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International Human Rights Standards: How Does India Measure Up?

By Dilip Lahiri

China's fulsome praise for India's human rights record on April 14, 2008 in the first session of the UN Human Rights Council's new system of Universal Periodic Review (UPR) would have come as a respite for the Indian delegation even as India was being subjected to hard and searching questions on torture in police custody, extrajudicial killings and child labour by representatives of several members of Western delegations of the Human Rights Council. While some recent openness and improvement in China's own human rights record is there for all to see, this endorsement of India's human rights record is perhaps not the best recommendation for India at a time of intense international criticism of China's current repression in Tibet. China is also likely to expect a quid pro quo from India when China's own situation comes up later before the Council.

The UPR is the crown jewel of the UN human rights system. So far, scrutiny has been limited to the periodic reports which countries are required to provide on their implementation of each UN human rights Convention to which they are a party. These reports are then examined by treaty bodies consisting of independent experts who report their findings and recommendations to the state concerned and the UN General Assembly. But the UN Charter and the Universal Declaration of Human Rights, which are the mother texts from which the various human rights instruments have been elaborated, are not treaties requiring implementation reports. This allowed Malaysia, for example, which is not party to either the Convention on the Elimination of All

Forms of Racial Discrimination (CERD), or the International Covenant on Civil and Political Rights, to act as if it had no international obligation not to discriminate between Malay, Chinese and Indian Malaysians, whereas the obligation is unambiguous under the Universal Declaration which has acquired the status of customary international law. Similarly, while India has regrettably not ratified the Convention against Torture, the international prohibition of torture is clear in the Universal Declaration of Human Rights.

The UPR is designed to "undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States". All 192 UN member States are to be covered within the four-year UPR cycle, including each member of the Human Rights Council during their terms on the Council. The UPR is based, not only on the state's reports on implementation of human rights instruments to which it is party, but also its commitments and obligations under the UN Charter, the Universal Declaration, as well as customary international law. Apart from the State's own report, the review by the Human Rights Council considers information contained in the reports of various UN human rights treaty bodies and other mechanisms, as well as credible and reliable information provided by other relevant stakeholders, including NGOs, national human rights institutions, human rights defenders, academic research institutes, regional organizations, as well

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as civil society representatives.

It should have been no surprise, therefore, that India's non-conformity with international human rights benchmarks received more concentrated exposure during the UPR than they have ever had in the past in the course of the fragmented consideration of its implementation reports under individual Conventions. Pointed questions were raised about India not ratifying the Convention against Torture, not being Party to the Conventions on the Rights of Migrant Workers and their families, on refugees and stateless persons, the ILO Conventions on the abolition of child labour, on the rights of indigenous and tribal people, and the Government's persistent refusal to cooperate with the Council's special procedures with respect to torture, the treatment of human rights defenders, contemporary forms of racism and racial discrimination (read Dalits and caste discrimination), extrajudicial, summary and arbitrary executions, sale of children, child prostitution and child pornography, and arbitrary detentions. Most persistent were questions about the lack of implementation of India's comprehensive constitutional and legal framework for protecting human rights.

All this does not at all mean that India is an international scoff-law on human rights. India's record on human rights, warts and all, is certainly no worse than that of the majority of UN members, and would probably still be ranked among the top third. Indeed there is widespread international appreciation and admiration for the sweeping proactive legal and administrative provisions that have been put in place for the promotion and protection of the full range of internationally recognized human rights, whether in terms of outlawing egregious forms of caste discrimination, or affirmative action programmes in favour of historically disadvantaged sections of the population and vulnerable sections such as women, children and the disabled.

But India's Achilles heel has always been implementation and what has been described as a "culture of impunity" when faced with routine violations of the laws and regulations in terms of atrocities against Dalits, deaths in police custody, encounter killings and disappearances or commu-

nal violence, as reported almost every day in India's own media. The international legal obligation undertaken by India under the various human rights conventions is not only to respect the prescribed rights and prohibitions, but also "to ensure" that they are enforced on the ground. Good laws and regulations are of course necessary for this, but not sufficient. No one believes that the Indian administrative or law and order apparatus is helpless in implementing the laws and regulations in place, if not fully, at least in substantial measure. When this is not done, the charge by Indian and foreign NGOs of official encouragement of the culture of impunity by deliberate non-implementation of the law by the Government's own designated enforcement agents becomes difficult to refute.

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Another self-inflicted problem, more emotional than substantive, is the Government's extreme sensitivity to external criticism, possibly due in good part to the style of functioning of the polity and media, where every issue is politicized, and any stick is good enough to beat the Government with. In this environment, criticism in UN fora of inadequate action to eradicate existing and self-acknowledged social ills and iniquities could well be seen as the Government's failure to protect India's interests and honour from external interference on matters of domestic concern. It is also an implicit admission in international fora of its failure at domestic governance.

Perhaps public and political opinion needs to be educated to recognize that the erstwhile international system of exclusive national jurisdiction over domestic affairs has been overtaken to some degree, at least in the field of human rights, by the UN Charter, the Bill of Rights, customary international law and Conventions which India has herself participated in formulating. Under these we have agreed, in exercise of our own sovereignty, to cede the right to other countries to examine India's domestic record of compliance with international human rights benchmarks drawn up with our agreement and participation. Compliance with these standards is not a matter of dragging a horse to the water. Here the horse itself is keen to drink, since these human rights standards are almost all incorporated in Indian law and embody our aspirations to a kinder, gentler

and more humane society. The discomfort of being named and shamed occasionally for not doing what we should be doing on our own under our own laws could well be a spur to moving faster on the path along which we ourselves want to progress.

It is worth noting, in this context, that the international system is moving gradually, but quite definitively, to implement what Kofi Annan described as the international community's "responsibility to protect" actual or potential victims of massive atrocities and violations of human rights, by force if necessary. The legal cover used, whose moral imperative is difficult to question, but whose disingenuousness makes many uncomfortable, is for the UN Security Council to decide, whether or not based on the factual situation, that a particular situation of human rights violations is a threat to international peace and security, and to take coercive action under Chapter VII of the UN Charter. But this could be the thin end of the wedge. What happens if the Security Council cannot take a decision in such a situation, either due to lack of the required nine vote majority, or a veto by a permanent member? Would the international community then stand by and let the massive atrocities proceed, or could any country then legitimately decide, even if for altruistic motives, that the technicality of a UN vote could not frustrate the international community's "responsibility to protect", and that it would intervene on its own, or with a "coalition of the willing", to discharge this international responsibility?

The above digression from India's human rights record was only intended to bring out the salience which human rights issues have attained in the international system and the cost in terms of influence and standing in the international community that may be incurred by being seen to be unmindful of international human rights obligations or refusing to extend due cooperation to established multilateral mechanisms for monitoring the promotion and protection of human rights. In India's case it would be totally gratuitous to incur such costs since we are in broad agreement with the system's objectives and could not hide our failings even if we wanted to. Perfection may be distant, and is not really

expected; but the effort must be seen to count.

The following are some initial steps that would help to correct the reputation for disingenuous self-righteousness and evasion of the real situation that India is increasingly developing internationally on human rights:

First, we must improve implementation of the commitments we have undertaken. The culture of impunity has to be frontally attacked. Action must include prompt and visible prosecution under our laws of those committing atrocities on Dalits, tribals and, particularly, their women; this must be accompanied by punishment and disciplinary action against the district administration and police who do not take prompt and effective action to apprehend and prosecute the

perpetrators of such crimes, and for cases of custodial or encounter deaths and disappearances in their jurisdiction. Statistics of such prosecutions should be included in our implementation reports to UN treaty bodies complementary to our customary enumeration of our comprehensive laws and regulations.

Secondly, India must ratify the Convention against Torture without further delay. Non ratification after signing provides us no leeway, since the Vienna Convention on the Law of Treaties requires signatories to abide by the letter and spirit of the treaty even if not ratified.

Thirdly, India should try to get out of the longstanding, sterile and legalistic stalemate with the UN as to whether or not caste discrimination falls within the ambit of racial

discrimination of CERD which explicitly defines such discrimination as that due to descent, or whether or not Scheduled Castes and tribes are indigenous people of whom we claim to have none in India. The controversy becomes particularly moot in a situation where India fully recognizes that discrimination against Dalits and tribals does indeed continue to exist in India, declares that we are prepared voluntarily to discuss the issue and provide material on it, but insists that we will never agree to acknowledge the existence of racial discrimination in India by submitting information on this issue to the Committee for the Elimination of all forms of Racial Discrimination. While it is understandable for the biter against apartheid in South Africa to be upset

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at being bit on grounds of racial discrimination due to descent, UN bodies have vigorously rejected India's position, leaving India in splendid isolation to record its dissenting view. Persisting in this line will require India regularly and with embarrassing frequency to be the lone voice expressing reservation on texts and resolutions on racial discrimination, an issue pioneered by India in the UN, particularly as we approach the Durban Follow-up Conference in 2009.

Finally, India should reconsider its objection to receiving and cooperating transparently with visits by UN Special Rapporteurs on issues such as torture, arbitrary and extra judicial police killings and detentions, treatment of human rights defenders etc., requests for which have been pending for years. All these practices are illegal in India but are widespread. Not receiving UN rapporteurs on these issues

will scarcely push the situation in India under the carpet. Nor will it prevent the extensive reporting on happenings in these areas by reputable Indian and foreign NGOs who are increasingly being recognized as close and active stakeholders on human rights in the UN. To be sure, their reports will be critical. So indeed were the findings of the Rapporteur on Freedom of Religion, whom we allowed in thinking that our record on this matter was exemplary. India is an open society and, on balance, it has little to lose, and something to gain, by an improved reputation for transparency, some useful pointers to areas requiring urgent domestic corrective action, and almost certainly greater caution and a reduced sense of impunity on the part of government functionaries and their supervisors whose performance in these areas will come under public and international scrutiny.

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