



Centre for Democratic Institutions

Philippines Workshop on Human Rights Treaty Reporting

Manila

16-17 September 1999

The Philippines has strong commitment to human rights and to fulfilling its reporting obligations under human rights treaties. Recognising the importance of submitting reports on time, the Ramos Administration issued an Administrative Order creating the Coordinating Committee on Human Rights (CCHR). The Estrada Administration has maintained a commitment to this the CCHR, which comprises the concerned Executive Departments and is chaired by the Department of Foreign Affairs, with the Office of United Nations International Organizations serving as the Secretariat. The primary task of the CCHR is to prepare country reports to various UN treaty monitoring bodies. The CCHR became operational in 1998.

The Centre for Democratic Institutions worked closely with the Department of Foreign Affairs of the Philippines to plan and deliver a workshop on report writing under the six human rights conventions, designed to reinforce the ability of the CCHR to report effectively. The workshop focused on the following conventions:

- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on Civil and Political Rights (ICCPR)
- Convention Against Torture (CAT)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC) *full paper available*
- Convention on the Elimination of All Forms of Discrimination (CERD) *full paper available*

In planning the workshop it was considered important that the programme draw on the strengths of both Australia and the Republic of the Philippines. The training team was composed of six eminent speakers, three from Australia and three from the Philippines. We were especially privileged to have two serving members of the Human Rights Committee – Justice Elizabeth Evatt and Professor Virginia B. Dandan. The training team comprised:

- Virginia B. Dandan, Chairperson of the Committee on Economic, Cultural and Social Rights

- Aurora J. de Dios, Commissioner, National Commission on the Role of Filipino Women
- Sedfrey A. Ordonez, Former Chairman, Philippine Commission on Human Rights
- Elizabeth Evatt, Chairperson, United Nations Human Rights Committee
- Robert McCorquodale, Faculty of Law, Australian National University
- Roland Rich, Director, Centre for Democratic Institutions

The thirty-four workshop participants were drawn from the departments and organisations that will form the Committee charged with responsibility for drafting reports. Participation in the workshop was very strong, with lively and intensive question and answer sessions. Feedback from both workshop participants and organisers was positive. Importantly, the workshop established networks between relevant departments through which future collaboration can take place. One of the unintended benefits was to allow Filipinos working in this area to meet and discuss the issues over two days, an opportunity that would not have occurred otherwise.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: PREPARATION OF COUNTRY REPORTS

Human Rights Training Program for Philippine Government Officials,
Manila, 16-17 September 1999

Associate Professor Robert McCorquodale
Faculty of Law, The Australian National University

Introduction

Every day around the world, children will be born, children will laugh, children will learn, children will play, children will cry, children will be abused physically and sexually, children will fight in wars and children will die. They will do this in their thousands and millions. It is because of all these aspects of children that the Convention on the Rights of the Child 1989 (the CROC) was drafted.

The CROC is the most widely ratified of all the major international human rights treaties. It entered into force on 2 September 1990 and there are 191 States that are parties to it. There are only two States that are not parties to the CROC: Somalia (which has no government) and the USA. The Philippines was one of the first States to become a party to the CROC, when it did so on 21 August 1990 with no reservations. Indeed, it is important to note that The Philippines has ratified most of the major human rights treaties and its nationals have played, and continue to play, a significant and positive role as members of international human rights bodies and in the development of international human rights law.

The CROC is only about ten years old. It is thus still a child compared to the other treaties discussed. While the drafting of the CROC and the procedures and processes under the CROC built on the experience of older treaties, there are still a number of matters that have yet to be made clear in the procedures and processes under the CROC. This paper considers some aspects of the CROC in relation to the reporting requirements on State parties, including the roles of the Committee on the Rights of the Child, elements of the reporting guidelines and some key issues. The issues considered are those that are distinctive to the CROC and so will not overlap to any substantial extent with other papers.

The Role of the Committee on the Rights of the Child

The supervisory body under the CROC is the Committee on the Rights of the Child (the Committee). By virtue of Article 43 of the CROC, the Committee comprises 10 independent experts who have four year terms, though an amendment to this article has been proposed (and supported by The Philippines) to increase the number of members to 18.

The Committee first met in 1991 and has had 21 sessions so far. It meets three times a year in Geneva for a total of nine weeks, usually with a one week meeting of Working

Groups prior to each meeting. Prior to the 1999 session, the Committee had received 131 initial and 20 periodic reports from States and has reviewed 93 of these reports.

Although the Committee's main role under the CROC is in regard to reviewing reports by States, it also has been given a specific power to request that studies relating to children be undertaken (Article 45(c)) and to request United Nations agencies to assist the Committee and States in the provision of information and reports (Article 45(a)). It has the additional ability to request UNICEF (the United Nations' Children's Fund) to provide technical assistance to States, including in the preparation by States of their reports. It has also convened a few "thematic" meetings on aspects of children's rights and members of the Committee have visited various regions of the world publicising the CROC and the work of the Committee.

It is surprising that the Committee is the only international human rights treaty supervisory body that has not yet issued any General Comments. Thus most of information available on the approach of the Committee to the reporting procedures and processes comes from their concluding observations on reports and their guidelines on reporting.

Elements of Reporting

There are three main elements of reporting under the CROC: the reporting obligations of States, the reporting procedures before the Committee and the reporting guidelines issued by the Committee. Each of these will be briefly summarised.

Reporting Obligations

The CROC, primarily in Article 44, sets out the following obligations on States:

- States must report on measures adopted that give effect to the rights recognised in the CROC and the progress made in the enjoyment of those rights.
- A State's initial report must be provided within two years of entry into force of CROC for that State. This should be comprehensive and include a summary of the State's legal, political, economic, social and cultural systems.
- A State's periodic report must be provided every 5 years thereafter. Interestingly, there has not been the same degree of overdue reports under the CROC as there has been with other international human rights treaties, though this may be due to the fact that it is still relatively early in its application.
- A State's report must indicate factors and difficulties, if any, affecting the degree of fulfilment of obligations.
- A State's report must provide sufficient information to allow the Committee to have a comprehensive understanding of the implementation of the CROC.
- A State must make its reports widely available to the public in the State. This is intended to enable non-governmental organisations (NGOs) and civil society generally in the in protection of the rights of children.

Reporting Procedures

Once a State has sent its report to the Committee, the following procedure occurs:

- A working group of the Committee, which will not include any member of the Committee who is from the State concerned, drafts a list of relevant issues that are likely to be raised by Committee. These are sent to the State, which may respond to these issues in writing or deal with them at the oral meeting with the Committee.
- In considering the report and formulating any list of relevant issues and, later oral questions, the Committee relies very much on reports or other information received from United Nations agencies, from NGOs and from any other source. These are considered to be collateral sources of information to assist the Committee, rather than alternative or contradictory information, as the State is still regarded as the main producer of relevant information.
- The State party meets with the Committee in Geneva during one of the Committee's sessions. At this meeting, the representatives from the State introduce its report and provide any clarifications to it, including any responses to the list of issues sent to the State by the working group of the Committee. The Committee will ask the State's representatives many questions and the State's representatives will have to respond to them. At the end of this meeting, there will be a concluding statement by the State's representatives and a brief observation by a Committee member.
- At some time after the meeting, the Committee draws up its Concluding Observations. These are sent on to the United Nations Economic and Social Council (ECOSOC) and to the State concerned. These Concluding Observations are public documents. The Concluding Observations tend to contain comments on positive aspects where progress has been achieved by the State as well as recognition of factors and difficulties impeding implementation of the CROC. They will also include principal subjects of concern about the State's compliance with, and implementation of, the CROC, request any additional information required from the State and suggest any technical assistance that might be offered to the State by a United Nations agency. It will finish with suggestions and recommendations for action.
- It is clear that the Committee expects future reports by that State to deal directly with issues raised in the Concluding Observations of previous reports. These issues will be on the agenda at the next session between the Committee and that State.
- The current Chair of the Committee, Ms Nafsaih Mboi of Indonesia, has called the interaction between the Committee and a State as being a 'partnership to assist in solving problems and achieving solutions' and not as one of an overbearing supervisor. This is a helpful expression of the relationship.

Reporting Guidelines

The Committee has issued guidelines to assist States in their reporting obligations. The first set of guidelines were issued in 1991 and applied to the initial reports. As the Philippines has produced its initial report, which was considered by the Committee in 1995, I will not consider these guidelines. The second set of guidelines was issued in 1996 and relates to the periodic reports. These are quite detailed + comprise over 160 paragraphs. They are found on the United Nations High Commissioner for Human Rights website: www.unhchr.ch

The four key points about these 1996 guidelines are:

- States that have submitted a comprehensive initial report (as did The Philippines) does not need to repeat this basic information in subsequent reports (see Article 44(3)). Rather, in each report the State must refer to its previous report and show changes that have occurred since that report was provided.
- The report must include direct references to, and copies of, all relevant legislation, judicial decisions, administrative practice, statistical information, etc.
- Cross-reference should be made to obligations of the State under other international human rights treaties. For example, cross-reference should be made to reports of compliance with obligations about non-discrimination under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). This is intended to reduce the burden and repetitiveness of human rights treaty reporting for States.
- The rights in the CROC should be dealt with in categories. The categories are:
 - a. General measures of implementation (Articles 4, 42, 44(6));
 - b. The definition of the child (Article 1);
 - c. The four general principles: non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); and the right to respect for the views of the child (Article 12);
 - d. Civil rights and freedoms (Articles 7-8, 13-17, 37(a));
 - e. Family environment and alternative care (Articles 5, 9-11, 18(1-2), 19-21, 25, 27(4), 39);
 - f. Basic health and welfare (Articles 6, 18(3), 23-24, 26, 27 (1-3));
 - g. Education, leisure and cultural activities (Articles 28-29, 31); and
 - h. Special protection measures (Articles 22, 32-36, 37 (b-d)).

Key Issues under the CROC in relation to Reports

There are three key issues that will be considered in relation to reporting under the CROC. They are implementation obligations, the definition of a child and the meaning of the best interests of a child.

Implementation Obligations

The rights recognised under the CROC are extensive. They include both civil and political rights and economic, social and cultural rights. Article 4 of the CROC provides that all

States parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. With regard to economic, social and cultural rights, States parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

This obligation requires a State to ensure that there is effective harmonisation of its national law and policy with the CROC. Thus a State will usually have to do more than just pass complying legislation but will also have to ensure that the legislation is effectively enforced.

In relation to economic, social and cultural rights, there is no general qualification that these rights are to be “progressively realised”, in contrast to the obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Some rights are expressly so qualified, e.g. the right to education (Article 28(1)) and the right to health (Article 24(4)). However, the lack of a general qualification on these rights has been justified by the Committee on the basis that there should be a priority to children in the distribution of resources in a State.

Indeed, the Committee has often commented in its Concluding Observations about the need to give priority to providing resources to children, while recognising that debt burdens and structural adjustment programs of the International Monetary Fund do put real constraints on a State. For example, in its Concluding Observations on Yemen’s second report, the Committee said that it

remains concerned that the adoption of structural adjustment programmes might have an adverse effect on the implementation of social programmes, especially those related to children. In the light of articles 2, 3 and 4 of the Convention, the Committee encourages the State party to continue undertaking all appropriate measures to the maximum extent of its available resources, including through international cooperation, to continue ensuring that sufficient budgetary allocations are provided to social services for children and that particular attention is paid to the protection of children belonging to vulnerable and marginalized groups. The Committee also recommends that the State party take into consideration a child rights component in designing its social policies and programmes.

Thus the implementation obligations of a State under the CROC are extensive.

Definition of the Child

Article 1 of the CROC defines a child as follows:

a child means any human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

This definition expressly does not provide when childhood (life) begins. However, a number of States have made an interpretive declaration about this Article when they have ratified the CROC. For example, Argentina has said that ‘the article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of 18’, whilst the UK has declared that it ‘interprets the Convention as applicable only following a live birth.’ Both these views are possible under the CROC and so the State concerned is able to implement the CROC in its national law in accordance with its own interpretation of the time when childhood begins.

A State can provide for a lower age limit than 18 for when childhood ceases. However, if it does then that law must then allow all aspects of adulthood to flow from that date, such as property rights, voting rights, etc. The CROC allows for different age limits for different purposes. For example, Article 32 in relation to admission to employment and Article 40(3)(a) in regard to not being liable for a criminal offence, provide for differing age limits.

Currently is an Optional Protocol to the CROC on the Involvement of Children in Armed Conflict is being drafted. Its aim is to make the minimum age for involvement in armed conflict to be 18. This would increase it from 15, which is the age provided for under Article 38 of the CROC. This treaty is still some way from agreement with no consensus on the minimum age for participation in hostilities or on the minimum age for recruitment into the armed forces (though latter seems to be moving to 17 years). As part of this development, the United Nations Security Council passed a resolution (Resolution 1261 of 25 August 1999) seeking to end the use of child soldiers.

Article 2 of the CROC prohibits discrimination on a wide range of grounds. This would include a prohibition on any discrimination in setting an age limit as between girls and boys unless that different age limit could be proved by objective facts. The Committee has commented on this in its Concluding Observations. For example, in its review of Bolivia's second report the Committee said that it is

concerned about the use of the biological criterion of puberty to set different ages of maturity for boys and girls. This practice is contrary to the principles and provisions of the Convention and, inter alia, it constitutes a form of gender-based discrimination which affects the enjoyment of all rights.'

Thus a State needs to be careful that it does not create structural discrimination against girls/women at a very early age.

Best Interests of the Child

One of the general principles of the CROC is set out in Article 3. This provides:

In actions concerning children,...the best interests of the child shall be a primary consideration.

This is probably one of the most contentious aspects of the CROC. As yet the Committee has not offered a clear definition of what "best interests of the child" means and it has been argued that, in any event, it would be inappropriate to offer one definition of this principle as the notion of "best interests of a child" will change depending on political, economic, social and cultural factors, as well as changing over time and in the context of the evolving capacity of each individual child.

Three main issues can be raised in this regard: whether children have rights; the balance between children's and parents' rights and interests; and the balance between the obligations of States and the obligations of parents.

In relation to the concept of children's rights, there was some significant debate during the drafting of the CROC about whether children had "rights" in the sense of legal entitlements with obligations on others. While State parties have generally accepted, by their ratification of the CROC, that children do have rights, the debate still continues within many States.

The issue is most clearly seen if how children are viewed in most societies is considered. Generally children are, at least when they are very young, seen as being vulnerable and in need of protection. Consequently, having rights can imply a separateness of children to those responsible for them and so a degree of autonomy and competence by a child. For some, children's rights encourages an individualistic, anti-parent, legalistic society and one that offers no solution as to when can a child

decide that she/he does not want a medical operation, go to school or live outside her/his own community. At the same time, if the concept of human rights derives - as most philosophers argue - from an acceptance that rights are in us all and arise from human dignity, then all humans must all have rights, no matter what is our place of birth, our race or our age (see P. Alston (ed), *The Best Interests of the Child*, 1994).

The CROC is based on two rationales for recognising rights of children:

- each person, solely by virtue of being human, is entitled to enjoy full range of human rights; and
- children are people in their own right and are not appendages or chattels of others who are older.

Thus the CROC aims to clarify that children have legitimate interests that should not be ignored. By clarifying these legitimate interests as “rights” it is a reminder of the responsibility of parents and governments to children, in order that this responsibility is carried out. The issue under the CROC has become one of determining the appropriate time and context in a child’s life when certain rights can be exercised rather than whether the child has rights at all. Those rights are then only exercised appropriately, like all human rights, in the context of the rights of others and of the general interests of the community.

Concern about the balance between children’s and parents’ rights and interests has been one reason given for the current decision of the USA not to ratify the CROC and has been the rationale for why a number of States have entered reservations or declarations to the CROC. For example, the Vatican (Holy See) is a party to the CROC but has declared that it interprets CROC ‘in a way which safeguards the primary and inalienable rights of parents.’

The key article, other than Article 3, in this area is Article 18. This provides:

Parents...have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Further, the Preamble to the CROC states that

the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...[and that] the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

While everyone may desire the situation expressed in the Preamble, sadly this is not always the case. It is because of the reality of life for many children that the CROC places restrictions on families only where there is oppression, exploitation or abuse of children, where there is some form of discrimination against children or where there is denial that children have legitimate interests that may not be identical with those of the family as a whole.

Hence the Committee has taken the view that if the CROC was implemented fully then better family values and services for children and for all the community could result and would enable parents to fulfil their role with regard to children and so bring them up in the appropriate atmosphere of “happiness, love and understanding”. For

example, in its Concluding Observations on Bolivia's second report, the Committee said that while

the principles of the "best interests of the child" (Article 3) and "respect for the views of the child" (Article 12) have been incorporated in domestic legislation, it remains concerned that in practice, as it is recognized in the report, these principles are not respected owing to the fact that children are not yet perceived as persons entitled to rights and that the rights of the child are undermined by adults' interests. The Committee recommends that further efforts be made to ensure the implementation of the principles of the "best interests of the child" and "respect for the views of the child", especially his or her rights to participate in the family, at school, within other institutions and in society in general. These principles should also be reflected in all policies and programmes relating to children. Awareness-raising among the public at large, including traditional communities and religious leaders, as well as educational programmes on the implementation of these principles should be reinforced.

The balance in the CROC between the best interest of the child and a family's interests can be seen in Article 7 concerning a child cared for by parents or legal guardians, balanced against Article 9 where it is realised that it may be in best interests of child to be separated from her or his family, where there has been neglect, abuse or exploitation of the child. Indeed, the Committee has been very forthright on the need for States to have a system of child protection against abuse and exploitation as well as programmes of rehabilitation and care for child victims.

It should also be recalled that the "best interests of the child" is a "primary" consideration under the CROC. But it is not the only consideration. At the same time, there are some rights under the CROC where the best interests of the child is a paramount consideration, such as in Article 21 on adoption and Articles 37 and 40 in relation to the justice system. Also the Committee has indicated that in refugee situations (Article 22) the best interests of the child are effectively paramount.

It is arguable that declaration or reservations that place the interests of parent's as a priority over the interests of the child breach the objects and purpose of the CROC (and so are invalid), as the object and purpose of the CROC is to give priority to the rights of children. However, the better view is that these declarations and reservations are reiterating the emphasis in the CROC that the rights of children in some areas are subject to parental and adult rights.

In regard to the balance between the obligations of States and the obligations of parents, Article 5 of the CROC provides as follows:

States parties shall respect the responsibilities, rights and duties of parents,...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

Thus the State has role as back-up to assist families with their responsibilities towards children. This is seen most clearly in Article 18 where, after noting that parents have primary responsibility (see above), provides that State parties

shall render assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

States also have a role when the family is unable, or unwilling, to carry out their responsibilities or where the family abuses its responsibilities. This is not always an easy role, such as under Article 24(3) in relation to female circumcision and whether it is a cultural issue or a health issue. At the same time, it is important to note that the CROC only establishes minimum standards.

Finally, it is relevant to note that an Optional Protocol on Child Sexual Exploitation is being drafted. This is intended to strengthen the existing obligations in Articles 34 and 35 that require States to combat sexual exploitation of children in general terms. The drafting of this Optional Protocol has seen a divisions between States as to whether the Optional Protocol should be limited to exploitation for sexual purposes or whether it should be extended to include child labour and illegal inter-country adoptions. It is hoped that The Philippines, that has taken a strong stance in regard to child sexual exploitation can make States see that sexual exploitation must be clarified first and made stronger and that the other issues can be dealt with later.

Concluding Observations

There are three main issues that arise from consideration of the CROC, which have an impact on States reporting obligations. These are in relation to reservations to the CROC, the need to learn from the Concluding Observations and the requirement of broad consultations.

Reservations

The incredible widespread ratification of the CROC does not mean that States all comply with the CROC or that full implementation of their obligations occurs. In particular, it is not clear that there is unanimity over the content of these obligations due to the large number of reservations to the CROC. Over 60 States have entered declarations, understandings or reservations to the CROC, with a few having later been withdrawn.

Some reservations are narrow and precise and arguably enhance the operation of the treaty. For example, the reservation made by Australia in relation to article 37 provides:

Australia accepts the general principles of article 37...[t]he obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.

At the other end are the extraordinarily wide reservations made to the entire treaty. For example, Afghanistan stated that it

reserves the right to express...reservations on all the provisions of the Convention that are incompatible with the laws of Islamic Shari'a and the local legislation in effect.

These latter reservations are a cause for concern. Many would argue that they are against the object and purpose of the CROC and some States have objected to these

reservations on this ground. The Committee has not yet indicated its approach, though it has made very clear in its Concluding Observations that it does not like some reservations. For example, in its Concluding Observations on Pakistan's initial report, the first concern raised was:

The Committee is of the opinion that the broad and imprecise nature of the reservation made to the Convention raises deep concern as to its compatibility with the object and purpose of the Convention.”

If the Committee does adopt the approach of a number of other human rights treaty bodies, such as the Human Rights Committee and the European and Inter-American Courts of Human Rights, then it could declare that these reservations are incompatible with the object and purpose of the CROC and sever the reservation even if this would be contrary to State consent.

Despite this concern over reservations, it cannot be ignored that there has been such widespread and nearly universal ratification of the CROC. The mood of the international community to protect children is fantastic and must lead to greater compliance over time.

Learning from Concluding Observations

With most States having now produced their initial reports and with some periodic reports having been considered by the Committee, it is obvious that the Committee expects that each State will respond to the Concluding Observations from the previous report by that State. On the whole the Committee so far has been reasonably gentle on States in their initial reports but it is tougher in their comments and Concluding Observations on periodic reports, particularly if the State concerned has not addressed the issues raised in the previous Concluding Observations.

For example, in its Concluding Observations on Sweden's second report, the Committee said:

With regard to article 2 of the Convention and to the Committee's earlier recommendation [see CRC/C/15/Add.2, paras. 7 and 13], the Committee notes with concern that the principle of non-discrimination is not fully implemented for the children of illegal immigrants, the so-called “children in hiding”. The Committee recommends to the State party that it review its policies, with a view to expanding the services available to illegal-immigrant children beyond the provision of emergency health services.”

The Committee also requires more factual information, such as statistics, from States with each report. The Committee also often suggests that a State seek technical assistance from the United Nations and United Nations agencies.

Broad Consultations

The CROC requires that States both make their reports widely available in their own countries (Article 44(6)) and undertake to make the principles and provisions of the CROC widely known, by appropriate and active means, to adults + children alike (Article 42). The Committee expects that this will be done. It is aided in this by the express requirement that it can consider information from United Nations agencies dealing in matters affecting children. It also uses information from NGOs quite

effectively in its sessions and its procedures expressly allow for consultations by the Committee with NGOs, and this usually occurs before each session.

A State's report will be dealt with in a manner of a true partnership with the Committee if it has been widely distributed and if there has been effective consultation with NGOs and others in that State's civil society, before the report is presented to the Committee. Indeed, some States include NGOs in their delegations to Geneva.

Hopefully, it is in the interests of all - government, families and children - that the provisions of the CROC are promoted, explained and complied with. In the end the object and purpose of the CROC is not to hear the words of governments or of NGOs but to protect children. If this happens then more children will be able to laugh, sing and become responsible adults and parents.

**The Convention on the Elimination of Racial Discrimination:
A Guide to Preparing Philippine National Reports
Roland Rich
Foundation Director, Centre for Democratic Institutions**

The Importance of CERD

To appreciate the critical importance of CERD one need simply look back at modern history. The colonial era was based on conquest of foreign lands resulting in the domination of peoples by colonial masters. The colonial relationships were inevitably racially divided leading to notions of racial superiority. Slavery was practised in the last century. It was first outlawed in England in 1833 and the American Civil War in the 1860s was fought partly on this issue. Slavery was also invariably based on racial lines.

Moving forward to this century we need go back only sixty years to Nazi Germany which had developed a theory of racial superiority. This was far more than an academic theory. Its consequences led to a World War. Tens of millions of people died as a result. The largest attempted genocide in history was carried out against the Jewish people.

Has the international community learned its lessons? Yes and no. The answer is in the negative because to this day we continue to bear witness to acts of massive violations of human rights based on racial discrimination. The term ethnic cleansing has become a part of our vocabulary and in the 1990s we have seen its application in Europe.

The future may be no brighter from the perspective of the elimination of racial discrimination if we follow the thoughts of Professor Samuel Huntington who, in his book *The Clash of Civilisations*, draws a bleak picture of future conflicts flowing from basic civilisational cleavages which also translate into racial divisions. Whether one accepts Huntington's analysis or not, we must remain alive to the possibility that the future may hold further problems of racial discrimination.

But there was also a positive answer. The international community has recognised the danger posed by racial discrimination and has taken action. The main weapon in the fight against this form of human rights abuse is the Convention on the Elimination of Racial Discrimination.

An Outline of the CERD

The CERD is a shorter and simpler Convention than, for example, the two Covenants or the Convention on the Rights of the Child. It currently has 155 parties. It uses the term 'Elimination' because it works on the realistic basis that racial discrimination continues to exist and that active steps need to be taken to do away with it.

Article 1 defines racial discrimination broadly. It goes well beyond the biological distinction dividing humankind into three broad races as it also includes distinctions based on colour, descent or national or ethnic origins. The acts dealt with under CERD are also broadly defined to include all acts that impair the enjoyment of human rights "in the political, economic, social, cultural or any other field of public life."

Another aspect of Article 1 worth emphasising is that it covers acts which have the "purpose or effect" of causing racial discrimination. Intention is thus not a necessary part of the definition. Actions which may be designed for another purpose altogether but which nevertheless have the effect of causing racial discrimination are covered

under the Convention. This puts a particular obligation on States Parties to examine carefully the effects of their policies on groups protected under CERD.

Article 1(4) provides for an important exception. It permits the use of special measures for the advancement of racial or ethnic groups. Thus the notion of affirmative action exists under CERD if the measures are not permanent and do not lead to the maintenance of a separate regime of rights.

We have learned in Australia in relation to the government's handling of High Court decisions concerning indigenous land rights that legal regimes for land based on consultation with and consent of the indigenous community are not in breach of the Convention. Regimes not based on consent of the indigenous people have been considered to be a problem by the CERD Committee.

Article 2 contains the parties' condemnation of racial discrimination and their undertaking not to practice it, defend it or protect it. The article also contains a provision urging parties to encourage multiracial organisations as a means of eliminating barriers between the races.

Article 4 poses a problem of ethics and priorities. It requires States to condemn all racist propaganda and to take positive measures to eradicate incitement to discrimination. So far so good. Paragraph (a) requires States Parties to make an offence punishable by law five categories of misconduct:

- dissemination of ideas based upon racial superiority
- incitement to racial hatred
- acts of violence against any race or ethnic group
- incitement to such acts
- the financing of the above activities.

In many countries there will be a dilemma between undertaking the first two obligations in this provision and the protection of free speech. The Committee on the Elimination of Racial Discrimination has on several occasions pointed to this problem and argued that the two principles are compatible. General Recommendation XV of 1993 notes that Article 19(3) of the International Covenant on Civil and Political Rights foreshadows the possibility that freedom of expression may be subject to certain restrictions under domestic law for the protection of others' rights. The Committee makes clear that the obligations under CERD are mandatory. Nevertheless, practice demonstrates that many States continue to have difficulty with criminalising any form of expression of opinion.

There is no such difficulty with the other obligations under Article 4(a) concerning violence, the incitement to violence and the financing of activities promoting such violence.

Another difficulty arises, however, in relation to Article 4(b) requiring States Parties to declare illegal any organisation promoting racial discrimination. Many States find it difficult under their domestic legislation to declare an organisation illegal merely because it holds racist opinions but before it has taken any action based on those opinions. The Committee has accepted that there may be a problem and, in Recommendation XV, has called on States who cannot undertake this obligation to be particularly vigilant and take the requisite action as soon as its law permits.

Article 5 contains a list of rights that must not be allowed to be diminished by racial discrimination. While most of the rights enumerated appear in the two Covenants, it is worth recalling that the drafting of CERD preceded the drafting of the Covenants. The enumeration of rights to be protected under CERD provides a useful checklist. It also has merit from a legal basis in case some States Parties are not also Parties to both Covenants.

Interestingly, Article 5 contains certain rights not expressly contained in the Universal Declaration, the drafting of which, of course, preceded the CERD. The right to inherit (Article 5(d)(vi)) and the right of access to any place of service for the general public (Article 5(f)) are particular to the CERD. They should be seen as a specific application of the right to non-discrimination applied to racial and other groups protected under CERD.

Article 6 requires States to provide everyone effective protection and remedies against acts of racial discrimination. There is some flexibility in the type of measures adopted by States ranging from criminal sanctions to the work of ombudsmen to mediation bodies.

Article 7 contains States Parties' undertaking to adopt educational and other measures to combat racial prejudice and promote racial understanding. The Committee has shown some impatience with countries claiming that there is no need for action under this article as racial discrimination does not exist in their country. The Committee, in Recommendation XVII(42) of 1993 recommended that this be a task entrusted to a National Commission.

To complete this brief overview of CERD, Articles 8 and 10 deal with the CERD Committee, its make-up and operation. Article 9 concerns States Parties' reports to the Committee which we will discuss below.

Articles 11–13 outline a procedure whereby States may bring to the attention of the Committee its view that another State is not abiding by the terms of the Convention. As this procedure has never been employed, it may be best not to devote too much time to it.

Article 14 contains a procedure to which States Parties must specifically accede by way of a declaration whereby individuals in these States may bring complaints directly to the attention of the Committee. The Article outlines the procedures to be followed by which the Committee might ultimately make its recommendations to the State concerned. Only 28 of the 155 States Parties have made such a declaration of which the Republic of Korea is the only Asian nation. Should the Philippines consider the adoption of a National Human Rights Action Plan, it might give consideration to making the relevant declaration under Article 14 of the CERD.

Article 15 concerns Trust and Non-Self-Governing Territories, which is of limited interest today. Article 16 is a saving provision for settlements of disputes.

Articles 17-25 contain the final provisions the only one of which particularly worth mentioning is Article 21 containing a provision for denunciation. Interestingly, the two Covenants do not contain denunciation provisions and the Human Rights Committee has argued that this must have been intentional. A possible explanation for Article 21 is that CERD was drafted before the Covenants and before the notion of the inalienability of human rights was fully understood.

Reporting under CERD

Article 9 governs the reporting requirement under the Convention. The report should cover the legislative, judicial, administration or other measures giving effect to the Convention. The initial report is required within a year of entry into force of the Convention for the party concerned and thereafter every two years. This periodicity is the shortest among the 6 human rights conventions and practice of States has demonstrated a tendency to combine two or more periodic reports and thus lengthen the gap between reports to the Committee.

The Committee is looking for as honest a presentation as possible in the Report. Clearly it is important to provide government policy on the issues and any legislation, regulations implementing regime in place. But it is also important to provide

information on the actual situation. What the Committee wishes to assess is whether sufficient progress is being made towards the elimination of racial discrimination.

The report is to be divided into two parts; the first part providing general background information and the second part dealing directly with implementation of Articles 1-7 of the Convention. Drafters of the report are encouraged to read the 20 or so General Recommendations made by the Committee over the years. They are easily accessible on the Internet by keying in the website of the UN High Commissioner for Human Rights

Since 1993, the Committee has developed other procedures to deal with pressing cases. This obviates the need to await a country report before a situation can be dealt with. One of the objectives to be met was the need to have the various human rights treaty bodies involved in dealing with situations of massive violations of human rights.

Accordingly, early warning measures and urgent procedures were developed in 1994 as part of the Committee's armoury. Early-warning measures are directed at preventing existing problems from escalating into conflicts. Urgent procedures are to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. Criteria for initiating an urgent procedure could include the presence of a serious, massive or persistent pattern of racial discrimination.

Philippine Reporting under CERD

The most recent Philippine Report to the CERD was submitted on 21 February 1997 combining the eleventh, twelfth, thirteenth and fourteenth reports (consolidated in one report) covering the reports due in the years 1990, 1992, 1994 and 1996. It was distributed as document CERD/C/299/Add.12 of 13 March 1997.

It is, in my opinion, a very good report. Among its strengths is the clarity of the explanations of the political and legislative context in a period covering momentous developments in Philippine history under the incumbencies of Presidents Aquino and Ramos. It contains a useful discussion of the constitutional situation and the legislation and Presidential decrees under it. It also contains information from the census that assists the Committee better to understand the make-up of the Philippine population.

The most impressive aspect of the Philippine approach is its acceptance that there are two major groups in the Philippines protected under CERD. Considerable attention is paid in the report to the indigenous cultural communities and to Muslim Filipinos. This is impressive because I suppose it was open to the Philippine authorities to argue that these groups are not racially or ethnically distinct from the Philippine population as a whole. To its credit, the Philippine report accepts that the indigenous cultural communities, though racially indistinct, "became historically differentiated from the majority of the Filipinos".

The distinctiveness of the Muslim community is also recognised in the Report "due to long years of neglect by the central Government." The report deals with the political and secessionist problems of the Muslim south in an open and honest way.

Not surprisingly, the CERD Committee gave the report and the situation in the Philippines high marks (CERD/C/304/Add.34 of 15 October 1997). The Committee welcomed a number of government initiatives including the National Decade for Filipino Indigenous People, the Social Reform Agenda and the steps taken to settle peacefully the problems with Muslim Filipinos. In terms of structural initiatives, the

Committee welcomed the establishment of the Commission on Human Rights and of the Tanodbayan (Ombudsman).

The Committee also pointed out a number of shortcomings. The absence of specific legislation prohibiting racial discrimination which the Committee noted should be introduced to complement the general provisions of the Constitution protecting human rights. Indeed, absence of specific laws and decrees implementing various parts of the Convention is the major complaint of the Committee.

The Committee also made some specific observations including concern at the number of reported cases of disappearances that do not appear to have been fully investigated. There is also concern over forced evictions and displacement of indigenous populations in development zones. Clearly these cases need to be fully dealt with according to law.

Future Reporting

The fifteenth periodic report was due on 5 January 1998 and the sixteenth report is due on 5 January 2000. Consideration might be given to consolidating those two reports and hopefully submitting them early in the new year.

It would be important before embarking on the drafting of the report to study the Committee's General Recommendations and to review some of the Committee's comments on other reports, perhaps of other Asian or developing countries. Most importantly, the Committee's comments on the Philippines' most recent report should be examined carefully to ensure that the Committee's concerns are addressed.

Among the issues the Committee has called on the drafters of the next Philippine report to concentrate on include:

- reporting on recent legislation
- the integration of the reporting on indigenous and Muslim Filipinos within the reports on Articles 1-7 rather than as separate parts of the report
- information on the work of the Commission on Human Rights and the Ombudsman
- information on education and social indicators for indigenous Filipinos
- a review of the implementation of Article 5
- information on strengthening the judicial system.

The Committee also noted that the Philippines might give consideration to the Philippines making the declaration under Article 14 allowing individual Filipinos the right to approach the Committee directly.

I would add two suggestions. I believe it would be useful to discuss a draft of the next report with cause-oriented groups interested in human rights. The Australian experience in this regard has been positive on balance. While these meetings open the opportunity for criticism of the government by NGOs, a confident government should not shrink from such a possibility. The positive aspect of such consultations is that it allows for the views and opinions of the NGOs to be listened to and considered. This can often lead to positive results.

My other suggestion is that the reports from the Philippines under each of the six Conventions should be more accessible to the people. The drafters of these reports should think of their readers as the people of the Philippines so that the report becomes a report not just to a Committee in Geneva but also to the nation as a whole. One way to do this is to put the Reports on the government web page. This would make them accessible nationally and internationally.

16 September 1999