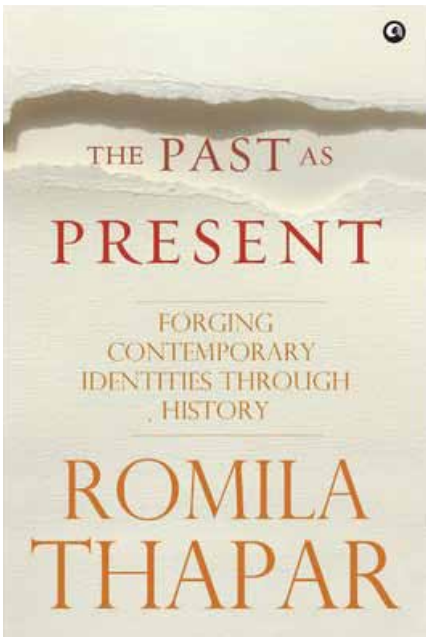
BOOK REVIEW: **BY ABHISHEK SAHA**

THE PAST AS PRESENT

FORGING CONTEMPORARY IDENTITIES THROUGH HISTORY

Romila Thapar argues against the Hindutva notion that Muslim rulers destroyed Hindu temples in the past because of religious animosity alone. She points out, even Hindu kings like Harshadeva, Paramara raja, and some other Kashmiri ones destroyed Hindu temples for different reasons. Analytical study of history shows that temples, other than being places of worship, were centres of political power and depositories of wealth too, and hence an assault on them.

FOR those who believe that the lone founders of 'Indian civilization' were the Aryans or that the Indian past was singular and exclusive in character, Romila Thapar's latest book The Past as Present, is a must-read. Thapar, in her highly readable yet profound essays, logically demolishes distorted historical arguments and shows readers how and when different academic pursuits and debates have gone wrong.



For example, Romila Thapar argues against

the Hindutva notion that Muslim rulers destroyed Hindu temples in the past because of religious animosity alone. She points out, even Hindu kings like Harshadeva, Paramara raja, and some other Kashmiri ones destroyed Hindu temples for different reasons. Analytical study of history shows that temples, other than being places of worship, were centres of political power and depositories of wealth too, and hence an assault on them.

In another instance, Thapar claims, with 'archaeological and linguistic' evidence, that 'Indus Civilization was pre-Aryan and non-Aryan'. The belief that Indian civilization was Aryan in its roots is nothing but the fruit of a faulty Western interpretation of the Indian past, a mistake for which she holds even the German philologist Max Mueller responsible.

Though the nineteen essays in The Past as Present were written over the span of Thapar's illustrious career as a scholar and researcher, readers will be delighted to discover that the essays cover the most essential themes and ask the bravest questions pertaining to the current socio-political discourse in the country. To put things in perspective in the relation between the past and the present, Romila Thapar has filled the interstices of the narrative with thought-provoking insights. For example, if in 1940 'Muslim nationalists' were countered by saying that nationalism of a religious

community is not Indian nationalism, then why after seventy years a man claiming to be a 'Hindu nationalist' is considered to be an Indian nationalist?

She explains, what happens when nationalism is reduced to identity politics and priority given to a specific religious community. She writes extensively on secularism and states why the secular critique is not of religion, but of those who exploit religious faith for political gain. In many of her essays she fervently asks the readers to ponder whether India's past was only a 'Hindu past' or an extensively plural one that embraces multiple identities, cultures, and religions. She talks about attempts to cherry-pick from Indian history so as to substantiate the claims of a certain political ideology.

A memoir in some parts, the essays in the book stretch over a wide array of themes—the study of history, religion and communalism, identities and pluralism, the temple of Somnatha, religious texts and epics, and so on. This collection is a powerful voice against historical misrepresentation and propaganda masquerading as facts. It's a timely reminder of things that might go amiss if the country is deprived of a correct interpretation of its past. But, at the same time, these essays have a subtle poignancy running through their veins—one that reminds us how intellectual and academic discourse on any subject can be easily distorted and fed into public discourse.

In certain parts, however, the essays are in defence of the conscientious historian, who strictly follows what his research yields, in the face of repeated attacks by political agents. Thus, Thapar recounts how journalists and eminent BJP politician Arun Shourie had taunted 'eminent historians', as having hymens so thick that they retained their virginity even after publishing articles on Leftist platforms. She reiterates – not as yet another piece of mud slung at the BJP, but as an example of how proponents of divisive political ideologies have time and again tried to erase the 'intellectual enterprise' – what the study of history is and the 'intellectual dimension' that are often required. In this context, she criticises both Hindu and Muslim communalisms which try to impose a fabricated understanding of the past to leverage their political gains in the present.

In fact, Thapar also writes about how the two school history textbooks she wrote for the NCERT came under harsh criticism, from the Morarji Desai government and from the Sangh Parivar. She was attacked by the Morarji Desai government for having written in the textbooks about the 'disabilities of lower castes', for not describing Muslim rulers as 'oppressors and tyrants' consistently, and for not saying that 'Aryans were indigenous to India'. And, she was criticised by the Sangh Parivar, simply for not teaching children the Hindutva version of Indian history.

Apart from seeking a correct interpretation of our past, what Romila Thapar stresses in her essays is that the study of history has changed its course—no longer is it a mere collection of facts about rulers and their wars. With the advancement of research into themes hitherto unknown, history is being looked into with a much broader and analytical perspective by scholars. The remarkable fact is that the author herself has been one of the strongest catalysts for this change in the country.

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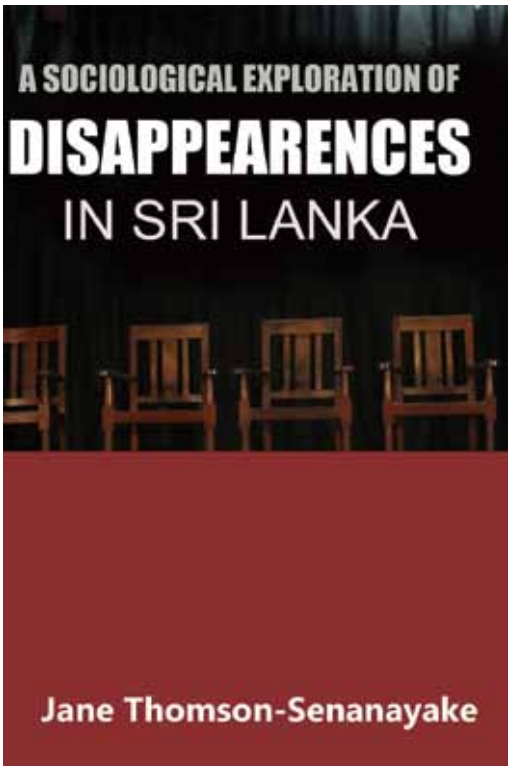
Abhishek Saha *is a journalist based in Delhi. He was born and brought up in Guwahati, Assam. After graduating in Civil Engineering from Birla Institute of Technology, Mesra, Ranchi, he pursued a postgraduate diploma in journalism at the Asian College of Journalism, Chennai.*

BOOK REVIEW: **BY JESSICA FERNANDO**

SRI LANKA

LIMBO OF DISAPPEARANCES

In the words of one of the family members of Sri Lanka's disappeared, 'We can't open our mouths and tell you in words all that we have gone through.' Over the past few decades there has been a discourse building on what happened to Sri Lanka, a country once considered an example for the region as a democracy functioning under the rule of law. How did the rule of law system collapse? How did disappearances become an established political tool?



Anybody interested in the country and willing to enter the necessary debate would be well-served by reading *A Sociological Exploration of Disappearances in Sri Lanka* by Jane Thomson-Senanayake[1].

In this book, an adapted doctoral thesis researching the period between 1971 and 2002, the author tracks the recent political history of Sri Lanka, including the establishment of its socio-political system based on patronage and how successive political regimes have subverted the legal institutions in the country, and illustrates key reasons for the Sri Lankan system's state of collapse.

This book is an important contribution to the debate on Sri Lanka, both locally and internationally. One reason is that the author approaches Sri Lanka's complicated political history with an even hand and provides an unflinching and fair narrative of history that even opposing parties can rely on. When dealing with disappearances, and the trauma suffered by an entire nation-state denied adequate redress, history has gone largely unwritten. As the author notes, even the knowledge of where some of the mass graves are will continue to die with local inhabitants.

Neither redress nor reform

In line with much of the current discourse, the author focuses on the underlying structure that facilitated the use of disappearances: 'Under the pretext of nation building, the 1978 constitution created a virtual dictatorship by curtailing the independence of the judiciary, parliament and administrative apparatus in favour of executive interference.'[2] Further, '[u]nder

1 Published by the Asian Human Rights Commission (AHRC), 2014, available here: http://www.humanrights.asia/resources/books/AHRC-PUB-002-2014 [available as a PDF, and printed copies can be purchased]

2 ibid, p. 196

the alternative state apparatus, death squads and paramilitary groups were empowered to carry out disappearances on behalf of their political masters. The entire state apparatus became complicit in the practice and its concealment.'[3]

This study shows how a democracy that functioned under the rule of law was destroyed, as its framework of governance and governing institutions were undermined. One of the key institutions tracked is the police force.

The use of the police to commit disappearances has altered the functioning of the entire institution. Thomson-Senanayake shows how the 1971 emergency regulations changed the exercise of the powers of arrest, detention, and the possibility of obtaining bail. Police were given the power to arrest without a warrant. They were allowed to detain persons for 15 days without trial and had no duty to report that the detention was taking place. Orders for further detention were supposed to be signed off by a magistrate, but most were not. The safeguard against forced confessions was removed and statements made in police custody were made admissible in court as evidence. The writ of *habeas corpus* was suspended and the courts' power to grant bail was removed. The lawfulness of a detention order issued by the Defence Minister could not be challenged in court. Through a fundamental abandonment of checks and balances, decisions about arrest, detention, and bail were removed from the purview of the courts and placed under executive control. Another power put into the hands of the police was the power to dispose of bodies, without adhering to any requirements under normal law; neither an independent inquest, nor the issuance of a death certificate or any other record of death was needed. There was no requirement to even record the identity of the deceased. The only legal requirement under the emergency regulations was to dispose of the body. The role of the magistracy was reduced to rubber-stamping. While the emergency regulations were later revoked, the change in the role of the police had taken place. As a result, in Sri Lanka nowadays, there is a common understanding about the real behavior of the police and the subservience of the judiciary. The idea of having investigations and a court settlement to disputes, affirming the legal rights of citizens, has virtually disappeared.

Through an analysis of the ways in which the legal system was undermined, the author sheds light on the abandonment of the concept of law enforcement. This study is part of a global paradigm shift in understanding violence in the lives of the poor. The Asian Human Rights Commission has written for decades about the collapse of legal institutions, a situation that leads to a state of complete insecurity for the citizenry and impunity for state perpetrators. Studies such as the *Phantom Limb: Failing Judicial Institutions, Torture and Human Rights*[4] and *Narrative of Justice in Sri Lanka*[5], a compendium of 400 experience of police torture, show how these institutions actually function. There is a system operating in ways far different from that prescribed by law. Gary Haugen and Victor Boutros, in *The Locust Effect*[6], write about violence being facilitated by the lack of law enforcement. Haugen has stated that ensuring access to proper law enforcement should be part of the Millennium Development Goals.

These initiatives to study the collapse of the rule of law follow the legacy of such great works of global thought as *The Gulag Archipelago* by Aleksandr Solzhenitsyn[7] in that they show, through cases and analysis, the structure of the underlying system of control used by the state against its citizenry. Arrest, detention, the use of force, and other key elements of law enforcement have changed from their technical, written, and legal meaning into tools of oppression.
By looking at how the governing institutions, including law enforcement and the judiciary, were thoroughly undermined by both 'legal' and extra-legal methods – through emergency regulations and

3 ibid

4 A study jointly published by the Asian Human Rights Commission (AHRC) and Rehabilitation and Resource Centre for Torture Victims (RCT), Hong Kong: 2009, available online at: http://www.humanrights.asia/resources/books/AHRC-PUB-007-2009

5 Published by the Asian Human Rights Commission (AHRC), Hong Kong, 2013, available online at: http://www.humanrights.asia/resources/books/ALRC-PUB-001-2013

6 Gary A. Haugen and Victor Boutros, *The Locust Effect* (New York: Oxford University Press, 2014)

7 Aleksandr I. Solzhenitsyn, *The Gulag Archipelago: 1918-1956* (New York, NY: Perennial, 2002)

the 1978 Constitution, as well as by the state ensuring complete impunity to state agents who committed disappearances and other atrocities – this study shows how violence has become an entrenched part of the Sri Lankan experience.

At no stage has there been an attempt to undo this damage – either through redress or reform – and, as a result, the possibility of reoccurrence is high. The ultimate problem left is the same as that which Solzhenitsyn pointed out: abysmal lawlessness.

In fact, rather than pursuing any attempt to improve the situation, the State has assumed a duty to protect the perpetrators. As torture and extrajudicial killings have become entrenched practices, the State has been protecting the perpetrators in order to protect itself. The State retains lawlessness for its own survival. There is no room for any kind of redress or protection for victims or witnesses. That is the real deadlock nobody seems to be able to break.

'Not even a person, not even a word. No one said "go on." There was no encouragement.'[8]

In 87 excerpted interviews, family members of the disappeared speak about their crises. Many of them, especially young wives whose husbands were disappeared, have been exploited. Each of them has suffered symptoms of acute trauma. Some relatives, including many fathers of disappeared children, committed suicide. In 1995, Sri Lanka had the highest rate of suicide in the world.

One consequence of disappearances is the deprivation of the capacity to fully mourn the victim. The absence of the physical body means that the rituals of burial and almsgiving cannot be followed. The lack of proof of death keeps hope alive in the minds of the family members and accepting that their loved one has most likely been murdered can lead to feelings of guilt. Other members of their communities often fear associating with them in case they too are victimized. As carefully explored by the book and illustrated in the following poem by Basil Fernando, the family members of the disappeared have not received redress and, in that absence, often turned to fortune-tellers or witchdoctors to ask about the fate of their loved ones.

Witchdoctor's joy

He died
He was killed
We know
But we pretend not to.

"Justice,"
What is that?
We have heard
It is beautiful

As we have not seen it,
We do not know if that is true

It is wrong to forget,
And there is nothing
We can do even
If we remember

Except to light a candle
And tell God.

The witchdoctor awaits us
Eagerly.
Of the dead one
Is the witchdoctor's interest
All that is left?

Judges look away
When they see us.
Those who know us
Move away, looking down.

Only the witchdoctor
Awaits us with joy.

Jessica Fernando *is a law graduate based in Hong Kong. She has been involved with the work of the Asian Human Rights Commission throughout her student career. Her research interests include constitutional law and criminal justice.*

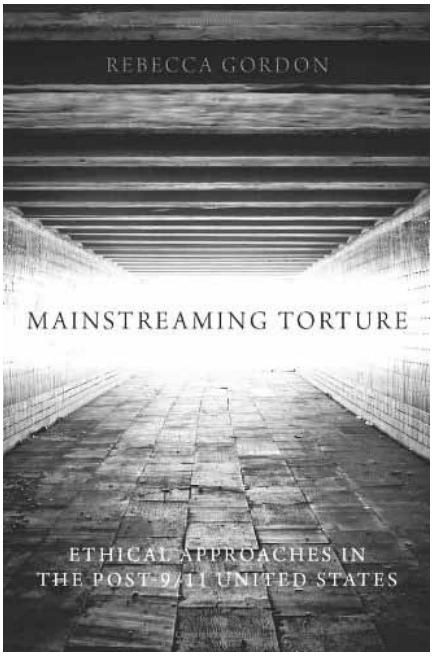
8 From an interview with Mrs. V, Matara District: Interview 2; Thomson-Senanayake, inside cover.

BOOK REVIEW: **BY KAREN MALPEDE**

MAINSTREAMING TORTURE

Ethical Approaches in the Post-9/11 Unites States

REBECCA Gordon's Mainstreaming Torture is written in a lucid and elegant prose. She combines the sensibility of moral philosopher with that of political activist. As such, she represents the best American tradition of deep, free thinking, nonviolent stance-taker for the public good (think Thoreau, Martin Luther King, Barbara Deming, Grace Paley). This is, unfortunately, a tradition currently in short supply. For as Gordon and others, like Darius Rejali, point out, the majority of Americans now favor torture "to keep us safe". This percentage has been on the rise ever since President Obama came to office, with his promises to end torture (using drone warfare, instead, to annihilate "terrorists") and to close the Guantanamo Bay prison camp. The inclination to torture, and acceptance of murder by drone, by the majority of citizens of the world's most powerful liberal democracy is explicable only if we understand that this is a nation in the grip of irrational fear of the other, enhanced, but certainly not solely created by the shock of the attacks of 9/11, for its roots go deep into the irrationality of American racism. This abiding fear Gordon boldly says has made us a nation of cowards, incapable, therefore, of fulfilling the purpose of life which is to live it wisely, with the goal of examined happiness, "employing the cardinal virtues of justice, courage, temperance, and prudence, or "wisdom about human affairs."



The Iraq war was started on lies, gotten by torture, that the majority of Americans came to believe. This information is not new, but it bears repeating at least until it is widely understood. Ibn al-Shaykh Al Libi was tortured until he told the CIA what the Bush administration needed to hear, the lie that Saddam Hussein was training and equipping Al Qaeda. Al-Libi mysteriously died in prison, but Shaker Aamer the only British citizen still being held in Guantanamo without charges and recently denied release even on grounds of severe mental illness, may have witnessed the torture of Al-Libi and this may be the reason he will never see the end of his nightmare imprisonment. When I asked one of his reprieve lawyers about this last summer, she replied, "Shaker witnessed a lot of things." Torture not only ruins individual lives, and families, but, far from keeping Americans safe, the U.S. torture program was used to begin an illegal invasion and set the stage for the massive death. Re-telling the Al-Libi story helps Gordon demolish the "ticking time bomb" notion that torture, if rigorously applied to the right person at the right moment by unflinching, wise torturers in possession of certain information about an imminent terrorist attack, will lead to actionable intelligence that can be employed just before the bomb goes off to save hundreds of lives. The fallacy of this fiction,

again, is not new, but bears repeating. The "ticking time bomb" scenario often used, and accepted, as the "only" reason for tolerating torture, is nothing but a conventional narrative strategy employed in schlock entertainment schemes like the television serial "24" to keep audiences rooted to their seats and dead to thought.

The breadth of Gordon's unfolding argument benefits greatly from the added authority of her previous experiences as an activist during the dirty wars in Central and South America—funded and supported in large part by covert U.S. actions and propagated by right-wing forces that used systematic torture, administered by police and military trained in and by the U.S., to dismantle popular opposition. Torture is not a discrete activity but a practice. As practice, or "false practice" as Gordon comes to name it, torture is deeply imbedded in the infrastructure of the state. There are manuals, and training camps; there must be tools and equipment, various levels of expertise, locations maintained where torture can be carried out, an underlying theory, or theories, orders given and followed, reports made and read, techniques perfected and passed on, ever-increasing budgets, and the force of accumulating history.

As cogent as these arguments are, I am not certain who she is thinking to convince (who are any of us going to convince). For it feels to me as if the entire question of torture immediately implicates our most irrational selves and this is why I wrote a wildly surreal play about the U.S. torture program, "Another Life" in the wake of 9/11 to dramatize the mass irrationality, and some of the principled resistance, that took hold. One is either repulsed by torture, instinctually, in one's core, or brutally attracted. Gordon says that what led her to write her book was her conviction that "torture is wrong and has to stop." Torture strikes me as deeply visceral, perversely sexual (as, in fact, many actual tortures are). Why the fascination among torturers with genitalia, sexual humiliation, threatened, simulated and actual rape, if torture were not primarily pre-rational sexuality at its source, made and promoted in the unconscious, infantile, all-devouring brain. After the pacifist American theater group, The Living Theater, was incarcerated for some months in Brazilian prisons during the dictatorship, they emerged to make a play "Seven Meditations on Political Sado-Masochism" about the torture they had heard through the walls and been told of by other prisoners. My point is this: torture exerts the same primal pull on us as sex. Some of us recoil in revulsion at the very thought of inflicting intimate pain on others while for others sexual violence fascinates in the extreme. (Indeed, in the course of a life, if I am honest, I can partake in each end of the sexual fantasy and practice.) In this Puritan country, the United States, it is not insignificant that the torture program was instituted and run by the political party of, so-called, family values: the same party that stands so resolutely against abortion that their fringe members would rather assassinate abortion providers than allow freedom of reproductive choice. Dick Cheney's "dark side" is, indeed, just that; Cheney's repressed, infantile desire to engage in wanton sadistic consuming of the source of life itself: to end forever the problem of the other by devouring it. So, perhaps, the adherence to torture by a growing majority of Americans for the "purpose of keeping us safe" is something other altogether; it is not about safety so much as about the glee of taking part in the forbidden, of being allowed to participate, even from a distance, in the complete violation of another's flesh for the purpose of satisfying the repressed omnivorous urge. If this is so, and I'm feeling quite out on a limb, then we are as a nation made even worse than cowards by our commitment to torture. We are infantile, sadistic cowards to boot, and perhaps there is no other sort. We not only wish to be safe ourselves at any cost but to watch (or do) from armored safety while another person writhes and squirms and soils him/herself.

Leaving, aside, now, the sexual nature of torture, our national life does seem to be increasingly infected with acts of brutal cowardliness. This summer has witnessed an entire country, the richest the world has ever known, flummoxed and convulsed about how to handle the influx of unaccompanied minor children over our Southern border, fleeing unbearable poverty and gang violence from Honduras, the murder capital of the world, Guatemala and El Salvador. All sorts of rumors are being manufactured about these children whose desperate presence seems to present an

existential threat to the American way of life. No one in government can figure out what to do except stir up the populace. Noam Chomsky is among the few who have pointed out that the crime-ridden, impoverished countries from which these children flee to enter this one (which could easily house, feed and care for every one, reunite them with family members, and offer all sorts of support for the same money it will take to run the deportation jails and courts) are the same ones where the United States trained and supported torturers and military coups in the 1970s and 80s. This immigration "problem" we face now results from past foreign policy.

Rebecca Gordon does a great service to the anti-torture argument by bringing in the American prison system, the place from which Charles Graner, one of the infamous Abu Ghraib torturers arose. In fact there is a revolving door policy from prison guard to National Guard members who work in military prisons, from home to war zone, and back home again, acquiring new techniques of torture and experience to share on all occasions. Solitary confinement is torture, and our prisons are full of inmates kept in such inhumane conditions for years in maximum security prisons throughout the land. The enormous size of the U.S. prison population is itself a scandal, as is its racial make-up, predominantly black and Latino, with an increasing number of Muslims, in a predominantly white nation. The torture practices we export to other countries are imbedded in our so-called justice system here at home.

Given how thoroughly torture has become part of the national project and imagination, how entwined torture is with the irrationalities of fear and desire and with, I would add, our unhappiness; we are unlikely to convince anyone by talking but only by taking action. If torture is false practice it must be replaced by a true practice inherently more attractive—the daily choice-making geared toward creating and maintaining the pleasurable virtues of life well-lived. Both I as playwright and Gordon as philosopher rely upon Aristotle's valuation of the primacy of action. "It is their characters, indeed, that make men what they are, but it is by reason of their actions that they are happy or the reverse," he says in The Poetics. We become happy by taking actions for the good of our selves and of others. This is how I understand the practice of virtue in which Gordon grounds her moral philosophical argument. Drawing heavily upon "the contemporary virtue ethics of the philosopher Alasdair MacIntyre" Gordon writes

"the good human life consists in a life-long quest to understand what constitutes the good life. This idea is not quite as circular as it sounds. It is an acknowledgement that even the most unexamined life involves a search—a quest—for whatever activities, experiences, and relationships will make that life a good one."

Human beings if they are to live meaningfully engage in a variety of social practices that partake of and create traditions to achieve the flourishing of self and community.

"I have argued that torture is a false practice. That is, it is a practice in which the quest for the good life has been diverted and in which the cardinal virtues of justice, courage, temperance, and prudence, 'or wisdom about human affairs,' which I have called 'practical wisdom,' are deformed."

She goes farther. Torture, Gordon repeats, makes us cowards. It supports the fantasy that we can be kept safe at any cost; that certain lives (American) are worth more than any other. From this first fallacy another irrational fallacy follows: that we might by destroying others keep our own deaths at bay. Torture becomes a pathway to immortality. If we accept this "repression of reality" Gordon quotes journalist Gary Kamiya as writing "it and the infantile reality of perfect safety—in other words, cowardice—become the driving force in our lives."

She is further correct, providing intellectual leadership, again, alongside others like Christian Parenti and Naomi Klein, by linking the violence of torture meant to sustain the American way of life with the observation that because of global warming the American way of life ought not to be sustained,

but needs radical reimagining. Torture and the wars that torture engenders, recent ones fought mainly for oil, are but deadly distractions from the real work at hand if we are to be able to live a good life—one that supports rather than further depletes natural resources, one that is bearable, even possible for generations to come, because we act forcefully now to limit further green house gas emissions.

What is to be done? Gordon, like many before her who have contemplated the U.S. torture program, says there must somehow be a full reckoning, that those people high in government, President Bush, Vice President Cheney, Secretary of State Rumsfeld, John Yoo and the other lawyers in the Dept. of Justice, private contractors, the CIA, must be held publically accountable. Because this is most unlikely to happen ever since President Obama took office and announced we must look forward, not back, the institutionalized U.S. torture program remains in place, ready to go into high gear at the next terrorist attack. "Torture which was once illegal," says Mark Danner, "is now a policy choice."

Gordon concludes her brave and comprehensive book: "I do not pretend to know how to engender and sustain virtue in a complex modern society like the United States. But building a movement to end the practice of institutionalized state torture might be a good place to begin. Members of such a movement might transform the very work of dismantling a false practice into a true practice, in the process of which we might be formed in virtues such as justice, courage, temperance and prudence."

With her principled insistence on understanding what the good life entails, suddenly a ray of hope appears: it matters what each one of us does, opposing torture and calling for a full accounting could become a part of the daily action of a movement of concerned citizens. Since practicing the good life leads eventually to living it, and as the good life is the goal of every human being, we might begin by putting one foot on the road.

Detail of the Book;
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Karen Malpede*, an American playwright, is author most recently of the plays "Another Life" about the U.S. torture program and "Extreme Whether" about the U.S. obstructionism over climate science which will have its world premiere Oct. 2, in New York. www.theaterthreecollaborative.org*

POST-COUP

LAND OF FEAR IN THE DISGUISE OF HAPPINESS

The tradition of granting the state authorities impunity does not only mean that the junta will never be punished for the coup, it will also save itself from being held accountable for past crimes, the most recent of which is the army crackdown on pro-government red shirt protesters in 2010, which resulted in nearly 100 deaths.

by SULUCK LAMUBOL

THAILAND'S 13th coup took place on 22 May 2014, two days after the Martial Law was declared nationwide. It was the 2nd coup within 10 years; the coup that ousted former Prime Minister Thaksin Shinawatra occurred in 2006. This time, his sister Yingluck Shinawatra was ousted, as the Army claimed they needed to end street protests and violence that had taken place in Bangkok for over six months since November.

For Thais, many are immune and not terrified about another coup. In Thailand's 82 years under Constitutional Monarchy, the country has seen 19 coups, including failed attempts, with 13 successfully carried out. Eighteen constitutions have been ripped apart and rewritten throughout the years, reflecting the democracy's shaky foundation in Thailand.

In most of the coups, the junta has cited the justification of national security and the need of military control to bring peace and order back to the country. What is different about this coup is the world has changed and no military regime can last long in the 21st century.

In the month after the coup took place, over 500 people have been summoned to the military and ordered not to participate in any political activity, and not to travel abroad before receiving permission from the military. The people summoned have been politicians, academics, activists, journalists, or ordinary citizens who have been involved in the pro-government movement. Some have been summoned because they were vocal on sensitive subjects like Thailand's monarchy and lese majeste law, which has one of the harshest sentences in the world. After detention that usually lasts seven days under Martial Law they have been monitored closely and some have been threatened.

The military has said the detention, despite being arbitrary, has been to "ask for cooperation" so that the country could return to peace and, now the main theme that the junta employs, "bring happiness back to the people."

Those detained have not only themselves been questioned and intimidated, but the military has also visited their families, to create fear and prevent them from coming out against the dictatorship. The military will have to answer to the public how creating fear will bring happiness and reconciliation to the people.

The National Council for Peace and Order (NCPO), the formal name of the junta, has employed many populist policies such as free movie tickets to patriotic films; free entrance to the zoo; free FIFA World Cup on TV; and organizing community events with army-

composed songs, free haircuts, massages, and food, hoping to make people happy with their post-coup lives.

However, no rights are guaranteed as the constitution is suspended. Media is under heavy censorship, dissidents are being closely watched, and even symbolic and peaceful protesters are being arrested. Those who violate the law are tried in the military courts where they cannot appeal. Happiness for the military definitely does not mean the same thing as the citizen's happiness in this case.

With the suppressive atmosphere, citizens who want to voice their opposition against the military rule have sought subtle or smart ways to express themselves. They have used sandwiches, three-finger salutes (as in the movie Hunger Games), wearing T-shirts with a political message, and holding placards, as ways to express their dissent. Yet, these people have been among the over 200 arrested for various reasons since the coup.

In the name of "peace and order", the army has ignored the people's civil and political rights and violated them by carrying out arbitrary detentions, interrogations, arrests, and prosecutions. According to a local rights organisation iLaw, since the coup, 60 people have been prosecuted, as of July 3rd, and of these, 49 will be tried in the military courts. Nine have been prosecuted for violating the lese majeste law, deemed by critics as severely limiting the freedom of speech.

But getting rid of the people who speak out against coup will not bring "peace" to Thai society; it will only deepen polarised political conflicts that have been rooted in Thailand for a past decade. By continually intervening in politics and not letting people decide by casting ballots will only cripple Thai politics and stall healthy democratisation of Thai society.

While international pressure has mounted on the regime, as the European Union has officially suspended partnership with Thailand until democratic rule is restored, the US has cut-off military aid, and Australia has banned issuing of visas for Thai military officers,

Press stuck in crosshairs of Thai protests. Photo : PrachaTai

the junta is remaking its image by drafting an interim constitution and has announced that it will hold election by 2015.

Traditionally, the junta has stipulated sections on Amnesty Law, whitewashing all the crime they have committed, the most serious of which is overthrowing the state. It would also immunize itself from any wrongdoings in issuing all orders such as arbitrary transfer of government officials, chairing the state enterprise boards, and other actions considered violations of rights and laws.

The tradition of granting the state authorities impunity does not only mean that the junta will never be punished for the coup, it will also save itself from being held accountable for past crimes, the most recent of which is the army crackdown on pro-government

red shirt protesters in 2010, which resulted in nearly 100 deaths.

As court cases related to 2010 proceed and the Criminal Court has found in inquest hearings that at least 17 people were killed by the military, calls for justice have become inevitable. Yet, the path to justice for those victims appear to be fading away and may end up like past state crimes, where perpetrators have never been punished, as the coup has taken place again in this vicious cycle.

It is ironic that the military, an institution self-perceived as having higher moral standard than the "dirty" politicians, have now turned to populist policies and amnesty, issues that sparked the anti-government protests last year and led to the 2014 coup, with the claim of bringing "happiness" back to the people.

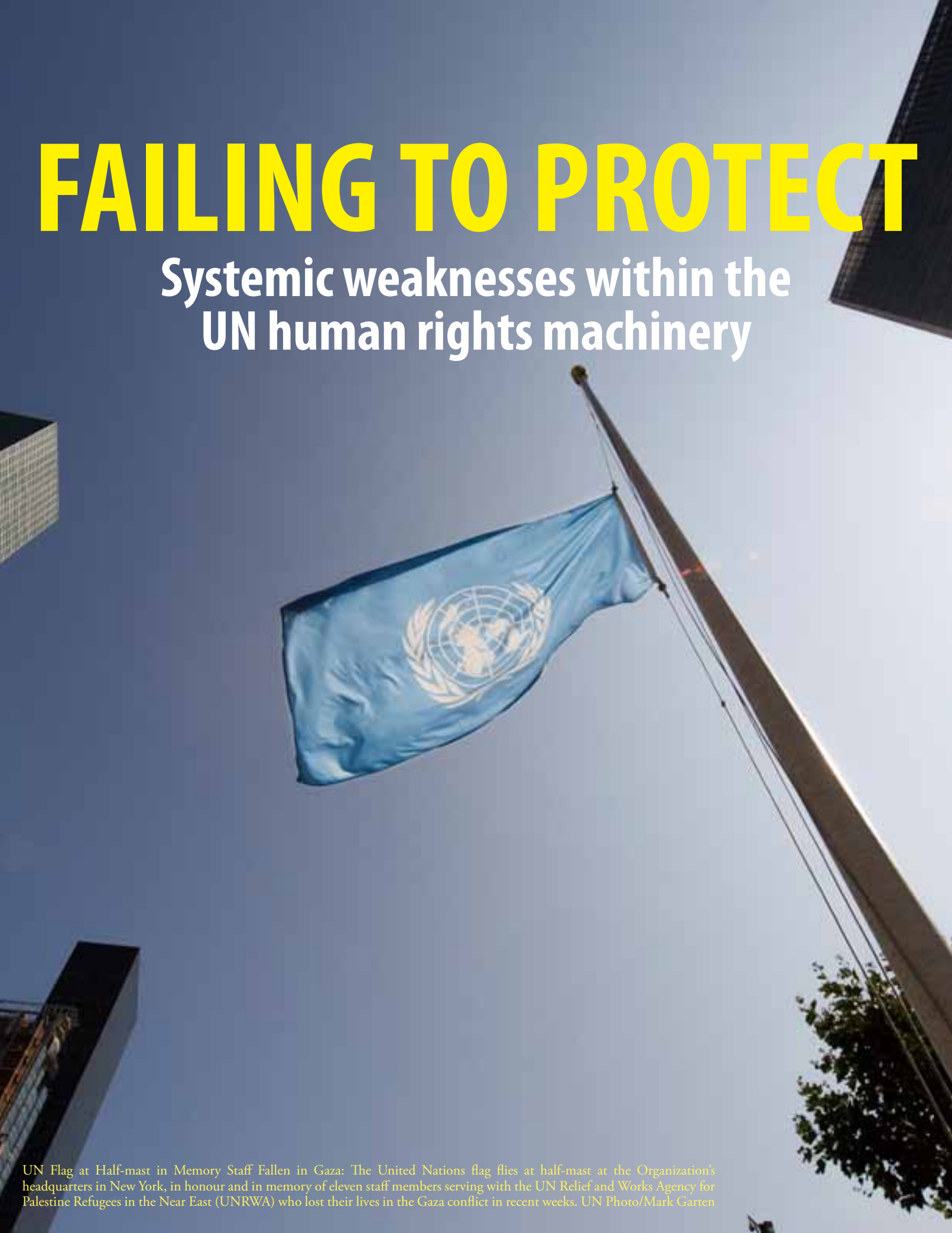
The only way that the military will ever truly bring happiness to the people is of it lets democratic rule function, makes itself accountable for crimes, and respects the rights and liberty of citizens in Thailand. Forcing the people to be happy by imposing power and purging dissenters will never work in the short or long term.

Suluck Lamubol (Fai) *works as a journalist for the alternative online news website Prachatai.com. She writes mainly about Thai politics and human rights issue in Thailand.*

(Images courtesy: Prachatai.com)

FAILING TO PROTECT

Systemic weaknesses within the UN human rights machinery



UN Flag at Half-mast in Memory Staff Fallen in Gaza: The United Nations flag flies at half-mast at the Organization's headquarters in New York, in honour and in memory of eleven staff members serving with the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) who lost their lives in the Gaza conflict in recent weeks. UN Photo/Mark Garten

FAILING TO PROTECT

Systemic weaknesses within the UN human rights machinery

by ROSA FREEDMAN

ON 20th March 2014 the International Service for Human Rights (ISHR) attempted to hold a minute of silence in the UN Human Rights Council's chamber in memory of Cao Shunli. Ms Cao was arrested on 14th September 2013 as she attempted to board a flight to Geneva. A human rights defender in China, Ms Cao was en route to the Human Rights Council to attend the September session. China's authorities detained Ms Cao for 5 months and during that time failed to provide her with access to proper medical care. She died in March 2014.

The NGO's attempts to hold a minute's silence in the Council's chamber were blocked by China on procedural grounds. Whatever the rights and wrongs of that form of protest, the message was loud and clear: The Council is not doing enough to protect individuals from grave human rights violations. The fact that a human rights defender travelling to the Council cannot be protected is emblematic of a broader and systemic 'protection deficit' in the Council. As the Universal Rights Group (URG) has explained in its most recent 'Report on the 26th Session of the Human Rights Council', the body passes woefully few resolutions addressing human rights violations. And even where the Council does call for action or condemn violations – as occurred in relation to Darfur, the Occupied Palestinian Territories, Sri Lanka, and most recently Syria – it lacks the enforcement powers to ensure compliance with those resolutions.

The failure to protect human rights does not just occur at the Council but across UN human rights bodies. Since the creation of those bodies, they have all contributed effectively to the development of human rights. The principal human rights body, initially the Commission and now the Council, fulfils that mandate through soft law in the form of decisions and resolutions, through providing a forum for discussion about emerging rights and normative content, and through working with states, civil society and other UN bodies in the pursuit of developing international human rights law. Treaty Bodies provide jurisprudence, both in the form of concluding observations and general comments, which expand upon and develop the normative content of the law.

The promotion of human rights has been strengthened with the reforms of the past two decades. The Office of the High Commissioner for Human Rights (OHCHR) has streamlined promotion activities. Since the creation of the Council and the expansion of the Special Procedures system, those activities have become increasingly effective. Promotion activities are weaved through all parts of the UN human rights machinery. Fact-finding, information sharing, cooperation, constructive dialogue, technical assistance, capacity building, peer support and review, are all effective tools in promoting human rights within states.

The problem, of course, is the protection mandate. Developing and promoting human rights are aimed at the medium- to long-term. They require dialogue, cooperation and constructive engagement. Protecting human rights focuses on the short-term. States are far less willing to engage with protection activities because they impact upon the immediate situation within a country. And a key weakness of UN human rights bodies is that, while they are set up for dialogue and engagement, they lack the teeth to effectively protect rights where a state is not willing to cooperate. Unlike the Security Council, human rights bodies do not have enforcement powers. Unlike international financial institutions, the UN human rights machinery does not have any leverage over states that fail to comply with their obligations. That is one main flaw in the system, and one that cannot easily be resolved, but it is not the only weakness.

Politicisation is the other main failing within the international human rights system - particularly at the Council. In my new book – 'Failing to Protect: The UN and the Politicisation of Human Rights' – I set out the many ways in which politicisation manifests itself, and why it undermines attempts to protect human rights. Whether through countries shielding their allies, or shifting the spotlight onto one or two pariah states; whether abuses are ignored within powerful nations or within those where there is no political capital to expose violations; or where the UN lacks the ability to cross a border into a territory; politicisation is a key reason for the UN's failure to protect human rights.

Almost all states are guilty of politicising human rights to a greater or lesser degree. Yet it is something rarely discussed, let alone addressed.

Yet solutions must exist. The UN human rights system has been reviewed and reformed throughout its existence. It is now time to focus those reform efforts on the protection mandate. My book is a call to arms. It sets out the problems, but it also seeks to explore possible solutions. I disagree with the call for a World Court on Human Rights, and set out why that idea will almost certainly not come to fruition. But there are other ways we can reform the system both in the short- and medium- term. Whether through changes to the ways in which human rights bodies access the Security Council and strengthening early warning; or through learning lessons from and strengthening regional mechanisms; or by finding ways to grant enforcement powers to the UN human rights mechanisms; it is surely time for the international community to recognise the problem and construct effective solutions.

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POEM

When Words Are Dead

by Danilo Reyes

Without action, words are empty
They are meaningless;

Without action, words are only for self gratification
They become a means of defence, not conviction;

Without action, words are just letters
Used only to justify one's guilt;

Without action, words have no value in human relations
Thus, one must not be convinced by words;

Without action, words can't reveal what a person is
Or tell how a person lives his life;

Without action, spoken words are merely lip service
Never will they contribute to social change;

Without action, words are just a ploy;
a deception to manipulate minds
Used on by the shrewd and cunning;
not by the kind-hearted;

Without action, words have little power,
and what power they might have has limits,
if not an end;

Words are dead without action.

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