



## HUMAN RIGHTS *advocacy*



### HIV PATIENTS' RIGHT TO MARRY

# Indian-Bangladeshi laws in perspective

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ONE of the hotly debated legal issues of the present time is whether HIV patients should have right to marry. Though a good number of countries have already enacted laws giving legal right to marry to the AIDS patients, it is still undecided in most of the countries of the globe. India and Bangladesh are two neighbouring countries which do not have any specific legislation settling the issue, though HIV/AIDS is considered to be a great threat to both Indian and Bangladeshi society. This write-up examines the present legal position regarding this issue in both the countries.

According to Islamic law and other modern laws, marriage is a civil contract which permits two persons of opposite sexes to live together. A successful marital life requires both mental or psychological and physical union of two persons. That is why the conditions for contract of marriage include both mental and physical elements. For entering into a marriage contract, a person has to attain a specified age, has to be mentally and physically healthy. Like any other contract, if any of these mental or physical conditions is not fulfilled, a person cannot marry. Even after marrying, if any of the conditions becomes absent, for example, if any of the spouses becomes insane or sexually incapable, the spouse is allowed to come out of that contract marital bondage. All these issues are regulated by laws of marriage and divorce.

Almost all marriage laws - for example, personal laws of Muslim, Hindu, Christian, Persian, as well as Special Marriage Act - provide the

'venereal disease' or 'sexually transmitted disease' as a ground for divorce to either husband or wife. HIV positive or AIDS is also a 'sexually transmittable disease'. Hence, legally HIV positive is also treated as a valid ground for divorce. (However, when recently an Indian court allowed divorce on the ground of HIV, it created huge controversy among the citizenry. In an earlier article titled 'whether HIV should be treated as a valid ground for divorce' - which can be found in The Daily Star, 17 Nov 2007 or at www.thedailystar.net/law/index.htm - I discussed about the controversy.) Now, if HIV positive is treated as a valid ground for divorce, it might also be treated as a legal incapacity to enter into a marriage contract. Then comes a question whether an HIV patient has right to marry.

Neither the Indian nor the Bangladesh Constitution has specifically recognised right to marry as a fundamental right. Though some legal experts argue that the right to marry is constitutive of one's right to life and that this right cannot be qualified on the basis of the health status of the person, seemingly, it is a legal right for only those who are mentally and physically capable. This, however, does not mean that a person suffering from a disease that makes him/her sexually incompetent loses his/her right to marry. When a person suffers from sexual disease, his/her right to marry becomes suspended only, and it revives again when the person recovers from the disease.

But when the disease is HIV positive or AIDS, which is medically treated as rarely recoverable, does the AIDS patients lose their right to marry? Suppose, an innocent 25 years youth is in some way

infected with HIV positive and there is no possibility to recover from it, should his/her right to marry be suspended lifelong? These are questions to which there are no clear-cut answers in Indian or Bangladeshi laws.

Legally, every young person has right to marry and to enter into a marriage contract. But unlike any commercial contract, responsibilities of the contract of marriage are not limited only within the contractual parties. Marriage is the foundation of a family as well as social relations. A couple owes a great responsibility to the family and society. In other words, right to marry is not an absolute one; it has to correspond to some other duties. For example, among the various objectives of a marriage, two prime objectives are to legalise the sexual intercourse between two persons of opposite sexes, and to procreate children. But through marriage, law does not only give right to two adult persons to satisfy their biological needs and to give birth to legitimate children, but also does impose a duty not to harm their life partner and children in any way. If a person is not able to perform this duty, he/she cannot exercise his/her right to marry.

Undoubtedly, HIV/AIDS is a deadly disease which can easily be transmitted to husband from wife and vice versa through sexual intercourse and it may infect the baby in the womb. Apparently, both Bangladeshi and Indian laws do not permit an HIV/AIDS patient to marry a healthy person and to infect their future innocent generation. These laws not only disallow it but also regard it as an offence. The penal provisions regarding this are same in both countries.

Section 269 of the Penal Code provides that whoever unlawfully

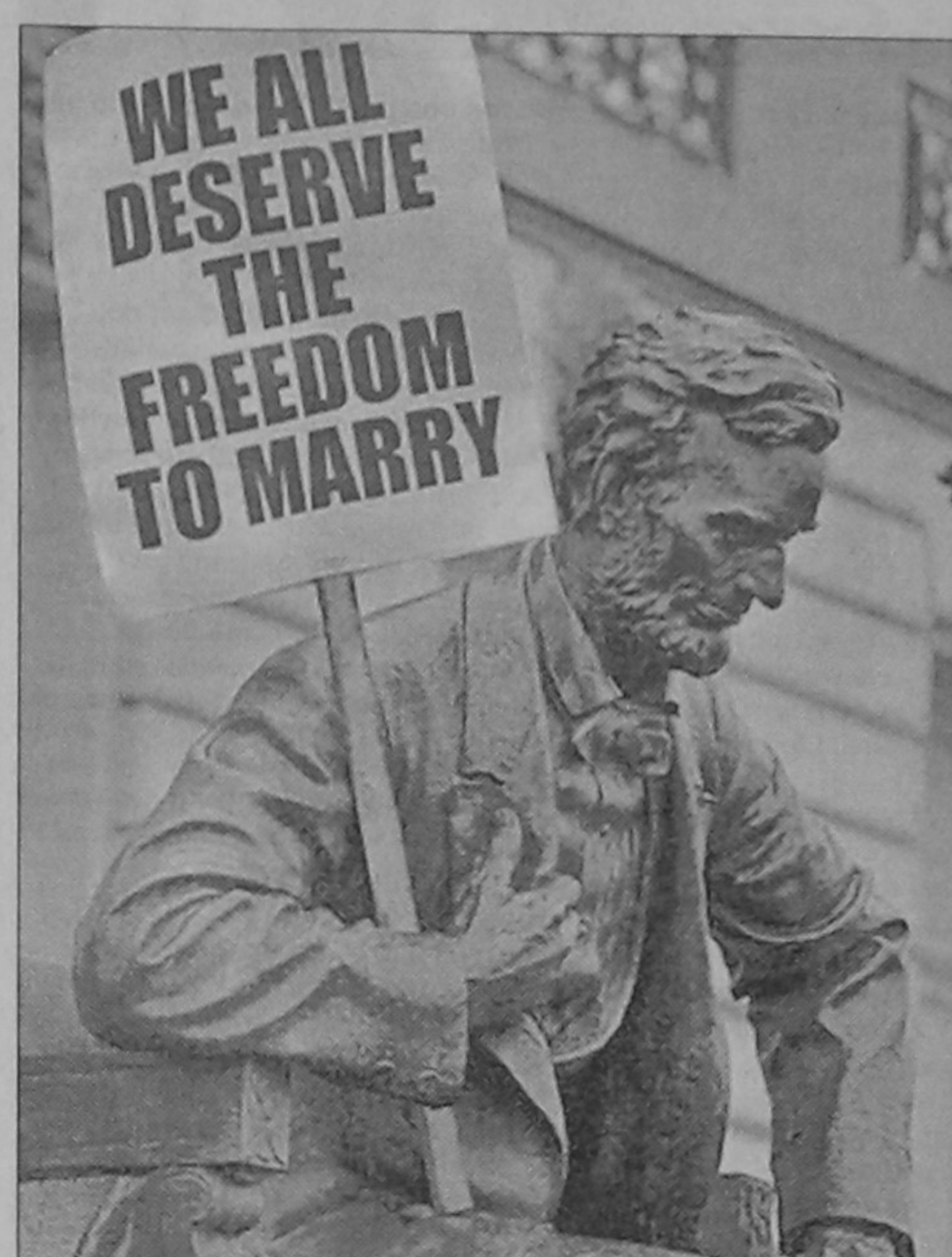
or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

Again, section 270 of the Penal Code also states whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

Hence, if a person suffering from the dreadful disease AIDS, knowingly marries a man or woman and thereby transmits infection to that person, he/she would be guilty of offences indicated in sections 269 and 270 of the Penal Code.

But if the global character of AIDS, its spread, infections, and human rights of the AIDS patients are taken into consideration, such a swiping legal decision cannot be made. And logically, the above mentioned legal provisions should not be applicable to a case of HIV/AIDS. In fact, these legal provisions were made at a time when HIV/AIDS was not detected. These provisions were made taking in consideration the other common diseases that are curable by proper treatment.

However, in absence of clear statutory provisions or policy guidelines, it is the court to decide whether these legal provisions will be applicable to a case of HIV/AIDS. So far as I know, no Bangladeshi court has faced the issue till today. But Indian courts faced this issue almost a decade



ago. In November 1998, a Division Bench of the Supreme Court of India held that if an HIV patient after knowing that s/he has been suffering from such dreadful disease decides to marry s/he shall be punishable under section 269 & 270 of the Indian Penal Code.

This judgement not only equated HIV to a 'venereal disease in a communicable form' but also

observed that "AIDS is the product of undisciplined sexual impulse. This impulse, being the notorious human failing if not disciplined, can afflict and overtake anyone how high so ever or for that matter, how low he may be in the social strata."

Of course, the court observed that the patients suffering from the dreadful disease AIDS deserve full

sympathy. They are entitled to all respects as human beings. They should not be avoided, which otherwise, would have bad psychological impact upon them. But, sex with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The court cannot assist that person to achieve that object.

At least one point is clear from these observations that the honourable Supreme Court Bench failed to take note that HIV also spreads through other non-sexual means, and any innocent person can be a victim of HIV/AIDS anytime.

The decision of the Supreme Court sent shock waves in the HIV community throughout the world. Subsequently another petition was filed before the Supreme Court against this judgment. A three-judge-bench decided that the earlier above decision was made without hearing all concerned groups (especially the NGOs) who are active in this field. Therefore, the learned three-judge-bench expunged the observations made in the abovementioned judgment and restored the rights of an HIV infected person to marry.

Nevertheless, the debate whether HIV/AIDS patients should have right to marry is not over. However, the overwhelming opinion world wide is that law should not take away the right of an HIV/AIDS patient to marry, as it is a basic human right. What law can do is to provide guidelines how they should exercise their right to marry. For example, as Indian Supreme Court guided, an HIV positive person must disclose his/her status to the other party. Then, if an infected or uninfected person knowingly wants to marry an

HIV/AIDS patient, law should not bar them. Again after marriage, their right to parenthood shall be suspended; so long scientific development ensures that HIV/AIDS parents can give birth to an uninfected baby.

In fact, HIV/AIDS is not just a disease. It is a global problem. So, all the issues related to AIDS should be decided globally. The world community should come forward to adopt a unique policy based upon human rights of HIV patients. Hopefully, UNAIDS has already been working for this purpose. Among the 12 International Guidelines on HIV/AIDS and Human Rights provided by UNAIDS, guideline 3 is very much pertinent here. It says, states should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

When it is important to see how much of these guidelines are being followed by the states, it must be kept in mind that law and policy is never a complete solution of any problem, but a partial solution only. As it is claimed by AIDS activists, the basis of discrimination against people living with HIV/AIDS is fear, and this fear comes mostly from wrong or distorted information. So, along side law and policy but with the same gravity, these countries must adopt a sufficient measure to correct misunderstandings about HIV.

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## HUMAN RIGHTS *monitor*

### Human Rights Watch 2008 Report

# Democracy charade undermines rights

THE established democracies are accepting flawed and unfair elections for political expediency, Human Rights Watch said today in releasing its World Report 2008. By allowing autocrats to pose as democrats, without demanding they uphold the civil and political rights that make democracy meaningful, the United States, the European Union and other influential democracies risk

human rights that are central to it, including the rights to free expression, assembly and association, as well as free and fair elections. But in 2007 too many governments, including Bahrain, Jordan, Nigeria, Russia and Thailand, acted as if simply holding a vote is enough to prove a nation "democratic," and Washington, Brussels and European capitals played along, Human Rights Watch said. The Bush

"It's now too easy for autocrats to get away with mounting a sham democracy," said Kenneth Roth, executive director of Human Rights Watch. "That's because too many Western governments insist on elections and leave it at that. They don't press governments on the key human rights issues that make democracy function: a free press, peaceful assembly, and a functioning civil society that can really challenge power."

In its World Report 2008, Human Rights Watch surveys the human rights situation in more than 75 countries. Human Rights Watch identified many human rights challenges in need of attention, including atrocities in Chad, Colombia, the Democratic Republic of Congo, Ethiopia's Ogaden region, Iraq, Somalia, Sri Lanka, and Sudan's Darfur region, as well as closed societies or severe repression in Burma, China, Cuba, Eritrea, Libya, Iran, North Korea, Saudi Arabia and Vietnam. Abuses in the "war on terror" featured in France, Pakistan, the United Kingdom, and the United States, among others.

Grave human rights abuses are fueling the worsening humanitarian crisis in Somalia and the Ogaden region of eastern Ethiopia. "The situation in Somalia and Ethiopia's Ogaden region, where millions are suffering, is a forgotten tragedy," said Roth.

Sudan's government bears principal responsibility for five years of the Darfur crisis, Human Rights Watch said. Some 2.4 million people are displaced, and 4 million people survive on humanitarian aid. In the last weeks, villages in West Darfur have been attacked, and civilians are at great risk as all sides ignore international humanitarian law.

Burma's military government, notorious for decades of abuse, used deadly force in August and September in response to peaceful protests by monks, pro-democracy activists, and ordinary civilians. Hundreds of people remain arbi-

trarily detained. In Sri Lanka, heavy fighting between the Liberation Tigers of Tamil Eelam and government forces led to deliberate and indiscriminate attacks on civilians. Hundreds of people have "disappeared," and more than 20,000 have been displaced.

Israel's blockade of Gaza denies 1.4 million residents the food, fuel and medicine they need to survive, a collective punishment that violates international law. Palestinian armed groups continue to launch indiscriminate rocket attacks on populated areas of Israel in violation of international law.

Human Rights Watch said sustained international pressure around the 2008 Olympic Games could push Chinese leaders to better respect human rights in China. But Human Rights Watch warned that the staging of the Olympics is exacerbating problems of forced evictions, migrant labor rights abuses, and the use of house arrests to silence dissidents. The Chinese government is cracking down on lawyers and human rights activists.

"The 2008 Olympics are an historic opportunity for the Chinese government to show the world that it can make human rights a reality for its 1.3 billion citizens," said Roth.

US abuses against so-called "war on terror" detainees are a major concern; 275 detainees are still held at Guantanamo Bay without charge. Some of those remain after being cleared by the United States for release, because they cannot be sent home and no country will resettle them.

The United States continues to have the highest incarceration rate in the world, with black men incarcerated at more than six times the rate of white men.

Human Rights Watch has documented a number of elections manipulated through: outright fraud (Chad, Jordan, Kazakhstan, Nigeria, Uzbekistan); control of electoral machinery (Azerbaijan,

Bahrain, Malaysia, Thailand, Zimbabwe); blocking or discouraging opposition candidates (Belarus, Cuba, Egypt, Iran, Israel in the Occupied Palestinian Territories, Libya, Turkmenistan, Uganda); political violence (Cambodia, Democratic Republic of Congo, Ethiopia, Lebanon); stifling the media and civil society (Russia, Tunisia); and undermining the rule of law (China, Pakistan).

Many of these tactics are illegal under domestic and international law, but rarely do outside powers call governments to account for it. Human Rights Watch said established democracies are often unwilling to do so for fear of losing access to resources or commercial opportunities, or because of the perceived requirements of fighting terrorism.

Human Rights Watch said the United States and the European Union should insist governments do more than hold a vote, and demand they uphold rights guaranteed by international law, including a free media, freedom of assembly, and a secret ballot.

"It seems Washington and European governments will accept even the most dubious election so long as the 'victor' is a strategic or commercially ally," Roth said.

The United States and some allies have made it harder to demand other governments uphold human rights when they are committing abuses in the fight against terrorism. And when autocratic governments deflect criticism for violating human rights by pretending to be democrats, the global defense of rights is jeopardized, Human Rights Watch said.

In Pakistan, where President Pervez Musharraf has tilted the electoral playing field by rewriting the constitution and firing the independent judiciary, parliamentary elections are due in February. But the United States and Britain, Islamabad's largest aid donors, have refused to condition assistance to the government on improv-

ing pre-electoral conditions.

In Kenya, the United States has at least expressed concern about the apparent rigging of December's presidential poll and the violence that to date has claimed more than 700 lives. But having accepted the results of oil-rich Nigeria's February 2007 vote, despite widespread and credible accusations of poll-rigging and electoral violence, Washington left the impression in Nairobi that fraud would be tolerated. It has not even threatened to withhold aid to push the government to negotiate with the opposition.

"Nigeria's leader came to power in a violent and fraudulent vote, yet he's been accepted on the international stage," said Roth. "It's no wonder Kenya's president felt able to rig his re-election."

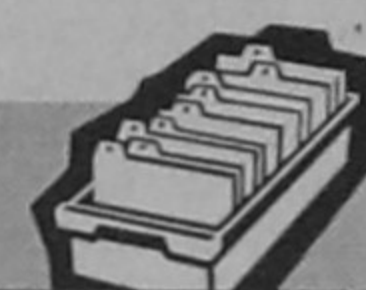
Bizarrely, the Organization for Security and Cooperation in Europe (OSCE), which is supposed to promote democracy, human rights, and security, agreed to give its chair in 2010 to Kazakhstan, which has vast oil and gas reserves coveted by both the EU and Russia. The OSCE decision came after the Kazakh ruling party "won" every seat in August parliamentary elections, in which, according to the OSCE's own monitors, the media was censored, the opposition suppressed, and the counting flawed.

Human Rights Watch noted positive developments in holding abusive leaders to account. Alberto Fujimori and Charles Taylor, the former presidents of Peru and Liberia, are on trial for human rights abuses. The International Criminal Court holds its first trial in May.

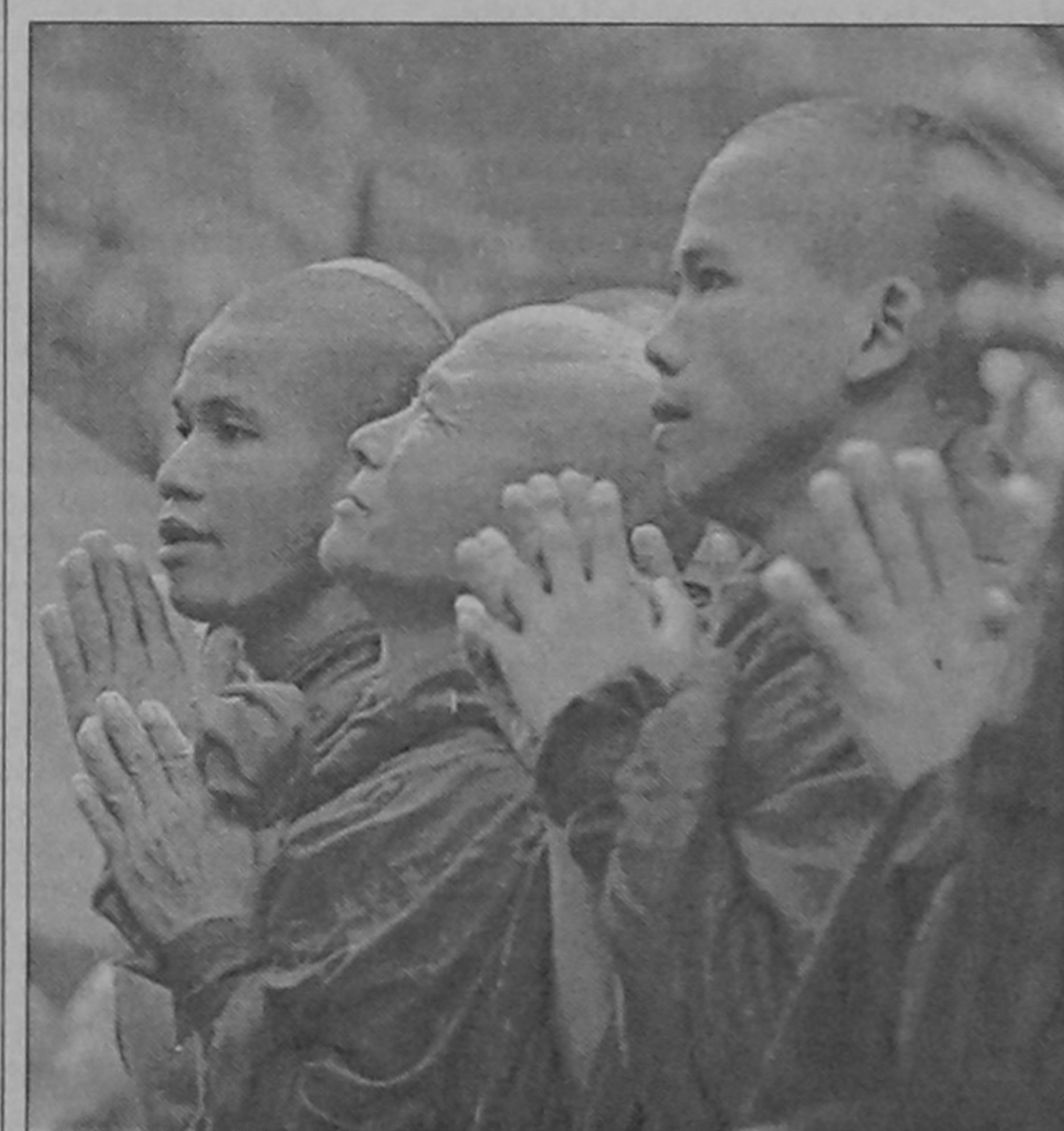
The World Report 2008 includes essays on China's foreign policy; how activists helped create the Yogyakarta Principles for gay rights; the scourge of violence against children at school, in the home, on the streets and in institutions; and the British government's erosion of the torture ban through "diplomatic assurances" against ill-treatment.

Source: Human Rights Watch.

## FACT *file*



### UN special rapporteur in Myanmar



NEARLY five months after Myanmar's forceful crackdown on peaceful protesters, political and human rights activists continue to be arrested, detained and sentenced to prison, an independent United Nations expert said today.

Paulo Sérgio Pinheiro, the UN Special Rapporteur on the situation of human rights in Myanmar, also voiced concern about the well-being of those being detained.

"Reports have been received expressing serious concerns regarding the health conditions of some of the prisoners who require immediate care and specific medication," Mr. Pinheiro said in a statement issued today in Geneva.

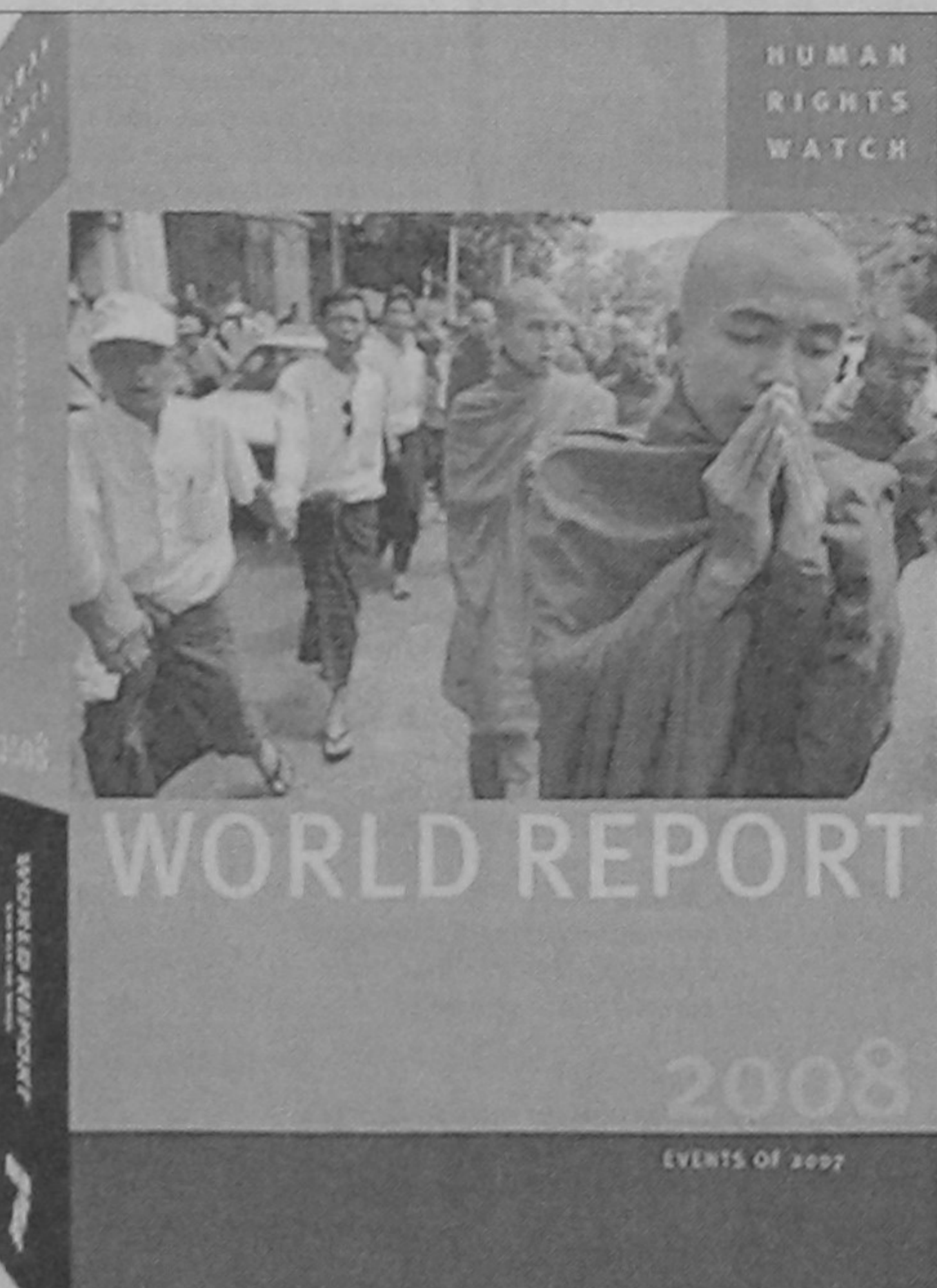
Calling the ongoing prosecutions "a flagrant abuse" of people's right to a free and fair trial in accordance with internationally recognized standards, he stressed that the Government has "a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms."

The Special Rapporteur visited Myanmar last November to verify allegations of abuses during the Government crackdown in the summer of 2007, determine the numbers and whereabouts of those detained or killed, and collect testimony about what happened.

He found that at least 31 people died during the crackdown 16 more than had been acknowledged by the Government and that between 3,000 and 4,000 people were arrested in September and October.

The UN Human Rights Council, to which Mr. Pinheiro reports, has requested him to conduct a follow-up mission to look into ongoing human rights violations before the Council's next session in March.

Source: UN News Service.



undermining human rights worldwide. States claiming the mantle of democracy, including Kenya and Pakistan, should guarantee the

administration has spoken of its commitment to democracy abroad but often kept silent about the need for all governments to respect human rights.