

The State of Human Rights in Eleven Asian Nations – 2007



Bangladesh • Burma • Cambodia
India • Indonesia • Nepal • Pakistan
Philippines • Republic of Korea
Sri Lanka • Thailand



ASIAN HUMAN RIGHTS COMMISSION

Human Rights Report - 2007

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ASIAN HUMAN RIGHTS COMMISSION (AHRC)

Asian Human Rights Commission 2007

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Cover photos

Top left: The chief justice of Pakistan, Iftikhar M. Chaudhry, presently under house arrest (Photo: Courtesy of the Pakistan Bar Council)

Top right: The acting chief justice of Pakistan, Rana Bhagwan Das, deposed on November 3, 2007, when President Pervez Musharraf imposed a state of emergency (Photo: Fahim Siddiqi, Courtesy of *Daily Dawn*, Karachi)

Bottom left: Munir A. Malik, former president of the Supreme Court Bar Association of Pakistan and a lawyer representing Chief Justice Iftikhar M. Chaudhry, who was poisoned during his arrest

Bottom right: Aitzaz Ahsan, current president of the Supreme Court Bar Association of Pakistan and a lawyer representing Chief Justice Iftikhar M. Chaudhry (Photo: Courtesy of the Pakistan Bar Council)

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Foreword

This publication features a collection of reports on the human rights situations in eleven Asian States, which together comprise the Asian Human Rights Commission's annual human rights report for 2007. The countries in focus this year are: Bangladesh, Burma, Cambodia, India, Indonesia, Nepal, Pakistan, the Philippines, the Republic of Korea, Sri Lanka and Thailand. Each report is prepared by the organisation's relevant country desk and does not purport to be exhaustive or a complete overview of the entire range of human rights issues that are present in the country, but rather presents the issues of concern and experiences that the organisation encountered during its work in 2007.

2007 was a year of significant upheaval in the Asian region, with one crisis following fast on the coat-tails of the last. These included the crack-down on peaceful protests in Burma, the battle for the independence of the judiciary and the resulting State of Emergency and political turmoil in Pakistan, and the stark rise in disappearances and conflict-related violence in Sri Lanka. While these situations have garnered a certain degree of interest around the world, other country situations have been overlooked, for example the mass arrests and State of Emergency in Bangladesh, or the ongoing problem of impunity and increasing lawlessness that risks presaging a return to conflict in Nepal, to name but two. Chronic human rights problems, such as those stemming from the caste system in South Asia, notably India, as well as poverty and the dysfunctional institutions of the rule of law that are at the root of most human rights violations across the nations of Asia are also included in this report.

The Asian Human Rights Commission wishes to thank all of the contributors to this report, as well as the organisation's partners in the field and its donors around the world.

Statement of Asian Human Rights Commission for International Human Rights Day 2007

ASIA : A year of historic struggles for human rights

The year 2007 will be remembered as a year in which historic struggles for human rights brought out increasingly belligerent responses from ruling elites across Asia. It is certain that throughout the region more and more people are resolved to assert their rights. It is also clear that its autocrats will respond more and more aggressively in order to keep control. Instead of acknowledging the need for change, states throughout Asia are continuing to prefer overt violence and blatant constraints on basic freedoms.

To mark International Human Rights Day, 10 December 2007, the Asian Human Rights Commission (AHRC) is releasing its latest annual report on the human rights situation in eleven Asian countries. Among them are Burma and Pakistan, which witnessed immense popular uprisings against military rule during the year. Also included are Bangladesh and Thailand, which have returned to periods of heavy military authoritarianism during the year. And there are Sri Lanka and the Philippines, where conflict and gross rights violations persist as a way of life, despite the superficial workings of elected governments. Other sections are devoted to Cambodia, India, Indonesia, Nepal and South Korea.

BANGLADESH

A prolonged and unjustifiable state of emergency has increased lawlessness and abuses of human rights in Bangladesh since January 11, 2007. All fundamental rights have been suspended. The armed forces have since enjoyed unbridled power and sheer impunity. Many human rights defenders have been threatened and intimidated, arbitrarily arrested and detained, tortured and implicated in fabricated cases. As a result, most human rights organisations have put a halt to controversial work, including fact-finding missions to document cases of abuse. Torture is rife but has not yet been criminalised, despite the government having ratified the UN Convention against Torture in 1998. The country's prisons are overcrowded. Private houses are being used to hold prominent persons detained on corruption charges. Custodial deaths from violence and neglect continue, with around 100 reported in 2007. Security forces also extrajudicially killed at least 148 persons up to the end of October. In not a single case of torture or extrajudicial killing were the alleged perpetrators brought before a court; the courts are not yet independent however, despite their powers having been formally separated from other parts of the state at the start of

November. There is no independent prosecution department or attorney general's office.

Country report link: <http://material.ahrchk.net/hrreport/2007/Bangladesh2007.pdf>

BURMA

The mass protests in Burma during August and September have shown that there is wide consensus for a transfer of power from the military regime to a civilian government. The government's response, with killings, disappearances and the arbitrary detention of thousands entirely outside of any legal process obliges the international community to take a determined stand, in particular through the United Nations. China and India, as Burma's big neighbors, have important roles and responsibilities. Thailand too must understand that its security depends upon improved conditions in its neighboring country. If economic conditions further deteriorate and dissent is stifled rather than acknowledged as legitimate, then it will cause further outpourings of persons in search of work and safety. All of Asia and indeed the world can only but benefit from a change in political and social arrangements in Burma, and thus it is in the best interests of all to see that it occur. Every society has its threshold, the point after which it will no longer tolerate things going on as before: Burma has reached its threshold. It is beholden on all of us to see that it does not spill over that point and into further uncontrollable violence and illegality, as it is sure to do if nothing is done to address the legitimate grievances of millions.

Country report link: <http://material.ahrchk.net/hrreport/2007/Burma2007.pdf>

CAMBODIA

Throughout 2007 the government of Cambodia continued to exhibit hostility towards UN human rights mechanisms, particularly the special envoy appointed by the Secretary General. In June the Cambodian ambassador in Geneva said that the government no longer recognized the envoy's mandate and effectively signaled that it will no longer cooperate with him. But at the same time, the country continued to join international human rights agreements, early in the year ratifying the Optional Protocol to the UN Convention against Torture. It has at the same time embarked on a number of reform programmes, although judicial reforms have lagged behind others. In February, a Code of Ethics for Judges was adopted, which if effectively enforced would be a remedy to endemic corruption and could inspire more public confidence in the courts; however, it lacks details and relies too much on political will to be made effective. Meantime, in August the Code of Criminal Procedures was finally brought into effect, after years of work; however, there remain doubts about its capacity to ensure fair trial, over the extent to which the justice minister may interfere with the workings of the judiciary, over inadequate protection of the rights of the accused, victims and witnesses; over the insufficient relaxing of pre-trial detention provisions, and over its silence on redress for human rights violations. During 2007 criminal lawsuits and

arrests continued to be used as a tool for political repression, particularly in land and labor disputes, and there were many restrictions on freedoms of the press, of expression and of assembly. Land grabbing was rife and remains one of the most serious economic and human rights issues in the country today.

Country report link: <http://material.ahrchk.net/hrreport/2007/Cambodia2007.pdf>

INDIA

Economic and political leaders across the world have referred to India as a model for the convergence of a new global order: democracy and capitalism going hand in hand. But from a human rights standpoint, India did not improve much in 2007, but rather increasingly showed up its failures and inabilities to give even the most basic guarantees to all of its citizens. While the central government tried its level best to cover up abuses in sensitive regions, like the northeast, state governments have continued to turn blind eyes towards extrajudicial killings and widespread custodial torture. The state administration of Gujarat even filed an affidavit in the Supreme Court that it had authorized its police to run interrogation chambers to 'elicit' evidence from suspects in an Indian version of Guantanamo Bay. Meanwhile, all government authorities in the country, particularly at the state level, have continued to neglect rural people to the extent that violent opposition groups have in some parts rapidly gained ground. Continuing caste-based discrimination and deaths from lack of food and simple illnesses have fanned anti-state sentiment in villages across the country, causing violent responses from security forces in Chhattisgarh and Andhra Pradesh, among other states.

Country report link: <http://material.ahrchk.net/hrreport/2007/India2007.pdf>

INDONESIA

Changes initiated in recent years have not been pursued, due in large part to a lack of political will. Police reforms have stalled, torture has not yet been prohibited according to international standards, the military continues to be the dominant institution in many regions and historic injustices have not been righted. Impunity remains the key feature of law and order, particularly with regard to torture and other gross abuses of human rights. Torture has not been criminalised; nor do mechanisms exist through which evidence of torture can be properly recorded, complaints made and investigated or any sort of redress obtained, either through the ordinary courts or the Human Rights Court. There remains heavy resistance to the amending of the outdated Penal Code. Even though a law on Victim and Witness Protection was passed in 2006, the Witness Protection Agency has not yet been established to give it effect.

Country report link: <http://material.ahrchk.net/hrreport/2007/Indonesia2007.pdf>

KOREA

One bright moment for human rights in Asia during 2007 came with the passing of a revised Criminal Procedure Act in the Republic of Korea (South Korea), which will be passed into law in 2008. The revised act sets in place many new measures to prevent abuses during criminal investigation, including provisions for non-custodial inquiries, rights to an attorney and to remain silent throughout interrogations, and technical innovations, specifically the use of videotaping, including special provisions to prevent tampering after recording. It also has amended and tightened procedures on warrants, court hearings, review of arrest and detention, and emergency searches and seizures. And it has explicitly introduced an exclusionary rule on evidence obtained not according to correct procedure. However, some major human rights concerns persist over laws relating to migrant workers; the rights of “irregular” workers; restrictions on freedom of assembly, and the continued use of the National Security Law. The persistent absence of any mechanisms to implement international jurisprudence and laws means that decisions on Korea at the UN Human Rights Committee have not been given effect; the government has so far failed to take up recommendations of the National Human Rights Commission that it address this gap in the country’s human rights framework.

Country report link: <http://material.ahrchk.net/hrreport/2007/SouthKorea2007.pdf>

NEPAL

Following a tumultuous year in 2006, in which popular uprisings effectively ousted the King of Nepal and the alliance of seven political parties signed the Comprehensive Peace Accord with the Maoists, bringing to an end a decade-long bloody internal armed conflict, it was expected that 2007 would be a year of progress towards peace, democracy and respect for human rights. Unfortunately, political gamesmanship and the lack of political will by all parties to address the much-needed human rights issues, such as the widespread impunity concerning forced disappearances, extrajudicial killings, torture and the rights of marginalized people led to increased criminalisation and the proliferation of armed groups. Society, which had earlier shown great unity, began to break apart along ethnic, social and political divides. At the end of 2007, the Maoists have left the country’s government, grave rights abuses are ongoing and there is a palpable fear that the country may soon again return to conflict. Addressing past and present rights abuses remains the only way to ensure stability, security and progress in the country—it is time for the country’s leaders to start taking credible measures in this regard.

Country report link: <http://material.ahrchk.net/hrreport/2007/Nepal2007.pdf>

PAKISTAN

This year was one of great upheaval in Pakistan, culminating in General Pervez Musharraf declaring a state of emergency and suspending the constitution in October. The crisis has centered on the judiciary's heroic struggle to free itself from executive control, led by Chief Justice Iftekhar Chaudhry, who has now been deposed from his post for the second time in one year. Thousands of lawyers and others have been held under detention in recent months, outside of the ordinary workings of law. Heavy restrictions have been placed on the media, with the broadcasts of two networks from abroad shut down. The question of disappearances remains unaddressed, with the failure of the military authorities to respond to earlier attempts by the courts to obtain answers in over a hundred specific cases. Torture remains habitual. Women and minorities continue to suffer violence and discrimination disproportionate to that already shared out among the rest of the population. Without the unconditional restoration of the judges dismissed since the state of emergency, without a complete lifting of its provisions and removal of restrictions on the media, and without addressing the growing numbers of forced disappearances and other grave abuses of human rights the situation will only continue to deteriorate. If that indeed happens then it will be a very serious cause for concern throughout the entire region.

Country report link: <http://material.ahrchk.net/hrreport/2007/Pakistan2007.pdf>

PHILIPPINES

Continued failure to prosecute and punish the perpetrators of extrajudicial killings has caused the situation of human rights in the Philippines to go from bad to worse. Repeated government assurances that it would take legal action have come to naught. Neither the recommendations of the presidential-appointed Melo Commission or those of international agencies have been given serious consideration. Institutions exist, yet fail to perform as mandated; the reasons for the failure have not been examined in any detail. Human rights defenders, labor unionists, peasant leaders and others continue to face grave threats to their lives. The Human Security Act introduced in 2007 will pose further threats to these persons as it gives enormous new powers to the police on the pretext of combating terrorism. Even without this law, the police have been a major impediment to human rights, both through their acts and omissions. Investigations are poorly done or are not impartial. Witness protection is for all intents and purposes non-existent. Neither police nor soldiers need fear the possibility of being brought before the courts over incidents of human rights abuse. Bills on human rights have stood before the national legislature for years without being brought into law, notably those on torture and enforced disappearance.

Country report link: <http://material.ahrchk.net/hrreport/2007/Philippines2007.pdf>

SRI LANKA

In Sri Lanka, the last months have seen a return to the situation prevalent before the ceasefire agreement in 2002. The result is the arrests of thousands of people purely on the basis that they are Tamil, and on the other hand both parties to the conflict, the armed forces and LTTE, have engaged in attacks on civilians, killing many. Virtually no investigations are taking place concerning violations of rights in any part of the country, either under the control of the government or the LTTE. The presidential commission appointed for inquiry into gross violations including disappearances has proven to be a farce. Sri Lanka has the highest frequency of disappearances reported to the UN. Under these circumstances the Sri Lankan government's refusal to allow any international human rights monitoring amounts to sanctioning of the prevalent levels of violence in the country. The present situation requires immediate scrutiny and action on the part of the UN and the international community. And the international community must examine whether it is justifiable to remain inactive purely on the grounds of the government's unwillingness to allow intervention to stop the high levels of violence in the country. The levels of insecurity for Tamils and Sinhalese alike are the worst seen in recent times as 2007 comes to a close.

Country report link: <http://material.ahrchk.net/hrreport/2007/SriLanka2007.pdf>

THAILAND

Throughout 2007, the military and its allies decisively reasserted their prerogative to determine the shape and direction of Thailand, following the coup of last September. It pushed through a new constitution of its own liking a year later, under extremely adverse circumstances, and is set to return power to a civilian government only after an election that it is also clearly determined to manipulate as much as possible. The constitution has compromised the senior judiciary by giving judges powers that are outside of their ambit and can but only subject them to greater political pressure and undue influence from other parties. Meanwhile, the army has awarded vast increases in funding to itself with no outside accountability, and reestablished a cold-war era command to oversee domestic affairs. It is set to have its appointed national assembly pass a security law that will give it unprecedented powers. It has throughout the year anyhow kept much of the country under martial law, and the southern border provinces under special emergency regulations. And while it announced investigations into the human rights violations of the former government it firmly blocked efforts to investigate killings, torture and other abuses committed under its administration, particularly those of soldiers.

Country report link: <http://material.ahrchk.net/hrreport/2007/Thailand2007.pdf>

This year also saw the finalizing of the new UN human rights body, the Human Rights Council. The council is yet to impress or convince, but needs to be given some more time in which to prove it is capable of performing according to its mandate. Its mechanisms, notably the Universal Periodic Review and interactive dialogues with Special Procedures offer some new avenues for human rights groups. However, its membership remains problematic, with many of the grave human rights violators playing significant negative roles.

The complete reports on each of the 11 countries contained in the AHRCs 2007 human rights report are available on the internet at <http://material.ahrchk.net/hrreport/2007/>.

About AHRC: *The Asian Human Rights Commission is a regional non-governmental organisation monitoring and lobbying human rights issues in Asia. The Hong Kong-based group was founded in 1984.*

BANGLADESH

Prolonged unjustifiable State of Emergency increases lawlessness and abuses of human rights

Bangladesh has been under a State of Emergency since January 11, 2007, which was proclaimed by the President of the country following an upsurge in violence between rival political groups. The State of Emergency has been prolonged for the whole year even though this violence has subsided, and it is presumed that it may be continued for an indefinite period over coming months and perhaps years.

The State of Emergency has been accompanied by the Emergency Powers Ordinance-2007, which has supplemented the Emergency Powers Rules-2007. Provisions contained within these laws run contrary to a range of international human rights norms and standards. For example, section 5(1) of the Emergency Powers Ordinance-2007 declares that *“No question should be raised before any court regarding the orders passed on the basis of this ordinance or by the authority of this ordinance”*. On the other hand, section 5(2) declares, *“If it is deemed that any order has been passed or signed by any authority according to the power delegated under this ordinance that order, passed or signed by that authority, shall be deemed admissible under the definition in the Evidence Act-1872 (Act X of 1872) in the courts.”*

This section has been repeatedly abused by law-enforcement agents in the country, notably to carry out arbitrary arrests of people without the need for any justification. The law effectively legalizes arbitrary arrests and detention. Any person arrested in Bangladesh runs the risk of being subjected to torture, so this law has in reality facilitated the process of torture of persons by the police, the armed forces, and paramilitary forces such as the notorious Rapid Action Battalion (RAB) and the Bangladesh Rifles (BDR), border security force. Coercion, including torture, is used to make arrested persons sign blank documents, which the authorities then complete in order to suit any needs they may have, including exonerating themselves from wrong-doing, justifying their actions or falsely incriminating the persons in question. Statements are also being forcibly extracted from victims and recorded using audio-visual equipment for the same reasons. This ‘evidence’ is then used against persons in court, and under the provisions of the emergency, cannot be challenged.

Rule of Armed Forces instead of rule of law:

Before the proclamation of the State of Emergency in the country the government of Bangladesh deployed thousands of its armed forces ‘to aid the civil administration’ offering

magistracy power to them. In section 2 (a) of the Emergency Powers Rules-2007, the country's "law and order maintaining force" has been defined as including the Bangladesh Police, the Armed Police Battalion, the Rapid Action Battalion, Ansar (a village defence paramilitary group), Battalion Ansar (an armed village defence paramilitary group), the Bangladesh Rifles, the Coast Guard forces, the National Security Intelligence service, the Defence Intelligence service and the Armed Forces. Under Section 16 (2) of the Emergency Powers Rules-2007, any member of the 'law and order maintaining force' is authorized to arrest any person on suspicion without a warrant. Since the state of emergency the involvement of the soldiers has been increased covering all the institutions and corporations as well as autonomous bodies.

The armed forces are playing a dominant role, and are perpetrating arbitrary arrests, torture and detaining people using the Emergency Powers Ordinance-2007 and Emergency Powers Rules-2007, while the police are following the commands, suggestions or recommendations of the armed forces.

The armed forces – an unchained, insane horse:

The armed forces of Bangladesh have been enjoying unbridled power and have been abusing human rights according to their wishes and capacities during the State of Emergency; they are not accountable to any authority at all. Instead, they are allowed to do and undo whatever they want. Section 20 of the Emergency Powers Rules-2007 authorizes the 'law and order maintaining forces' to use force in order to execute any order issued according to the Rules.

All the institutions, corporations and autonomous bodies, including the sports federations, of the country are either occupied by the officers of the armed forces. A few offices where the soldiers are still unwelcome are facing tremendous pressure and paying the costs for their 'unfriendliness,' having been effectively cordoned off by the military.



Bangladesh is facing increasing militarization and the soldiers enjoys power to arrest people without warrants and are guaranteed impunity for any misdeeds

Special Powers Act-1974- a supplementary license of detaining people:

Autocratic authoritarian tools for abusing human rights have been incorporated into every-

day governance by the military-backed rulers of Bangladesh. For decades, the people of Bangladesh have been suffering under the Special Powers Act-1974, which has been frequently abused to detain people arbitrarily. Section 21 authorizes the government to detain any person under the Special Powers Act-1974. Now, during the State of Emergency, things are worse, notably due to the Emergency Powers Rules-2007.

The above act has also been used to detain persons arbitrarily for longer periods. According to section 3 of the Special Powers Act-1974, the Government may detain any person for a prejudicial act [according to section 2(f) of the Act] or remove any person from Bangladesh. The relevant sections of the Act are as follows:

Section 3. Power to make orders detaining or removing certain persons-

- (1) The Government may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act it is necessary so to do, make an order-*
 - (a) directing that such person be detained;*
 - (b) directing him to remove himself from Bangladesh in such manner, before such time and by such route as may be specified in the order;*

Provided that no order of removal shall be made in respect of any citizen of Bangladesh.
- (2) Any District Magistrate or Additional District Magistrate may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act within the meaning of section 2(f) (iii), (iv), (v), (vi), (vii) or (viii) it is necessary so to do, make an order directing that such persons be detained.*
- (3) When any order is made under sub-section (2), the District Magistrate or the Additional District Magistrate making the order shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than thirty days after the making thereof unless in the meantime it has been approved by the Government.*
- (4) If any person fails to remove himself from Bangladesh in accordance with the direction of and order made under sub-section (1)(b), then, without prejudice to the provisions of sub-section (5), he may be so removed by any police officer or by any person authorised by the Government in this behalf.*
- (5) If any person contravenes any order made under sub-section (1)(b), he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.*

Section 4. Execution of detention orders- A detention order may be executed at any place in Bangladesh in the manner provided for the execution of warrants of arrest under the Code.

According to section 9 of the Act, *the Government is authorised to 'constitute an Advisory Board for the purpose of this Act'.* Another arbitrary section of the Act is following below:

Section 12. *Action upon the report of advisory board-*

(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit:

Provided that the Advisory Board shall, after affording the person concerned an opportunity of being heard in person review such detention order, unless revoked earlier, once in every six months from the date of such detention order and the Government shall inform the person concerned of the result of such review.

Since the Special Powers Act seems to be extremely prejudicial to civil rights, and since it empowers the government with a wide range of powers for repression, the act has been under severe public criticism from its inception. The opposition parties had always committed themselves to repeal it if they were voted into power. But in the last 33 years, the Act has yet to be defeated.

The ability to use force at will has increased the vulnerability of any persons that oppose the government, be they demonstrators, journalists or human rights defenders, for example. On August 23, 2007, some 12 journalists were arrested in one incident while covering the clashes between the military and Dhaka University students and other protesters. It is believed that several other journalists have also been arrested in separate incidents.

Another disastrous era for Bangladesh:

The Government of Bangladesh wrongly depends upon the armed forces, who are quite detached from public functions unlike the police, in order to maintain law and order during different periods. Instead of correcting and reforming the policing system of the country, the government deploys the armed forces to handle crime and maintain law and order. In reply, the military brings about human rights disasters in the country through arbitrary arrests and detentions, torture, and by causing a severe fear psychosis among the people. During each of the operations by



Victims of mass arrest by the police on the day of the proclamation of a state of emergency

the armed forces, hundreds of innocent people become physically and/or psychologically injured, and potentially handicapped for life.

According to the information collected by local human rights groups, more than 200,000 people have been arbitrarily arrested and detained in the country during the State of Emergency thus far, with a high proportion of them having been subjected to ill-treatment or torture, which remains endemic in the country. Most of the victims of arbitrary arrest are brutally tortured by the soldiers at the scene of arrest, on the street, on the way to military camps, as well as inside the camps. Many victims are implicated in pending cases and framed with fabricated charges. When law-enforcers fail to bring any charges against the victims, they then send the arrested persons to the courts under section 54 of the Code of Criminal Procedure. Finally, the arrested persons are detained in prison for indefinite periods.

Many of the victims who experience brutality at the hands of the army are socially stigmatised despite their resultant permanent physical and psychological ailments, and this can last for generations. The State of Emergency has been continuously causing arbitrary arrests and detentions, ill-treatment, torture, physical disabilities, psychological fear and panic, deaths in custody, deprivation of medical treatment, distortion and destruction of medico-legal evidence, the concealment of the truth regarding cases of custodial torture, extreme suppression of the public voices and absolute injustice for victims. It has engendered the disappearance of fundamental civil and political rights. The basic human rights of the citizens in Bangladesh have effectively been banished.

Suspension of fundamental rights - the denial of the freedom of expression:

The State of Emergency has suspended many fundamental rights, including the freedoms of expression and assembly. Section 3 of the Emergency Powers Rules-2007 absolutely forbids any kind of association, procession, demonstration or rally in the country without special permission from the authorities. Under Section 3(4) of the above, any person found guilty of holding any meeting or demonstration faces two to five years rigorous imprisonment. Additionally, Section 5 completely prohibits the publishing of any criticism of the activities of the government that is deemed to be 'provocative' by the authorities, in news bulletins, video footage, talk shows, features, articles, editorials or cartoons. A large number of grass-roots-level newspapers have reportedly been ordered to close indefinitely.

Two private television channels, ETV and CSB News have been accused of broadcasting 'provocative' video footage and reports concerning recent riots in the country, and on August 23, 2007, the Press Information Department ordered them not to publish any more such programmes. This was supplemented by an order to close down the CSB News TV channel. The AHRC was informed that the transmission of the CSB News was reportedly

cut from 6:35 pm on 6 September 2007 for seven days through the intervention by the Bangladesh Telecommunications Regulatory Commission (BTRC). The BTRC chairman, who is a retired major general of the army, was accompanied by a number of military officers at this time. It is believed that the BTRC stopped the transmission of the CSB News due to its broadcasting of the brutality of the armed forces and the police during the protest in the Dhaka University area. It is alleged that the government has intentionally stopped the transmission the TV channel without any guaranteed possibility of resuming its programme after the said seven days; it is still closed.

The officers of the armed forces monitor the television news bulletins and newspapers and threaten and intimidate editors by phone or in person. Television channels have stopped broadcasting many of their issue-based discussions and talk show programmes and newspapers are also engaged in heavy self-censorship. The media now only publish items that the government will like. The stories of arbitrary arrests, torture and extra-judicial killings at the hands of the armed forces and other law-enforcement agents, including incidents of fabricating charges against innocent people by the law-enforcement agencies, are rarely published in the print and electronic media.

Human Rights Defenders facing high risks:

Human rights defenders are becoming increasingly vulnerable in Bangladesh. Numerous human rights defenders have been threatened and intimidated, arbitrarily arrested and detained for months at a time, tortured and/or implicated in fabricated cases. As a result, most human rights organizations have put a halt to most controversial work, such as fact-finding missions to ensure the documentation of cases of human rights abuses. This could give rise to a situation where human rights abuses are increasing, but fewer reports are surfacing, which could send the erroneous signal to the outside world that the human rights situation is improving, while in reality it is getting worse.

Case Study-1: Jahangir Alam Akash arbitrarily arrested, detained, tortured and charged in fabricated cases

Mr. Jahangir Alam Akash, a human rights defender and journalist by profession, was arbitrarily arrested by the Rapid Action Battalion (RAB)-5 deployed from the Rajshahi region, from his residence at around 2 am on 24 October 2007. The RAB personnel (in plain clothes) reportedly dragged Mr. Akash, who was sleeping at the time,



Jahangir Alam Akash is a victim of arbitrary arrest and torture at the hands of the Rapid Action Battalion for exercising his freedom of expression as a journalist and a human rights defender.

out of his house and took him away. It is alleged that Mr. Akash was arrested because of a number of his reports in the newspaper Daily Sangbad and TV news channel CSB News, regarding a number of reports on the alleged torture and extra-judicial killings committed by RAB personnel.

After the arrest, Mr. Akash was allegedly hung from the ceiling until the afternoon of October 24 and severely beaten by the RAB personnel in the army camp, Rajshahi. Mr. Akash later informed one of his relatives that Major Rashidul Hassan Rashed and other army officers brutally assaulted him in the army camp. The AHRC reported that Major Rashidul Hassan Rashed had seriously intimidated the victim on 3 May 2007 for broadcasting news on the attempted extra-judicial killing of an alleged terrorist on a private television channel.

Mr. Akash was then handed over to the Boaliya police, who then produced him before the Chief Metropolitan Magistrate Court, Rajshahi, under arrest for Section 16(2) of the Emergency Powers Rules-2007. Under Section 16(2) of the Emergency Powers Rules-2007, any member of the 'law and order maintaining force' is authorized to arrest any person on suspicion without a warrant.

The magistrate of the said CMMC-Rajshahi then ordered Mr. Akash to be remanded at Rajshahi Jail. Due to his serious condition, Mr. Akash is currently in Rajshahi Jail Hospital. We have received information that his legs are horribly swollen, that there are injury marks all over his body and that he is unable to walk now due to his injuries. However, the jail hospital does not provide appropriate medical treatment to Mr. Akash.

The AHRC has also learned that Mr. Akash has been implicated in another fabricated extortion case under Sections 385 (extortion), 386 (extortion by putting any person in fear of death or of grievous hurt) and 506 (criminal intimidation) of the Bangladesh Penal Code (Case number: Boaliya Thana No.13 of 2007). It was filed by a person named Harun, son of Jalil, at the Puthia Police Station in Rajshahi district on October 23.

In his complaint, Harun alleged that he was forced to give a bribe to Mr. Akash, who threatened him with a sharp weapon. However, Harun had reportedly been convicted in a rape case in which Mr. Akash had conducted the fact-finding mission and identified him as the offender. Subsequently, Harun was convicted for a jail-term and fine by court. The local human rights groups believe that this is a plot against Mr. Akash to restrict his freedom of expression and human rights activities.

Mr. Akash is the coordinator of the Task Force against Torture (TFT)-Rajshahi city as well as the regional coordinator of the Bangladesh Institute of Human Rights (BIHR) in the Rajshahi region. He is also a journalist by profession working as the bureau chief of

private news television channel CSB News and the Daily Sangbad, a Dhaka based national newspaper.

According to the most recent information, he was released on November 9, 2007, but was shortly afterwards charged with extortion and now faces what is expected to be a summary trial under the Emergency Powers Rules-2007. There are therefore grave concerns for Mr. Akash's rights, freedoms and personal integrity.

Case Study-2: Nasiruddin Elan threatened and intimidated by Navy officers

At around 2 pm on 26 April 2007, Mr. ASM Nasiruddin Elan, the acting director of the ODHIKAR, a human rights organization based in Dhaka, received a phone call from Lieutenant Commander Mr. Mehedi of the Bangladesh Navy. Mr. Mehedi asked Mr. Elan to meet Mr. Zubayer, Captain of the Bangladesh Navy, at their Naval Headquarter in Banani, Dhaka. Soon afterwards another phone call was received by Mr. Elan from a person allegedly attached to the Naval Headquarter Intelligence. The caller informed that Captain Mr. Zubayer wanted to discuss with him regarding two incidents of deaths in naval custody in the Bhola district, which was earlier investigated by the Mr. Elan's fact-finding teams representing ODHIKAR.

At around 10:15 am on May 2, Lieutenant Commander Mr. Mehedi called to the office of ODHIKAR and once again asked Mr. Elan to go to the Navy Headquarters. Mr. Mehedi told Mr. Elan that Captain Zubayer wanted to discuss with him regarding the death of two persons, and insisted him to meet Captain Zubayer. Mr. Elan, however, told Lt. Commander Mehedi to instead send an official letter from the Navy Headquarter. At 12:15 pm and at 3:30 pm, Lt. Commander Mehedi made repeated phone calls insisting for him to report to their Headquarters at 9 am on May 3. Lt. Commander Mehedi told Mr. Elan that their office would never send any official letter to his organization. At 4 pm, Lt. Commander Mehedi once again called Mr. Elan informing him that his colleague, Captain Zubayer would meet him, at 9 am on May 3.

On May 3, at around 9 am, a man wearing plain clothes went to the ODHIKAR office. He introduced himself as Mr. Mizan, a radio operator and said that he was sent by the Navy officers to take Mr. Elan to the Headquarters. Mr. Elan was taken in a scooter with registration number: Dhaka Metro-Tha-03-3766. It was Mizan who driven the scooter towards the Navy's Headquarters and arrived there at 9:40 am. At 9:45 am, a Sub Lieutenant named Mr. Enayet Hossain, had called from the Navy Headquarters to inquire whether Mr. Elan had left from the Naval Headquarters or not.

At around 9:50 am, Mr. Elan was taken inside the Navy Headquarter and was made to wait until 11 am inside the communication room. A navy staff came in and took him to the room of Captain Zubayer. Two navy officers were present there at that time. Within a

while another two officers wearing plain clothes entered the room. Captain Zubayer addressed them as officers of the Directorate General of Forces Intelligence (DGFI). Soon after the two DGFI officers came in, Captian Zubayer started casting abusive words against Mr. Elan telling him: "How dare you criticize the Navy?" and proceeded on threatening him as: "If I kill you now, who will save you?"

The other persons inside the room likewise started interrogating Mr. Elan using rough and harsh language. They mentioned that they knew a lot about ODHIKAR and if necessary they would interrogate even the President of ODHIKAR, Mr. Hassan Arif, who is a former Attorney General of Bangladesh. Showing a number of paper clippings of ODHIKAR's fact-finding report. They also accused all the staffs of ODHIKAR as involved in seditious and anti-state activities and that they are all traitors.

"You all are agents of (abusive language) America, India and Pakistan from where you receive money." The officers continued on casting abusive language saying: "We (expletive) ODHIKAR, American Embassy and your admirers." One of them said: "I will hand you over to the DGFI for further action." The navy officers then told Mr. Elan to: "Stop you activities immediately! You must keep in mind that you are working in a State of Emergency". Captain Zubayer said to Mr. Elan that "it is better for him to start agricultural farming than engaging in human rights activities." He also warned Mr. Elan not to mention about their meeting to anyone, otherwise he could be arrested.

At the end of the meeting, Mr. Elan was asked to wait in the next room. His cell phone was switched off and kept away from him while he was being blocked from communicating with his colleague, Mr. Elyus. Mr. Elyus had earlier accompanied him to the place but was refused entry into the office of Captian Zubayer.

Case Study-3: Human Rights Defender and father went on hiding following military threats

On 24 January 2007, at around 11:00 am, a Chowkidar (messenger and security guard of village) of the local Union Council namely Mr. Rabindra Nath went to Mr. F M Abdur Razzak's house in Godaipur village under the Paikgachha police station. Chowkidar Rabindra told Mr. Razzak's wife Mrs. Rahima that Major Mr. Mizanur Rahman, commander of the army in Paikgachha upazilla (sub district), asked Mr. Razzak and his father Mr. Nur Ali Fakir to go to the Paikgachha Army Camp (temporarily established in the Lona Pani Kendra Motso Gobeshana (Saline Water Fisheries Research) Institute in the Paikgachha town at 10:00 am on the following morning (25 January 2007). At around 5:00 pm, the same Chowkidar came to Mr. Razzak's house to deliver the same message, and warned Mr. Razzak's wife that the failure to meet the Army Camp Commander would bring about danger to Mr. Razzak's family.

Since the first summon Mr. Razzak requested his friends over telephone to check the reason of asking him to meet the Major. In reply, his friends informed him that one of his neighbours, namely Mr. Mohor Ali Sana, made a complaint to the Army camp that Mr. Razzak forcibly took Taka 35,000 (USD 523) from that person, which should be refunded now with the assistance of the military personnel. It has been learned that one Mr. Mohor Ali Sana (55) had some dispute with his neighbour Mr. Shaheb Ali Mollik over lands and financial reciprocations. They lodged several charges against each other with the local police station and court. In one stage, the both parties had arbitration in presence of their respective lawyers where they came to an agreement to solve the problems; Mr. Mohor was found guilty in the arbitration and paid Taka 35,000 to his counterpart Mr. Shaheb. All these dealings were recorded in black and white by lawyers of both parties and witnesses to the arbitration. Mr. Razzak was among the witnesses of the said arbitration. Recently, when a state of emergency was proclaimed by the President in the country Mr. Mohor lodged a complaint with the army camp that Mr. Razzak forced him (Mohor) to pay Taka 35,000 as a toll. The army without verifying the allegation summoned Mr. Razzak and his father to meet the commander of the camp, Major Mizan.

Meanwhile, Mr. Razzak's friends informed some senior officials of the army about the attempts of the Paikgachha army. On January 25, two senior army officers asked Major Mizan to verify the allegation against Mr. Razzak and then take lawful actions following the verifications.

Mr. Razzak has been in hiding since the proclamation of the state of emergency in the country assuming the trend of conspiracy by his family rivals. Now, his father Mr. Nur Ali Fakir is hiding fearing further military brutality on him as he sustained in 2002.

On January 29, Paikgachha Army Camp Commander Major Mizan discussed the allegation of receiving money by Mr. Razzak from Mr. Mohor Ali Sana in presence of the concerned persons and ordered two members of the Godaipur Union Council namely Mr. Kazi Abul Bashar and Mr. Mir Anwar Elahi to solve the issue through arbitration. The allegation against Mr. Razzak proved false when they sat together on January 31. According to the decision Mr. Mohor Ali Sana paid Taka 1,000 (USD 15) penalty to his neighbour Mr. Shaheb Ali Mollik for unnecessary harassment. The army officers have already been informed by the union council members.

Following Urgent Appeals issued by the Asian Human Rights Commission (AHRC), the Assistant Superintendent of Police (ASP) of the Dakope Circle of the Khulna district reportedly went to Paikgachha, on 8 March 2007, to investigate the case of the harassment of a human rights defender Mr. F M Abdur Razzak and his father Mr. Nur Ali Fakir since the state of emergency imposed in the country. The ASP Mr. Shugen Chakma called Mr. Razzak to the Paikgachha police station on the morning of March 8. The ASP informed Mr. Razzak that they received a letter from the Asian Human Rights Commission (AHRC)

regarding the alleged torture of his family members during the Operation Clean Heart in 2002 and the recent harassment of him by the Army. Upon the request of the ASP, Mr. Razzak described the details of sufferings that he and his family sustained.

The police officer asked Mr. Razzak to prepare a written statement regarding his harassment and torture and that of his family, and told him to submit the statement to the on-duty officer of the Paikgachha police station. It is reported that Mr. Shugen Chakma talked to the lawyers and the police officials of Paikgachha regarding Razzak's professional background, activities and the alleged harassment and torture of his family. It is also reported that the police authority asked Mr. Shugen to submit his investigation report by 14 March 2007 to the concerned office.

Mr. Razzak is afraid of being subjected to harassment by the alleged perpetrators again in near future. He alleges that in the past the government also conducted investigations regarding harassment of his family. However, they did not take any action against the alleged perpetrators.

Overcrowded prisons and unconvincing remedial actions by the authorities:

The country's prisons are overcrowded to the point that the government recently released several hundred detainees who were either convicted of lesser crimes, such as theft, or had been detained for lengthy periods during their trials. In order to accommodate high-profile prisoners such as former ministers, law-makers and businessmen who have been arrested in recent months under the interim military-backed government's anti-corruption drive, the authorities have begun using public and private houses, which they are declaring as being 'sub jails'.

Custodial deaths resulting from torture at the hands of the law-enforcement and security forces continue to occur, with over 60 reportedly thought to have occurred in the last seven months alone, and around 100 such deaths for 2007 in total. The authorities claim that they all result from heart attacks or the victim having jumped from roof-tops or tall trees (the victims apparently have access to roofs and trees during searches for evidence of their alleged crimes, according to the authorities). This practice is reminiscent of the notorious Operation Clean Heart in late 2002, in which an estimated 58 persons died in suspicious circumstances in detention following mass arrests. There is no mechanism to punish the perpetrators of torture, as the practice has not yet been criminalized by the authorities, even though Bangladesh is a State Party to the UN Convention against Torture (CAT). It must be recalled that Bangladesh made a reservation on article 14(1) of the Convention, which asserts the State's obligation to provide medical treatment and compensation to the victims of torture, which greatly undermines the value of Bangladesh's ratification of this important instrument and is indicative of the country's real intent with regard to the respect of human rights, regardless of the rhetoric used by the country's

representatives at the United Nations Human Rights Council, body that counts Bangladesh amongst its membership.

The iron-clad impunity enjoyed by armed forces concerning extra-judicial killings:

Extra-judicial killings have been on the increase at the hands of the armed forces and paramilitary forces during the State of Emergency, adding further to an already serious situation. Such killings are covered up and justified as being encounter or accidental crossfire killings, and go unpunished. According to local human rights groups, at least 148 persons have become the victims of extra-judicial killings by members of the law-enforcement and security forces in the first ten months of the State of Emergency. The killings are reportedly being deemed as a competition among the armed forces, police and the paramilitary forces.

Not a single case of victims of such gross human rights abuses as torture, death resulting from torture or extra-judicial killings can even be pursued in courts at present.

Case Study-1: Extreme torture, child abuse and an extra-judicial killing as Navy runs rampant

On 20 February 2007, at around 10:00 am, a group of 11 naval officers, 9 of whom were in plain clothes and two who were armed and in uniform, went to the Char Fashion Municipality office located within Bhola district. The team went to the office room of the Commissioner of Ward No. 6 of the Municipality, Mr. Khabirul Islam Dulal, who was in a meeting with local citizens. One of the group members introduced himself as Mr. S M Reza who is the Lieutenant of the Bangladesh Navy Contingent deployed in Char Fashion. Following the command of Lt. Reza, the Navy personnel asked the victim to hand over the arms allegedly in his possession. When Mr. Dulal denied possessing any, the navy personnel severely beat, handcuffed and blindfolded him in the meeting. The Navy team pushed Mr. Dulal into one of their vehicles and brought him to the temporary camp in the upazilla Dak Banglo (a public rest house in the town used by the visiting government officials).

Over the next 4 hours, the commander, Lt. Reza allegedly kept physically assaulting the victim with roller sticks, fists and boots. The victim was kept handcuffed and blindfolded for almost the entire period. At around 3:30 pm, the navy took the victim to one of his aunt's house at Masterpara village in the Char Fashion municipality. At the house, the soldiers used abusive languages and threatened the family at gun point, including her 26 year-old and 16 year-old daughters.

Lt. Reza then ordered the navy officers to ransack the house. The victim was brought to the backyard and was again beaten by soldiers. The officers kept searching in the house for about 20 minutes.

At around 4:00 pm, the officers once again blindfolded and handcuffed the victim before proceeding to his house. Lt. Raza who was holding the rope that tied the victim's hands together, ordered the two armed soldiers to ransack the house. Lt. Raza again beat Dulal with a roller stick in the yard, this time in front of his family and relatives. At this time, Dulal's cousin's wife, Mrs. Parul Begum, attempted to save the man; however, officers pointed their guns at her head while two soldiers beat her with sticks on the lower part of the body.

Unbelievably, the soldiers also beat an 11-years-old girl named Moni who was carrying Parul's 6-month-old son. A soldier pressed against Moni's throat and strangled her. The 6-month-old infant, Abir, was thrown around 10 meters away from Moni's lap. While this was happening, Parul's son-in-law Mr. Nur Uddin and his brother Mr. Mosleh Uddin came to visit the house and were also beaten by the soldiers.

Dulal's two sons, eight year-old Ziaur Rahman Jim and three year-old Jibon, were held at gun point while their mother, Mrs. Jasmine Akhter Khuku, was beaten in front of the family. Dulal's aunt Mrs. Moyful Begum and Dulal's 58-years-old mother Mrs. Hajera Khatun were also beaten by the navy personnel. Mrs. Khuku alleges that Lt. S M Reza beat her on the hips with stick; pushed her against the wall and hurt her right eye and foot, before knocking her to the ground. Also, about 1.5 million Taka (USD 21,740) was stolen from the house, money that was to be used as payment for labourers working on the "Abashan" and "Adarsha Gram" housing projects. Gold ornaments worth approximately 1 million Taka (USD 14,500) and belonged to the projects contractors were also taken from the house.

After the raid on the house, two Navy personnel lifted Dulal's body and put a long roller stick under his arms, since Dulal's hands were tied behind his back. The men put the body by the side of a pond outside Dulal's house. Meanwhile, Dulal who had been unconscious returned to his senses and asked for water. A Naval staff brought dirty water from the pond in a pot and poured it in Dulal's mouth. Then, Dulal was taken to Mrs. Fatema Begum's home. As Dulal could not walk by himself, the Navy personnel held his arms and dragged his legs on the street. The Navy personnel asked Mrs. Fatema to give up the guns that were suspected of being kept in the house. Fatema then gave them a toy pistol, which her son plays with. Later on, Dulal was taken to the house of a former Member of Parliament (MP) and a leader of the Bangladesh Nationalist Party (BNP) Mr. Nazim Uddin Alam, who was not at home at that time. The security guards at the house Mr. Hafizur Rahman was also beaten by the Navy soldiers.

Then Lt. Reza brought Dulal to the rooftop and ordered him to stand up alone; however, Dulal was not able to do it by himself and fell down on the floor. Lt. Reza kicked him and ordered the soldiers to collect red chilli powder, salt and rice husks from a next door

neighbour named Mrs. Helena's. The spices were mixed together with water in a bucket and poured in Dulal's mouth. About 20 minute later, Mr. Reza forced Mrs. Helena to give hot water, which was also poured into Dulal's mouth. Dulal's relatives claim that many people living in the adjacent houses including the house of Mrs. Rina Khanom, a municipal commissioner of Reserved Ward No. 3 of the Char Fashion Municipality, had witnessed the scene of torture on the roof of Mr. Alam's house.

Later at around 9:30 pm, navy personnel picked up Dulal in a vehicle and took him to the Navy camp. Arriving at the camp, Lt. Reza kicked Dulal's motionless body, which was handcuffed and blindfolded in the back of the vehicle. Then, he held the rope and proceeded to kick Dulal's body severely and dragged him toward the nearby pond. As witnessed by many locals, Dulal's body rolled into the pond. For roughly five to six minutes, the body was under water. Later, Dulal's body was taken to the Emergency Unit of the Char Fashion Upazilla Health Complex. The Medical Officer (MO), Dr. Ekramul Kabir, found that Dulal was already dead. The MO then lodged a complaint with the Char Fashion police station. In his application, Dr. Kabir mentioned that at 10:55 pm, Navy personnel brought the dead body of Mr. Dulal to the hospital. It was alleged that Dr. Kabir was forced by Lt. Reza of the Navy to lodge the complaint with the local police.

The Officer-in-Charge (OC) of the Char Fashion police station, Mr. Zakir Hossain Fakir, recorded this case as an Unnatural Death (UD) case (No. 6, date: 20 February 2007) following Dr. Kabir's compliant at 11:45 pm. The OC, however, denied that the incident involved arbitrary arrest, torture and murder. However, the OC does note that when he went to the navy camp, S.M. Reza had refused to hand over the body so that he could return it to the victim's family.

According to a fact-finding report prepared by human rights organization ODHIKAR, "Doctor Ekramul Kabir of Char Fashion Upazila Health Complex also noted that Dulal died long before being admitted to the hospital. Observing the state of the body, he requested other four doctors for their opinion. After that they sent a report to the Char Fashion Police Station. In answer to a question Doctor Ekramul Kabir told ODHIKAR that there was a lot of water inside the dead body and the marks of ropes were clearly demarcated around the wrists. He also noticed that pieces of skin were falling off the body due to severe bruising and that the testicles were also bruised. Dulal's throat was distended, and some of his toes and finger nails were missing too."

The following morning (21 February 2007), the on-duty police also refused to return the body of the victim to the relatives of Dulal at the hospital. Magistrate Mr. Foyez Ahmed prepared the Inquest Report of Dulal's dead body at the Char Fashion hospital. The Inquest Report mentioned injuries on the legs, hands and in the back. A medial board comprising of Dr. Rathindra Nath and two others conducted the post mortem of the body

at the Bhola Sadar Hospital morgue at around 4:30 pm. The complete post mortem report is pending until the viscera examination report is conducted in a chemical laboratory in Dhaka.

Dulal's father-in-law, Mr. Shahidul Haque, alleges that the Dome of the Bhola Sadar Hospital, namely Mr. Bhanu, demanded a bribe from Shahidul if the deceased's family wanted a "fair post mortem report". This was done in front of Dr. Rathindra Nath, who did not comment or say anything to the Dome. Mr. Shahidul, then, allegedly responded the Dome to lodge a complaint against him with the Magistrate's Court.

Although the dead body was handed over to the family from the hospital morgue at around 5:15 pm the Char Fashion police finally gave the body to the family at around 7:40 pm at the police station. But, the family had to pay the transportation cost of the dead body from Bhola district town to the Char Fashion police station.

On February 22, the relatives buried the dead body of Dulal in their family graveyard. Two naval staff also joined the rituals in plain cloths while some soldiers were patrolling around the area.

Mr. Shahidul alleged that he was told not to announce about the funeral to the public by the Chairman of the Char Fashion Municipality Mr. Amirul Islam Mintis before the victim's funeral. It has also been reported that the Chairman told the victim's family to sign on a blank paper that the death of Dulal was "unnatural" and urged them not to lodge any complaint against the Navy officers about the murder of Dulal. Then the Chairman urged the family to leave the town and do not seek any further proceedings regarding the death of Dulal.

It has also been reported that the Police officers from the Char Fashion police station also urged the family to compromise with the Navy officers about the case. Mr. Shahidul also received a phone call from an Assistant Sub Inspector (ASI) Zakir Hossain of the Char Fashion police station who told him that he should not pursue any further persecutions against the Navy officers and offered money in exchange for his silence.

Mr. Shahidul and the wife of Dulal have lodged a complaint with the office of the Superintendent of Police (SP) of Bhola district on 26 February 2007. Both of them are asking the police officers to record the case of Dulal however the police officers allegedly refused to register the case. On 27 February 2007, Mr. Shahidul submitted another petition to the Upazilla Nirbahi (sub-district executive) Officer (UNO) seeking further post mortems of Dulal's dead body by impartial medical doctors. The application was addressed to the Deputy Commissioner of Bhola.

Meanwhile, Mr. Shahidul further alleges that he received threats to his mobile phone from unidentified callers, who warned him not to step forward regarding this case. On 6 March 2007, at around 11:00 pm, Shahidul received two calls from phone number +8801720494851 and +8801725440257. Mr. Shahidul, along with his daughter Mrs. Jasmin Akhter Khuku (Dulal's wife) and her two sons are now in hiding. Mrs. Khuku is now questioning whether they will have right to achieve justice. She is extremely worried about the future of her two minor-aged sons as she has no assets left by her husband and has no job.

It is also alleged that the Navy officers threatened human rights defenders, who conducted the fact-finding mission regarding the death of Dulal. According to the report of ODHIKAR, "The ODHIKAR fact-finding officer visited the Navy Contingent to talk with Lieutenant SM Reza. Lieutenant Reza tried to shake him off and ultimately threatened to have him arrested as a member of the JMB (an underground radical group). He claimed that he did not have the intention to kill or arrest Dulal and that if that was their intention; they would have done so in 'crossfire'. He commented that Dulal was not meant to live a long life and met his fate by drowning."

Local journalists also alleged that they received threats from the Navy and were told to only write that "Dulal jumped into a pond and died when trying to flee". The Navy personnel also threatened the local journalists that they would kill them like Dulal if they disclose anything more regarding the murder.

However, Lieutenant Commander Ashraf of Char Fashion Navy Contingent told ODHIKAR's fact-finding team that Khabirul Islam Dulal was a threat to the people of his locality. Dulal was arrested on the basis of a number of verbal and written complaints from the people of the locality against him, including toll collection, harassment of women, land-grabbing and other anti-social as well as criminal offences. Mr. Ashraf claims that the complaints were preserved in the Khulna and Chittagong Navy headquarters. According to Dulal's statement they conducted an arms recovery operation in various places; an Indian pistol was recovered from the house belonging to Fatima, beside his home. On recovering the pistol, they returned with him to the base and untied his wrists in order to take a picture of him with the pistol. Dulal tried to flee but fell into the pond. He was rescued and sent to the hospital, where he died.

Legislation provides prior impunity to the perpetrators of human rights abuses:

Bangladesh has further entrenched its culture of impunity during the State of Emergency. Section 6 of the Emergency Powers Ordinance ensures prior impunity to any perpetrators of gross human rights abuses. Section 6(1) declares that "*Any order relating to any authority delegated by or under, this Ordinance shall not be challenged before any court.*" Furthermore, according to Section 6(2), "*Unless any provision under this Ordinance stipulates otherwise, no civil or criminal*

case, or any other legal proceedings shall be lodged against the government for any harm incurred as a result of any action, or any action done in good faith under, by the authority of this Ordinance.” Impunity has been legislated in the past in Bangladesh. For example, the government passed the Joint Drive Indemnity Act-2003 following the disastrous Operation Clean Heart, ensuring impunity for the perpetrators of torture and killings committed under this operation.

Failure to criminalize torture despite membership in the United Nation’s Human Rights Council:

Bangladesh has been a member of the UN Human Rights Council since its creation 9 May 2006, and has been present for more than one and a half years in the world’s top human rights forum. Before having been elected to the Council, Bangladesh made voluntary pledges, as was the case with other candidates. The country affirmed its “deep commitment to the promotion and protection of human rights of all of its citizens.”

The UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CAT) was ratified by the Bangladesh government in October 1998. However a reservation on article 14 paragraph 1 of the CAT was made at the time. This article states that “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.” While ratifying the CAT Bangladesh declared that it “will apply article 14 para 1 in consonance with the existing laws and legislation in the country.”

On one hand the Bangladesh government promises to implement the provisions of international human rights instruments into its domestic legislation. Unfortunately, on the other, in reality, violations of human rights, particularly torture, remain rampant in the country.

Torture is an integral part of the policing and the law-enforcement system, in all parts of the law-enforcing agencies and the military, paramilitary and security forces and is used against persons both in custody and otherwise. Death due to torture at the hands of the law-enforcers is a regular phenomenon in the country. Torture is used as a method of extracting money and confessions from the detainees. The term, ‘interrogation’ in police remand, the Joint Interrogation Cell and “Task Force of Interrogation” as part of criminal investigation is synonymous with torture. Passing an hour in the custody of these forces without experiencing torture is considered as being a miracle. Now, in the ongoing State of Emergency, according to local human rights groups, around 200,000 people have been arrested and detained within a period of only six months; and of course, there are allegations of torture in almost all cases as well as reports of as many as one hundred custodial deaths.

The consequences of torture which are visible concerning such persons indicate the very harsh methods being used. Persons who are arrested by the police or any other forces, are ill-treated or tortured throughout the duration of their arrest in almost all cases. It is common that in custody people are tortured if they fail to pay bribes to escape the brutality. Payment of inadequate bribes is reason in itself for torture which often results in serious physical injuries. Often, failure to pay the demanded amount of money to the police will also add one or a number of fabricated charges against the person for which he or she and family-members will be required to appear before the courts for years; the investigations will also be performed by the same police officer, or perhaps a close colleague, with a view to ensuring no progress is made and ruining the victims in the process.

Nine years have passed since Bangladesh ratified the CAT, but still the reservation is imposed on the article 14 para 1 of the Convention; meaning that the government does not want to ensure the right to compensation and adequate medical treatment for victims of torture. The authorities never want to punish the perpetrators of torture; they have not yet made any legislation criminalizing torture in compliance with the CAT although the government promised to do so a long time ago. Instead, the culture of impunity enjoyed perpetrators has been deeply entrenched by a number of laws. Indemnity Act-2003, which was made to ensure impunity for the armed forces and the police for killings, torture, arbitrary arrests and detentions during the notorious Operation Clean Heart in late 2002 and early 2003, is still in effect.

Nobody knows how long the Bangladeshi authorities will take to criminalize torture in domestic legislation, however international pressure has not been anything near adequate to make the country respond and honour its responsibilities to its citizens. The Bangladeshi authorities seem blissfully unashamed about the extreme inconsistencies between their pledges and practices regarding abuses of human rights. It is a black comedy indeed when one listens to Bangladeshi diplomats attempting to sound like human rights experts at the Human Rights Council.

The absence of the right to information leading to a culture of torture:

Usage of torture has become so deeply rooted in the system, especially, in the governmental institutions, that medical doctors in many cases collude with the perpetrating law-enforcement agencies. They conceal the truth in cases of custodial torture, which helps the alleged perpetrators destroy evidence and deny justice to the victims. Either medical doctors support the perpetrators who use torture or they fear harassment by these so-called law-enforcers.

In the case of arbitrary arrest, torture and detention of NGO leader Mr. Shadhidul Islam despite not having any case against Mr. Shahidul, the Tala police could not lay any specific

charges against him. The police called in two medical doctors to the police station to check the physical condition of Mr. Shahidul. Dr. Md. Hedayetul Islam, Upazilla Health & Family Planning Officer of Tala, and Dr. Md. Zahirul Hassan, Resident Medical Officer (RMO) of the Tala Health Complex, examined Mr. Shahidul in the police station. He was detained in the police station in the night. However, the two medical doctors did not disclose the physical problems. When asked what the about the victim's condition, the medical staff avoided the question and kept providing vague information by answering, "He (Shahidul) is weak physically and mentally". The medical doctors of the Satkhira district Sadar Hospital also allegedly assisted the armed forces by injecting pain-killer vaccines instead of appropriate medical treatment, and concealing Shahidul's health conditions to his lawyers and relatives while asked repeatedly. After having been released after his seven months long detention the physicians of renowned private hospitals based in Dhaka told Shadhidul that he had excessive wrong treatment immediately after having sustained injuries by the armed forces.

Many medical doctors have little commitment to the ethics of the profession and the concept of providing care for the people. Rather, they are drawn to the profession by their love money and power. Under the auspices of the Official Secrecy Act, they deny information to the media, conceal the truth, and in most cases help State-agents buy time to cover up their offences so that the latter can avoid punishment. As a result of not having a right to information, the victims cannot achieve justice; the absence of right to information ensures the absence of rule of law through the expansion of harassment, exploitation and the denial of justice for victims of torture.

The mockery that is Bangladesh's subordinate judiciary:

According to Article 33 (2) of the Constitution of Bangladesh, a person arrested should be brought before the nearest magistrate within 24 hours after the arrest. Further, Article 33 (3) of the Constitution clearly states that clause (2) of Article 33 shall apply to any person including an enemy alien or person arrested or detained "under any law providing for preventive detention".

However, during the current State of Emergency, all fundamental rights of the Constitution (from article 26 to 42, except article 41) have been suspended. It seems that the Bangladesh administration, the army and the police are taking advantage of this situation to abuse the fundamental rights of its own citizens.

The Magistrates, who had been controlled by the Home Ministry for the decades until 31 October 2007, do not consider or verify the facts during the production of persons having arrested by the law-enforcers. The Magistrates do not consider whether the arrested persons have any evidence of having committed crime against them or whether the persons were

brutalized or tortured by the authorities. They also do not consider whether the persons have received or are going to receive adequate medical treatment for any injuries sustained due to torture. The Magistrates are blind to visible injuries. They are deaf to the victims of torture.

The lawyers, who are accustomed to a corrupt judicial system are at best demoralized by years of working with the system and do not fight for innocent victims of arbitrary arrests and other abuses. Sometimes, they fear the army and the Rapid Action Battalion, and avoid clashing with the law-enforcement agents. As a result, the victims never get justice.

However, the Code of Criminal Procedure of Bangladesh still maintains its legal force even during the State of Emergency, and NGO leader of Satkhira district Mr. Shahidul's case is in clear violation of Section 61 of the Code, as well as illustrating the lawlessness prevailing in the country. Section 61 clearly states that "persons arrested should not to be detained for more than twenty four hours" and "no police-officer shall detain in custody a person arrested without warrant for a longer period than all the circumstances of the case make reasonable".

The concerned government authorities have still not given any valid explanation as to why Mr. Shahidul has not been produced before any court despite weeks passing since his arrest, which was made without any arrest warrant, or charges or cases against him.

Case Study-1: Justice denied to NGO leader Mr. Shadhidul Islam of Satkhira after his arbitrary arrest, torture, detention and the fabrication of charges

At around 11:00 am on 27 January 2007 two army personnel, one warrant officer (WO) Mr. Amir Hossain and one army constable, came on a motorcycle to the UTTARAN Training Center based in Mobarakpur village, Tala upazilla (sub district), Satkhira district, Bangladesh. At around 11:25 am, the warrant officer Mr. Amir told Mr. Shahidul that Major Mehedi Hasan of the Tala army camp would like to talk to him. The officer did not inform Mr. Shahidul that he would be arrested and did not produce any arrest warrant or other valid documents. Within five minutes, an army van full of army personnel arrived at the UTTARAN training center and told Mr. Shahidul to go with them to the Tala Army Camp, which was temporarily established in the Government B Dey High School in Tala town.

Mr. Shahidul was put into the army van and taken before Major Mr. Mehedi Hasan of the army camp. The military officers then started interrogating Mr. Shahidul, while accusing him of depositing black market money and asked him to reveal its sources. They also accused him of involvement in terrorism activities and underground politics.

Meanwhile, a relative of Mr. Shahidul (the name is withheld for security reasons) was

informed about Mr. Shahidul's arrest and went to the army camp within 40 minutes after the arrest was made. However, the army personnel did not allow him to meet either Mr. Shahidul or Major Mehedi Hasan and simply assured him that Mr. Shahidul would never be tortured in army custody and that they would hand over him to the Tala police when the interrogation is finished.

No sooner had the relative left the army camp, a group of soldiers, namely Mr. Gopal, Mr. Mizan, Mr. Newaz, Mr. Didar and Mr. Shakil blindfolded Mr. Shahidul, tied his arms and took him to a toilet in the army camp, where Mr. Shahidul was severely assaulted with hockey sticks on his legs and back. It was alleged that different groups of soldiers assaulted Mr. Shahidul in turn in several phases.

Due to brutal torture, Mr. Shahidul was severely injured. At around 2:15 pm, the army then called Dr. Hedayetul Islam, the Upazilla Health and Family Planning Officer of Tala town to the army camp to treat Mr. Shahidul. Eyewitnesses reported that Dr. Hedayet's behaviour was very unusual when he returned to the hospital from the army camp and he shouted at his colleagues not to go to the camp when they received any phone calls from the army.

According to local people, including journalists and Mr. Shahidul's relatives, who were present about 50 meters away from the army camp premises (the school campus), heard the cries of Mr. Shahidul and immediately the army personnel chased them away from the campus.

At around 3:00 pm, Mr. Shahidul was carried by four army men before Major Mehedi Hasan, who simply ordered them to hand him over to the Tala police. Four army men then carried Mr. Shadidul by the arms and handed over him to the Tara police at around 3:30pm.

According to eyewitnesses, Mr. Shahidul could not walk due to his injuries and his eyes were blindfolded and arms tied when he was taken to the police station. Inspector Mr. Md. Abdur Razzak, the Officer-in-Charge (OC) of the Tala police station, did not agree to take Mr. Shahidul because he has received no complaints and charges against him. He was also concerned with the victim's severe physical condition. At this point the army men got angry and called doctors from the Upazilla Health Complex, which is the only public hospital in the town.

The Resident Medical Officer (RMO) Dr. Zahirul Hassan and Medical Officer Dr. Humayan Kabir Apu of the Upazilla Health Complex rushed to the Tala police station to treat Mr. Shahidul, who was lying on the floor and not able to move and speak due to severe pain. When the doctors and the police tried to raise him to a sitting position, Mr. Shahidul fell

unconscious. There were multiple red and black bruises all over his body, especially, on the lower limbs, back of the chest and abdomen as a result of beating with blunt weapons. Further, both sides of his feet were dark due to beating with blunt weapons.

On the evening of January 27, Mr. Shahidul was sent to the Satkhira District Jail without being produced before any court of the country, which is in a clear violation of law. The prison authority then sent him to the medical unit of the jail. On the following morning on January 28, the jail authority transferred Mr. Shahidul to the Satkhira Sadar Hospital due to his deteriorating condition. The X-ray report at the hospital showed fractures in the second and fifth toes of his right foot. A medical source informs that Mr. Shahidul's blood pressure status was, then, 90/60, which was normally 150/90 before his arrest, according to his relatives. Mr. Shahidul is now in police custody at the hospital, while being handcuffed at the hospital bed.

The Deputy Commissioner ex officio District Magistrate, Mr. Md. Kefayet Ullah, later issued an order sheet dated on 27 January 2007 (the date was changed from January 28 to January 27 on the certificated copy of the order sheet that Mr. Shahidul's lawyers received), that Mr. Shahidul received 30-day detention order under the Special Powers Act-1974. This Act is one of the country's laws being abused for arbitrary detention of the arrested without any judicial review in the current situation of the State of Emergency in the country. Mr. Shahidul has never been produced before any court since his arrest on January 27. It is a clear violation of Article 33 of the Constitution of Bangladesh and Section 61 of the Code of Criminal Procedure of Bangladesh.

A case of false implication in a murder by the army:

It is reported that in order to cover up the illegal arrest and detention of Mr. Shahidul, the army allegedly pressured the Magistrate's Cognizance Court-Ga Area of Satkhira district to show that Mr. Shahidul was arrested relating to one murder case. This murder case is bearing case number 3 dated 05/05/2004 at the Tala police station relating to the assassination of the Chairperson of the Tala unit of the Bangladesh Nationalist Party (BNP), Mr. A B M Altaf Hossain on 4 May 2004.

According to the information received, Mr. Badrul Alam, Joint Secretary of Satkhira district unit of the BNP, was arrested by the joint forces from Mr. Abdul Latif's house in Khajra village under the Ashashuni police station of Satkhira district on 30 January 2007. Since the arrest, Mr. Badrul was kept in military custody, while he was allegedly beaten and intimidated to be killed in pre-planned "crossfire", unless he gives a false statement accusing Mr. Shahidul of involving in Mr. Altaf's murder. Mr. Badrul finally gave the false statement against Mr. Shahidul fearing for his life.

It is alleged that at around 2:00am on 2 February 2007, the army handed over Mr. Badrul to Inspector Mr. Haripado Bishwas of the Criminal Investigation Department (CID) of Satkhira district. Although this is not the office hours, the army officers also contacted First Class Magistrate Mr. Saidur Rahman to come to the court and record Mr. Badrul's "confessional statement" under section 164 of the Code of Criminal Procedure. The magistrate then came to his office room of the Deputy Commissioner cum Magistrate's Court building at around early hours at 2:00am and recorded Badrul's statement by 3:45pm.

According to the magistrate court's administrators, on February 6, Mr. Shahidul was "shown arrest" in the Altaf murder case with an order signed by a magistrate of the Magistrate's Cognizance Court-Ga Area, which was issued based on "confessional statement" of Mr. Badrul. The decision of "shown arrest" of Mr. Shahidul was only disclosed on February 7 but strangely the court order's signed date is February 6 (the paper carries the wrong date of 16-2-2007 by mistake).

However, interestingly, on February 2, the Investigation Officer (IO) of the said murder case, CID Inspector Mr. Haripado Bishwas, submitted a remand prayer, which is also signed on 6 February 2007, in advance before a magistrate seeking 7-day police remand of Mr. Shahidul for an inquiry. It should be noted that based on the court arrest order dated 6 February 2007, Mr. Shahidul was not under arrest relating to the said murder case till February 6. According to the legal procedure, the police can only apply for taking Mr. Shahidul in their remand after February 6 because the court order document shows that the magistrate signed the arrest order on February 6.

The certificated copy of the court documents shows that on February 6 the magistrate signed on both the papers: the custody warrant (shown arrest) order sheet and the remand prayer of the police both dated on 6 February 2007. However, we suspect that the magistrate might have signed on both papers on February 2.

Meanwhile, the hearing on the remand prayer officially held at the Magistrate Cognizance Court-Ga Area on February 7 and the magistrate later decided to hear the police's remand prayer after Mr. Shahidul's 30-day detention is over. Mr. Shahidul was not produced before court at this time.

The irregularities of the court documents and unusual police action are extremely confusing. While the custody warrant of Mr. Shahidul shows that the magistrate signed the order on February 6 (or 16) but the police unusually moved Mr. Shahidul's remand prayer on February 2, four days before Mr. Shahidul was under arrest in this murder case. This has been a proof of distortion of the truth and fabrication. This, together with the unlawful and unusual actions of the magistrate and the police clearly indicates that all these things were set up and coordinated by the army to justify their illegal arrest and detention of Mr. Shahidul.

On February 8, Mr. Shahidul's lawyer Advocate Mr. M Shah Alam lodged a petition seeking bail for the victim before the Magistrate's Cognizance Court-Ga Area of Satkhira. However, the Second Class Magistrate Mr. Zahid Hassan rejected the bail prayer. The lawyers then filed a Criminal Miss case (case no. 126/2007) with the Session Judge's Court of Satkhira on 14 February 2007. The next hearing for bail application is fixed for 6 March 2007.

Meanwhile, the Magistrate Court refused to supply the certified copy of Mr. Badrul's statement to Mr. Shahidul's lawyers. Advocate Mr. M Shah Alam, the General Secretary of the Satkhira District Bar Association, applied three times separately on February 7, 8 and 11 seeking the certified copies of the First Information Report (FIR) of the murder case that Mr. Shahidul was implicated with, the copy of Mr. Badrul Alam's statement, the copy of the "shown arrest" order and the copy of the remand prayer by the IO of the murder case. On February 11, Third Class Magistrate of Satkhira Magistrate Court Record Section, Mr. Manjurul Islam, approved all the papers to be provided to the lawyers except the copy of Mr. Badrul's statement and the lawyers received those copies on February 13.

Mr. Shahidul's relatives claim that the deceased Mr. Altaf's family alleges that the former Member of Parliament elected from Satkhira-1 constituency, Mr. Habibul Islam Habib, was directly involved in the killing of Mr. Altaf. In fact, Mr. Altaf's family openly claimed this allegation in their written statements in two press conferences held in Varsa village under Patkelghata police station in Satkhira district separately held on 2 and 6 November in 2006.

They further claimed that the political leaders and the police managed one Mr. Abdur Rahman, who is known as "Goru Chor (cattle thief)" in the area, to lodge the murder case of MR. Altaf with the Tala police station, while the family received death threats from the armed cadres of the former MP Mr. Habib to pressure them not to lodge a case against the real murderer.

Meanwhile, Mr. Shahidul's elder brother Mr. Nazrul Islam lodged a writ petition with a High Court Division Bench on 31 January 2007 challenging his brother's arrest and detention. The judges of the Bench then issued a rule nisi and directed the concerned authority to explain why the arrest of Mr. Shahidul shall not be declared unlawful within two weeks time. However, the concerned authority has not furnished the required explanation before High Court to date although the deadline of submission was expired on February 13.

Mr. Shahidul is currently warded in a private hospital in Dhaka after having been released from the prison after his prolonged arbitrary detention without any reason as well as protracted legal battle in the lower and higher courts.

There is no explanation from the government as to why the magistrate became so serious as to need to record Mr. Badrul Alam's "confessional statement" in early hours (at 2:00am) in relation to a murder case that occurred more than two years ago. Such an unusual action was taken by the magistrate; while the former MP Mr. Habibul Islam Habib was never arrested, despite the open accusation from the deceased man's family. Two separate written statements of the family were not recorded by the police and judicial authorities.

Furthermore, the magistrate's refusal to supply a certified copy of the "confessional statement" made by Mr. Badrul Alam to Mr. Shahidul's lawyers without any explanations violates Mr. Shahidul's fundamental rights.

Meanwhile, no investigation has been made and no one has been arrested so far relating to the alleged torture of Mr. Shahidul.

The lack of truly independent courts:

In Bangladesh it has been little more than a formality for the Home Ministry to have the courts release persons from prosecution on the grounds that the cases have been politically motivated. For instance, the brother of a government minister escaped prosecution over a series of bomb blasts that occurred in 1998. After a similar order the Home Ministry had no hesitation in deciding itself qualified to adjudicate these cases on behalf of the courts, which are compliant with its wishes and are not independent. In this manner, justice is mocked and political expediency reigns supreme.

The manner in which the Home Ministry chooses to withdraw cases against its people suggests that either it itself does not have any faith in the judicial system, or it is harbouring killers. If it did, and the accused in these cases were truly innocent, then surely it could let a trial run its course and see the accused redeemed before the law and the country through full proceedings. Instead, by acquitting them itself it sends a message to the country that the courts cannot be trusted to make a reliable decision. The only other conclusion that can be reached about this behaviour is that the accused persons in these cases are in fact guilty and the purpose of withdrawing charges against them is to free them from legitimate punishment. The message sent in this case is that anyone with ruling party connections is guaranteed impunity. In either case, judges and the judiciary are severely discredited.

The same concerns arise with regard to the police and public prosecutors. All of the accused that have been released as above were charged following criminal investigations. Were the police investigators also politically motivated? Can their investigations be trusted? If the Home Ministry is so confident that the charges were brought without any basis, what action will then be taken regarding those who carried out the investigations? And

what can be said of the public prosecution each time a case such as this is withdrawn, other than that it is an open humiliation concerning its role and personnel? Again, the ordinary person will be forgiven for lacking confidence in these institutions when they are rubbished by the government itself.

It takes considerable time and money for an ordinary person to get a case lodged in a court. One reason for this is to prevent frivolous complaints. In Bangladesh, it takes relatively more time and money than in other countries. The families of victims felt that there were charges to be answered against those accused who have now been acquitted by the Home Ministry. They have seen their time and money wasted due to the politicised condition of the country's courts. They may now themselves be subjected to attacks for having filed their complaints. Frustrated and hounded, they are left with less and less hope for justice each passing day.

The separation of powers has just taken place in Bangladesh, on 1 November 2007. The notion of independent courts has been unknown to the people of Bangladesh so far. There is in its stead the notion that courts are an asset of the State, and specifically, whichever party is in power at the time. Faith in the system will only be restored over time if a concerted effort is made to establish a certain mindset among the judges, prosecutors, investigators, lawyers and staff of the concerned offices by separating the courts from the government ministries, and therefore, from the clutches of the political parties.

The judiciary in Bangladesh must be completely reformed through removal of the culture of politically biased recruitments of judges, prosecutors and related officials, who are substandard in quality at present.

There is no independent prosecution department or attorney service in Bangladesh. The Ministry of Law, Justice and Parliamentary Affairs appoints prosecutors on a temporary basis following politically motivated decisions by ruling party leaders and law-makers. This is known as a disposable prosecution system, which contributes nothing to the nation's next generation. The prosecutors come with zero experience and leave the same way from office, and in many cases, create a number of problems as a result of corruption and ignorance.

Criminal investigations in the country are performed by the police without any credibility. The same person works as protocol officer, an on-duty officer in the police station, controlling mobs and beating persons whenever possible, and investigates cases of criminal offences without having specialized training, knowledge, skills or time. Moreover, the police are for the most part corrupt. Such faulty, inefficient and corrupt policing is a great obstacle to justice, regardless of the quality of the judiciary.

The role of the higher courts:

The role of the Supreme Court, especially that of the Chief Justice's, have significantly increased in Bangladesh since the subordinate courts were separated from the executive on 1 November 2007. The Judicial Service Commission headed by the Chief Justice is to control judicial matters, which requires drastic changes in order to reinstate public faith in the judiciary.

In reality, the concerned people and the professionals are not completely convinced with the role of apex court of the country. On one hand, it is true that the Supreme Court played a strong role in order to ensure the separation of the judiciary since December 1999 by declaring 12-point directives aimed at the government as part of the verdict handed out concerning the famous Masdar Hossain case.

Besides, in several public meetings the present Chief Justice admitted that massive harm had already been done to the top-most judiciary for which the nation will likely feel the repercussions for more than two decades. However, the Chief Justice did not take the problem to the Supreme Judicial Council to assess and address the problem. Moreover, according to an admission made by the Chief Justice in public that "Some points of laws are being relaxed for some people and made tougher for some others. As a result, what verdict a judge delivers on a point today gets changed the next day." This is a very bad picture of the country's apex judicial body.

The lengthy process of hearings as well as the inefficiency of judges and the Attorney General causes major barriers for persons seeking justice. The High Court Division Benches and the Appellate Division of the Supreme Court spent several months hearing a few writ petitions, and issuing rulings upon the concerned departments of the government, of which all complainants were influential political or business leaders of the country.

Due to the established corruption in the offices of the courts, especially the offices of the bench clerks, the Attorney General's department and record offices, and the high fees of the Supreme Court Bar Association's practicing lawyers, poor victims cannot hope to seek redress from the High Court Division Benches of the Supreme Court in Bangladesh. Ultimately, the have-nots remain unable to seeking justice in the country.

The establishment of a National Human Rights Commission- a smoke screen:

Bangladesh has no National Human Rights Commission, although the government has formed a committee comprising bureaucrats to draft a concept paper concerning the establishment of such a Commission, but nine months have passed without any news of progress by this committee. The government of Bangladesh has been promising its citizens

and the international community that it will establish a National Human Rights Commission in the country for some 17 years now, without any actual progress.

On 19 March 2007, Bangladesh's present government has "in principle decided to establish a National Human Rights Commission in the country". This was announced during a regular weekly meeting of the Advisory Council which was chaired by Chief Adviser Dr. Fakhruddin Ahmed. Following a proposal by the Foreign Affairs Ministry, the Advisory Council approved the proposal in principal. A committee was reportedly formed headed by the Cabinet Division Secretary comprising representatives from the Ministries of Law, Home and Foreign Affairs. This committee was supposed to look at the human rights commissions in South Asia to sketch a possible structure and guidelines of the proposed Commission and would take suggestions from representatives from civil society. Following the announcement, it was also recalled that the formation of a national human rights commission was one of the election pledges made in part by the past government. A similar committee had been formed on 10 December 2001. A final draft was then sent to the Cabinet Division on January 23, 2003; however, it had been shelved at the ministry since the Cabinet sent it back on January 29, 2003.

Although the government had put the idea on hold for several years, the announcement was a welcome message to everyone concerned about human rights issues in Bangladesh. At the same time, this "in principle decision of the formation of a national human rights commission" has been commissioned by a government which was born within a State of Emergency, when all fundamental human rights remain under suspension; law-enforcement in the country has been militarised; deaths in custody, extra-judicial killings and brutal torture cases have occurred almost everyday, while arbitrary arrests, detentions and denial of justice, including to human rights defenders, have become a very common phenomenon. Naturally, one question arises, what is the real "principle" behind the government's motivation? There are also supplementary questions such as whether the government is only going to make a toothless national human rights commission, whose "principles" are contradicted and ridiculed by human rights violations that go unchecked? In the past, the international community has observed that there is a gulf between the pledges and practices of governments of Bangladesh.

In addition, the committee appointed to design the structure and guidelines of the commission is another surprise. An influential bureaucrat assisted by three others has been given the task of setting up the human rights commission. These bureaucrats are often more concerned with keeping their jobs than ensuring an effective service to the citizens of the country. There is not much hope that such a committee will lead to the creation of an effective system.

According to the Bangladeshi system, all of these bureaucrats have worked as magistrates in the early years of their careers. What was their role and records as such that can qualify them to understand human rights? How much have they contribute to the protection and promotion of human rights? It is a very serious concern that this commission may be nothing more than another bureaucratic mechanism that acts like a toothless tiger.

Moreover, human rights commissions in South Asia are not shining examples of human rights bodies. Although it is not bad to learn from your neighbours' experiences in combating human rights violations, the government must consider how much benefit the people of South Asia received from their nations' human rights commissions. Despite the existence of the national human rights commissions in several countries, the culture of impunity is deeply rooted there, much as it is in Bangladesh.

The Asian Human Rights Commission (AHRC) therefore urges the Bangladeshi authorities to involve human rights defenders working at the national and grass-roots level as well as victims of brutal human rights abuses in the committee, so that the real problems of human rights and the needs of the people are adequately reflected in its recommendations. The Bangladeshi authorities must clarify their level of commitment to human rights, especially since rampant human rights violations are occurring during the current State of Emergency. Useless human rights commissions can only bring about further frustration amongst the victims of human rights violations and undermine the government's credibility.

No place left for redress and reparations for the victims of torture:

Victims of torture and gross human rights abuses have no place to go. The police stations of the country do not register complaints of torture at the hands of other law-enforcers even though their offices are responsible and legally obliged to record these.

At present, police officers from among the perpetrators are usually assigned for the investigation into a case in order to ensure that the complaint appears as a "false allegation" against "reputed officers of the government". In the event that any court is kind enough to order a judicial probe it will result in nothing but a farcical report - with the ultimate intention of saving the perpetrator, as the magistrates and the police are colleagues. In this manner the doors to justice are closed on victims of torture.

This brings about the destruction of faith in the justice system and victims and their family become financially exhausted by the burden of attempted actions. They are socially stigmatised for the brutal humiliation at the hands of the law-enforcers. Victims of torture not only become physically and psychologically handicapped in most cases, but also their families as well as themselves become isolated from society as people are reluctant to mix with them.

Nobody sees the law-enforcers as an assisting force to uphold the law. Instead they are seen as perpetrators of gross human rights abuses. The people's faith in the judicial system has disappeared. As a result, the common people avoid the police and the courts in order to avoid further harassment by the "licensed terrorists" of the country, as the police are known.

The AHRC has learned of these matters through a large number of cases documented in Bangladesh. The authorities in Bangladesh promise and pledge rather than taking any effecting measures to address the human rights abuse issues.

Ultimately, the poor and helpless victims of the human rights abuses are completely deprived of their right to seek redress and reparations from any institutions in Bangladesh.

Recommendations:

The Asian Legal Resource Centre (ALRC), a sister organization of the Asian Human Rights Commission (AHRC), in its written submissions in February and September, urged the UN Human Rights Council to call on the Bangladeshi authorities to withdraw the State of Emergency from the country immediately. The Council was also urged to insist that the country reinstate the fundamental rights of its citizens, as enshrined in the Constitution of Bangladesh, as well as the international human rights instruments to which the country is party. Arbitrarily arrested citizens should be immediately released. Adequate compensation must be provided to victims of arbitrary arrests and detention, and all reports of torture and extra-judicial killings must be fully investigated and punishment and reparation must be provided in compliance with international human rights laws and standards. All laws that run contrary to the enjoyment of rights, such as the Emergency Powers Ordinance-2007, the Emergency Powers Rules-2007 and the Special Powers Act-1974 must be repealed without delay.

The AHRC also recommends that an independent and effective national human rights institution be established in Bangladesh, which would be mandated with receiving complaints, conducting investigations and providing redress to victims of human rights abuses. This system should supplement the criminal justice system rather than replacing it, and legislation criminalising torture should be promulgated without delay to strengthen this system. As a member of the Human Rights Council, Bangladesh is urged to issue standing invitations to all the Special Procedures' mandates, especially mandates dealing with arbitrary arrests and detention, with torture and with extra-judicial killings. The ALRC also urges the Office of the Secretary General of the United Nations and the Human Rights Council to take all measures necessary to ensure the increased monitoring of the situation in the country, as they are so far failing to address a deepening crisis. Bangladesh is clearly becoming a serious embarrassment to the Human Rights Council, as it is flouting every acceptable

norm and standard while occupying a position on the Council. The question is, does the Council have the ability to take any credible action against its members or will membership on the Council equate with immunity for even very grave rights violators?

The Asian Human Rights Commission welcomes the announcement of the formal separation of the lower judiciary from ministries in Bangladesh, being among the organisations who have for some time pushed for this step. However, it shares the concerns of lawyers and others in Bangladesh that there remains a long way to go until the country's judiciary is made properly independent. It is the hard work towards this end that must now begin. Among the next steps must be the:

1. Establishing of a separate secretariat with sufficient funds and personnel for the Judicial Service Commission;
2. Drafting and implementation of a clear and well-defined plan for the amended Rules on the Code of Criminal Procedure;
3. Swift appointment of new judicial magistrates to criminal courts around the country;
4. Further action to depoliticise the public prosecution department, which has in Bangladesh for years kept the rule of law at bay in collusion with the magistracy.

The Asian Human Rights Commission also urges all legal and related professionals to concentrate their efforts on the desperately-needed reforms to the criminal justice system in order to ensure that the people of Bangladesh may at last enjoy some of the rights that they have so long been promised.

B U R M A

Political psychosis & legal dementia

The defining characteristic of the crackdown on the largest protests in Burma in almost two decades this September 2007 was its patent illegality by all standards of law, including the country's own law. But how and why this happened cannot be properly understood unless placed against the backdrop of daily interactions between citizens and the state in Burma, particularly the police, courts and local councils.

A non-existent criminal justice system

The existence of a justice system, in the true sense of the word, cannot be inferred from the existence of a building called a court or a person called a judge. A justice system derives from the extent to which that building stands independently from others, and the person referred to as the judge has authority to act with integrity. It derives from the confidence invested in the system by the public, and confidence of the judiciary in itself.

But in Burma the judiciary cannot be properly called an agency for the delivery of justice at all. As another arm of the executive, it is not a system upon which rights can be asserted and guarantees for participation in the ordinary affairs of the society obtained. This must be the starting point for any understanding of the conditions in Burma that prevail over the lives of millions there.

Another feature of Burma is that its law-enforcement officers are better understood as order-enforcement officers. The distinction is important. Law enforcement requires proper criminal investigations; order enforcement requires none. Law enforcement requires training; order enforcement is easier without it. Law enforcement depends upon rational behaviour through written rules and communications along a hierarchy; order enforcement can be arbitrary and undocumented. Law enforcers are themselves answerable to the law; order enforcers are not. Ultimately, order enforcement works with or without law, as suggested by historian Mary Callahan in an article on colonial-era policing and military force: “[The] failures to establish any kind of effective local policing established the pattern of order

This report consists of extracts from a special study on Burma published by the sister organisation of the Asian Human Rights Commission, the Asian Legal Resource Centre, in the October-December 2007 edition of its bimonthly periodical, article 2 (vol. 6, no. 5-6). The report can be downloaded in full from: www.article2.org.

maintenance that exists to today: when local affairs get unruly, the state sends in the military”.

Complaints

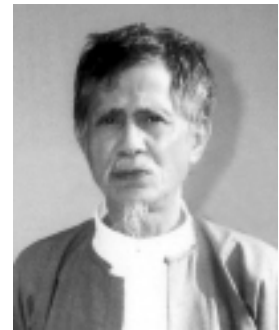
People in Burma who make complaints deemed to be “false” risk court and jail. The director-general of the police, Brig-Gen. Khin Yi, has given press conferences in which detailed rebuttals have been made of alleged extrajudicial killings and other gross abuses that have become widely known. But simultaneously other news reports have sought to reassure genuine complainants that they won’t face reprisals, that investigations will be undertaken and that action will follow where investigations reveal wrongdoing, particularly concerning allegations of illegal forced labour.

What actually happens to complainants in Burma has been documented by the Asian Human Rights Commission (AHRC) in literally hundreds of specific cases. Ma San San Aye and Ma Aye Mi San accused the chairman of a local council in Pyapon Township, Irrawaddy Division of rape in 2002 and were themselves jailed for making false accusations of grievous offences. The mother of Ko Aung Myint Oo withdrew a complaint against police officers of Myinchin Township, Mandalay who reportedly assaulted her son in 2006 after she struck a deal with one of the perpetrators; the mother of Maung Ne Zaw, a resident of Mohnyin in Kachin State, was forced to flee the country due to constant harassment by special anti-drug squad police against whom she lodged a complaint over the death of her son in custody the same year. After U Tin Nyein complained that the authorities in Bogalay Township, Irrawaddy Division, had negligently demolished an irrigation embankment and flooded his paddy crop he was himself imprisoned in 2006, but the Supreme Court upheld his appeal and he was released; the court rejected the appeal of U Aye Myint and U Win Nyunt against a two-year sentence for having complained of corrupt practices among village council authorities in the same township. The two men, one a school headmaster and the other a government mass organisation executive, were acting on behalf of a group of villagers. The township authorities accepted the complaint, reprimanded the officials and ordered them to return illegally collected monies. The irate officials lodged a counter-complaint with the district council, which reversed the earlier order and instructed that the two men be prosecuted.

Other cases that go to trial are decided without regards even to the domestic law and basic criminal procedure. Nyi Nyi Htun was in 2006 sentenced to three years’ imprisonment for illegal gambling in a summary trial presided over by a magistrate without the requisite authority. U Aung Pe was sentenced to three years’ imprisonment on a charge of giving unlicensed tuition, whereas his crime was described in the judgment as having “hung a t-shirt bearing an image of Daw Aung San Suu Kyi” in his classroom, which is not illegal. Maung Chan Thar Kyaw, a 15-year-old boy, was in 2004 convicted of obstructing the

police in the course of their duties: he was detained and tried without regard to the Child Law 1993, which was passed after Burma joined the international Convention on the Rights of the Child, only to be freed after his case became the subject of high-profile campaigning by groups outside of the country. Ma Su Su Nwe and U Aye Myint were released from prison terms related to complaints made to the ILO only after the government was threatened with eviction from the world body and legal action in the International Court of Justice. U Thein Zan was charged with causing a public disturbance after posting defaced state propaganda articles on his suburban fence; initially denied bail at a hearing where a person presumed to be a police officer stood in the courtroom and took photographs of observers, he was later freed and the charge against him dropped after two strangers came to his house by Land Rover and said that they would take care of things. Not long after, another court accepted two cases under the same section of law against assault victim U Myint Naing and five associates, who were blamed for aggravating villagers. Myint Naing alleged that the attack was planned and instigated by local authorities with the collusion of the police; the court accepted his complaint too, but only on one minor charge against three men on the bottom rung of the bureaucratic ladder (ten-household heads) and three other persons.

Together these cases speak to the key feature of both criminal justice in Burma and the state itself: that there is no predictable outcome of any discourse or exchange. If there were, even if coercive, it would allow citizens to plan their behaviour accordingly, with a reasonable expectation of a particular outcome. But for people in Burma, there are no objective criteria upon which to determine the consequences of a visit to a police station, a complaint to a ministry or a case before a court. This arbitrariness is the true indicator of the “un-rule of law”.



U Thein Zan

Killings

Reports of deaths in custody for ordinary criminal offences are increasingly common in all parts of the country. For instance, according to the Oslo-based Democratic Voice of Burma (DVB) Radio, on 27 July 2007 a 58-year-old man died while being transferred from police detention to a prison in Mandalay Division, upper Burma. U Ohn Kyaing was among seven pagoda trustees from Pan-aing village arrested and charged over the theft of the historic Shwemawdhaw Pagoda’s diamond-topped umbrella. He had allegedly been tortured during interrogation at Meiktila Police Station No. 1 and not received medical attention. The court hearings continued against the other six.

Two days later, a young man accused of stealing a motorcycle also died in the custody of the same police. Ko Kyaw Htay, 36, was kept in the police lock-up after being arrested at his house late at night by a unit of ten officers from Meiktila Police Station No. 2 on July

27, who according to his mother began assaulting him from the moment that they slapped on handcuffs; he was later transferred to the same station as U Ohn Kyaing, where he allegedly died. Visitors were denied access to him just a few hours before his death.

Meanwhile, on July 30 special drug squad police operating in the capital of the northern Kachin State reportedly beat a young man to death. According to the Delhi-based Mizzima news service, 22-year-old Maran Seng Aung was sitting on the road in the vicinity of his home in Myitkyina around 9:30am when three officers on motorcycles came, bound his wrists and assaulted him in public before pulling him into an auto rickshaw. By 5:30pm his dead body was in the local hospital. His mother has reportedly been warned against pursuing a complaint in the local court. Mizzima reported that people in Myitkyina claim that there is at least one death in the drug squad's custody every month.

At the start of August 2007, 38-year-old Ko Maung Myint also reportedly died in detention in the northeastern town of Muse having been stopped while illegally crossing the China border and not having enough money with which to pay off the police as demanded. When his wife came to the station on the third day of his custody, August 4, she was told that his body had been sent to hospital. When she went there she reportedly saw bruising and injuries suggestive of an assault.

The many accounts of bloody assaults by the police and other local security forces in Burma speak to the fearlessness with which these personnel operate and the lack of avenues for complaint, as described above.

But whereas the existing state institutions cannot themselves be called upon to offer redress to victims, in the past there was at least one other limited option. The International Committee of the Red Cross (ICRC) could earlier access prisons and other centres of detention and confidentially report on specific cases to higher authorities. It had been opening up new offices around the country and for some time had been making important interventions, in accordance with its global mandate, that must certainly have saved lives.

However, since late 2005 the ICRC has been stopped from visiting detainees, after the authorities refused to comply with its standard arrangements and procedures, including that it be entitled to talk with prisoners in private. At the end of June 2007 it issued a vigorous press release in which it roundly condemned the government for its attempts to thwart the committee's work in the country. Its president, Jacob Kellenberger, was quoted as saying that

“The organization uses confidential and bilateral dialogue as its preferred means of achieving results. However, this presupposes that parties to a conflict are willing to enter into a serious discussion and take into account the ICRC's recommendations. This has not been

the case with the authorities of Myanmar and that is why the ICRC has decided to speak out publicly.”

In response, the government used one of its proxies to accuse the committee of relying on “wrong assessments” and “made-up exaggerated stories”. The wife of the junta’s head, who doubles as the head of the Myanmar Women’s Affairs Federation, in July observed Myanmar Women’s Day by saying that the ICRC was to blame as its personnel “mostly met the prisoners who were in the list given by anti-government groups... [which] were followed by unrest and protests at the jails” and so “the authorities had to hold discussions to lay down new procedures”.

The belligerent response reinforced the ICRC’s point. The government in Burma has long approached discussions with international organisations not with the intention of seriously taking into account their recommendations but in order to give the appearance of dialogue while achieving nothing. In this manner the armed forces have remained in control for decades.

However, people in Burma need international groups to persist in their efforts to intervene, if for no other reason than that it will be many years before any credible domestic institutions may exist upon which citizens can rely to assert their rights and obtain even some limited form of redress. It is for this reason that the steady withdrawal of the ICRC from the country has been a great loss for people in Burma, and one felt especially during the days of mass detentions in the aftermath of the August and September 2007 protests.

Thugs

One feature of the handling of the protests, about which the AHRC had expressed concern for some time, was the use of government-organised gangs as proxies for state security forces.

Reports of the use of these gangs, loosely known as Swan-arshin (“masters of force”) had become increasingly frequent throughout 2007, as thugs, apparently most under the direction of the Union Solidarity and Development Association (USDA), a mass-organising body, had repeatedly attacked human rights defenders and persons holding prayer vigils for the release of political prisoners. In some cases council officials, police officers and other state security personnel were known to have been among those carrying out or organising the attacks. The courts have then been used to add insult to injury through the laying of charges against the targets of the violence, rather than the perpetrators.

For instance, after a man in Mattaya, upper Burma, assaulted U Than Lwin on 15 June 2007, he ran for cover in the local USDA office. Police who came to the office were refused access, and they did not demand it, despite the fact that the law of criminal

procedure gives them the right to enter any premises where an alleged criminal is believed to be hiding. Nine persons, including a number of Than Lwin's children, were thereafter charged and jailed for periods of five to seven years while no action was taken against the assailant.

That it is easy for authorities in Burma to organise a gang to harass, assault and abduct anyone of their choosing speaks to the complicity of the state in systematic abuse there. And just how easy is it? According to a participant in the illegal arrest of rights defenders gathering at a pagoda in Rangoon's northern suburbs during May, his gang was not even paid for the job but just taken to a teashop for a snack afterwards. The AHRC also has documents that reveal unequivocally that the gangs are working as hierarchically organised muscle under township councils and USDA offices.



**U Than Lwin after
the assault**

The use of violence through non-conventional forces has been a part of how Burma's military regime has got things done for many years. Thugs were used at the front of the brutal attack on a convoy carrying democracy leader Daw Aung San Suu Kyi and her supporters at Depayin in 2003. However, the extent to which they have now been incorporated into the routine monitoring and control of the population indicates a disturbing new phase in the country's downward slide, away from the "law and order" that the military junta claims to uphold and towards government by outright thuggery. It signifies a further diminishing and displacement of the police and courts, and a strengthening of arbitrary and extralegal institutions with no other agenda than to manipulate and brutalise.

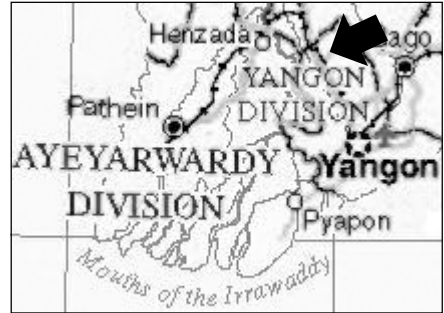
As the balance of power shifts, it will become increasingly difficult for even the most mundane and ordinary criminal procedures to be followed in Burma. That the police who came to look for Than Lwin's attacker did not bother to enter the USDA office speaks to where the real authority lies. USDA and local government officials also successfully covered up the murder of Ko Naing Oo inside a Rangoon council office during March 2007 after a petty family dispute. They even arranged for his prompt cremation, to prevent subsequent post-mortem inquiries. In 2006, a USDA executive in the delta region escaped investigation and prosecution after allegedly raping his 15-year-old neighbour.

The rising number of violent and coercive incidents involving USDA members, thugs, and un-uniformed police, army personnel and their affiliates—together with the manifest absence of institutions or channels for redress—presages growing lawlessness and fear in a country that has for decades been characterised by lawlessness and fear. Whereas the military regime in Burma promotes itself as a defender of law and order, its agencies and agents are in fact the greatest threats to these principles, not to mention the rule of law and human rights.

The Hinthada 6: Victims of a criminally insane system

The case of the Human Rights Defenders and Promoters (HRDP) group in Hinthada (Henzada) is indicative of how Burma's criminally insane justice system plays out in the interests of those in power and against those of anyone else whose interests do not coincide with the former.

On 17 April 2007 four men travelled to Hinthada Township, about 30 miles west of Rangoon, for a human rights education session. They carried with them documents like the Universal Declaration of Human Rights and the Convention on the Rights of the Child, to which Burma is a signatory.



At about 12:30pm on April 18, the group set out from Oatpone to another nearby village on two motorcycles. As they were passing the Yatanathiri Monastery on the way to Taluttaw at the outskirts of the village, a gang of around 50 persons came on to the road with slingshots and sticks to assault them. The first motorcycle with Ko Tin Maung Oo and Ko Yin Kyi could escape, but the second motorcycle, carrying Ko Maung Maung Lay and Ko Myint Naing, was stopped and the two men encircled and beaten up.

A pick-up truck carrying some monks came and broke up the attack. The two injured men were put onto the vehicle and taken to Taluttaw police station, from where they were transferred to Hinthada Township Hospital. Myint Naing was seriously injured, with six incisions to his head, and suffering concussion. Maung Maung Lay had minor injuries to the head. Their bodies also had minor injuries all over them caused by the beating and slingshot pellets. The two victims were transferred for emergency treatment and x-rays at the intensive care unit in Rangoon around 10pm that night.



Ko Myint Naing goes to hospital

The attack was allegedly organised by USDA executives. During the night that the group stayed at Oatpone village, a USDA township official, local police officers and at least one officer from the police special branch also came to stay there. In the morning it was reported that an official from the township council came too. The attackers are alleged to have been USDA members, and police and security forces in plain clothes.

On April 20, the HRDP organiser, U Myint Aye, made a written complaint to the local police chief, in which he accused the local USDA secretary of having coordinated the attack. In the complaint he quotes the secretary, U Nyunt Oo, as having shouted to the group of attackers to “Strike, hit, kill them!” He said that in addition to the injuries to the two men who could not escape, the gang stole their possessions, including a digital camera, voice recorder, watch and cash.

On April 23, the state-run newspapers ran articles against the group in which they accused it of going to stir up trouble and that villagers had insisted that “there were no incidents of human rights abuse” in their area. It said that when the group had gone to Oatpone and the villagers had tried to have them leave a confrontation had followed, but that the authorities and local abbot had resolved it.

Two days later, the UN Special Rapporteur on Myanmar and the Special Representative on human rights defenders made a joint statement in which they said of the incident that “the level of violence and the absence of intervention by the local police to protect the victims... remind us of the circumstances surrounding the tragic incident of Depayin in 2003”.

After the news reports, on April 24 the authorities sent notices to Ko Myint Naing and five other local men, all farmers—U Win, Ko Kyaw Lwin, U Myint, U Hla Shein and U Mya Sein—indicating that they would be charged with intent to cause a public disturbance. Two local village council chairmen lodged two separate complaints in the township court under the Penal Code that the accused had made statements “with intent to cause... fear or alarm to the public... whereby any person may be induced to commit an offence against the State or against the public tranquility” (section 505[b]) and “with intent to incite... any class or community of persons to commit any offence against any other class or community” (section 505[c]). Their accusations related not to the attack of April 18 itself but to a series of incidents in the lead-up to it, including that the men had been falsely alleging forced labour and creating local disputes among villagers, one concerning the alleged theft of a duck, another relating to a bicycle accident between a schoolteacher and a local resident.

On May 2, Ko Myint Naing himself lodged a criminal complaint in the Hinthada court against 12 persons, including the USDA secretary and another official, police chief and his deputy, and



U Win



Ko Kyaw Lwin

four ten-household heads under Penal Code sections 325, 326, 337, 350, 392 and 114, for causing grievous bodily harm with dangerous weapons and endangering life, criminal force, robbery, and aiding and abetting. In the complaint, he described how many local council members were among the attackers. He also described how as he tried to flee the assault he ran towards the local police chief and his head of security, standing and watching at one side. At that time, the latter himself pulled a slingshot out of his bag and fired a steel pellet into Myint Naing's stomach. He was then again surrounded and had his possessions looted. By this time villagers had assembled to see what was happening, but the perpetrators blocked them from offering assistance. It was not until the abbot of the Buddhist monastery came in a pickup truck that the perpetrators dispersed and allowed the monk to ferry them to safety.

The same day that he lodged his complaint the preliminary hearings in the two cases against him and the five others were heard in the same court. Judge Daw Myint Myint San ordered all six men to be kept in custody, including Myint Naing, who was still receiving treatment for the head injuries he suffered during the April assault.



U myint (L) & U Hla Shein (R)

On May 4 when hearings continued the defendants saw that someone allegedly from the Office of Military Affairs Security appeared to be secretly recording the proceedings in court. Their lawyer complained and the judge had the man taken from the court by the police, but nothing is known of what happened after that. There were around 200 persons in court to support the defendants; so, on May 11 when the hearings continued around 60 persons came to the court as observers on the side of the state, after the authorities had reportedly sent instructions that five persons should be sent from each ward in Hinthada town.

On May 24 the lawyers for the six again approached the court for bail on grounds that it was the time for planting rice and as the defendants are farmers if they could not go ahead with planting it would severely affect their families (who were already facing economic hardship due to the defendants being imprisoned); and, that Myint Naing needed to have medical consultations. But Township Law Officer U Myint Swe opposed granting of bail, claiming that Myint Naing had recovered, and next day the court again refused to grant bail. The doctor tending to Myint Naing was reportedly been refused access to the prison in Hinthada where he was being held.



U Mya Sein

The lawyers to six lodged petitions for charges to be dismissed on the grounds of lack of evidence and because the allegations against the accused didn't fit with the charges that have been lodged against them. In a lengthy submission with numerous citations of case law to support their assertions, they also questioned the authority of the local officials to lodge such charges and suggested that only township police commanders or above could lodge these charges, as per section 45 of the Criminal Procedure Code (CrPC).

On June 8 the township court reviewed the police report about the April 18 incident and accepted the complaint on just one relatively-minor charge of voluntarily causing hurt (a one-year jail term if found guilty), and only against six minor accused, namely three ten-household heads—Ko Soe Win, Ko Win Hlaing and Ko Sapu—and three ordinary villagers; it omitted the other six, including all of the primary accused: the local council chairman, USDA secretary and local police. The judge did not call the accused police or others to court to conduct his own inquiries as he is empowered to do, but just followed the police findings. Unlike the six human rights defenders, the six accused in this case were all given bail. A request by Myint Naing's lawyer to have the local council chairman and police appear as witnesses in this trial was refused. The case is not known to have proceeded.

On July 24 the court found the six accused rights defenders guilty, despite a lack of any firm evidence concerning the series of random allegations against them: Myint Naing was sentenced to eight years, as he was a respondent to both criminal cases; the other four to four years each, two years under each offence. As in many other cases of this kind in Burma, the judge's main role was to summarize the parts of the hearings suited to his purposes, iterate the charge and give a sentence. Neither of the judgments contains anything approaching legal reasoning for the verdict. On the contrary, the decisions are summed up with a single line, that, "It is found that the defendants have violated Penal Code section 505(b)/(c) and the sentence is passed accordingly as follows..."

The lawyers for the six men have lodged appeals against the sentences and at time of writing they had proceeded to, and been refused a hearing in, the sub-divisional courts.

The Pakokku incident & Saffron Revolution

On September 5 sporadic protests over a dramatic and unannounced rise in the cost of all basic fuels of the month before took a dramatic turn when about 500 Buddhist monks in Pakokku in upper Burma were met by uniformed soldiers who fired about 10 to 15 bullets before they dragged some monks away. At least one monk was tied to an electricity pole and beaten with rifle butts and bludgeons.

This was the first time that the military was directly used to suppress one of the protests since they began on August 21, and against monks at that. It drew a strong and swift

response. On September 6 a group of officials, headed by the secretary of the Magwe Division Peace and Development Council and head of the divisional Department of Religious Affairs went to Mahavithutarama monastery at around 10am to ask the residents not to demonstrate. Some monks allegedly began throwing rocks at their cars. A standoff followed, and the group was held hostage for about another six hours before being released. The officials were let out at the back door, as there was a huge crowd in front of the monastery. Four cars were destroyed during the incident and according to further reports, groups of monks went to at least one house and one shop belonging to members of the Swan-arshin and USDA, and damaged property as well as writing slogans on the outside. The incident was condemned in the state media; however, only the destruction of the cars was mentioned, not the hostage-taking and other events.

Shortly thereafter, the Mandalay Monks Union called for a nationwide religious boycott, a “turning of the alms bowl” against the government, USDA and Swan-arshin.

The last time such a boycott was declared on any scale in Burma was in 1990, after an attack on monks at a ceremony to commemorate the 1988 uprising that left two of them dead, along with two members of the public; it was brutally suppressed, thousands of monks detained and disrobed, hundreds of monasteries blockaded and raided, and a series of orders issued to prohibit religious organisations not explicitly approved by the state. These orders were again invoked during 2007, as was the language of sorting genuine from “bogus” monks.



Crowds gathering in Ragoon to await the arrival of protesting monks on September 19

But in the aftermath of the Pakokku incident, the view of monks in Burma was that such an extraordinary moment had again arrived. Beginning from September 17, in response to the failure of the regime to apologise for the violence, thousands took to the streets of cities and towns around the country, including Rangoon, Mandalay, Pegu, Sittwe, Kale, Pakokku, Kyaukpadaung, Tharrawaddy, Aunglan and Chauk. In many places the street marches were accompanied by special ceremonies in accordance with the disciplinary code of the Buddhist order, the Vinaya, to reject as a matter of moral and religious duty any offer of donations from the military or its supporters, or to preach before them.

On September 22, hundreds of monks marched towards Hledan along Pyi Road in Rangoon and approached the home of the democracy party leader Daw Aung San Suu Kyi on University Avenue. She came to the gate and paid respect to the protesting monks while the crowd shouted “Long Live Aung San Suu Kyi”. This was her first public appearance since May 2003; however, security forces blocked them on the following day. Meanwhile, thousands of monks marched in Mandalay, which together with its surrounds has the highest concentration of clergy in the entire country.

Within a few days, the monks were met by growing numbers of ordinary citizens, and the scale of the protests quickly escalated to the point that they captured global attention. By September 23, monks in the big cities and towns walking through flooded streets chanting verses of loving kindness were joined by human chains on either side of the road, and elsewhere around the country by crowds of delighted onlookers.



**Monks marching through heavy rain on
September 23**

On September 24, thousands of monks in Rangoon headed for the two holiest Buddhist sites in the city, Shwedagon Pagoda and Sule Pagoda. The monks marched in five columns, stretching more than a kilometer. They were joined by thousands of civilians who locked their arms to protect the monks, cheering and chanting. The crowd occupied five blocks and some estimates put it at around 100,000. Protests also took place in at least 25 other towns in the country, including in Pegu, Mandalay, Sagaing and Magwe, as well as in towns in Mon, Arakan and Kachin states and Kawthaung in Tenasserim Division.

By September 25, the military regime was openly threatening people to get off the streets, but the numbers of protestors continued to grow. Prominent actor and social activist Kyaw Thu and famous comedian Zarganar led over 20 actors, artists and writers to give

alms to the monks at the Shwedagon Pagoda. A column of thousands of monks left from there at 1pm and marched through Bahan Township together with members of the public. Some protestors waved red Fighting Peacock flags of the student groups that led the protests in 1988. Others carried banners calling for the release of political prisoners, national reconciliation, and saying that “this is a non-violent people’s action”. Meanwhile, in Taunggok, Arakan State and in Monywa, Sagaing Division tens of thousands of people also joined the monks.

Backlash & confrontation

On September 26, the military government ordered a 60-day 9pm to 5am curfew on Rangoon and Mandalay, and a prohibition on assemblies of more than five persons. Uniformed riot police and soldiers took to the streets and built barriers outside the main pagodas. When an estimated 10,000 protestors, among them 500 monks and some nuns, marched to Shwedagon Pagoda again around 11am they were hit with teargas and assaulted: dozens were taken away, and there were the first reports of many unconfirmed deaths. Swan-arshin thugs and other government heavies were also said to be among the attackers there, and in other parts of the city. Some were later rewarded with additional payments, sacks of rice, and permanent work with the city council, according to news reports.

However, protestors assembled and sat on the ground together around the Sule Pagoda at the city centre, chanting slogans like, “The people’s armed forces are our armed forces” and “The people’s army must not kill the people”. Around 3pm riot police again assaulted protestors and fired tear gas there. Unknown numbers—possibly hundreds—of monks and ordinary citizens were taken away in trucks to unconventional detention centres at a racetrack, the Mingalardone air force base and the Government Technical Institute (GTI) in Insein (all north of the Rangoon city centre).

Over ten thousand also marched in Mandalay, starting from the Dhammikarama and Taunghtilin monasteries, through the city. Although they were not met with violence as in Rangoon, there were army roadblocks in places with armed troops, including at the historic Phayagyi Pagoda. Some monasteries also reportedly had armed soldiers outside. Protests also continued in Sittwe and Pakokku.

On the morning of September 27 people around the world were wondering if the protestors in Burma would quietly stay indoors after the threats of the day before. They did not. Throughout the day, tens of thousands again gathered in Rangoon, Mandalay and Sittwe, and smaller groups came together elsewhere.



**Crowds on the steps of
Shwedagon Pagoda,
September 25**



Riot police deployed in Rangoon, September 26

In Rangoon, crowds assembled on the road to Sule Pagoda in the city centre were soon met with gas, gunfire and baton charges from assembled troops, riot police and auxiliary forces. They repeatedly retreated and reformed. By nightfall thousands had still not dispersed; the voice of an eyewitness speaking to the Democratic Voice of Burma (DVB) radio from Pansodan, in the downtown area, was punctuated by the sound of gunfire from near and far.

By the admission of the military regime alone nine died in Rangoon—among them four monks, a high school student, university student and a Japanese journalist. (In November it acknowledged 15 deaths.) But by all accounts there were many other casualties.

At least seven persons died outside High School No. 3 in Tamwe Township when troops pursuing protestors from Pansodan opened fire and drove a truck into the crowd before assaulting people with truncheons; however, security forces took the bodies away. Others who were beaten allegedly had their money, jewellery and mobile telephones robbed by the troops. One dead person who was later identified was 16-year-old Maung Thet Paing Soe, a ninth grade student at the school. His family obtained permission to cremate his body, which was being kept at a government facility, but they could not invite anyone for the funeral. The corpse had reportedly been autopsied but no report was given to the family. According to family members, at the time they went they saw roughly six bodies in that mortuary.

Eight corpses were reportedly left on the road after security forces attacked a crowd in South Okkalapa, between the Punnami and Post Office intersections. Local residents knew some victims, and took them back to houses in the neighbourhood. But after a short time, security forces allegedly entered the area, searched and located the bodies and took them away. One was identified as 31-year-old Ko Htun Htun Lin, a local resident whom witnesses said police and troops beat to death with truncheons outside the township post office.

There were also many unconfirmed reports that from 80 to 200 bodies of monks and ordinary citizens, including some who were seriously injured but not yet dead, were taken from the Kyaikkasan interrogation centre and burned at Ye Wei crematorium outside of Rangoon around midnight on September 29. According to one person claiming to have quit the Rangoon city council hygiene department who was assigned there, drunken soldiers moved the bodies, which included at least one woman who looked to have come from a well-off family, and another who was pregnant.

Elsewhere, a young man who was closely involved in the protests in Taunggut, Arakan State, was reportedly found dead in a creek on October 19. According to news reports, the police took and disposed of the body of Ko Nyi Pu Lay and did not inform his relatives; only when they filed a missing person report at the station on October 24 were they told of what had happened to him and they confirmed his identity from clothing.



Protests continue on September 27

In Mandalay, thousands of demonstrating monks and civilians were warned with gunfire from troops and riot police stationed at roadblocks all around the city. Hundreds were also assaulted and arrested, but they were joined for the first time by a column of over a hundred monks from the Buddhist University there.

Large numbers of demonstrators chose to confront the military, despite obvious risks to life and liberty. While some were killed and more injured, far larger numbers were taken into illegal detention: in Mandalay virtually the entire National League for Democracy (NLD) leadership was been picked up. Hundreds of monks were rounded up and tens of thousands confined to their monasteries by troops. At the school in Tamwe, students and others also were driven off en masse.

By the most conservative estimates as of September 28 at least 700 monks and 500 ordinary citizens had been taken away by security forces in every part of the country. A few days later the authorities themselves acknowledged that over 2500 were in custody and being “investigated”. They included prominent persons, such as comedians Par Par Lay in Mandalay and Zarganar in Rangoon (both were later released with warnings), and staunch human rights defenders such as lawyer U Aye Myint in Pegu. But the vast majority consisted of ordinary persons who had joined the protests out of sheer frustration at the unbearable conditions in their country. Many were women. Many had left their houses in the morning and simply did not come home at night, among them 30-year-old Ma Ke Naing Zaw, a mother of two from Pazundaung Township in Rangoon who disappeared while coming home from a hospitality course at the Kandawgyi Palace Hotel on September 27. Similarly, 18-year-old Ma Po Po



Government thugs take people into detention, September 28 (DVB)

Pyi Sone and her two sisters, Ma Thida Aung and Ma Moe Moe Swe, both aged 23 (parents U Myint Win Maung and Daw Aye Aye Maw), left Batheinmye Ward in Dawpone Township in the afternoon of the same day and did not come back; however, they were released from custody on October 3. By contrast, still missing at the start of October was Ma May Mi Oo, whose mother said in interviews that she had been taken from their house in Bahan Township, Rangoon, on the night of September 19, three months' pregnant with her first child at the time. Local officials had denied any knowledge of her whereabouts.

Persons taken from their houses or neighbourhoods described a similar pattern of being called at night, being told that they would not be gone long and would not need to take anything with them, being blindfolded and not being told where they were being taken or by whom, and being assaulted for no reason. The experience of Par Par Lay, interviewed by the Burmese service of the Voice of America on November 1, was typical:

“They called for me on the night of September 25. Around 1am we had an annual donation ceremony going on at our ward’s religious hall and I was there for that programme. It was while that was going on that they came and immediately shoved me into a van. ‘Wait, I need to get my stuff,’ I said. ‘Never mind, you don’t need anything,’ they said. I didn’t have anything warm, just a light shirt and lengyi; not even slippers. ‘Get on the van,’ they said, so I got on and they blindfolded me and took me away. I didn’t know how come.

“Back at my house, my wife asked them, ‘Which organisation are you from? Tell me, why are you taking him? What are your names?’ ‘You don’t need to know,’ they said.

“There was another person on the van with face covered. I didn’t know him. At about 3am we reached the Shwesaryan riot police camp. It’s called the number 4 camp, riot police. After we got there, the story began. ‘So, we have some questions for you,’ they said and forced us to sit and began the interrogation. It was tough, because they hit us constantly. They kept changing the guy. One would interrogate, the other one would take a rest. Like that.”

Reports soon began filtering out about conditions for detainees. Witnesses at the GTI and Kyaikkasan camp told stories of disrobed monks being whipped and kicked in the head. At least three persons and one monk who were receiving emergency treatment at the Rangoon General Hospital were removed while still getting medical attention, and taken to undisclosed locations. Four detainees taken to Insein Prison after the protests in August were transferred to the jail hospital where they were kept isolated from other inmates, also having been seriously tortured. On September 27, a disrobed monk was brought to the Rangoon General Hospital for treatment of injuries to his feet that were apparently caused by torture.

Monks, monasteries and religious objects were not spared from the violence meted out on the rest of the population. After night-time raids on September 26 and 27, over 300 monks from the Ngwekyaryan and Meggin Monasteries in the northern suburbs of Rangoon were reportedly taken to the GTI and forcibly disrobed. At least two persons, 33-year-old Maung Kyaw Kyaw of Shwebo Road and Maung Than Aung of Inwa Road, both in South Okkalapa, were killed during the raid on Ngwekyaryan. The monasteries were profaned, smashed and looted in the same manner in which troops have demolished villages in outlying civil war areas for years: money, electrical equipment and Buddha statues were carried off. In October, township council officials and Special Branch police came back to the Meggin Monastery, which is in Thingankyun, and searched for items to use in prosecuting its abbot, U Einda. The monastery had remained sealed off for some days after the raid, and when it was reopened only two monks were allowed to return and reside in it; but at the end of November the entire monastery was ordered closed.



Smashed doors at Ngwekyaryan Monastery, September 27 (DVB)

Not only in Rangoon and Mandalay but elsewhere too soldiers stormed religious buildings and took away their occupants. For instance, according to The Irrawaddy news service troops raided monasteries in Bamaw, Irrawaddy Division and took away 108 monks. When they began reciting protective verses while in prison they were separated. Some 30 of them started a hunger strike. On September 27 they were sent from the prison to army lockups. Similarly, on September 27 soldiers raided the Pauk-myaing Monastery in Chanmyathazi Township, Mandalay and arrested most of the 50 monks who were praying at the time; a few managed to escape.

There were also many reports of troops walking across images of the Buddha and the Buddhist flag, dropped in the streets by fleeing monks at the start of the crackdown, and of troops entering religious premises with their boots on. Ironically, this behaviour closely resembles the actions of British colonial troops, which used pagodas, including the Shwedagon Pagoda, as military encampments, and also refused to remove their footwear on religious grounds, as required by custom. It was this behaviour that in part led many monks at that time to join and lead the anti-colonial movement around the country.

Back on the streets, smaller numbers of mostly male protestors continued to confront the security forces in Rangoon, shouting slogans such as “General [Aung San] did not give you training in order to kill the people!” “We don’t want military government” and “May the people who killed monks be struck down by lightning!” In Mandalay, on September 29 up to 1000 monks and over 10,000 people continued marches, closely watched by troops,

police and government thugs. In Sittwe, about 50 monks and 300 civilians marched for around half an hour and were threatened by armed troops, and in Pakokku around 200 monks led 2000 civilians in a peaceful two-hour march to Thihoshin Pagoda starting at 2:30pm that was not broken up by the authorities. During the march they also chanted slogans such as those in Rangoon. They prayed at the pagoda before dispersing. To the south of Pakokku, at Yenanchaung, around 200 monks followed by a few thousand supporters marched around the town chanting slogans. Many of the monks were from the Shwedaung Pali University, which is under the control of one of the 47 top government-approved monks of the Maha Sangha Nayaka Council, U Tezaniya.



Protestors in Rangoon on September 28 (DVB)

Hospitals were ordered to refuse medical treatment for persons apparently injured due to the crackdown on the protestors and also persons receiving treatment were transferred into army custody. According to DVB, 48-year-old U Than Aung died after being taken into custody after protests in Rangoon on September 27; he was reportedly injured at the time he was taken to the interrogation centre, but was denied medical attention. Similarly, according to a released protestor, a young man from Thingankyun in Rangoon, Ko Mya Than Htaik, had been taken to the GTI where he was denied medical treatment although he had been shot. Armed security personnel were also patrolling hospitals, guarding the entrances to emergency treatment wards and obliging staff to inform them of persons being admitted with injuries. At the Rangoon General Hospital, six persons who had been receiving treatment for wounds, including Mya Than Htaik from Thingankyun, were taken away to an unknown location by soldiers on October 3; over a week later their families had still not found out their whereabouts. In some places, such as Myinchin and Taungthar townships in Mandalay, officials were rumoured to have sent orders to hospitals that they not treat monks who were continuing to boycott the military regime.

By October 1, while arrests continued there were also some persons being released, revealing something of the atrocious conditions in which protestors had been held: crammed into otherwise empty rooms with no washrooms or toilets and virtually no food. One detainee said that she had been kept with around 200 women in the GTI and that around 3000 people were kept there. Some had died in custody and monks had been forcibly disrobed and thrown in with everyone else, she said. Another, Daw Khin Mar Lar—an NLD member in Mandalay who had apparently been taken into custody in an attempt to get at her husband—said the conditions under which she had been kept, first at Police Battalion 4 and then at Ohboe Prison, were appalling. She described the little food given

as consisting of nothing more than rice soup, which stank and was full of gravel and dirt and that “even dogs wouldn’t eat”. At least one of her co-inmates, Daw Thin Thin, was aged more than 70. Khin Mar Lar was released only having signed a pledge that she would not cause any trouble and having been threatened that she would receive a long compounded jail term and her family members also would be taken away if she did otherwise. As more persons were released they all indicated that they had been obliged to sign similar documents. Others said that they had been pressured to testify against monks and other detainees in exchange for being freed.

Another feature of the authorities’ response that emerged at the start of October was to take family members of wanted persons as hostages. Among them was almost the entire immediate family of U Gambira, one of the monks wanted in connection with the September protests. His younger brother Ko Aung Kyaw Kyaw was taken from a street in Rangoon on October 17; another younger brother Ko Win Zaw was taken earlier. His mother and a sister were detained in Meikhtila, upper Burma, on October 16. At last report, his father and another sister were in hiding. The monk was finally captured in November. The abbot of the Thitsamandai monastery in Gontalabaung village was also reportedly arrested on October 2 and held to be exchanged for his brother, who is also a monk, whose monastery in Mingaladone, Rangoon, was raided during the crackdown on protests.

In accordance with which law?

By mid-October the state was beginning to concoct court cases against persons accused of offences over the protests in order to pretend that there existed an element of its original “law and order” rationale in its agenda. According to a report in the *New Light of Myanmar* of 9 November 2007 on the latest visit of the United Nations special envoy to Burma, Ibrahim Gambari,

“During August and September when the nation saw protest marches, the government had to tackle in accordance with the law the incidents in which some people violated the law and the protest marches were turning to unrest and violence. Unavoidably, the government had to call in those who got involved in the marches, some of whom were artless people, for questioning. Now, all those who were not relevant to the violent acts and violation of law have been released. And those who are [suspected] of the violent and terrorist acts are being questioned...”

Thus protestors such as Naw Ohn Hla resurfaced to be superficially treated “in accordance with the law”. Ohn Hla



Naw Ohn Hla

had earlier risen to prominence by virtue of her involvement in the “Tuesday Prayer Group”, which met every week at the Shwedagon Pagoda in Rangoon to pray silently for the release of political prisoners. Throughout 2007 security forces and others acting on their behalf, including pagoda trustees, constantly harassed her and the other women involved in the group. On one occasion the officials childishly doused the area where they customarily gathered (the Tuesday corner of the pagoda) with dirty soapy water. Ohn Hla was herself libelled in articles printed in private journals on the orders of the government, which alluded to her as a prostitute. Nonetheless, she and the other women kept coming to pray.

After the August 15 fuel price rise that precipitated the nationwide protests, Ohn Hla was among the first to protest and be taken into custody “for questioning”. Like everyone else, she was taken without regard to any provision of law or criminal procedure. And like most others, nobody knew where she was held, for how long she would be held or the conditions of her confinement.

At an October 12 court hearing in Hmawbi, just north of Rangoon, she was placed under a restricting order in accordance with the 1961 Restriction and Bond Act. She was denied a lawyer and the only witnesses were the township police chief, her village tract council chairman and an official underneath him. At the end of the brief trial, Judge Aye Aye Mu instructed that she cannot leave the township for the next year without seeking a permit, or reside in another part of the country, and must report to the local police station once every seven days.

Even leaving aside the process by which she was brought into the court and the most obvious procedural absurdities, the order itself was sheer nonsense; devoid of legality. The two subsections of the act under which Ohn Hla was charged were specifically for habitual offenders and their abettors or someone evidently about to commit a felony. But the judge’s reasons for placing her under the order were that she has “no fixed address” in her village of registration and has “no fixed occupation”. In fact, she had explained to the court how she had come to reside in another township and be placed on a guest register there, and two prosecution witnesses acknowledged that she works as a small goods vendor in her home village, and the register is both for the purposes of residency as well as trading—as if any of this was significant anyhow. Indeed, were these criteria applied evenly across the population of Burma, millions would probably have to be brought before courts for similar orders to be passed against them.

The treatment of Ohn Hla, although legally devoid of merit, was relatively benign. In many other cases those labelled as ringleaders of protests have been tried under the same provision of the antiquated Penal Code as the Hinthada 6, according to which,

“Whoever makes, publishes or circulates any statement, rumour or report... (b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility... shall be punished with imprisonment which may extend to two years, or with [a] fine, or with both.” (Section 505)

It has been a characteristic of the criminal injustice system in Burma under the current administration that virtually anything can be found to fall within the parameters of section 505(b), from the making of complaints about forced labour to the watching of a wedding video of a general’s daughter. But in the aftermath of the protests this section has been overused to the point of absurdity, suggesting a policy dictate rather than any kind of legal process, no matter how feigned.

For instance, on October 19, the township court in Katha, Sagaing Division, sentenced NLD members U Myint Kyi (son of U Ba Zaw) and U Zaw Lin (a.k.a. U Maung Maung) to two years with hard labour for their alleged part in the protests. According to Police Superintendent Myint Zaw, the two men held a meeting with others at Myint Kyi’s house on September 25 to plan for a protest in the town the next day. The court heard that the march lasted for a half an hour and involved around 50 monks and over 400 residents who apparently went not in order to press for changes in their society but rather in order “to cause alarm to the public”. The accused maintained that they were not organisers of the protest and anyway Zaw Lin did not even attend it, but Judge Ne Aung does not appear to have considered their testimony as like other such judgments in Burma’s courts, his lacks evidence of any specific reasoning behind the verdict.

In a related case, on October 18, the court in nearby Indaw sentenced Shwe Pein (a.k.a. Htay Naing Lin) and Chan Aung (a.k.a. Nyi Htay) also to two years with hard labour for allegedly having had contact with the defendants in Katha and having communicated to short wave radio stations abroad about goings on there. Interestingly, Deputy Police Chief Kyaw Htay used telephone records and called an official from the government communications department to testify against the two—who are members of the HRDP group. Others in that group have been targetted in similar legal actions throughout 2007. Judge Daw Khin Myat Tar concluded that the defendants had “sent news to foreign broadcasters with intent to injure State tranquility and the rule of law by causing alarm to the public” and passed her sentence accordingly.

U Min Aung, a father of three small children, was brought into the district court of Thandwe (upon the western seaboard) facing the same charge on October 17. Min Aung—who was apparently targetted for having worked on a number of forced labour cases in Arakan State and having had contact with the International Labour Organisation’s office in Rangoon—was sentenced for his alleged involvement in protests in his hometown of

Taunggut on September 26 and 27, although in his defence he maintained that he had been away from the area until October 12, the day before he was arrested. When Min Aung complained that he had been denied a lawyer, in violation of his human rights, Judge Daw Hsaung Tin added another two years to his sentence for contempt of court, making it nine-and-a-half years in total. Later, it seems that a lawyer was able to get the case reviewed and the sentence brought back down to two-and-a-half years, despite having been refused permission to get copies of the court's judgment.

Reports of identikit charges, investigations and convictions have come from all over the country. For instance, the Yoma 3 news service (Thailand) said that on November 7 Judge Maung Maung at a court in Pyi, lower Burma, sentenced two other HRDP members—Ko Zaw Htun and Ko Thet Oo—to two years each under 505(b), along with a disrobed monk, U Pandita. Similarly, according to the Burmese service of Radio Free Asia, courts in Kachin State, on the border with China, sentenced NLD members U Ba Myint of Banmaw and U Ne Win of Myitkyina (the state deputy chairman) to—yet again—two years apiece on November 9. Ba Myint was reportedly tried in a closed court, without the knowledge of his family, while Ne Win's wife only learnt of the charge against him when she went to the court on the afternoon of November 8; the next morning he was given 15 minutes to hire a lawyer (without success), after which the judge tried the case and passed the judgment that evening.

Ko Kyauk Hke, an artist living in Aunglan, Magwe Division, was on September 30 watching satellite television footage of the crackdown on protests in Rangoon at a street-side video stall when he leapt up and yelled, "Long live Theravada Buddhism!" He was arrested shortly thereafter, likewise charged under 505(b), refused the right to a lawyer and sentenced to two years after the prosecution accused him of also shouting anti-government slogans. Similarly, Ko Aye Cho in Pyawbwe township, Mandalay was reportedly sentenced to six years' imprisonment under the same section and others at the end of October for having accused USDA members in his area of plotting to kill activists.

Analogous cases have proceeded against two NLD party members in Monyin, U Kyaw Maung and U Hpe Sein, who are aged 60 and 74 respectively. And according to a human rights lawyer, others facing or having been sentenced in 505(b) cases include U Myint Oo, the NLD secretary in Magwe; U Thar Cho in Yenanchaung, Htun Htun Nyein in Chauk, and schoolteacher U Htay Win in Natmauk, all also in Magwe; and Ko Saw Win, an NLD organiser in Hinthada (Irrawaddy delta) and Maung Khaing Win, who offered water to protestors in the same township. The lawyer only came to learn of the last two by accident, as he was lodging papers concerning a separate case.

The fantastic irony of all of these cases is that while the military regime rails against neocolonialists and the supposed interference of others in its internal affairs, it is using a

colonial-era law in its desperate attempts to crush opponents to its unsavoury rule in exactly the same manner as did the British officials who devised and implemented the law over a century ago. The provision is the same one that exists until today in the Indian Penal Code (1860), which can be found in one form or another throughout the Commonwealth; however, despite its persistence on the statute books, nowhere is the section so shamelessly and blatantly manipulated for purposes entirely contrary to notions of justice than in Burma today.

Some cases were retried or persons released despite having been given lengthy sentences. For instance, Ko Soe Win, a young man who had held a solo protest in Taunggyi, Arakan State on September 11 was charged with insulting religion (Penal Code sn. 295A; by virtue of his calling for Snr-Gen. Than Shwe, the head of state, to be excommunicated) and under 505(b). He was not able to meet with a lawyer or family members and on October 11 was after a brief hearing sentenced to four years in jail. However, on October 25 he was reportedly retried and the conviction overturned.

Conclusion

Every society has its threshold, the point after which it will no longer tolerate things going on as before. The threshold for people in Burma is much higher than that of many other societies today, and thus they have put up with a lot more for a lot longer than might otherwise have been expected. This does not mean that they have not in the past fought back, but rather that their forms of resistance have not attracted much outside interest, nor seriously threatened the army's hold on power.

But it is no longer possible for people there to use ordinary methods to alleviate their problems. Clearly, the conditions under which they are being forced to live have become intolerable. The protests of 2007 are a consequence of the threshold being reached.

The struggle for survival of Burma's people is by corollary a struggle for survival of its dictators, whose response to the protests has throughout been characterised by lawlessness: the complete departure from not only international law but also from those domestic standards to which they pretend to subscribe.

Against this backdrop, the struggle can also be seen as a struggle against the un-rule of law. The demands are for both rice and rationality: each depends upon an end to the arbitrary rule under which people in Burma have been needlessly obliged to subsist for over four decades.

CAMBODIA

The Human Rights situation in 2007

In October 1991, Cambodia's warring factions and 17 concerned countries gathered in Paris, France, to sign a set of agreements, in the presence of the Secretary-General of the United Nations, to end the war in Cambodia. All State signatories then recognized, among other things, that Cambodia's tragic recent history required special measures to ensure the protection of human rights.

Among these measures were Cambodia's adoption of a pluralistic liberal democratic system of government, and its undertaking to ensure respect for, and observance of, human rights and fundamental freedoms. For their part, the other State signatories also committed themselves to promoting and encouraging such respect and observance, and the UN was tasked with monitoring the situation of human rights in the war stricken country.

Following these accords, Cambodia has become party to all major international human rights norms and standards and incorporated them into its constitution. This constitution has established an independent judiciary for the protection of the rights and freedoms of all Cambodian citizens so that aggrieved individuals can have courts to adjudicate on and enforce their rights. Furthermore, the same constitution has assigned the King of Cambodia to be the guarantor of both the independence of the judiciary and the rights and freedoms of Cambodian citizens.

Cambodia is therefore internationally bound by international human rights norms and standards by virtue of the Paris Peace Agreements and the constitution it adopted in 1993.

This report focuses on some developments that conditioned, for better or for worse, the situation of human rights in Cambodia in 2007. These developments are as follows:

1. The strenuous relationships between the Cambodian government and the UN human rights mechanisms in Cambodia;
2. The adoption of the Code of Ethics for Judges and the enactment of the Code of Criminal Procedure, and their impact on the judiciary and human rights;
3. Criminal lawsuits and arrests to strike fears in the population;
4. The restrictions on the freedoms of the press, of expression and of assembly;
5. Land disputes and land-grabbing, and the measures taken to address this issue.

1. The strenuous relationships between the Cambodian government and the UN human rights mechanisms in Cambodia

Under the Paris Peace Agreements and with the consent of the Cambodian government, the UN High Commissioner for Human Rights has set up a field office in Cambodia (Cambodia-OHCHR) and the UN Secretary-General has appointed a Special Envoy for Human Rights in Cambodia (UNSGSE). The Cambodia-OHCHR office is doing the field work while the UNSGSE visits the country from time to time and, with help from the Cambodia-OHCHR office, presents reports on the human rights situation in Cambodia.

The purpose of these two UN human rights mechanisms is basically to monitor the human rights situation in Cambodia and to provide technical assistance to the Cambodian government to help it meet its human rights obligations and ensure observance of and respect for human rights in the country.

However, right from the start, the Cambodian government has reluctantly welcomed the presence and role of the two UN mechanisms, notably when their reports have continued to identify violations and abuses of human rights and made recommendations for change to improve observance of and respect for human rights. There has been apprehension as to whether the Cambodian government would consent to the extension of the mandate of the Cambodia-OHCHR every time this mandate is about to expire.

In fact, the Cambodian government has maintained its hostility to both UN mechanisms. The strenuous relations reached a high point in 2006 when the latest UNSGSE, Prof. Yash Ghai, after having visited the country and met with people in the government and civil society, presented a report critical of the leadership of the country for overlooking and failing to act upon repeated recommendations of his predecessors for the improvement of the institutions of the rule of law and the situation of human rights in the country. He singled out the concentration of power in the hands of the prime minister, which he said was not conducive to the respect for human rights.

The government reacted sharply to Ghai's matter-of-fact presentation. Prime Minister Hun Sen called on the UN Secretary-General to dismiss him and also threatened to close down the Cambodia-OHCHR office. The UN Secretary-General did not heed the call and the UN High Commissioner for Human Rights, Louise Arbour, during a visit to Cambodia several months later, succeeded in defusing the tension between the Cambodian government and the two UN human rights mechanisms.

However, the tension flared up again in June 2007 following Ghai's presentation of his critical report concerning the human rights situation in Cambodia during a session of the UN Human Rights Council in Geneva. His report highlighted, among other things, the

lack of an independent judiciary, political repression and detentions, a lack of progress concerning legal reforms, land-grabbing and forced evictions, corruption, the lack of freedom of speech, violations of indigenous peoples' land rights, and impunity. All of these issues are central themes that concerned local and international organizations have repeatedly raised and are the key hurdles facing the country at present.

Following Ghai's presentation, the country's ambassador to the United Nations in Geneva, Chheang Vun, launched an unwarranted attack on the UN Secretary-General's special envoy. Chheang Vun attempted to dismiss Ghai's report, claiming that it focused solely on negative aspects, but without dismissing its veracity. He then stated that Cambodia no longer accepted Ghai's mandate in the country and called on the UNHRC to review the Special Envoy's nomination to this position. In doing so, Cambodia has effectively signalled that it will no longer cooperate with this important UN mechanism that was initiated to further respect for human rights and the rebuilding of the country as a whole.

2. The Code of Ethics for Judges and the enactment of the Code of Criminal Procedures

After the election of a new government and the adoption of a new constitution in 1993, Cambodia has continued to join newly adopted international human rights instruments. In early 2007, it ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). However, it has not yet ratified the First Optional Protocol to the International Covenant on Civil and Political Rights, although it had signed it even before signing OPCAT.

Cambodia has also embarked on a number of reform programmes, one of which is judicial reform programme, in order to reform its system of government, to shed its communist past and become a pluralistic, liberal democracy governed by the rule of law. However, the implementation of the judicial reform programme, as will be shown below, has been the slowest of the various reform programmes.

Over the last couple of years judicial reform has gained some momentum, with the enactment in 2006 of the Code of Civil Procedure and in 2007 of the Code of Ethics for Judges and the Code of Criminal Procedure.

A. Code of Ethics for Judges (CEJ)

In February, the Supreme Council of the Magistracy (SCM) of Cambodia, the supreme judicial body governing the judiciary, adopted a Code of Ethics for Judges (CEJ). In the Cambodian justice system, judges and prosecutors are all magistrates and belong to the same body. Therefore the CEJ applies to both judges and prosecutors.

If effectively enforced and well complied with, the CEJ could become a remedy to the endemic corruption within the judiciary, which then infects the other branches of government. It will also strengthen the independence of the judiciary, inspire more public confidence in the system, and lay a solid foundation for the establishment of the rule of law in the country.

The CEJ begins with the objective of reinforcing the dignity and independence of all judges. It then successively announces the principles of independence, impartiality, honesty, dignity and diligence, and the application of each of these principles. The Cambodian code reflects much of the Bangalore Principles of Judicial Conduct and similar codes in countries endowed with a well functioning, independent judiciary. It confirms the independence of the prosecution as stipulated in the country's constitution, in which it is recognised that prosecutors belong to the same body of judges.

It further incorporates the inadmissibility in court of evidence obtained through the use of illegal means and the prosecution of those who have resorted to those means, which is a novelty under the Cambodian legal system and which is left to the law of evidence and the law on the crime of torture in other countries. Section 9 of the CEJ states that "when a judge receives evidence against a suspect, and that evidence is known or believed to derive from illegal means which seriously violate the rights of the suspect, especially when it relates to torture or inhuman treatment, or any human rights violation, that evidence shall not be permitted to be used against the suspect, and the judge shall take necessary measures to ensure that the persons responsible for the above acts are immediately brought before the court."

The CEJ, however, does not contain much detailed and elaborated application of or commentary on each of the principles it enumerates. Those principles and their respective application are therefore very open to various interpretations that may render their enforcement less effective.

For instance, regarding judges' attitudes towards political activities and issues, the Cambodian code states under the principle of independence that judges "shall remain neutral in political activities"; and under the principle of impartiality, that they "shall not make any prejudgment relating to ...political tendency..." when making judgments, and that they "should avoid making any statement ...relating to political controversies; involving political parties; ..."

The CEJ does not specify, as codes in some other countries do, that judges should refrain from membership in or association with political organisations or activities. A clear recommendation in this regard would put an end to the political control of judges and prosecutors through their affiliation to the ruling party since the communist days, or their

more recent politically-encouraged affiliation. It is now known that “99 per cent of judges and prosecutors” are members of the ruling party, the former communist Cambodian People’s Party (CPP), whose discipline remains as strict as it was in the past.

Judges and prosecutors have since been trained in the adopted judicial ethics. Although its effectiveness is yet to be seen, it will encounter the same fate as that of other laws in Cambodia, whose implementation is weak and depends on the erratic “political will” of the country’s leadership, instead of depending on the institutions of the rule of law, which are primarily dysfunctional.

B. The Code of Criminal Procedures (CCP)

Cambodia adopted a Code of Criminal Procedures (CCP) in August 2007. The CCP had been prepared by French experts, and it is very much modelled on the French Code of Criminal Procedures. It replaces the section on criminal procedures in the law known as UNTAC Law, enacted in 1992 when the United Nations Transitional Authority in Cambodia administered the country in 1992-1993, pursuant to the Paris Peace Agreements of 1991.

This replacement inadvertently ended Cambodia’s recognition of some important principles and rules related to criminal procedures adopted by the United Nations that had been an integral part of the UNTAC Law. These principles and rules are not carried forward or adequately provided for in the new code.

These principles and rules are: (1) *The Basic Principles on the Independence of the Judiciary*; (2) *Code of Conduct for Law Enforcement Officials*; (3) *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*; (4) *Standard Minimum Rules for the Treatment of Prisoners*; (5) *Standard Minimum Rules for the Treatment of Detainees*; (6) *Basic Principles for the Treatment of Prisoners*; (7) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

It remains to be seen whether the CCP has superseded all of these principles and rules altogether and Cambodia has repudiated an important part of human rights norms and standards contained within these.

Another concern is that the CCP, which “aims at defining the rules to be strictly followed and applied in order to clearly determine the existence of a criminal offence,” is silent on the responsibility of the judiciary for the protection of human rights as stipulated in the Paris Peace Agreements and in Cambodia’s constitution.

The CCP lays out in detail rules of procedure to be followed at every stage of the criminal process from the beginning of investigation to the imprisonment of the guilty. It makes adherence to those rules mandatory and renders void any process being conducted

in breach of them. These rules are the bread and butter of the judiciary, but the whole of the criminal procedures should begin with an announcement of the essence of the constitutional rights and the responsibility of the judiciary for their protection, as the French CCP does in its preliminary article.

i. Characteristic features of the Cambodian justice system

The CPP crystallized Cambodia's French-modelled civil law system, which is an inquisitorial system whose main features comprise:

- (1) Judicial inquiry as the core of criminal investigation;
- (2) Prosecutors and judges belonging to the same body of judicial officers called magistrates;
- (3) The subordination of the police, called the judicial police, to the prosecution;
- (4) Criminal investigations by investigating judges for felonies, prosecutors for misdemeanours, or by judicial officers under the direction of prosecutors or on behalf of investigating judges;
- (5) Trial judges taking a lead in the interrogation of defendants in court based on their thorough reading of the case file constituted by an investigating judge or a prosecutor;
- (6) Court judgments being based on the "true belief" (in French *intime conviction*) of the trial judge in the evidence submitted in court, not on "proof beyond reasonable doubt";
- (7) Brevity of trials;
- (8) Pronouncement of the verdict and sentencing at the same time in a single judgment not very long after the end of the hearing, in the same day or within a few days;
- (9) Absence of clear equality of arms and the accused person's right to silence in court;
- (10) Inferior status and role of the defence counsel throughout the criminal process;
- (11) Secondary role of prosecutors in trials.

ii. No guarantee of fair trial

There should be concern about the absence of equality of arms, the leading role of the trial judge, the principle of the trial judge's "true belief" in evidence, and the inferior status of the defence counsel in court, and their negative impact on the right to a fair trial of the accused.

The physical arrangement of the courtroom already indicates the guilt of the accused and the inferior status of the defence counsel. The desks of all court actors are arranged in the form of a U shape, with the trial judge's desk placed at the highest level at the base of the U, with the prosecutor's and the clerk's desks placed lower down either side, and the lawyer's desk placed at the lowest level, on the floor, beside but lower than the court

clerk's desk. In the middle facing the judge and a distance away from the lawyer's desk, on the floor, is the horse-shoe shaped bar behind which stands the accused, with the trial judge, the prosecutor and the court clerk literally looking down on him or her. Victims and witnesses stand beside the accused.

As the result of Australian assistance, the Kandal provincial trial court (a "model court") has all desks, except the judge's, placed at the same level, with the clerk's desk placed right in front and beneath the judge's desk, and the prosecutor's and the lawyer's desks facing each other. It is quite an innovation towards the equality of arms and the common law, accusatory system. It is known that the prosecutors of that court were at first reluctant to use the new courtrooms when they had to lower themselves down to the lawyer's level. However, the president of that court does not mind that physical symbol of equality of arms between the prosecution and the defence and seems to welcome a combined civil and common law system in his court.

In the court, the trial judge first interrogates the accused based on the case file constituted by an investigating judge, who has already found probable evidence to prove the guilt of the accused and who has the approval of the prosecutor for the submission of the case for trial. The counsel would not dare object to questions, including leading questions, the trial judge poses to the accused, for fear of antagonizing the judge and suffering from the judge's displeasure. After completing his interrogation, the trial judge allows the prosecutor and the counsel to question and cross-examine the accused, and make submissions and rebuttals. The court then hears victims and witnesses.

The hearings are normally of short duration: an hour, several hours or one day at the most. They are rarely adjourned. At the end of the hearing, the trial judge withdraws to his chambers. He comes back shortly after or within a few days at the most to pronounce his judgment, which includes the verdict and sentencing. In a trial in 2005 of two men, Born Sam nang and Sok Sam Oeun, who were accused of the murder of leading union leader Chea Vichea, the trial judge came back to the courtroom some 20 minutes after a day-long to pronounce his judgment, sentencing them to 20 years in prison.

It is commonly known that, after examining the case file prior to the hearing, trial judges have already made up their mind as to the guilt of the accused and have already prepared a rough judgment. The hearing is often merely a formality. In fact the police, the prosecutor or the investigating judge have normally already decided the fate of the accused at the stage of investigation. A big part of the unfairness of the trial lies there, where the accused, mostly in detention and also mostly without legal counsel, is in a disadvantageous position to defend himself, notably when the procedure is not conducted in public.

The judgment, which includes both the verdict and the sentencing, requires the presentation

of mitigating factors at the end of the same hearing, prior to the pronouncement of the verdict. The defence is very much at a disadvantage when the mitigation, especially for leniency, can influence the judge's verdict on the guilt of the accused.

The system relying on the "true belief" in evidence of the trial judge should be tested for its constitutionality, as it concerns the impartiality of the judge and the fairness of the trial. After examining the case file together with the conclusion of the investigating judge prior to the trial, it is unlikely that the trial judge does not have any prejudice and can maintain his or her impartiality. This "true belief" may not be compatible with what the constitution says about evidence in court: "any doubt shall benefit the accused." What the constitution says can be interpreted as meaning that a trial judge must have "proof of evidence beyond reasonable doubt" before pronouncing the guilt of the accused.

Furthermore, the CCP restricts the right to fair trial when it limits the causes for recusal of judges. These causes are basically the judges' own, their current or former spouse's, or their close relatives' involvement as parties in the case before them. It does not extend those causes for instance to the involvement as parties in the case of other individuals or groups with whom they themselves, their current or former spouse, or their close relatives have close association.

The CCP also too heavily penalizes defendants who request the recusal of judges when they doubt the judges' independence, competence or impartiality, should their request be rejected. They will be fined a sum of US\$50 and may have to also pay damages to the concerned judge in such cases. Defendants may have to think hard before lodging such a request, especially as another judge, albeit at a higher court, decides on the request.

iii. Subordination of the police to courts

The CCP stipulates that the judicial police perform their duties in support of the judiciary and have the duty to: control felony, misdemeanour and petty crimes; arrest accused offenders; and collect evidence. It is composed of police officers trained for these purposes. There are three groups of judicial police officers:

- (1) National or civilian judicial police officers, who are personnel of the Ministry of Interior;
- (2) Military police officers, who are personnel of the Ministry of National Defence; and
- (3) Heads and deputy heads of territorial units, that is, in descending order, governors and deputy-governors of provinces, governors and deputy-governors of districts, and chiefs and deputy-chiefs of communes.

The prosecutor of a court of first instance directs and coordinates the activities of judicial

police officers working under the jurisdiction of his or her court. All judicial police officers under the jurisdiction of a Court of Appeal are placed under the supervision and control of the court's Prosecutor-General. The Prosecutor-General has power to discipline these officers.

There are other civil servants and public agents who are authorized by law to investigate criminal offences under their respective jurisdiction. These civil servants and public agents are also placed under the supervision of prosecutors.

The prosecutors of each court of first instance have extensive power. They can order the police to: conduct investigations, conduct investigations themselves, file the case without processing, summon the accused person to appear in his or her court (citation), order the accused to appear in court for trial for misdemeanour cases, send the case to the investigating judge for investigation, participate in the interrogation of the accused by the investigating judge, issue search and arrest warrants, conduct searches, request the detention of the accused, have a say in the release of the accused, approve the charge to prosecute the accused in court, appeal against court judgments, and visit judicial police units under the jurisdiction of his or her court.

Judges in a court of law can serve as trial judges and also investigating judges, but the latter cannot be trial judges for cases they have investigated. The investigating judge has power to order the detention of the accused, to interrogate him or her, to summon witnesses, to seek the service of experts, to get the judicial police to conduct investigations on his or her behalf, to drop the charge against the accused, to order the release of the accused subject to approval by the prosecutor, and to send the case for trial when his or her investigation has been completed.

There is a concern that in practice both the prosecutor and the investigating judge mostly rely on the judicial police to do the investigations for them as prosecutors and investigating judges are few in number and do not have adequate resources to conduct investigations by themselves.

The CCP has altered the "balance of power" between the judiciary and the police. Prior to the adoption of the code, as part of the legacy of the communist days, the police had resisted any subordination to the judiciary. The opposite was true when the police "had guns" and was placed under the powerful Ministry of Interior, and the judiciary had only the law as a weapon and was placed under the weak and resource-starved Ministry of Justice.

It will help a smoother and effective enforcement of the CCP if there is a change in that balance of power in favour of the judiciary, which is very much a moot point so long as the judiciary continues to rely heavily on the judicial police to conduct investigations. This

is all the more the case when the CEJ continues to give credence to the police investigation report in court: "In principal, the record prepared by judicial police officers in the course of inquiry is for information only. However, such record (original version) is worth as persuasive evidence and shall be valid unless counter evidence is shown. Counter-evidence may be freely shown to the judge by all means permissible by laws."

iv. Inadequate protection of the rights of the accused

There is a concern that the CCP is not comprehensive enough to ensure the protection of the rights of the accused, of the victims and of witnesses. Suspects are very much at the mercy of the police at least for the first 24 hours in police custody following their arrest. In this 24 hour period in police custody they have no right to legal council. During these 24 hours they cannot communicate with their families or people they trust. After this period suspects can have access to legal counsel, but for only 30 minutes. This access again depends on whether the custody officer is in the mood to allow the lawyer in to get his or her potential client to sign a request for his or her services.

Persons can be kept in police custody for 48 hours, extendable for another 24 hours. In police custody they have no right to medical examinations. Only custody police officers or prosecutors can call for medical examinations. They also don't have the right to silence or to be clearly informed that statements they make can be used in court against them. They could well be, and many have already been, subjected to torture or other ill-treatment to make confessions.

Suspects will be formally informed of their rights to legal counsel and to silence when they are brought before and interrogated by the prosecutor or the investigating judge.

The CCP has not made it mandatory for prosecutors, investigating judges and trial judges to check a suspect or accused person's physical or psychological state when he/she appears before them, to see whether the person has been subjected to ill-treatment or torture, and take action forthwith. The CCP should make this task an integral part of the duty of prosecutors and judges and should further stipulate, as the Code of Ethics for Judges (CEJ) mentioned above does, that "the judge [meaning also prosecutor] shall take necessary measures to ensure that the persons responsible for the above acts [illicit means] are immediately brought before the court."

v. Insufficient relaxation of pre-trial detention

The CCP sets limits to the duration of temporary detention while an accused is under investigation by an investigating judge. It stipulates that, as a rule, all accused persons remain free, and should only be in pre-trial detention under exceptional cases as defined

in the CCP. All accused charged with offences punishable by a prison sentence of equal or less than one year must not be detained. This relaxation is deceptive, as such offences are very few – there are only four in the UNTAC Law and two in the Land Law.

The duration of pre-trial detention for misdemeanours must not exceed 4 months, but the investigating judge can extend this for another two months with clear justification. In any case the duration of the detention must not exceed half of the minimum sentence set by law. For felonies, the duration of pre-trial detention is limited to 6 months, but the investigating judge can extend it for another six months, and at the expiry of this extension, he or she can extend the detention for another six months, each time with clear justification.

There are two concerns relating to the above. First, there is no clear cut distinction between misdemeanours and felonies in all laws that contain prison sentences. The UNTAC Law has a clear cut distinction: sentences for felonies start from three years. There should therefore now be a clear legal distinction, for example to define a felony as an offence punishable by a prison sentence equal to or more than three years in detention.

Secondly, who can determine what “clear justification” is? The CCP is silent on any challenge to this justification. It just says that the lawyer must present his or her defence to protect the rights of the accused. To whom should the lawyer present this defence? To the investigating judge? Would that judge go back on his decision? Or to the Investigation Chamber of the Court of Appeal?

In practice, under the now-superseded procedure of the UNTAC Law, appeals against any extension were filed in the Court of Appeal. However, the accused or their defence counsel was very reluctant to do so for fear that such an appeal would delay the trial when the extension was for only two more months for both misdemeanours and felonies. It remains to be seen whether appeals will be made when the detention for felonies can be extended twice for a further six months at a time, to a total of up to one and half year.

vi. Inadequate protection of the rights of victims and witnesses

The CCP to some extent protects the rights of victims of crimes. The right to be a civil party to legal action against offenders, namely to be present and give input into the decision-making and the right to compensation from offenders, as well as the right to privacy are spelled out clearly in the CPP. The right to receive information about the progress of the case, which consists of notification of whether action is taken against offenders or not, and the right to appeal against the prosecutor’s decision to file the case without processing, are also recognized. A victim, as a civil party, has the right to legal counsel.

There is a cause for concern as the CCP is silent about the right to be referred to adequate

support services and the right to physical protection. In this regard, it is also silent on witnesses' right to protection. Victims have no right to be consulted before the prosecution or the court make decisions, especially decisions to release the accused, even though victims could face retaliation from these persons.

In 2007, in separate cases, two victims of crime manifested fear concerning this. The first victim, Ms Chem Sopheap, a vendor of sugar cane juice in Phnom Penh, had to go into hiding upon the news that her attacker, a senior army officer, had been released from jail, fearing retaliation from him. The second victim, Ms Pov Panhapech, a popular singer and TV host, who survived gun shots and was recovering in Vietnam, did not want to go back to Cambodia, fearing that her attacker, who was still at large, would attack her again and this time end her life.

To allay fears for their physical safety of Chem Sopheap, Pen Panhapech and other victims of crime, the prosecution and courts should consult such victims and seek their views and concerns at appropriate stages of the proceedings where their physical safety is affected, especially before making any decision to release their attackers. They should impose upon those attackers certain conditions, for instance not to be in the vicinity of the victims' domicile and place of work, and notification to the police of those localities for protection purposes, to ensure these persons will not do any further harm to the victims. They should also notify the victims of their decision prior to any such release.

vii. Another violation of judicial independence

There is concern that the CCP legalizes political control of the judiciary in violation of the constitution, as the Minister of Justice can order the Prosecutor-General or the prosecutor of a trial court to take legal action when the Minister has knowledge of any criminal case. Furthermore, the same Minister can give them any directive he deems appropriate.

This mirrors the power given to the Minister of Justice in France where there is only a "judicial authority" (*autorité judiciaire*), not a "judicial power" (*pouvoir judiciaire*) or a judiciary that is a branch of government on an equal footing with the legislature and the executive, and where prosecutors are placed under the authority of this minister. In Cambodia, the constitution provides for the separation of powers and a constitutionally independent "judicial power" or judiciary, not a "judicial authority." Prosecutors are judges, and they and judges belong to the same body which is to be (as a law to that effect has not been enacted yet) regulated by the same law on their statute, and are appointed and disciplined by the same SCM chaired by the King of Cambodia, who is the Head of State but has no executive power. The Cambodian SCM is modelled on the French SCM, but the French SCM is chaired by the president of France, the Head of State who in does have executive

power.

Another law which is intended to strengthen the legalisation of political control over prosecutors was the anti-terrorism law enacted in the same year. Under the law, the Minister of Justice can order the Prosecutor-General of the Court of Appeal to freeze the assets of terrorists on the list of the UN Security Council's Anti-Terrorism Committee.

viii. Inspection of places of detention

The CCP has some provisions on the inspection of places of detention. The Prosecutor-General of the Court of Appeal and prosecutors of trial courts can inspect judicial police units. The CCP further makes it mandatory for the Prosecutor-General of the Court of Appeal, prosecutors of trial courts, the President of the Investigation Chamber of Court of Appeal and investigating judges to regularly inspect prisons.

The CCP does not spell out in detail the purposes and the periodicity of such inspections. Are such inspections meant to ensure that there are no violations of absolute rights, namely, the freedom from torture and cruel, inhuman or degrading treatment, and other rights of persons detained in those places? What action should judicial officers take when they encounter violations of these rights? The code is silent.

ix. Silence on redress for human rights violations

The CCP stipulates that investigators, either from the police or judicial officers, are bound by professional secrecy. Any breach will be punished by a law that has yet to be created. The law further makes it mandatory for judges to make an immediate examination when they receive a complaint of illegal detention, without specifying action to be taken against the offender(s).

Furthermore, unlike the now-superseded procedure of the UNTAC Law which made such breaches criminal offences punishable by imprisonment ranging from one to five years, the CCP is basically silent on the penalty for any breach of procedure which affects the rights of the accused or other people. It instead relies on disciplinary measures against violators, for instance against judicial police officers by the Ministry of Interior or the Ministry of Defence at the initiative of prosecutors and the Prosecutor-General of the Appeal Court. It also relies on the inadmissibility of evidence if there is any breach of procedure, as a deterrent. This sanction may not be effective and cannot deter such breaches.

Victims of rights violations during the criminal justice process can file complaints in court if such violations are criminal offences already defined in law, such as illegal confinement, battery or murder. Other violations may not yet have been prohibited and made criminal

offences, leading to loopholes being created.

The CCP is also silent on the procedure for providing redress for violations of other human rights that are not as yet, recognized as being punishable offences. These violations include, for instance, the abuse of power, and violations of the freedoms of assembly, expression, and the press, and of economic, social and cultural rights. People do not know in which court and how to file a complaint when they have suffered from violations of these other rights.

3. Criminal lawsuits and arrests used as a tool of repression

The judiciary does not have adequate procedures to protect human rights and fundamental freedoms. Furthermore, it has continued to serve as a tool for the strong and powerful, and accepts their criminal lawsuits against apparently innocent but weaker parties to the disputes and to issue orders to arrest the latter. These criminal lawsuits and arrests are malicious and aim not so much to seek justice as to cow and punish the weaker parties for their resistance to the strong and powerful. They are meant to strike fears in them, deter others and exhibit the power and will of those strong and powerful, which is very much an aspect of power culture in Cambodian society.

A number of these suits and arrests are related to land disputes and land-grabbing, but they are also related to other disputes such those over the management of political parties' assets, labour relations, loan and service contracts, and the freedom of expression.

a. Land disputes and land-grabbing

According to the Human Rights Action Committee, a coalition of human rights NGOs, and the NGO Forum on Cambodia, during 2007 up to the time of writing, 121 people were detained in land disputes. 83 of those people had been released, but 38 were still being detained in various prisons in the country. Many of those arrested and still in detention awaiting trials were charged with such offences as wrongful damage to property, infringement upon public property, battery, or fraud.

Below are cases that have been documented by the Asian Human Rights Commission during 2007, up to the time of writing. In October 2007 two men named Soeng Vannak and Bunn Chhoeun were arrested in Siemreap province on the allegation of inciting hundreds of fellow villagers to clear forests for land for cultivation in a national reserve. The villagers went to clear those forests after there had been no response from the authorities to their application for a land concession for social purposes, and for cultivation to sustain their livelihood. The villagers then staged a protest against the arrests and the two men were released on bail.

In the same month in the same province, a woman named So Socheat, a community

representative who had been arrested in May 2006 during a protest in a land dispute, was convicted in the Siem Reap Provincial Court of committing battery with injury and wrongful damaged to property. When trying her, Judge Khorn Sokal accepted that So Soheat had not committed the battery, but said that since she was the “ring leader” of the protesters, she had to be responsible for what the other villagers had done.

On the allegation of wrongful damage to property, the following women and men were prosecuted or arrested during different disputes in different localities:

- a woman named Ros Pov was prosecuted by the Phnom Penh court (September);
- two women, Keo Chorn and Keo Sun (September); two men named Oung Phen and Mr. Chreng Khorn (August); two men named Phorn Hen and Vorn Van (August); and three men named Oung Sarat, Nhean Phan and Dun (August) were arrested at the seaport town of Sihanoukville;
- a man named Chea Ny (August) and two men named Tet Bunthoeun and Oung Chea (June) were arrested in Battambang province (the latter were released in September);
- a man named Im Khnoy (August) was arrested in Kandal province;
- four men named Chheun Rat, Sin Kosal, Oun Sotheara, and Um Nov, and a woman named Mao Sokha (June) were arrested in Banteay Meanchey province.

On the allegation of fraud over state land, the following men have been arrested:

- two men named Horng Nith and Oung Sokha (June) were arrested for alleged infringement upon public property and wrongful damage to property;
- four men named So Dek, Oun Rin, Kuy Yung and San Nek (May), were arrested for the alleged use of violence against the alleged owner of a contested land;
- 13 men including Chum Pet, Yieng Ren, Nom Chry, Chry Chan, Chang Sitha, Sok Ron, Ken Noeu were arrested in April in Sihanboukville for wrongful damage to property, infringement upon public property, and striking police officers during the forced eviction of 107 families; a human rights activist was facing arrest for alleged incitement of those villagers to protest against their eviction and has had to go into hiding;
- three men named Khyorng Bet, Chhuen Ampil and Chan Ra (February) were arrested in Rattanakiri province for alleged infringement upon public land.



Houses burn during a landgrabbing operation

- Photo courtesy of NGO LICADHO

A man named Pich Choeun was arrested in April in Siemreap province for alleged

land fraud. In May two men named Dul Din and Vong Pril were arrested in Prey Veng province for allegedly stealing 80 tons of rice in a land dispute.

Two men named Chea Pek and So Sokhom were prosecuted in January in Banteay Meanchey province for allegedly robbing rice that they had harvested from disputed land. In the same month, in a similar case from the same province, Cheb Roeuk was also prosecuted for incitement to disorder after a confrontation between rival groups over contested land.

In January, Leang Seng, the deputy-director of the Provincial Agriculture Department, went on radio charging that some people had incited families to stage their protests against a land concession in Kratie province, implying that if identified they would be arrested and charged.

In December 2006, Chum Vanny and relatives protested against the grabbing of his land in Kandal province by a land development company. Several days later he received a summons to appear in the provincial court to answer a charge of fraud.

b. Labour disputes

In June and July 2006 workers at Jenchou Inn Factory in Kanthouk commune of Angsnoul district, Kandal province went on strike to demand better working conditions and the reinstatement of their union's officials and other fellow workers who had been sacked by the company. The strikers blocked the factory's gate, but left a passage for staff to get in and out. However, three officials of the Free Trade Union of Workers of the Kingdom of Cambodia, Lach Sambo, Gneom Khun and Koemsan, all working at that factory, were later arrested at their homes on the charge of illegally confining the staff. On August 7 they were sentenced to three years' imprisonment, with one month and four days served and the rest suspended.

Also in 2006, Eng Vanna, Sieng Sidaro and other staff of the Phnom Penh Cable TV Company formed a union named Phnom Penh Cable TV Employees Union. Eng Vanna and Sieng Sidaro were elected to be its president and vice-president respectively. They officially registered their union in October and went to notify the company director. He blamed them for not having told him earlier and filed a criminal lawsuit against Eng Vanna and Sieng Sidaro for allegedly



Arrests during a forced eviction

- Photo courtesy of NGO LICADHO

stealing the company's master plan. In November the prosecution at the Phnom Penh court summoned them for questioning; in early January 2007 the company suspended them from work and sacked them on the same day. It submitted a copy of the court summons to the labour ministry to justify its decision.

In 2007, no such criminal lawsuits and arrests were reported. However, in February, Hy Vuthy, the president of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) at the Suntex garment factory, was shot dead while riding his motorbike home after finishing his night shift at the factory. The 36-year-old union leader had received telephone death threats approximately three months prior to his assassination.

c. Dispute over assets management

In November 2006, Nhiek Bun Chhay, the secretary-general of the FUNCINPEC party filed a complaint at the Phnom Penh court accusing Prince Norodom Ranariddh, the former president of the party, of selling the party's headquarters and using the proceeds to buy another property in his own name. Chiek Bun Chhay requested the court to prosecute Norodom Ranariddh for breach of trust, a criminal offence under article 46 of the UNTAC Law that is punishable with between one and five years in jail. Civil litigation is already proceeding against the former president; however, in early January 2007, the party urged the court to arrest him "to enable smooth court proceedings and solve the complaint".

In March Ranariddh, who is also former prime minister and president of the National Assembly, was tried in absentia and was sentenced to 18 months in prison while he was out of the country. In October the Court of Appeal upheld the sentence. This sentence will likely keep him out of the country and prevent him from returning to Cambodia to pursue his political career.

d. Freedom of expression

In September 2006, Hek Samnang, Thach Ngoek Suern and Try Non were arrested and charged with disinformation and defamation for having disseminated leaflets accusing Prime Minister Hun Sen of involvement in corruption and land grabbing. In fact, defamation is a sufficient charge in this case, but as it no longer carries a jail term disinformation, a criminal offence with prison sentence, was added to ensure that they were locked up.

Similarly, in August 2006, Teang Narith, a law and politics lecturer at Sihanouk Raj Buddhist University in Phnom Penh, was dismissed and arrested the following month and charged with disinformation for writing a book critical of government policy. He has been in jail since that time.

In 2007, the AHRC has not documented any criminal lawsuits or arrests related to the exercising of the freedom of expression. Apparently Cambodians did not dare exercise this right out of fear of being arbitrarily locked up in jail, as courts of law are under political control and do not protect their rights. Furthermore, the government has other ways of denying such a right, such as threats and intimidation or outright bans (see next section).

4. Restrictions on the freedoms of the press, expression and assembly

Freedom of the press has gained ground up to a point, but the freedoms of assembly and expression have continued to meet with severe restrictions during 2007.

a. Restrictions on the freedom of the press

According to Worldwide Press Freedom Index issued by Reporters Without Borders, Cambodia's press freedom ranking moved from 108 in 2006 out of 168 countries to 85 out of 169 countries. In 2007, Cambodia was, in this regard rated, above all of its fellow ASEAN member countries. In 2007, Freedom House change the status of the press in Cambodia from "not free" in previous years to "partly free".

However, this progress should not be taken at face value when a small section of the population reads newspapers and the overwhelming majority rely on radio and television for information and this electronic media is very much under government control.

There has been a proliferation of publications, but their dissemination is still very much confined to urban centres. Not many Cambodian people have any reading habits. The price of newspapers, US\$0.17 upward per copy, is simply beyond the reach of the overwhelming majority of the population, one third of which still live under the poverty line of US\$1 per day.

Almost all Cambodian people depend on radio and television for information, and all TV channels and radio stations, except one radio station of limited coverage, are under the control of the government, the ruling party or supporters of the ruling party. The government closely monitors their broadcasts.

Press freedom was most affected in 2007 in situations where newspapers and journalists made reports critical of the government, the ruling party and powerful officials, they faced restrictions, attacks or lawsuits. Reporters of the Khmer-language programme of the US-funded Radio Free Asia (RFA) are known to be "frequently singled out for harassment by government officials". Ath Bonny, the Phnom Penh-based RFA field editor has been reported as saying that "news reports about illegal logging, malnutrition in

impoverished areas, and human rights abuses have resulted in angry, and sometimes threatening, calls from senior Ministry of Information officials.”

In February 2007, an RFA reporter named Ratha Visal was barred from getting into the venue to report on a ground-beating ceremony for the construction of a road in Rattanakiri province. The following month the police in Battambang province accused another RFA reporter named Lem Piseth of getting the daughter of a victim of a murder to make an untrue statement to the police, concerning her father’s participation in the opposition party’s procession during the commune election campaign. That statement changed an ordinary murder, as claimed by the police, into a political killing, which sounded bad for the ruling. Most of the police force belongs to this party.

In April there were many actions taken in succession against journalists. A district governor in Battambang province barred another RFA reporter, named Sao Yuth, from entering a junior high school to report on the students’ request for the removal of the school principal.

An army general named Muong Khim threw fish sauce in the face of two reporters for *Angkor Thom* magazine and threatened to smash their heads in a restaurant in Phnom Penh. The incident happened after the two reporters had conducted a phone interview with his famous singer wife named Meng Keo Pichchenda. The two reporters learned that that singer intended to remarry. Her intention became the title of their magazine article that appeared on the same day as the incident.

A deputy-governor of Rattanakiri province named Phou Lam made a phone call to inform a freelance journalist named Chea Kimsan living in his province that he would file a lawsuit against Chea Kim San for serving as an informant on forest clearance in the province for *Moneaksekar Khmer* newspaper.

In May, an army general in Battambang province named Pol Sinuon threatened to shoot a journalist for *Kampuchea Thmei* named Chim Chenda following a discord, simply because Chim Chenda was a journalist. In the same month, in Phnom Penh, Prime Minister Hun Sen pointed a finger at an RFA reporter named Um Sarin and called him “insolent” and “rude” as a response to his question on the fate of the coalition after the removal of a minister from a coalition partner party. Hun Sen warned Um Sarin not to ask such questions in future. Um Sarin was scared when Hun Sen’s bodyguards walked up and down around him. The scene was shown on TV and Um Sarin had to flee the country for a while.

In June, a RFA reporter named Lem Piseth received a death threat by phone after he had reported illegal logging in Kompong Thom province. Lem Piseth had to flee the country for a period.

In August, the house of a journalist named Phon Phat in Pursat province was set on fire by two men just days after he had received two threatening phone calls from numbers allegedly belonging to members of security forces. He was threatened for reporting on illegal logging activities to the forestry administration for his newspaper, *Chbas Kar* (Veracity).

In the same month, a journalist for *Teassanak Khmer* (Khmer Vision) named Heng Veasna was assaulted by Ouen Vanak, who is the deputy commander of the provincial military police of the province. Ouen Vanak was very angry with Heng Veasna after the latter had written an article critical of the conduct of a judge and the provincial prosecutor with whom Ouen Vanak had good relations.

In September the Ministry of Social Affairs put up a sign at its entrance saying: “Allowed in: Journalists from *Rasmei Kampuchea*, *Koh Santepheap* and *Kampuchea Thmey* newspapers. Journalists from all other newspapers are strictly banned”. It is said that this discriminatory ban was aimed at avoiding talking to newspapers that did not support the interest of the ministry. It affected freedom of the press and freedom of access to information. It is widely known that *Rasmei Kampuchea*, *Koh Santepheap* and *Kampuchea Thmey* are “pro-government” newspapers.

In October, the Ministry of Information suspended a local Khmer-language newspaper, *Khmer Amatak*, for a month without any due process of law after the editor had refused to publish a correction from a deputy-prime minister. The editor, Bun Tha, claimed the veracity of the story and was willing to settle the dispute over the story with that deputy-prime minister in a court of law. The arbitrary suspension of that newspaper violates freedom of the press.

In November, the Ministry of Information and the Ministry of Interior confiscated all of the thousands of copies of the first issue of *The Free Press Magazine* from newsstands in Phnom Penh and in the provinces. They accused it of “insulting the retired King Norodom Sihanouk and of violating the law” as it published articles and cartoons critical of the retired king and Prime Minister Hun Sen. The publication was ordered to close down. Furthermore, its publisher, Lem Piseth, was summoned to the Ministry of the Interior.

Fearing that he was going to be arrested, Lem Piseth fled the country. Previously (see above), when reporting for Radio Free Asia, Lem Piseth had faced police accusation of instructing a witness to make an untrue statement to the police in a murder case and also received death threats when reporting on illegal logging.

b. Restrictions on the freedoms of assembly and expression

In January 2003 angry Cambodian demonstrators protested against a Thai actress’s hurtful remarks concerning their country’s famous temple Angkor Wat and attacked the Thai

embassy and Thai businesses in and around Phnom Penh. The authorities have used that attack as an excuse to impose strict rules on public demonstrations aimed at banning them altogether.

Organisers must have permission from concerned local authorities to hold demonstrations. Before granting such permission, the authorities minutely vet every aspect of any planned demonstration, including the issues to be raised, the banners and slogans used, the venue, the route to be taken if there is any procession, the number of people participating and the transportation used in the demonstration. They have invariably used disturbance to public order or obstruction of traffic as reasons to refuse permission, or they assign a place to stage the demonstration without any procession.

The authorities do not hesitate to use anti-riot squads and to crackdown on and disperse unauthorized peaceful demonstrations and protests. The squads are armed and are specially trained for the purpose.

In February and March 2007 there was a positive development regarding the right to the freedoms of assembly and of expression, when the NGO network Alliance for Freedom of Expression in Cambodia, succeeded in organizing for the second time a “march for the freedom of expression, non-violence, and political tolerance” for two weeks, from the capital Phnom Penh to Siemreap, the famous ancient capital of the Khmer Empire, covering a distance of over 300km across four provinces and many districts. This succeeded despite obstructions from the local authorities.

However, the march, like the first one organised by the same NGO network in the previous year, was yet another swallow that did not bring about spring for the freedoms of assembly and expression. The government has continued to ban this constitutional right.

In January 2007, Prime Minister Hun Sen launched attempts to curb the exercising of this freedom. While presiding over an official function in Kompong Cham province, he issued a stern warning to all political parties against criticising their competitors in order to win votes in the April commune elections. He urged them to adopt a commercial advertisement style, extolling one’s own goods or services and not criticising the goods or services of others. He said that he



Peaceful demonstrators being violently repressed

- Photo courtesy of NGO LICADHO

would take firm action against persons responsible for criticism which would be, in his opinion, divisive and detrimental to the country's stability. That warning was meant to silence criticism that was predominantly targeted at him and his ruling party.

However, people have continued to exercise their right to freedom of assembly and expression amid all these restrictions and warnings.

In February, the Cambodian government threatened to expel the Open Society Justice Initiative (OSJI), a New York-based human rights NGO, after it had publicised allegations of corruption at the Khmer Rouge Tribunal (KRT) and requested a thorough investigation. The OSJI had worked in Cambodia since 2003 to assist in the establishment, functioning and monitoring of the KRT, by providing a wide range of expertise and advice to court officials as well as to civil society groups. When audited later, the accounts and the management of the tribunal confirmed the veracity of the allegations made by OSJI.

In April, some 150 riot police cracked down on a demonstration staged by around 40 Buddhist monks in front of the Vietnamese embassy in Phnom Penh, demanding an end to persecution by the Vietnamese authorities of fellow Cambodian monks living in Vietnam. There are millions of Cambodians living in the southern part of Vietnam, which is known as Kampuchea Krom or Lower Cambodia. These Cambodians are known as Khmer Krom (Cambodians living in Lower Cambodia). The area was part of Cambodian territory before the French colonial power ceded it to Vietnam. The 40 monk demonstrators were Khmer Krom.

In June, the government banned the dissemination of a report by an international environment NGO, Global Witness, which exposed the involvement of Prime Minister Hun Sen, his relatives and other senior officials in the illegal devastation of Cambodia's forests. The Global Witness staff received an open threat from Hun Neng, the governor of Kompong Cham province and Prime Minister Hun Sen's brother.

Further to the ban, the Minister of Information, Khieu Kanharith, issued a warning letter to the *Sralanh Khmer* newspaper to stop its publication of the Global Witness report.

In August, about 400 families in Phnom Penh staged a protest and put up resistance to a forced eviction and the demolition of their houses by a group of 100 people comprising police, military police with pistols in uniform and some personnel with sticks, hammers and axes. That group forced their way in and beat up those families. In the assault four women, named Long Sokhom, Ros Pov, Kim Leng and Long Nirdey, were injured.

In the same month, a group of representatives of 500 families in Svay Rieng province went to Phnom Penh to stage a protest against the grabbing of their land by a rubber

company. After staging a demonstration in front of the residence of the Prime Minister, they went to the National Assembly. In both places they demanded help from the Prime Minister and Members of Parliament to address their grievances.

The protesters were going to camp out in front of a monastery near the National Assembly. However, at night fall, approximately 80 police and military police, some of whom were armed with pistols, cordoned off the area to keep out journalists and human rights activists. They then rounded up all those protesters and forced them into buses to send them back to their native province. In that police action, some of the protesters were beaten, two of whom were rendered unconscious and were taken to hospital for treatment.

In October, an NGO running a radio station called Voice of Democracy (VOD) organized a public forum in Stung Treng province. VOD organised such fora to enable grassroots people to air their concerns about local and national issues and, together with concerned local authorities and members of parliament, to address the issues in question. In that province, local officials came to force the land-owner not to provide VOD with land to serve as the venue for the forum, but the land owner defied the order. On the day of forum, a group of civilian and military police was dispatched there to prevent villagers from participating in the forum. They charged that the holding of that forum was “illegal” since the organizers had no permission.

From June to October, VOD organized 19 public fora in different localities. Eight of those forums, including the one mentioned above, experienced various degrees of disruption by the local authorities. In June, in Kandal province, the local authorities ordered all tent owners in the locality not to build a tent to shelter the forum. The forum proceeded all the same, under the trees.

In the same month, in Kampong Chhnang province, one local official ordered VOD to seek permission from another official who then ordered it to approach yet another official, passing the buck around as a way of refusing their permission altogether. VOD decided to go ahead with the forum despite this, but on the day of the forum police officers used threats to prevent people from joining it. People defied that threat and participated in the forum all the same.

In July, in Kampot province, the local authorities warned the owner of a venue not to allow VOD to use it. VOD had to find another place to hold its forum. In August, in Takeo province, VOD met the same problem from the local authorities. It succeeded in finding another place, yet when the forum was opened, the queue of people wanting to speak was packed with supporters of and sympathizers with the ruling party. Others who wanted to raise local and national issues or voice their grievances were crowded out.

In September, in Rattankiri province there was an on-going land dispute between a lady dignitary with connection high up in the country's leadership and a group of indigenous people. The local authorities did not allow the public forum and posted military and police officers along the route leading to the forum to prevent people from participating in it to voice their grievances over the land dispute.

In October, in Kandal province, the local authorities posted several police officers at the entrance to a forum to threaten people and deter them from participating in it. In the same month, in Kratie province, the chief of the commune made the same threat to prevent people from joining the forum, but people defied the threat and participated in it anyway.

a. Arbitrary guidelines

When barring VOD from holding public fora, the local authorities referred to guidelines issued by the Ministry of the Interior to commune authorities (lowest level of administrative units) to instruct them, among other things, that "all activities of non-governmental organizations, civil society organizations and community-based organizations at the local level must have cooperation from provincial or municipal governors."

The phrase "cooperation" is very ambiguous in the first place. Does it mean "permission" or "authorization"? Secondly, the guidelines are apparently not based on any executive order or regulation or on any law that prescribes such "cooperation." The guidelines are silent on the right to appeal against the refusal of cooperation by provincial or municipal governors.

Furthermore, the same guidelines create practical difficulties to organizers of such functions, in provinces in particular, as they have to travel long distances to the offices of the provincial governor and may have to go through a heavy bureaucracy before they can get the prescribed cooperation, especially a written document to that effect to show to the local authorities. Organisers have to spend time and resources to secure such cooperation. All this is tantamount to deterring the organizations from conducting such activities.

This point of the guidelines and any action based on them is to prohibit or ban the exercising of the freedoms of assembly and expression, and may well violate this constitutional right. They should be subjected to judicial review by a court of law and finally by the Constitutional Council.

A judicial review is also required for the law on peaceful demonstrations, when it will be enacted. The government approved the draft of this law (bill) in October and it is expected that the law will be adopted by the parliament and come into force soon.

b. Legalising restrictions

The Bill on Peaceful Demonstrations will in effect legalize the restrictions that the authorities have so far been imposing. It requires organisers of any demonstration to “notify” the provincial or municipal authorities of planned events, and these authorities need to “examine” these “notifications.” If they “have clear information that the demonstration could cause any danger or gravely affect security, safety and public order,” they must immediately notify the organizers so as to give them an opportunity to meet with local authorities and other concerned authorities to consider the matter, and discuss it to find a solution.” If both sides do not reach an agreement, the concerned provincial or municipal authorities “must seek the decision of the Minister of the Interior.” The latter’s decision will then be final.

Through this process, the term “notification” is misleading. According to the practice so far, which is likely to continue, notifications mean meticulous scrutiny by the provincial or municipal, local authorities and other concerned authorities. The authorities check the identity of organizers, the purpose, date, time, duration, and route of the planned demonstration, the number of people participating in it, and the number and types of vehicles used, and whether the date falls on the main public holidays at which time all demonstrations are banned, all of which the Bill has stipulated. They also vet the issues to be raised and the banners and slogans to be used.

The procedure of “notification” is made so intricate and intrusive to deter those who wish to organize such peaceful demonstrations. Only those with stamina, determination and resourcefulness would struggle to get the authorities to accept their “notification.” All these difficulties are tantamount to restrictions.

The Bill requires “clear information” on the way in which the planned demonstration could cause “danger or gravely affect security, safety and public order,” before they can ban it. However, this information and its clarity, and the assessment of such a danger and the impact on security, safety and public order, are arbitrarily decided by the authorities, including the Minister of the Interior, who is actually their boss.

The Bill provides for no independent body, for instance a court of law or the Constitutional Council, to which organizers could appeal against the Minister’s decision. It is possible to challenge the constitutionality of decisions at the Constitutional Council, but organizers have to go through an ordinary court of law all the way to the Supreme Court before they can get their case adjudicated by this Council. The procedure is so complicated that so far no organiser has bothered to challenge such decisions.

The Bill creates practical difficulties that hinder the enjoyment, though peaceful demonstrations, of the freedoms of assembly and expression, which are among the

fundamental rights guaranteed and protected by the constitution. For organizers and would be demonstrators living in municipalities such as Phnom Penh or Sihanoukville, there will be no long distance to travel to notify the municipal authorities of their planned demonstrations. However, those living in the provinces and remote ones will have to travel long distances to be able to do so. Distance itself and the related travel costs and time are significant deterrents to attempts to enjoy these rights.

The Bill is purported to facilitate the organization of demonstrations by less than 200 people as it offers a simpler procedure requiring only the identity of organizers and simple notification to the authorities, if those demonstrations are staged at a venue assigned by local authorities and include no procession. The venues are called “public opinion places,” apparently modelled on Hyde Park Corner in London. According to the Bill, the provincial and authorities must assign “one” such place in each province or municipality.

This offer is misleading. It is very likely that such “public opinion places” will be located in the national and provincial capitals. It is easier for residents of these towns to stage small demonstrations. Yet people in rural areas, some 85 per cent of the total population, will have to spend more in terms of travel costs and time to exercise their right at those assigned places in the national or provincial capitals. All these costs are yet another deterrent. Furthermore, it is unlikely that the provincial or municipal authorities will assign such places any near the offices of provincial or municipal governors.

There is another restriction in the Bill as it imposes civil liability to organizers for any damage and harm caused by demonstrators. It shifts this liability away from individual demonstrators to organizers, who have no forces to control them, and especially away from law enforcement agents who have the primary responsibility of preventing such damage and harm and who have forces to carry this particular task. Such civil liability is yet another deterrent.

The freedoms of assembly and expression are further restricted as the Bill empowers the competent authorities, meaning the police, to violate these freedoms at will, as they can arrest and detain for the whole duration of a demonstration, for “holding a potentially dangerous instrument, or causing suffering to others, or committing an act which infringes the rights and freedoms of others,” if they do not let them take away the instrument or do not heed warnings not to commit such acts.

The authorities will likely arbitrarily determine the potential danger posed by such instruments, the suffering of and the infringement upon the rights and freedoms of others. A placard pole, a banner pole, an umbrella, or a glass bottle can be considered as “potentially dangerous” instruments. Waving them can be interpreted as “causing suffering” to others. Shouts with or without bodily gestures such as raising fists or slogans critical of corrupt

government officials, leaders, cronies, or land grabbers can be interpreted as “infringing the rights and freedoms” of those targeted people.

All in all, the Bill does not help the enjoyment of the freedoms of assembly and expression in an orderly manner through peaceful demonstrations at all. It has the effect of legalizing restrictions against this instead. It is in breach of the human rights norms and standards stipulated in the Paris Peace Agreements and Cambodia’s constitution.

5. Land disputes and land-grabbing

Land disputes and especially land-grabbing have continued to be one of the most serious issues facing Cambodia since it abandoned communist collectivisation at the end of the 1980s to embrace a market economy based on private property. In recent years, this problem has become worse as land conflicts have dramatically increased.

Land-grabbing is a major factor contributing to rapid development running parallel to landlessness and large landholdings. According to a survey presented in a recent seminar in Phnom Penh, over 24 per cent families are landless, over 38.8 percent of families have less than 0.5 hectare and occupy 3.5 per cent of the total land, and over 11.6 per cent own 3 hectares and over and they occupy 72.2 percent of the total land. Among owners of 500 hectares and over, 30.7 are businessmen, just under 23.1 percent are high ranking officials, just under 23.1 per cent are dignitaries (lords), just under 15.4 per cent are high-ranking army officers, and just under 7.7 per cent are members of parliament.

According to the Ministry of Agriculture, Forestry and Fisheries which was cited in a report of the Cambodia Office of the High Commissioner for Human Rights, *Economic land concessions in Cambodia: a Human Rights perspectives*, dated June 2007, two companies - Pheapimex Co.Ltd and Green Sea Agricultural Co.Ltd - owned respectively over 315, 000 and 100,000 hectares of land on December 31, 2006.

These landholdings starkly contrast with those prior to the communist days in the 1970s and 1980s, when the biggest landholding was 132 hectares and landless families were rare. The Cambodian population was then only some 7 million, half of what it is now.

In 2007 the issue of land disputes and land-grabbing showed no sign of declining. According to its first half yearly report, the National Land Dispute Authority, which had already had nearly 2000 cases in its hands, received yet another 116 complaints about land disputes and land-grabbing from individuals and from state organs. This authority is overwhelmed by the number of cases and is incapable of reducing its load. In the first half of the year it succeeded in “resolving” just over ten cases, in three of which it took action against land-grabbers.

The government, fearing a “peasant revolution” over land-grabbing, took a bold decision to end land-grabbing. In March, Prime Minister Hun Sen declared “a war against land-grabbers” whom he identified as “CPP officials” and “people in power.” His declaration met with some scepticism when the “iron fist” policy he had likewise bombastically announced in 2004 to rid the judiciary of corruption had produced few results, if any.

Amidst such scepticism, the “war” nevertheless scored an immediate victory. The first success was against an army major colonel named Te Haing who was arrested for encroaching on State land and cutting into forestry land to take about 1,567 hectares in Banteay Meanchey province. The second success was against an army general named Chao Phirun, who was forced to hand 200 hectares of land back to the government. However, no action was taken against him. The third case concerned a tycoon named Tan Seng Hak who was a former advisor to CPP Chairman Chea Sim. Tan Seng Hak was arrested together with two members of his group for falsifying documents regarding 300-hectares of land located on the outskirts of Phnom Penh.

The early momentum of the “war” died down until July, when the government sent a delegation of officials, ten excavators and over 100 workers under the protection of armed policemen, to reclaim a site that once included Lake Kob Srov. Long Chhin (Cambodia) Investment Ltd, a mainland Chinese company with good connections to top leaders in the country, had filled in the lake in order to build a luxury housing estate, called Long Chhin Resorts, 12 kilometres northwest of Phnom Penh. The government claimed that the filling-in of that lake was illegal and that it needed to reclaim the site as the construction work on the estate would block the water flow in the area and cause floods in the capital, Phnom Penh. The company claimed that it had the approval of the government.

The excavators and workers tore down and demolished all construction on the estate, turning it into rubble in three days. The demolished structures included all the brick walls around the estate, all entrance porches, seven two-story apartment blocks, 21 finished villas, eight villas that were still under construction, three guesthouses, a karaoke hall, 10 leisure kiosks, a warehouse, an office building and other amenities.

A number of Cambodians lost their investments in the estate, having already bought villas and apartments from the company or made deposits on them. Suppliers of construction materials have also lost money that the company owed them. The total losses suffered by house buyers and the company’s creditors have been estimated to amount to around US\$20 million - a huge sum in a poverty-ridden country. Some 60 house buyers and creditors have now filed separate suits against the company to get their money back.

Prime Minister Hun Sen’s “war” is yet to score more victories as little of the old land disputes and land-grabbing cases had been resolved, while new cases and confrontations

continue to arise. The “war” against the powerful brought terror to the powerless, instead of relieving them, in cases where they dared put up any resistance to claims by the powerful or the government, especially in areas which have become prime sites for development.

The following are some of the cases of land disputes and land-grabbing, which have mostly effected the powerless.

Phom Penh, the capital, is one of the prime real estate sites. In August, a confrontation between 400 families and a company called 7NG took place over an ongoing land dispute. A group of 100 people comprising the police, military police with pistols in uniform and some personnel with sticks, hammers and axes - allegedly hired by 7NG company - went to demolish houses, huts and tents belonging to families who protested and were resisting against their attempts to enter the community for demolition.

A clash occurred between the families and the group and they started beating the families who prevented the group from entering. Four women were injured and another woman was arrested.

In early November, the authorities in the capital sent some 200 police officers armed with assault rifles, batons and shields, 200 demolition workers and two excavators to evict at dawn 132 families from a bank of the Mekong River in front of the city centre and demolished all their houses. The authorities claimed these families had illegally built their houses, polluted the river, spoiled the beauty of the area, and posed a problem of security. They promised each of them a plot of land in a settlement area on the other side of the capital, in an area where previous forced evictees had been settled. There they were to build their new houses, and had to make a new life far away from their places of work.

The seaport of Sihanoukville on the Gulf of Thailand is another contentious site, especially after the discovery of offshore oil in Cambodian territorial waters. In April, the authorities there sent armed police and security personnel to forcibly evict 107 families from 17 hectares of land, for the benefit of Senator Sy Kong Triv, a tycoon and a member of the ruling party.

That day the town’s governor, together with his deputy, the town prosecutor, the police commissioner and military police commander, led about 100 police and military police officers armed with AK47 assault rifles, electric batons and tear gas to search for illegal weapons in the homes of these families. Although they had a warrant, the search for weapons was merely a legal cloak to cover up the eviction of the families as the security forces failed to find any weapon and instead took their land.

The families resisted and clashes ensued. The security forces fired shots in the air and into the ground and charged the villagers, using their rifle butts, electric batons and water canons to disperse them. Thirteen men among the villagers were seriously beaten, and many women were assaulted. A 75-year-old man in the village was so severely beaten and electrocuted that he required hospital treatment. Three members of the security forces were also injured.

The security forces arrested 13 villagers for “battery with intent” and “wrongful damage to property.” Say Hak filed a criminal lawsuit against Chhim Savuth, a human rights investigator, for “inciting” the villagers to form a “breakaway zone independent of government rule.” Chhim Savuth went into hiding to evade arrest (see section 3.a).

The homes, crops and other belongings of those families were destroyed by fire, tractors and bulldozers during the eviction. They were made destitute, and until the time of writing some 40 families were still camping under plastic shelters or trees under monsoon rains and the tropical hot sun on the roadsides along Highway 4 leading to Phnom Penh. They were surviving on relief handouts from humanitarian organizations.

In July, the same authorities forcibly evicted 92 families following a dispute between them and the town’s army commander over about 130 hectares of land. They destroyed their homes and all of their crops. These families were forced to live destitute under shelters and have been exposed to tropical storms, rains and the sun. The authorities have ignored their responsibility for these persons’ well-being.

In October, at dawn, the same authorities sent a combined military and police force armed with guns and electric batons, together with tractors, to evict 45 families who they claimed had built huts in 100-hectare land “in the front of someone else’s land,” which had “a negative impact on the city tourism zone.” The force used threats and intimidation against the villagers. They also beat them with rifle butts, electrocuted them with electric batons, and arrested one villager. They also destroyed all their homes and crops. The families had lived there since the early 1990s.

In October, in Koh Kong province, several hundred villagers staged a peaceful protest lasting more than a month in front of the house of the Chi Khor Leu commune chief, regarding an unresolved dispute over several hundreds of hectares of lands stretching on either side of National Road 48. According to protesters, along the north side of the road, Oknha (lord) Li Yong Phat grabbed several thousand hectares of land, and on the south side of the road, several hundred hectares of land were being grabbed by a number of Oknhas who are clearing the lands by demolishing homes and chasing the villagers out from their land.

In May, in Kompong Speu province, villagers reported that an army tank unit used tanks to clear several hectares of land belonging to them. They were defenceless when facing such action by an army unit.

In Svay Rieng, a rubber plantation company cleared 1500 hectares of land that 500 families claimed to have been cultivating since the 1990s. In October, a group of representatives of these families took the protest to the country's leaders in the capital Phnom Penh, only to be bundled into vehicles and sent back by the police to their villages (see section 4).

In October, in Siemreap province, some 140 villagers went to a human rights NGO to seek help to protest against the clearing of 620 hectares of their rice-fields that a rubber company had started clearing.

In virtually all cases of land disputes and land-grabbing, the weaker parties have received no fair compensation, which they are entitled to as of right under the country's constitution. They cannot resort to courts of law to adjudicate on and enforce their rights when the judiciary is under political control and the authorities seldom resort to the due process of law, instead preferring to issue orders and have law enforcement agents execute these orders.

Conclusion

The Cambodian government should make more efforts to honour its international human rights obligations. It should adopt a positive attitude towards the Office of the High Commissioner for Human Rights and the UN Secretary-General's Special Envoy for Human Rights in Cambodia. It should enter into dialogues with them to explore ways of heeding their recommendations. Closing down the OHCHR office and refusing to cooperate with the Special Envoy not only reflect very badly on the Cambodian government, but will also fail to address human rights issues.

The Code of Ethics for Judges (CEJ), will not be effective without the Supreme Council of the Magistracy (SCM) recognising the need for it to reorganise itself in order to become an independent body and to put in place a set of transparent and fair enforcement mechanisms.

Under the Cambodian constitution, the SCM provides assistance to the king, who is also its chairman, to guarantee the independence of the judiciary. Under the law on its organization and functioning, the SCM is responsible for the discipline of judges and the effective functioning of all courts of law. It has a disciplinary council specifically for this purpose, and is therefore the body that is responsible for the implementation and enforcement of the code.

However, the SCM is unlikely to be effective in the enforcement of the code as seven of its nine members are themselves judges and prosecutors and may not be very forthright in disciplining their peers, especially as almost all of these seven members and their peers belong to the same ruling party (CPP).

Three of the seven members are openly known to be active members of the CPP. One member is the President of the Supreme Court and a member of the standing committee and central committee of the CPP. Another member is the President of the Court of Appeals and is also a member of the CPP. He is known to be very close to a powerful Deputy-Premier. It is very difficult for these two leading judges to maintain and proclaim their neutrality in political activities. Another SCM member is the Minister of Justice who runs and controls the SCM secretariat. He is also an active member of the ruling party.

Because of its composition, its members' political affiliation and the control of its secretariat by the Minister of Justice, a politician, the SCM is not free from political control. It is not in a good position to ensure judges' neutrality with regard to political activities, as the code has stipulated. In the past, it has not proved itself as being effective in disciplining judges for misconduct.

For instance, in 2004, it did not act upon a request by the Ministry of the Interior to investigate the corruption of certain judges. This inaction created a confrontation with the ministry in question. Prime Minister Hun Sen stepped in then with his "iron fist" policy which was allegedly aimed at stamping out corruption from the judiciary, but which instead had the effect of consolidating his control of the judiciary. The SCM then brought to justice a number of judges only to allow them to resume their normal judicial functions when the "iron fist" policy had lost its thrust and petered out.

More recently, in 2007, the government bypassed the SCM and violated the country's constitution altogether when it took action to remove the President of the Court of Appeal and appoint her replacement.

Furthermore, the SCM does not as yet have any transparent and fair complaint procedures in place to enforce the code of ethics. Its decisions on discipline have, so far, not been known to be free of bias, and judges that have been disciplined have not been able to challenge decisions, which cannot be the subject of an appeal. Besides, it is widely known that members of its discipline council are not themselves free from corruption, as accused judges can bribe them to have the charges against them dropped.

The first required step is for the SCM to reorganise itself to become a body that is independent and free from political control. Only an independent SCM can ensure an independent judiciary. Its members should have no affiliation to any political party, and at

least half of them should be non-members of the judiciary. It should run and control its own secretariat. Its members should comply with the code – especially the principles of independence, impartiality and honesty - and serve as models for all members of the judiciary.

The SCM should now widely disseminate the CEJ and encourage the public to report any misconduct by judges. It should enact by-laws on the complaint procedure, clearly distinguishing complaints against judges' decisions, which are under the jurisdiction of the Courts of Appeals or the Supreme Court, and complaints against judges' conduct, which fall under its jurisdiction.

These by-laws should set out in detail who can make complaints against judges, how such complaints can be made, where they should be sent, and when they can be acknowledged and their outcome notified to the complainant. They should detail the process by which complaints are dealt with, how they will be examined, how inquiries are conducted, how accused judges can defend themselves, and how sanctions are decided.

They also need to determine the range of sanctions available, which should be proportionate to the seriousness of the proven misconduct. All of these complaint procedures should be transparent and fair, and made known to all members of the judiciary, the legal profession and the wider public. The SCM should assign a leading judge in each court to act as ethics officer for other judges to consult on ethical issues they may be encountering in and out of court.

The subject of the implementation of the CEJ would be greatly facilitated and made more effective if judicial ethics is made an important course in the training programme for judges and lawyers at both the Royal Academy of Judicial Profession and the Centre for Lawyers Training and Professional Improvement in Phnom Penh. The Ministry of Justice and the SCM should also include judicial ethics as an important topic in all refreshment training seminars for judges that they organise.

There should be periodic evaluations of compliance with the code and ways should also be explored to better instil judicial ethics into the country's judicial culture.

With regard to the Code of Criminal Procedure, the judiciary should seek the enactment of additional legislation to make up for the inadequacies, flaws and shortcomings of the procedure, in order to help it to fully discharge its constitutional duty to protect the rights and fundamental freedoms of Cambodian citizens. The additional legislation should re-incorporate all internationally adopted principles and rules pertaining to criminal procedure that the UNTAC Law recognised and that the code has discarded. It should also ensure there is adequate protection of the rights of suspects, accused persons, victims of crime,

witnesses and concerned people. It should criminalize, as the UNTAC Law has done, all breaches of the criminal procedure that affect all rights. The code should be periodically reviewed to evaluate compliance and effect improvement.

In the meantime, rules of court should be adopted to ensure respect for rights, especially with regard to suspects' and an accused persons' right to the presumption of innocence, right of silence, right to legal counsel with provision of legal aid, right to communicate with their families, and right to medical examination. The Supreme Court should institute equality of arms between the prosecution and the defence for trial hearings, and order trial judges to confine the questions put to the accused during interrogation to seeking clarification and nothing else. They should allow the prosecution and the defence more latitude to respectively prosecute and defend the accused. They should pronounce the verdict before the presentation of mitigation, and then the sentencing after due consideration of the mitigating circumstances.

There should be rules of court that fully and adequately protect the rights of victims of crime and also witnesses, especially the protection of their physical safety. Another set of rules of court should make it mandatory for prosecutors and judges to check the physical and mental state of suspects or accused persons who are brought before them. Any suspicion or sign of torture or other ill treatment should be immediately investigated and action taken against the perpetrator(s). They should also clearly define the purpose of judicial officers' visits to judicial police units and prisons as prescribed by the code, concerning the prevention of torture and other ill treatment, and the protection of the fundamental rights of persons detained in those places.

For his part, the Prosecutor-General of the Appeal Court who supervises the judicial police should issue directives or guidelines to all judicial police officers and prosecutors to fully respect and protect the afore-mentioned rights, and to inform suspects, victims of crime and witnesses of such rights, right from the time of a person's arrest.

The judiciary should effect a shift of culture away from criminal lawsuits and arrests that are effectively malicious and vexatious and meant to strike fear in the weaker parties to disputes, especially in land disputes and land-grabbing cases. Prosecutors and judges should give weight to the rights of these weaker parties when considering the legality of facts against them. They should strive beyond legal justice for equity. They should desist from forcing the weak and the poor to make sacrifices for the benefit of the better off, or the strong and powerful.

For its part, the government, including all public authorities, should likewise desist from, prevent and deter the same action. Forcing the poor and the weak to make sacrifices for "development" or "beautification" of cities through their forced evictions without adequate compensation are nothing short of criminal acts.

The “war against land-grabbers,” mainly waged through executive orders or the leaders’ public speeches, has so far been proven to be ineffective as land disputes and land-grabbing continue. This war should cease and be replaced by recourse to the due process of law and the rule of law. The cadastral committees, established at the district, provincial and national levels by the Land Law, should be empowered and given adequate resources, including expertise, to resolve disputes over non-registered land. The courts of law should likewise be empowered and given adequate resources to resolve disputes over registered land.

The government should not interfere in the work of all these cadastral committees and courts. It should instead cooperate with and provide supporting services to them, and implement their decisions.

Concerning the freedom of the press, and the freedoms of assembly and expression, the government should consider them as fundamental rights, as they are specifically enumerated in the Paris Peace Agreements as well as in the country’s constitution. Individuals and society alike should accept some inconvenience that the exercising of such rights may cause.

If any media are suspected of having abused press freedom, the government or affected individuals should have recourse to the due process of law to ascertain the abuse or any breach of the Press Law, for instance. Arbitrary confiscation, suspension or ban by executive orders without recourse to the due process of law is unlawful and violates this fundamental right.

Prior to the Ministry of Interior issuing its guideline on NGOs activities or the government’s approval of the Bill on Peaceful Demonstrations, the enjoyment of the freedoms of assembly and expression through meetings, training seminars, public forums to discuss local and national issues, peaceful demonstrations or protests, have been carried out in a peaceful and orderly manner, with the least inconvenience to individuals and society. The experience so far has not warranted such guidelines and such a law.

The violent attack on the Thai embassy and businesses in 2003 was an exception which the government has taken as a rule. That attack was spurred on by Prime Minister Hun Sen’s verbal attack on the Thai actress at the centre of the debacle for making a comment hurtful to Cambodians. Importantly, the police failed to act in time to prevent the attacks.

The police should draw lessons from such a failure and, in order to ensure that there will not be any repeat of such attack, and demonstrations pass off with the least inconvenience, they should dispatch forces to march along either side of processions, regulate the traffic along the route and protect venues used for meetings. Traffic jams, when alternative

routes are available, or claims of hypothetical public disturbances, should not be used as reasons for banning such peaceful demonstrations.

Cambodian society and the country's government should bear the costs incurred by such forms of policing, if they deem this right fundamental, as they are meant to under the constitution. Any executive order or legislation that aims at restricting freedoms, when their enjoyment does not affect the honour of other people, good customs of the society, public order or national security, is a violation of the constitution.

The Ministry of the Interior should scrap its guidelines and the government should remove all restrictive clauses from its Bill on Peaceful Demonstrations.

For their part, State signatories to the Paris Peace Agreements should also honour their respective commitment to the promotion of, observance of, and respect for human rights and freedoms in Cambodia. First they should support the continued presence of the field office of the High Commissioner for Human Rights and also the position of the UN Security-General's Special Envoy for Human Rights in Cambodia. Secondly, they should work with all the three branches of government in Cambodia to ensure that they honour Cambodia's human rights obligations, that their institutions for the rule of law protect these rights, and that no unconstitutional restrictions are imposed on the enjoyment of rights by Cambodian citizens.

I N D I A

The State of Human Rights in 2007

If there is one place on the face of earth where all the dreams of living men [and women] have found a home from the very earliest days when man began the dream of existence, it is India.

Romaine Rolland

1. Introduction:

India is 3.3 million sq kilometer of geographical expanse, home for an estimated 1.2 billion people speaking 844 different dialects. India has 22 official languages. Of the 1.2 billion population, an estimated 80.5% are Hindus, 13.4% Muslims and the rest is a mixture of Christians, Sikhs, Buddhists, Jains and other religious sects. While predominantly a Hindu dominated society, India has the third largest Muslim population in the world. It is also home to all five major racial types – Australoid, mongoloid, Europoid, Caucasian and Negroid, finding their representation in India.¹

The pure vastness of the country and the diversity of the population that it encompasses is a fertile soil for differences than harmony. Yet, after sixty years since independence the country has remained sutured together with a national identity, despite the demands for recognition and consideration from a growing number of factions claiming a separate national, political and ethnic identity. In spite of all these India is also one of the fastest developing economies in the world and as economists assess, is far more likely to be a stable economy than its immediate rival China.²

To summarise the issues arising out of this milieu of differences and commonalities is a difficult task. To narrow it down to prioritised



Women learning how to write their name during a folk-school session held in Belwa village

concerns is even worse. Any such attempt requires detailed studies and in-depth knowledge about India, its institutions and more than a billion strong population that draw on these institutions. In the absence of such a wide and deep experience, the Asian Human Rights Commission (AHRC) and its sister organisation the Asian Legal Resource Centre (ALRC) are attempting to summarise some of the key concerns regarding India through this report. The report is prepared drawing from the experience the AHRC and the ALRC have gained about India from their work on India during the year 2007.³ The concerns expressed and the issues articulated are evolved not only from the AHRC's intervention on human rights issues in India during the past twelve months, but also through the understanding the AHRC has gained from its work in India for slightly more than a decade.

The AHRC and the ALRC being regional human rights groups based in Hong Kong, most of our information sources are secondary in nature. This is because the AHRC's intervention in India or for that matter in any country in the region is through local network groups. Interventions are made locally, regionally and internationally through institutional collaborations with grass-root human rights groups spread across the region. Said this, the AHRC and the ALRC is still to establish a nationwide network of organisations in India. Yet, from where it began a few years before with just one organisation in Kerala, the AHRC have developed a considerable network of partnerships with human rights groups and activists spread across the country.

In addition to the specific cases where the AHRC has tried to intervene, information provided through other secondary sources like the media and the researchers the AHRC is engaged with has been used to assess the human rights issues in India. Given the priority of the work and its nature, the AHRC is primarily concerned about the following issues in India. The issues are:

- Caste based discrimination
- Policing and custodial torture
- Right to food
- Low intensity armed conflicts

Discussing human rights is mostly about discussing institutional frameworks and the legitimate space for dispute resolution between conflicting parties and their interests. The above issues from India, irrespective of the region, have surfaced time and again throughout the year. Most of these issues, on analysis, are found to be arising not merely from any particular mindset of the people. The conduct of a given society is not static. General human conduct evolves and changes to suit the circumstances in which they live. Change however requires impetus - rewarding or punishing. In India, violation of human rights in theory is a conduct that calls for punishment, however trivial the punishment may be vis a vis the severity of the violation. But the fact that violations of human rights continues

unabated indicates that the deterrence the punishment may carry is either not severe enough or there are no deterrence at all. This is where the role of the justice mechanisms in India plays a pivotal role. These above issues that continue to cause dents upon peoples' life are thus closely connected to the administration of justice in India. It does not however mean that a well functioning justice system if in place will be complete solution for all the human rights issues in India.

The perceived notion of the justice institutions is not that these institutions function in a vacuum, detached from the social milieu in which these institutions situate. The justice institutions are administrated by individuals who relate their daily activities to the realities within the society within which they function and live. Their modus operandi is a reflection of the socio-political climate within their jurisdiction. Those who function within the justice delivery system are considered to be socially privileged than the ordinary person. For the same reason any friction between the ordinary people and the justice machinery tends to isolate the people from these institutions, giving more space for those in authority or those who are able to exploit their position with the authority in a manner adversarial to a less privileged individual. As of today in India this isolation is becoming more and more vivid.

Human rights concerns in India whether it is a socio, economic or cultural issue or a civil and political issue have a direct bearing upon the functioning of these systems. Matters ranging from the continuation of the caste based discrimination to the low intensity armed conflicts in India are someway or other related to the justice mechanisms in India. What India is in theory is a total negative of what it is in practice. Discussion of human rights issues in India invariably leads to examining the functioning or the non-functioning of the particular segment of the justice system that allows a specific derogatory conduct, whether it is from the government, its agent or from the ordinary citizen. Needless to say, in the following report the discussion of each issue culminates in discussing the justice mechanism that fails to prevent a particular human rights abuse.

1.1. Why the four concern areas?

The Scheduled Caste and the Scheduled Tribe is estimated to comprise of about $\frac{1}{4}$ of the total population of India. A discussion about India without referring to such vast a community is never complete. The backbone of rule of law is policing. It calls for a special mention in any human rights report on India. Policing is often the key for promotion and violation of human rights. The state of policing in India is still in doldrums. Consistent calls for attention to improve the state of policing in India within India and outside has been largely ignored by the administration. Even attempts by the Supreme Court regarding this issue have faced a stone-cold response from the government. A large proportion of human rights abuses reported from India are concerning the police.

An empty stomach is no place for any other concern. While India has repeatedly claimed itself to be self-sufficient in food grains and other food stocks, a considerable proportion of Indians live in abject poverty, deprived of daily food. This poorest of the poorest Indians who are deprived of food security are found in rural and urban backdrops. Being exploited by the rich, most commonly as a free form of labour, the poor sections of the society also is a fertile ground for secessionist ideologies. As of now there are a considerable number of districts in India under the spell of such secessionist ideologies, which in the long run will be counter productive for a developing nation and its people. Right to food has been an area in which the AHRC is interested and the cases of starvation that are reported from India does not in anyway justify India's great leap forward as a fast developing nation.

Several states of India are facing low intensity conflicts. Of the 607 districts in India about 170 are reportedly affected by armed conflicts. The armed conflicts in these districts are not aimed to break away from the republic, but a response to utter neglect and brutal oppression of the people by feudal landlords or corrupt government agents. It is a shame that in a country like India that has a best justice delivery mechanism in theory fails to address its people's concern in practice and force several of them to take up arms.

The response of the state administration to the armed conflict is presumable. It is neither admirable nor productive. The implementation of draconian laws and the state sponsoring private armed militia has further worsened the situation in these places. The people living in these regions are looked down by the state with suspicion and relative contempt. Such an attitude has not only resulted in further isolating the people from the government, but has resulted in the people developing sympathy towards a violent mode of communication and an affinity towards its carders.

2. Caste based discrimination

*"The Bráhmána was his mouth, of both his arms was the Rájanya made. His thighs became the Vaishya, from his feet the Súdra was produced."*⁴

Caste based discrimination is one of the most heinous forms of discrimination practiced by humans. Distant entities like the European Parliament have expressed concern about the issue.⁵ Caste being a qualifying quotient in social life in India, attributed by birth and fortified by religious beliefs, once born into a particular caste, the stigmas and/or benefits continue till death. It is precisely for this reason that caste based discrimination is considered as a form of discrimination that haunts a person from cradle to grave.⁶

In the past one year, the AHRC has reported several cases that depict the brutality of caste based discrimination. Of particular importance is the case of Suresh Musahar, a

primary school student who was facing discrimination based on caste not only from his classmates, but also from his teacher.⁷

Suresh Mushar is the son of Mr. Sajjan Musahar and a resident of Ayer Musahar ghetto, under the jurisdiction of Cholakpur police station in Haranhuwa block of Varanasi district. Suresh is 8 years old and is studying in class two at the Shivrampur Government Primary School. On 2 August 2007 Suresh complained to his class teacher Ms. Sangeeta Agarwal regarding his missing school bag. The bag could not be traced out on that day. On August 4, 2007 Sangeeta returned the bag to Suresh. While returning the bag, the teacher asked why Suresh has to be concerned about the missing bag and books since the members of his community will invariably end up rearing cattle and working for the upper caste. Saying this, without any further provocation the teacher started caning Suresh.

Suresh's mother who came to know about the incident complained to a local human rights group seeking intervention. Mr. Vijay Bharati, an associate of the People's Vigilance Committee on Human Rights intervened. Bharati organised a meeting of the parents from the Musahar community whose children are attending the government school along with Suresh. In the meeting the parents and the children complained that most of the Musahar children were treated similarly by Sangeeta as well as the other staff in the school. The children also complained that the teacher discriminated them due to their lower caste and had instructed them not to touch her thereby 'polluting' her.

2.1 Caste, a tool for exploitation

The practice of caste based discrimination has been so much engraved into the social fabric that even legal deterrence could not make the slightest dent upon this evil practice. Out of those who suffer the worst from caste based discrimination are the rural poor who are still under the repression of the feudal landlords.⁸ In the absence of a comprehensive land reforms policy in India, in the rural villages in India the majority of the land is held by upper caste landlords who literally rule the villages as feudal lords. Most of the agricultural land holdings are with these landlords who force the Dalits to work for them for a pittance. Often wages are in the form of a meal for the family once a day. Once the agricultural season is over the Dalits are left with no food or work.



Musahar women - forced to work for less than 1 US\$ a week

Majhuwara village in Chandauli district of Uttar Pradesh is a classical example of how the socio-economic conditions coupled with caste based discrimination keep the Dalit communities under repression of the upper castes. There are about 150 families in Majhuwara village of which 130 families are from three Dalit communities - Kol, Chamar and Musahar. None of these families have their own property. They entirely depend upon the landlord, who also happens to be the head of the village. In the state government records however, the property held by the landlords belong to the forest department as reserve forest. Most of this land, which extends to more than 2000 hectare, has no semblance of any forest but are vast extents of paddy fields.

The wages are paid in kind, not in money. For a day's work a person is paid about 5 kilo of paddy. Paddy cultivation being a short-term crop that last only 90 days, the Dalits will have work only for about 40 days in a year, even for which they are not adequately remunerated. For the rest of the year, these families are at the mercy of the upper caste families for everything. When a member of the family gets sick, they are forced to borrow money from the upper caste landlord who collects 125% interest for the paltry sums given on loan. The enormous rate of interest makes it impossible for the Dalits to pay back the debt, which forces them to accept bonded labor at the upper caste farms.

Caste based discrimination is not limited to remote villages in India.⁹ The practice is reflected even in urban settings where caste plays a decisive role in daily life. Mr. Kali Charan Shakwyar, an assistant teacher in a junior high school of the Maharajpur village of Jalaun district's Madhaugarh block in Uttar Pradesh state faces harassment by both non-Dalit children as well as their parents. He cannot reprimand non-Dalit students. If he does so, then their parents quarrel with him. He is not even invited to upper caste marriages.¹⁰

2.2 The curse of manual scavenging

Caste based discrimination is not limited to a particular region in India. Even academic curricula in schools downplay the practice of caste based discrimination.¹¹ Evil practices associated with caste based discrimination are practiced across the country. For example in the state of Tamil Nadu the Dalit community Arunthathiyar is forced to work as manual scavengers. Manual scavenging is prohibited in law in India.¹² The



Women engaged in manual scavenging

government of India had declared that the practice of manual scavenging would be completely eradicated in the country by 2007.

The programme of liberation and rehabilitation of scavengers has three necessary components, which between them should have been sufficient to achieve the objective. These are: (1) Legislative back up to prohibit dry latrines and manual scavenging in the form of ‘the Employment of Manual Scavengers’ and Construction of Dry Latrines (Prohibition) Act, 1993; (2) an alternative to dry latrines in the form of low cost sanitation units for which loan and subsidy are provided under the ‘Centrally Sponsored Scheme of Low Cost Sanitation Scheme for Liberation of Scavengers’; and (3) the National Scheme for Liberation and Rehabilitation of Scavengers and their Dependents for training and rehabilitation in alternative occupations. There is a separate scheme of scholarships for children of families practicing unclean occupations under which children of families engaged in manual scavenging are eligible for pre-matric scholarships. Despite these provisions, the programme has not achieved success in removing the practice of manual scavenging.

The Act (‘the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993’) does not prohibit dry latrines and manual scavenging in a direct fashion. It operates after the particular state government issuing a notification fixing a date for enforcing the provisions prohibiting employment of manual scavengers and dry latrines in the specified area. The notification itself can only be issued after giving a notice of ninety days, and only where ‘adequate facilities for the use of water-seal latrines in that area exist’.

While government estimates suggest that there are about one million manual scavengers in India, 95 percent of whom are women, unofficially the figures are much higher and all this, more than a decade since the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. Even the Indian Railways employs manual scavengers. According to a petition filed in the Supreme Court – in its recently announced Integrated Railways Modernization Plan (IRMP), the Indian Railway does not have the elimination of manual scavenging on its radar. The Tenth Five Year Plan, however, has mentioned the eradication of manual scavenging by 2007 as a goal.¹³

In spite of all this most of the Indian states have not adopted the Act, and those who have adopted the law have not enforced its provisions to achieve the intended results.¹⁴ As a result of the complete failure by the state governments to implement the law within their jurisdiction, the practice of manual scavenging continues even as of today in India.

2.3 Caste based discrimination vis a vis legislative framework

Discrimination based on birth and caste is condemnable. The government of India also in theory condemns this practice. There are a series of laws in India that not only prohibits

caste based discrimination but also penalises such practices. Discrimination is prohibited in the Constitution of India.¹⁵ Untouchability, one of the worst practices of the caste system is specifically prohibited in the Constitution. Article 17 of the Constitution abolished untouchability and its practice in any form is forbidden. Article 25(2b) of the Constitution provides that Hindu religious institutions of a public character to be open to all classes and sections of Hindus.

The Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 criminalises certain acts against the members of the Scheduled Castes and Scheduled Tribes. The Bonded Labour System (Abolition) Act, 1976 provides for a special program for identifying bonded laborers, and for their liberation and rehabilitation. While this law does not specifically mention Scheduled Castes, it is significant to them because the majority of bonded laborers belong to the Scheduled Castes. The practice of requiring Dalits to clean/remove human feces by hand continues despite the prohibition of manual scavenging by the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

The question is in spite of all these domestic laws and the legal framework in India, why is that caste based discrimination still continuing in India. For example the practice of untouchability is practiced widely in India.¹⁶ The answer probably lies in the fact how far these laws are practiced? Enacting a law is one thing, but implementing the law is a completely different game. In India, the implementation of the laws and the mechanisms available to implement the laws has somehow failed to meet the challenge. The implementation of the domestic laws have failed to that extent that even registering a complaint based on these laws calling for an action from the authorities itself is a difficult task. Where implementation fails, the law fails and thus the evil practice of caste based discrimination continues. The failure of implementation of laws however is not limited to caste based discrimination.

2.4 Caste based discrimination and food security

Of the series of issues that arise due to the practice of caste based discrimination, the most important is the denial of right to food to the members of the lower caste. The ALRC in its report to the United Nations Committee of Racial Discrimination for its 70th session has submitted a report detailing how caste based discrimination results in denying the



Thousands of children die from starvation and malnutrition, of which only a few are reported

right to food to the most marginalised communities in India, to which the members of the scheduled caste belong.¹⁷

Caste based discrimination in the milieu of overwhelming corruption spread throughout India not only perpetuates the practice, but also hampers development. The denial of development is not however limited to the lower caste but also affects the entire country.¹⁸ Even government assisted programmes like the Food For Work Programme and the National Rural Employment Guarantee Act, 2005 fails to deliver result due to caste based discrimination and widespread corruption.¹⁹ Even the Union Minister for Rural Development Mr. Raghuvansh Prasad Singh acknowledges this fact.²⁰

2.5 Conclusion

The caste structure and the injunctions attached to it control the social life and define the role of an individual in India. One is born into it and dies with it. If born a member of a lower caste or an untouchable, you die the same. There is no way out. The concept of the caste system brings in stratification of society based on duties. It is a defining tool to cast obligatory duties on people as the result of birth, which cannot be taken away. On the surface, it seems to paint a picture of societal obligation and duty. In reality, it is used as an instrument of exploitation by the upper castes against the lower castes.

India has ratified the International Convention on the Elimination of All Forms of Racial Discrimination.²¹ The ratification of the convention and the obligations attached to it is in addition to the obligations by the state under the Constitution and other domestic laws. However, in reality most of these obligations remain as sections and clauses in the domestic laws and fail to reach out to the Dalit communities across India. This is evident from the concluding observations made by the Committee on the Elimination of Racial Discrimination after reviewing the report submitted by India during the CERD session held in Geneva from 19 February to 9 March 2007.²²

Caste based discrimination is worse than slavery.²³ A person is born into the caste, whereas slavery is slightly different. A person may become a slave due to numerous circumstances. However, a slave may earn his or her freedom, whereas in the caste system there is no escape, because the only defining factor is birth or descent. Once born as an untouchable one remains an untouchable. Dr. B. R. Ambedkar who is also known as the father of Indian Constitution and also a Dalit by birth stated that untouchability based on caste is worse than slavery. 'Neither slavery nor untouchability is a free social order. But if a distinction is made there is no doubt that there is distinction between the two. The test is whether education, virtue, happiness, culture and wealth is possible within slavery or within untouchability. Judged by this test, it is beyond controversy that slavery is hundred times better than untouchability. In slavery there is room for education, virtue, happiness, culture

or wealth. In untouchability there is none' he said.

The avenues for those who are born into the lower caste are many in theory, however, in practice, none of these mechanisms work, especially if the person is poor. Dalits, 99% of them are poor with less than 1USD per day as their income. Oppression of the 160 to 180 million Dalits, who are viewed as being too low to even be part of the caste system, is one of the most repelling, but enduring, realities of the India. Equally oppressive is the violence perpetrated against them, especially the women. To be a Dalit today means having to live in a subhuman, degraded, insecure fashion: Every hour, two Dalits are assaulted. Every day, three Dalit women are raped, and two killed.²⁴ In most parts of India, Dalits continue to be barred from entering Hindu temples or other holy places - although doing so is against the law. Their women are banned from wearing shoes in the presence of caste Hindus. Dalit children often suffer a form of apartheid at school by being made to sit at the back of the classroom.

Yet, the Dalits are resisting. In parts of the country, they are organizing politically to demand their rights. A Dalit woman rules the largest state, Uttar Pradesh. However, breaking the barriers laid down by the Hindu caste system is an uphill struggle, especially when the government does little to uphold the law of the land that prohibits discrimination on account of descent.

3. Policing and custodial torture

India is hardly different from any of its neighbors. To the outside world, India is a democracy marching ahead with sustainable development. In fact, within India democratic values have suffered a major dent due to non-democratic approaches in governance. A true democracy is where basic guarantees are assured for the protection of persons and property, and where life is free from fear and repression.

The mere existence of a Constitution and the possibility to cast a vote once in awhile is not what democracy means. Democracy involves and demands good governance. Good governance must be reflected in every aspect of public life where state agencies are respected and considered as instruments and institutions of service, not as sources of suspicion and fear. The Prime Minister of India declared in a public speech early this year that India would soon ratify the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since then, nothing has been heard about India's preparation to ratify this convention.

One of the best indicators of good governance is the perception of the ordinary person about his state institutions. The failure of any single state institution suggests defects in governance. When the law enforcement agency becomes a failing institution, and there is

no credible attempt to address this, the situation is much worse. In India, the institution that is primarily responsible for law enforcement is the state police. There are serious concerns about policing in India — which is not much different from in neighboring countries.²⁵

3.1 Torture as a tool for investigation

Instances of custodial torture are reported all over from India. The AHRC in the past one year has documented numerous cases of custodial torture reported from India. It appears that in general, investigation of a crime begins and ends with a confession. In most cases the arrest of a suspect precedes the investigation of a case. The arrest is often followed by a prolonged period of illegal detention during which the detainee is tortured.

The case of Mr. Pahallu Musahar is a classical example.²⁶ Pahalu Musahar is the second son of Ms. Chanda Musahar. Chanda has four sons and two daughters. Of the six children Umesh, the third son, was involved in some criminal activities and has run away from home since the past ten years. The family had no information whatsoever about Umesh's current whereabouts.



Victim of custodial torture

On May 21, 2007 at about 6pm a police constable from Cholapur Police Station came to Pahalu's house and asked to give directions to his sister Bibi's house. Pahalu asked the constable why the constable wanted to go there for which the constable informed him that he wanted to question Bibi's husband about Umesh's whereabouts. Pahalu agreed and took the constable to his sister's house. At his sister's house the constable asked Bibi's husband whether he knew about Umesh's whereabouts. Bibi's husband said that since nobody knows where Umesh is they cannot give any useful information.

The constable then asked Bibi's husband to come along with him to the police station. He refused, informing the constable that even if he comes, he will find it difficult to return since he is suffering from night blindness. The constable then contacted his superior officer and Pahalu was taken to the police station. Since then what has happened to Pahalu is not clearly known, other than the fact that his mother was informed that he is been questioned regarding Umesh. Pahalu was brutally tortured at the police station to find out the details regarding his allegedly absconding brother Umesh.

On May 25, 2007 Pahalu's father filed an affidavit at the Cholapur Police Station affirming that the family does not know about their son Umesh since he has left the family ten years before and that nobody in the family had any contacts with them. Pahalu's father also faxed letters to the Senior Superintendent of Police, Varanasi informing the illegal custody of his son Pahalu and requesting the officer to release him. The family also sent a registered letter demanding similar relief. None of these letters were considered by the officers. Later it was known that Pahalu was kept at the Mirzapur Prison, being charged with nonbailable offenses. Pahalu was been charged with offenses to justify the detention and illegal arrest.

Neither Pahalu, nor his family is informed why Pahalu was taken into custody and on what charges. Pahalu's family was not aware where exactly he is detained. Pahalu was detained merely to force his brother Umesh to surrender before the police. While detention of this nature is prohibited in law in India, it is mandatory for the police to inform the detainee about the charges for which he is taken into custody. The police are also required to inform the nearest relative of the detainee about the arrest and the details of the member of their family. Pahalu was tortured in custody to force him to divulge information regarding his allegedly absconding brother.

3.2 No domestic law penalising custodial torture

Torture is not expressly prohibited in law in India. As of now there are only indirect means through which torture can be addressed in India. For example the Criminal Procedure Code, 1973 which lays down the rules of arrest, detention and enquiry does not prohibit the use of torture, but only prohibits 'unnecessary use of force'.²⁷ Section 50 of the Code requires the officer to inform the person arrested of the reason for the arrest, including the alleged offence for which the person is being taken into custody. The statutory requirements have been reiterated by the Supreme Court of India, when it ruled that at the time of arrest, a memo must be prepared by the arresting officer. This memo must contain the alleged crime, the place, date and time of arrest, and also the place to which the person will be taken for detention prior to being produced before a Magistrate. The rules framed by the Supreme Court also require the officers to ask a person to witness the arrest memo.²⁸

Whatever be the law, when it comes to following it, in spite of dozens of directions from the courts and also recurring orders from the state the police still stick to their habit of torturing the suspect. Often such instances defy human conscience. The case of Mr. Giasuddin Mandol is an example.²⁹

Mandol is an iron scrap dealer from the North 24 Parganas district of West Bengal. On August 2, 2007 at about 7:30pm, the Sub Inspector of Police Mr. Ayub Ali from Deganga Police Station along with other officers came to Mandol's shop and took him into custody.

Mandol was later brought to the police station. At the station, the Inspector in Charge Mr. Julfikaqr Ali Mollah started questioning Mandol. After a while the officer forced Mandol's head under a table in the police station and poured/sprayed some acidic liquid into Mandol's rectum through his anus. It is reported that Mandol who suffered intense burn from the liquid started bleeding through his anus.

Two days later, that is on August 4, 2007 Mandol was sent to Biswanathpur Hospital for medical checkup. But the medical checkup was not done properly and Mandol was under threat not to complain to the doctor about his bleeding. On the same day after the medical checkup Mandol was produced at the Barasat Magistrate Court. Mandol was produced in the court as a suspect in case number 154 of August 4, 2007 registered at the Deganga Police Station. The charge leveled against him was under Section 399 [making preparations for dacoity] and Section 402 [assembling people with an intention to commit dacoity] of the Indian Penal Code, 1860 read with Section 25 (1) a [possessing or carrying firearms or ammunition without license] of the Indian Arms Act, 1959.

The Magistrate ordered judicial remand for Mandol till August 13, 2007. The Magistrate also ordered for the treatment for Mandol at the Jail hospital. But at the prison he Mandol was sent to R. G. Kar Medical College and Hospital on August 13, 2007 since Mandol's condition was serious. At this hospital Mandol underwent a surgery on the same day and was later returned to the prison. On September 3, 2007 Mandol was allowed bail and was released the next day.

Later the local police also implicated Mandol with two additional cases; case 57 and case 58 dated March 17, 2007 of Deganga Police Station. A local human rights organization, the Committee of Protection of Democratic Rights came to know about Mandol's case and organised a protest meeting, locally, against Mandol's treatment at the police station. The organisation as well as the victim has lodged a complaint against ill-treatment at the State Human Rights Commission.

3.3 Criminal justice and custodial torture

The criminal justice dispensation system of India depends much upon the policing and the proactive role played by the judiciary, specially those officers from the lower ranks of the judiciary. Even though scholars and experts argue that the judiciary and the police are two independent institutions responsible for maintaining the rule of law in the country, in practice they are both interdependent and at times, very deficient in their functioning. This interdependency continues all the way through from the very stage of institution of a criminal case to that of the prescribing of punishment if the accused is finally convicted and sentenced for imprisonment or acquitted as the case may be.³⁰

It is an alarming trend in India that in an increasing number of cases if the police are certain, according to their “conviction,” that the suspect in custody was involved in a serious crime, often the suspect is killed, allegedly in an “encounter.” It appears that the government is increasingly tolerating the misuse of authority by law enforcement agencies. The cases of “encounter killings” reported from the states of Gujarat, Uttar Pradesh, Karnataka, Chhattisgarh and Andhra Pradesh show a consistent and alarming pattern of tolerance for the use of violence by state agencies.

After each reported “encounter killing” the government launches a smear campaign against the murdered suspect, justifying the act of the state agencies as if the murder were inevitable and is in fact an achievement. Custodial torture and encounter killings are closely related. State-sponsored interrogation centers — often torture chambers — function in most states in full public view. The suspects are brought in, kept in illegal detention and tortured as part of questioning. Later they are killed and declared as “killed in an encounter.” Such centers are run under the guise of protecting ordinary citizens from anti-social and anti-national elements. These centers are the Indian version of Guantanamo Bay camps.

In a proceeding in the Supreme Court regarding a case from the state of Gujarat, the state government admitted in court that it was aware of the existence of the interrogation and torture centers. The government also admitted that in several cases the officers might have killed witnesses to an arrest and detention in order to avoid questions at a later stage. The Gujarat experience, while a shocking revelation of the state of policing in that state, is also proof that the public could be forced into silence through fear, if the state so requires. The alleged war against terror — in its Indian version — serves as a good excuse for allowing state agencies to resort to extrajudicial means of punishment.

In this backdrop it is a matter of concern when the judicial officers themselves behave in unwarranted manner, often breaching the procedural laws and mandates set by the Supreme Court. None other than the Chief Justice of India has remarked that about 20% of judges in India are corrupt. The Prevention of Corruption Acts, 1947 and 1988, have not succeeded in checking corruption. A.P. Bharucha as Chief Justice of India admitted that there was corruption in the ranks of the judiciary to some extent, mostly at the lower levels.³¹

3.4 Consequences of custodial torture

Even though the use of violence and imparting fear among the populace are considered among the worst methods of crime prevention in many countries, they are widely practiced in India. This is because even today the concept of law and order is based on the principle of imparting fear. The state has neglected the need to modernise and humanise the police.³² The state police are often under extreme pressure to control crime. When pushed beyond their capacity and capability, the law enforcement agencies resort to crude forms of policing, which is often the use of brute force.³³

Widespread use of custodial torture in India is not the result of government neglect alone. It is also the result of the lack of seriousness in approaching this issue by the other justice mechanisms in India. Meager compensations awarded after decades long court cases serves no better deterrent than a scarecrow. To punish a law enforcement officer who has engaged in torture, as of now, there is no law in India.

The widespread use of custodial torture has also taken its toll upon the law enforcement agencies and is reflected in the overall state of the rule of law in India.³⁴ Ordinary people isolate themselves from the law enforcement agencies, not trusting them. The use of torture has considerably reduced the morale of the law enforcement agencies.³⁵ For example, cases that are brought to court based on evidence gathered by the use of torture often result in acquittal. The loss of morale of the law enforcement agencies is also exploited by corrupt elements in the society.

In spite of all this, neither the government of India nor its state governments have declared a policy of non-tolerance to custodial violence. In the remote villages of India, government means the local police constable. The atrocities committed by these uniformed state agents create a fertile ground for anti-social and anti-state elements to propagate and advocate violence. The increase of violence in society has resulted in the loss of a middle ground for those who do not support violence.

3.5 Reforms remain in paper

Various state governments in India and their law enforcement agencies have lost control of law and order over considerable parts of their jurisdictions -- a backwash of erratic policies. This concern is expressed by various agencies in India like the National Human Rights Commission and the National Police Commission.³⁶ The state governments are reluctant to free the local police from its political grip. Concerns regarding the political control over policing are not an altogether new issue in India. Even police officers are concerned about this. Mr. Prakash Singh, a senior police officer approached the Supreme Court of India seeking exactly this -- to free the police from the clout of corrupt politicians. The court admitted the case and issued directives to the government. This case is now known as the Prakash Singh Case.³⁷

The directives of the court is intended to setup a temporary arrangement for a balanced and independent policing mechanism in India, free from political influence and to considerably remove the scope of political cronies from being appointed as head of state police service. If the directions are implemented it will free the state police from political clout, provide fixity of tenure for senior police officers, prevent administrative abuse by rampant transfers and also will setup independent mechanisms to investigate into complaints against police officers. The directives of the court is only a temporary arrangement until

the central and state governments come up with appropriate legislations and permanent mechanisms to settle the issues regarding policing in India. The findings of the court is based on reports and recommendations of various commissions constituted during the course of thirty years, to look into matters concerning policing and also on specific concerns aired by the National Human Rights Commission of India. The complete control of the bodies to be constituted to overlook the functioning of the state police is left with the respective state governments.

While several state governments are yet to implement the directives of the court, the state government in Kerala went ahead to partially implement the court's order.³⁸ An Ordinance was issued by the government, claiming that the government is implementing the directives of the court's directives. However the Ordinance is a far cry from what the court directed.³⁹

3.6 Conclusion

Torture is not a crime in India. To convict a law enforcement officer for torture, the act has to qualify all the requirements like any other crimes in the Indian Penal Code, 1890. To prove a crime, meeting all standards, to be punished under the Indian Penal Code, is difficult because of the absence of independent investigating agencies in India. The absence of an independent agency to investigate cases of custodial torture is exploited by the offenders since they know that even if a complaint is made regarding torture it would not be properly investigated.

The widespread use of custodial torture has taken its toll upon the law enforcement agencies in India and is reflected in the overall state of rule of law in India. As of today, the ordinary people have isolated themselves from the law enforcement agencies. The people do not trust the law enforcement agencies. The use of torture has also considerably reduced the morale of the law enforcement agencies. For example cases that are brought to a court based exclusively on the evidence gathered by use of torture often results in acquittal. The loss of morale of the law enforcement agencies is exploited by corrupt elements in the society who would like to use the local police as their militia, paid from the state exchequer. This isolation of the law enforcement agencies from the ordinary people has resulted in increasing number of incidents where people take law into their hands.

In the past few years incidents of violence committed in the name of 'justice' are increasingly reported from India, of which the highest number was reported in 2007.⁴⁰ These are acts of violence, is resorted to by either the state agents or the people for executing what they think is justice. Such violence indicates that the public perception of justice in India is rapidly changing - changing for the worse. The people's perception of justice depends upon how the justice dispensation mechanism in a country functions. In theory, India has

a reasonably good legislative framework within which laws are drafted, debated and implemented. But in practice the drafting and debating of laws remain mostly outside the scope of any public discourse. The acts of the legislature are often dominated by caste, religious and partisan political sentiments as opposed to welfare and betterment of the people.

In addition to the limited scope of people's participation in the legislative process, the justice dispensation organs of the state is also suffering from ineptitude and fatigue due to mismanagement. The delay in court proceedings and a failing policing system are two classic examples. For an ordinary Indian, the courts in India make a mockery of the term 'justice' by delaying proceedings for years. Long periods of delays are often exploited by those who can manipulate the system.

Law enforcement agencies are also exploited and manipulated by the same group of individuals. Instead of serving the general public, the law enforcement agencies in India often tend to serve those who have power and money. It appears that the law enforcing agencies in fact allow themselves to be manipulated so that these agencies could also exploit the resulting opportunity for their benefit. The result is selective justice, often to the detriment of the ordinary people. This situation also facilitates widespread corruption in the society.

For the ordinary person the presence of justice is evident in the functioning of the local police and the local courts. These are the two important institutions in any state structure that provide protection and guarantee to a person's life and property. Due to the proximity of these two institutions to the people and their life, the functioning of these institutions is under the constant scrutiny of the people. When these institutions fail to perform reasonably well, the people will exploit its weakness and will also disregard them. A failing judiciary, inept law enforcement agencies and widespread corruption is the cocktail for disharmony and violence. The convergence of the failing justice mechanisms is the meltdown of the public perception of the justice by the state. When the state fails to provide security and guarantee to its own people, people take law into their own arms. The result is what India is experiencing today.

In spite of all these, the government of India or its state governments have no declared policy of non-tolerance to custodial violence. Instead of preventing the use of torture the attempt by the government is to provide further impunity to the law enforcement agencies by proposing changes in the procedural law. The legislative changes have not been implemented yet, but the proposal by the government is to implement these changes in the recent future.

To remove possible internal resistance in implementing these proposals the government

has roped in several non-government organisations under the banner of the UNDP — India office, in an allegedly consultative process on this issue in the name ‘Strengthened Access to Justice Programme’. Many organisations in India have inadvertently jointed this lopsided programme, currently executed through the Department of Justice.

The direction towards which India is headed as of now is imminent chaos and lawlessness. The widespread use of violence and the continuing neglect of the government to prevent it have also isolated the ordinary people from the government. In the remote villages of India government means the local police constable. The atrocities committed by these uniformed state agents create a fertile ground for anti-social and anti-state elements to propagate and advocate violence as a means of communication. This has also resulted in the loss of a middle ground for those who do not support violence.

For the central government in Delhi and the mutually opposing state administrations, governance is only an affair of five years. This congenital defect of myopic vision is a shocking feature of all governments in India and is reflected in their policies. A failed policing system and a justice mechanism that depends on such a police is what these governments covet for. Prevention of torture and reformation of law enforcement agencies is the last priority in these circumstances for any government. As of today, various state governments in India and their law enforcement agencies have lost control of law and order within considerable parts of their jurisdictions — a backwash of erratic policies. The spread of anti-state activities covering considerable parts of India must be an alarming wakeup call for the government. This shocking situation of chaos in law and order is certainly the result of the failure of police as an institution in India.

4. Right to food

The Prime Minister of India in his foreword in the ‘*Report to The People*’ dated May 22, 2007, claimed: ‘*In this 60th year of independence, the country should have the satisfaction of recording for the fifth year in a succession a rate of economic growth of over 8.5%.*’⁴¹ What is not sure however is whether the estimated over 200 million Indians who are presently suffering from malnourishment, and the many more million who have done so during past decades, will be satisfied with this growth. The country’s overwhelming population is often given as an excuse to justify poverty and starvation in India.⁴²

This theory is applicable only if the State itself is poor and has no means to procure enough food for its people. India is not poor, even though 70% of Indians are. India’s projected defense budget for 2007-08 is 24 billion US\$ and it plans to spend further on its weapons upgrade programmed.⁴³ Defense spending of such proportions in a country where a section of the population equivalent to 2/3rds the size of that of the United States is undernourished or suffering from malnourishment, is difficult to stomach. The

United Nations Special Rapporteur on the Right to Food has highlighted this contradiction of priorities in his report following his mission to India in 2005.⁴⁴

India is a country of contradictions. A country that has a projected 9% development index performs worse than some Sub-Saharan countries with regard to addressing starvation and malnourishment within its territory. The National Minimum Programme promulgated by the Government of India in 2004 speaks about the Rural Employment Guarantee programme, which is also reflected in India's voluntary pledge to the United Nations Human Rights Council.⁴⁵ However, millions of Indians in rural villages are not benefiting from this programme and remain unemployed. The programme is not properly implemented and in places where there are possibilities of implementation and thus employment, recruitment to the programme is based on caste bias and nepotism.

Poverty and resultant starvation in India is not limited to the lower caste, although they suffer the most. The lower caste forms only about 20% of the Indian population, whereas starvation and malnourishment affect about 53% of its entire population. Starvation and malnourishment are the direct result of the failing administrative system in India. A malfunctioning administrative system has a direct bearing upon the living conditions of the poor. For example, for the distribution of food to targeted population the government has established the Public Food Distribution System (PDS). However, the management of this system suffers from corruption – particularly black marketing, caste prejudices and the utter failure of various local governments.

4.1 Reality vis a vis theory

The case of 18-month-old Alina Sahin the youngest daughter of Mr. Ansar Ahmed is an example. Ansar has two daughters and a son. Ansar's wife died six months before and Alina is taken care of by her paternal grandmother. The AHRC had issued a hunger alert on September 3, 2007 expressing concern over Alina's situation. Yet Alina died from acute malnourishment on September 14, 2007.⁴⁶ Alina's parents are from the handloom weaving industry of Uttar Pradesh. The handloom weaving industry across India, particularly in states like Uttar Pradesh is now dead for all practical purposes, that the weavers and their families who once led a moderately good life are now forced to take up menial jobs for survival. Alina's death also symbolises the fate of the weaving industry in India.

Apart from the finite nuances of a dying industry and the complexities of import and export policies, in plain and simple language, Alina's death is the result of criminal neglect by the state government to address poverty in various section of the society. Acute poverty and deaths from starvation are not reported across the spectrum in the Indian society. It is only reported from select minority communities, tribes and the scheduled caste and scheduled tribe.

The targeted PDS was introduced in India in 1997. The shift from a Universal PDS to a targeted PDS was performed with the intention of avoiding the misuse and wastage of subsidised food materials. However, owing to a lack of proper screening methods and transparency in the procedure, the PDS is still a failure in India. For example, the licensing procedure for running a PDS shop is plagued by corruption. Licenses are awarded by the respective state governments and the authority to issue them is delegated to the district administrations, which are notoriously corrupt. To receive subsidised food a family is required to possess a ration card, which also serves the purpose of determining the family's financial status. This process involves obtaining certificates from the village-head and officers at the district administration. While the village-heads often refuse to issue such certificates, district administration officials demand bribes. The AHRC has documented several cases where the refusal of the village-heads to issue certificates to the poor is the part of a larger plan; to prevent the poor, particularly those from the lower castes, from accessing government welfare schemes such as the PDS shop. This is because the longer the people remain poor and near starvation, the easier it is for the village-head to continue subjecting them to bonded labour.

The continuation of caste-based discrimination is yet another factor that perpetuates poverty and deprivation of food, as was briefly mentioned in the Special Rapporteur's report.⁴⁷ 60 years after independence, the prevention of caste-based discrimination remains on paper rather than being enforced in practice. Due to this, caste-based discrimination is widely practiced and discrimination prevents the lower castes from accessing food. Additionally, the lower castes are deprived of landed property and those who have titles to particular pieces of land are frequently prevented from actual possession by local feudal lords.

In addition to this, large-scale land holding still continues in various States, including States that have enacted the land ceiling laws. Holdings of large extents of land (by individuals or families) deprive the poor from having arable lands of their own. However, the poor can still benefit from such large-scale cultivation, by being employed by the landlord, although in reality this tends to be for much less pay than that stipulated in the Minimum Wages Act, 1948. However, when landlords find that agriculture is not profitable for various reasons and sell off their land to property developers, the most affected are the poor landless communities, as this often results in the starvation of the agricultural labourers who depended upon such large-scale cultivations. Uttar Pradesh state in India is now administered by a government led by Ms. Mayawathi, a Dalit by birth and a Buddhist by practice. The government led by Mayawathi has sworn to prevent caste based discrimination and starvation deaths. But the AHRC in the past one year has documented at least a dozen cases of acute starvation, predominantly from the Dalit communities from the state.

In addition to poverty caused by human interference, large-scale poverty exists in remote regions of the country. One such example is the Murshidabad district of West Bengal.

This district shares a border with Bangladesh. Land erosion by the river Padma has rendered large numbers of persons landless. Those who could afford to, left well in advance, but the poor had to stay until their land was taken by the river. This situation is exploited by cross-border smugglers based in the state who employ the poor to smuggle articles across the border to Bangladesh.

The smuggling involves crossing the river at night, which often claims peoples' lives, while others are shot and killed by the Border Security Force stationed along the Indian border. Ironically, a major portion of the smuggling involves food – grains collected from PDS shops are smuggled across the border to be sold on the black market. The West Bengal State Government considers the people living along the international border in Murshidabad as being illegal immigrants from Bangladesh and does nothing for their welfare.

The situation of hundreds of families in the Jalangi block of Murshidabad involves grave cases of exploitation, starvation and malnourishment, many of which have been documented by the AHRC,⁴⁸ and which has also been mentioned by the Special Rapporteur on right to food. The state and central government schemes remain highly ineffective and are totally failing the starving population in Jalangi. However, the government of India has not taken any credible action regarding this issue.

4.2 Conclusion

The government of India has formulated and is executing several welfare programmes intended to prevent starvation and malnourishment in India. While proper planning and implementation of these programmes are necessary, what has been mostly ignored is the poor state of functioning of the PDS. The system itself, as claimed by the government, covers only 16% of the total population.⁴⁹ The actual number of households using the PDS is around 91 million, significantly less than the 160 million being claimed by the government. 78% of these persons are trying to make use of the system - 26% are from urban areas while 52% are rural households.⁵⁰ Of these 91 million households an alarming 61% claim that the PDS is plagued by corruption and 49% claim that corruption has increased in the past year.⁵¹ The PDS is viewed as the most corrupt institution in India.

Such corruption exists in the PDS due to the failed criminal justice system in India. Illegal dealing with rationed articles is a crime in India.⁵² A crime registered under the relevant domestic law must be tried in a special court constituted in each state. However several states are yet to establish such a court, meaning that cases registered under the law in those states will have to wait for years to be decided through the regular courts. Additionally, states most frequently withdraws from prosecutions related to cases registered under the Essential Commodities Act as compared with other prosecutions. This shows not only the tolerance that various state governments exhibit towards corruption within the PDS, but

also the influence of the licensees upon the government.

Even though the Rapporteur expresses his concerns about corruption in the PDS, there are no concrete proposals suggested by the Rapporteur in his report to address this issue. To achieve any improvement in addressing the food security in India, there must be a multifaceted approach to the issue focusing on: the implementation of welfare schemes; increasing the existing network of the PDS within the country; and taking effective steps to prevent corruption within the PDS.

The prevention of corruption within the PDS cannot happen in a vacuum. It will require equipping the criminal justice mechanism in India to specifically address this problem. In addition to an increase in the number of special courts to try offenses related to the distribution of rationed food articles, a separate and independent mechanism must be constituted to investigate such cases. This must be independent from the local police since the latter is itself corrupt and will therefore fail to effectively investigate crimes related to food distribution. There is also a need to change domestic law, in particular the Essential Commodities Act, 1955.

As a country that has a surplus of food, it is a pity that in India, food that is distributed to the poor does not reach them, but is either spoiled and lost or sold on the black market. To change this, there are no quick-fixes. However, the prevention of corruption within the PDS is a critical starting point. This however requires a consolidated attempt from the state and central government in India which as of today is given the last priority for which there is no excuse.

5. Low intensity armed conflicts

In April 2007 the Chhattisgarh State Police ambushed a 12-member strong brigade of armed Naxalites (a group similar to the Maoists in Nepal) operating near Dhanora village. In the operation, the police arrested two girls, respectively aged 14 and 15 years old, who were wearing school uniforms and were armed with old 303 bore rifles. When questioned, the girls confessed that they had been picked up from school by the Naxalites, and given a few days' training on armed combat, before being sent out in the company of older members to fight against the State Police and the Salwa Judum, a State-sponsored private militia.

5.1 Children in armed conflict

Elsewhere, in Chhattisgarh State's capital Raipur, five-year-old Saurabh reports for duty every day at the local police station and works as a boy police constable. Saurabh was employed by the State Police after his father was killed in an ambush by the Naxalites.

Saurabh is not the only boy in the State Police. In nearby Korba Police Station, Manish Khoonte, a ten-year-old boy is employed as a police officer. Saurabh and Manish are paid US\$ 57 per month by the State Government.

Local human rights organisations, including the National Commission for Women, have expressed concern about the employment of child soldiers in Chhattisgarh by the State and the Naxalites.⁵³ The Naxalite child soldiers wing is called the Bal Mandal (Child Forum).⁵⁴ The members of Salwa Judum are known as ‘Special Police Officers’ or SPOs.

India ratified the Convention on the Rights of the Child on December 11, 1992. However, protection of the rights of children, particularly for preventing them from being made to fight in armed conflicts, is an area where the country has thus far failed. Children are often forced to take up arms in India after losing a close relative in the conflict.

In Manipur State in the northeast of India, hundreds of children have lost their relatives, including their parents, in the intense armed conflict that has been waged over the past decade.⁵⁵ Many children have witnessed atrocities committed against family-members by the members of underground movements as well as by State-agents, including rape, torture and dismemberment and mutilation of bodies. The situation in Manipur and Chhattisgarh is not unique. Child soldiers are used in several parts of the country, in the states of Jammu and Kashmir, Assam, Nagaland, Meghalaya, Tripura, Sikkim, Karnataka and Andhra Pradesh.⁵⁶

Children are often recruited from tribal communities, as these communities are frequently caught up in armed conflicts. A common strategy used by both sides to these conflicts is to recruit children aged around 14, as their age can easily be covered up. The extent to which children are exploited by State-sponsored militias and anti-State militias does not differ much. However, in anti-State militias, girls are reportedly used for the sexual gratification of older cadres. The presence of girls in camps also assists in camouflaging them as being ordinary villages.

Anti-State militias typically falsely claim that children volunteer to justify their recruitment. State-sponsored units recruit children by manipulating their personal and nationalist sentiments. Once recruited, they are trained to use weapons and to manufacture explosives. Those who are not good at using weapons are used for espionage or for passing messages between groups. Children are also used for gathering extortion money for the militia. This practice is more prevalent in the northeastern States.⁵⁷

State-sponsored militias usually recruit children based on the promise of future jobs at the State police department. Forcibly displaced tribal communities in conflict zones are another source of recruits. As the State agencies move in to counter anti-State militia activities,

villagers are evacuated and relocated to government schools, forcing the schools to cease functioning normally. Such schools then become military targets for anti-state groups, as these schools will normally be guarded by members of the government-sponsored militias. During this period children, particularly boys, are recruited on the basis of the need for them to protect their parents and sisters from the anti-State groups.

The members of village defense forces are often trained by the Rashtriya Swayam Sevak Sangh (RSS). The RSS is a militant support group of India's Baharatiya Janatha Party (BJP). Indoctrination through exploitation and manipulation of inflated nationalism, peppered by the BJP's and RSS's interpretation of Hindu Rastra (Hindu state)⁵⁸ is a major force in recruitment to the State-sponsored militia.

Possession of arms in India is regulated by law.⁵⁹ While restrictions are employed for possession of arms and ammunition in India for ordinary persons, the members of State-sponsored private militia groups are given more than one weapon, of which some are provided for use by the child soldiers.

Whenever State-sponsored child soldiers are killed in encounters, the government's claims the child was a member of an anti-State armed group, and the anti-State militia do the same and disown the child. In several cases, child soldiers' bodies have been mutilated in order to hide the possibility of their age and identities being found. Deaths of such children are frequently blamed on having resulted from being caught in the crossfire of an armed encounter.

Child soldiers' living conditions are invariably very poor, regardless of which faction they belong to. They are often denied adequate food. Food is often used as a reward for work. Children are used as scouts and to test the land for anti-personnel mines and other forms of explosives.⁶⁰ Using children for these purposes makes troop movement easier for both sides. Even if a child dies or is injured, the loss is considered to be minimal, as a child is considered to be far more expendable than a trained cadre.⁶¹

5.2 Spreading its wings across the nation

India's Naxalite movement and the anti-state sentiments in the north-eastern states are both spreading out, increasing the areas affected by armed conflicts in the country. Child soldiers are considered as being highly expendable pawns in these conflicts.

In Andhra Pradesh, the children's faction of the Naxalite movement is named the Bala Sangam (Children's Group). There were reportedly 75 Bala Sangams groups in the state, including an estimated 800 children in their ranks in 2003. This number has likely increased by 2007, as the Naxalite movement in the State has steadily increased since 2003.

Child soldiers are also used in the mainly Hindu versus Muslim religious conflicts throughout India. Both factions have created their own self-styled armed brigades. The Hindu 'self-defence' groups operate under various banners, such as the RSS, the Bajranj Dal and the Shiv Sena. Similar Muslim factions are known to be operating under the banner of the Jamaat-i-Islami-Hind and the Islamist Sevak Sangh.⁶² All these groups have child soldier units. For example the Viswa Hindu Parisad (VHP) is also reportedly recruiting girls to a group called the Durga Vahini.⁶³

Once a child soldier is taken into custody by the State agencies, they are often falsely identified as being adults. Their ages are exaggerated in official records, so that they can be tried in regular courts, instead of juvenile courts. This is possible because in such cases, charges are typically framed without producing the accused in court. Once the charge has been framed, the child will have to wait in custody for a minimum of three to four years for the case to come to trial, by which time the child have often become adults.

Prolonged detention also reduces the prospects of the future rehabilitation of the child, if acquitted. Owing to the non-functioning of the public legal aid service, most cases will be decided without a proper legal defence being provided to the accused resulting in an unfair trial.

5.3 Armed conflict and human rights defenders

There are no existing mechanisms in India to prevent such rights violations from being committed against children, even if the child is fortunate enough to survive a battle and to be produced before a court. Those who dare to complain are targeted by the State police and administration.

The case of Dr. Binayak Sen, who is currently being detained in Raipur Central prison on charges of association with the Naxalite movement in the State, is a typical example.

Such attacks on the integrity, personal freedoms of human rights activists and their ability to work,



Army in combing operation in Manipur

have a direct impact not only upon the children themselves, but also upon the communities that are caught up in such armed conflicts. Another concern is the absence of proper medical care in these conflict areas. The threat to end the operations of Medecins Sans Frontiers [MSF] in August 2007 in Chhattisgarh has compounded this problem here.

There are currently at least 170 of India's 607 districts facing armed anti-state activities.⁶⁴ In all of these conflict zones, children are employed by both parties to the conflict. The UN Committee on the Rights of the Child, in its report dated February 26, 2004, urged the Indian government to ensure that thorough and impartial investigations are conducted into allegations of the use of child soldiers in India.⁶⁵ However, the reference to child soldiers in the report was limited to the State of Jammu and Kashmir and India's north-eastern states; however the problem of the use of child soldiers is far more widespread than this in the country.

5.4 Conclusion

In 2007 more than 2000 violent incidents involving Naxalites were reported from India. About 712 people died in these incidents. There have been spectacular attacks across India in the past two years: a train hold-up in July 2006 involving 250 armed fighters, a jailbreak freeing 350 prisoners, a near-miss assassination attempt in 2004 against a leading politician. 'Naxalism' now affects some 170 of India's 607 districts - a "red corridor" down a swathe of central India from the border with Nepal in the north to Karnataka in the south and covering more than a quarter of India's land mass.

Early Naxalite leaders in India were students and middle-class intellectuals. But the tribal peoples among whom they find most of their new recruits are among India's poorest: "the most exploited, the bottom rung", according to Mr. Ajit Jogi, a tribal leader and former chief minister of Chhattisgarh state. Typically, they live in forests and have no rights to their land.

To bring development to these neglected reaches, the government needs to assert control. Private militias like Salwa Judum are the wrong way to go about it. A larger, better-trained police force might help. Eradicating Naxalism, however, is more than a local policing problem. One difficulty has been that, under India's constitution, security is a matter for state governments rather than the centre. So a national policy for dealing with the Naxalites has been inconsistent. In 2004, the government of Andhra Pradesh held abortive peace talks with local Naxalites, while other states continued to fight them.

The spread of Naxalism is causing justifiable alarm. For all their geographical reach, the Maoists' or Naxalite power base remains on the margins of Indian society. They are far from sparking a general insurrection. But, in places such as Chhattisgarh, almost a hole in

the map of the Indian polity, it is easy to see how a crude, violent ideology, promising land and liberation, might take root.

Other terrorists attack the Indian state at its strong points—its secularism, its inclusiveness, its democracy. Naxalism attacks where it is weakest: in delivering basic government services to those who need them most. The Naxalites do not threaten the government in Delhi, but they do have the power to deter investment and development in some of India's poorest regions, which also happen to be among the richest in some vital resources – notably iron and coal. So their movement itself has the effect of sharpening inequity, which many see as the biggest danger facing India in the next few years, and which is the Naxalites' recruiting sergeant.

6. Parting note

On Aug. 15, 1947, India embarked on a journey toward its independent destiny. Sixty years later, the fate of India as a country is still uncertain. Will it become a democratic, socialist republic or a lawless state? Unfortunately, India in 2007 does not give any indication of becoming a state where all citizens can enjoy their fundamental freedoms and liberties.

Skeptics who would counter the above argument use terms like “democracy” and “rule of law” as hallmarks to portray India as a stable nation, but that conclusion depends upon one's definition of democracy and rule of law. If democracy is a means by which criminals retain their authority through elections marred by violence and corruption, this definition is only applicable to a few countries, including India. Today more than 70 percent of India's politicians have a tainted image. Their names are synonymous with crime, corruption and ineptitude.

As for the rule of law and human rights, it is known in India today more by its absence. Institutions that should protect and preserve the rule of law in the country have a reputation for being its most conspicuous violators. Take, for example, the courts and the prosecution and policing systems. Like their counterparts in the alleged democratic process, those who serve in these institutions have a tainted reputation for corrupt, nepotistic and inefficient practices.

What is left are the people of this huge country. Out of an estimated population of 1.2 billion people, almost 70 percent still live in conditions that belie a life worth living. The remaining 30 percent have established their domain over the majority of the population through corrupt and shoddy practices. Moreover, they work to keep India in the same rut which they have created for the country to tread in year after year.

While isolation and silence is enforced upon communities in some states by their own

governments, it is the central government that is responsible for isolating communities in states like Jammu and Kashmir and the northeastern states. In the Northeast, for example, local communities are ruled by fear. To grant impunity to law enforcement officers deployed in this region, the government has sanctioned the unwarranted use of force. It is difficult for any community to feel part of a larger country when the armed forces of the country are deployed to silence them. This region has lost more people to acts committed by and against the state than they lost prior to 1947 when India gained its independence from Britain.

In a functioning democracy the justice system is of great importance. The courts are supposed to be the place where disputes can be decided impartially. In India, however, based on people's experience, the courts are unreliable.

The chief justice of India admitted in a recent statement that there are 25.9 million cases awaiting a decision in the country. Among these, various high courts have 9.8 million cases, and the Supreme Court itself has about 43,000 cases pending. Assuming that not a single new case is filed for the next few years, the Supreme Court itself will take several years to clear this huge backlog. A person thus cannot expect speedy justice.

With the administration and law enforcement agencies not functioning properly, it is no wonder that people are increasingly taking up arms, having found that communicating with the government by any other means is meaningless. Thus society is polarised between those who oppose and those who fight back; the only other option is to leave the country.

This is the India of today. Sixty years ago Indians asked the British to quit India. Now they are doing so themselves. To live with dignity and enjoy relative freedom, one has to quit India! With this massive exodus, what will be left behind a few years from now will be a violently charged and polarized society.

What could prevent this violent polarization from occurring? The intention of this report is not to suggest answers for issues that have deep-rooted causes, but to at least provoke a discussion and to document concerns so that it can eventually lead to answers. The resolution of any issue begins with a discussion, and that is precisely what is lacking in India today.

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INDONESIA

Reforms have started but atrocities continue

Many reforms have been initiated but not pursued in the last years but the additionally required shift in political approach remains missing. Neither have police reforms, the prohibition of torture according to international standards, or rule of military in many regions been ended, nor have the shadows of the past like the killing of millions in various massacres and political raids been addressed. In this environment the floor is open for more suffering due to executive control, ignorance of the rights of the poor who often become victims of torture, and exploitative oppression of ethnic groups.

1. Munir paid the ultimate price in his bid to expose the defective justice system

Thalib Munir, much respected, renowned Indonesian human rights defender fought all through his adult life to demonstrate that the prevailing system of injustice is a product of militarization, impunity and the absence of the rule of law. The only rule that persisted was that of the ruler. The rulers backed by the power and wealth hungry military officers determined every aspect of life of people. Subservience was the only expected response. This culture of subservience generated its own rules of behaviour, discipline and a system of justice.



Munir's¹ call for the cessation of the dominance of the military, the end of the culture of impunity, justice to the hundreds of thousands victims tortured, killed or disappeared was too threatening. It would have lead, in the eyes of the authority, to destabilization and the emergence of people's power, which would have turned tables on them, and which would have been too unnerving for many in the military and political leadership. Those who benefited from the dysfunctional justice system colluded in getting rid of him in a most despicable manner.

The killers benefited from the pathetic nature of the prosecution system in the country, which has a demoralizing record of trials that have been carried out, impartial, rapid and effective. Under these circumstances the system would have never been able to unearth the so called 'mystery' behind the death of Munir, or to identify the perpetrators to be

punished. Three years after his death, there have not been any significant breakthroughs, thus revealing the very defects that he tried to expose. At every turn in the trial, there have been major stumbling blocks. For instance the lack of witness and victim protection laws, allowed the killers to threaten the widow of Munir with death, More contribution came from the lack of collusion between the National Intelligence Bureau (BIN), the police and the Attorney General; or the shoddy investigations conducted by the investigation units. The hypocrisy of the President who appointed a fact finding team, but whose findings have neither been published nor given to the investigation unit for further action or the judiciary taking the path of least resistance by awarding a minimum sentence for a pre-meditated murder are more examples; a murder which was not even recognized so due to pressure from various groups. In fact due to the sentencing of the only suspected murderer with a minimum punishment, all subsequent actions were cleverly pre-empted. In fact the trial of Munir is the living example of what a juridical mess the Indonesia of today is. It reverberates with dysfunctions, apparent inalienable defects within the police, the prosecutor general or the judiciary. The attempts at the reform of these institutions have been cursory and half-hearted.

Response from the victims

Suciwati, the wife of the slain human rights defender Munir, with the support of friends, colleagues and the families of the victims of disappeared took up the challenge. This bold initiative by her has enkindled the hearts of many who never dreamt of a people's struggle for justice. The courage of these persons has been fanned with the support from all corners of the international community. The Asian Human Rights Commission in addition to the personal visits to the members of the family has been closely following the developments.

In all AHRC statements and updates regarding the case, the AHRC has been highlighting the link between the current impediments in the court case and the long tradition of impunity, which has not allowed the emergence of a tradition of effective and impartial investigation. In the publications, the AHRC explained through its statements that the reluctance on the part of the Prosecutor General or the related institutions and persons cannot be dissociated from a tradition where there was no need for a serious judicial process. There was no incentive for effective investigations as the crimes committed by the state are not to be investigated. Due to this there was a real flow in the development of the justice institutions. Such traditions cannot easily be discarded or made futile unless and until it is reinforced by the presence of a strong democratic space. Indonesia is yet to nurture the emerging democracy with the freedom of expression, opinion and association. If the country persists in condemning the much "maligned bogey" called communism, it will never be able to divest itself of the past or take steps in the direction of democracy. The concerted attacks on PAPERNAS and the refusal by the police to investigate such attacks are an indication of the hang over which does not auger well for the future.

2. Torture a symbol of the breakdown of the rule of law

Despite the repeated requests by the CAT committee, the civil society organisations both local and international, the government has stubbornly resisted the criminalisation of torture. Much of the resistance is associated with the revision of the Penal Code. A revision of the Indonesian Penal Code has been discussed for over twenty years without any timeframe being set either by the President or the House of Representatives. In the draft of the Penal Code, the definition of torture reflects largely that which is stipulated in the Convention against Torture (CAT). However there is a serious flaw due to the failure on the part of the state to affirm the uniqueness of torture as is found in the last Government report of 2005 submitted to the CAT Committee, whereby maltreatment or assault is confused with the act of torture.

Indonesia in its last report also mentions that

“...has also completed several other legislative measures in prohibiting torture. Among others are through the amendments of the 1945. Constitution (Article 28 I); promulgation of Law No. 39/1999 on Human Rights (Articles 33, 34, 67, 69, 71, 72, 74, 101, and 104); Law No. 26/2000 on Human Rights Courts; Law No. 3/1997 on Juvenile Justice, and Law No. 23/2004 on Domestic Violence.”

Judging from all the stipulated legislations It is apparent that Indonesia is unable to differentiate between rights, obligation, and prohibition. The aforementioned mentioned laws are concerned with the rights and obligations of the citizens and the state. There is no single article in abovementioned laws which state the prohibition with the attached sanction as well. There is no law which stipulates that torture (in general circumstance, not in a way of crimes against humanity) is punishable under the existing Indonesian laws.

Despite repeated calls by the local and the international community to pass domestic laws that meet the requirements for such legislative provisions to be present as the result of the ratification of CAT by the state, Indonesia has adamantly refused to comply. The state owes these legal amendments to its people and the international community. There are a few laws drawn up haphazardly with no proper procedures, which have little efficacy in practice. In the draft of the penal code, there is a recommendation for a minimum of five years and a maximum of 20 years imprisonment for acts of torture. However when compared with the punishment accorded to premeditated murder and torture there is an enormous gap with the belittling of the crime of torture. It is hard to imagine that a punishment that reflects the gravity of the crime of torture will be decided given the reticence on the part of the government to recognise its criminality. Besides, the heavy dependence on the use of torture by the prosecution system, would deter them from coming with harsher penalties to the prosecutors.

Torture: Denial of justice to victims of torture

The deliberate refusal by the state to pass domestic legislation that corresponds to the exigencies of CAT has had the serious effect of denying justice to the victims of torture, whilst granting impunity to the perpetrators. Over the years the Asian Legal Resource Centre (ALRC) and its sister organization the Asian Human Rights Commission (AHRC), have been collecting information on numerous cases of torture inflicted both by the members of the military and the police. The information concerning all cases has been sent to the Attorney General and the National Human Rights Commission of Indonesia (Komnas HAM) for immediate intervention. However, in none of these cases has there been any redress provided to the victims.

Torture: Why is torture still being used?

Scanning through the cases of torture that have been received by us, it is hard not to be surprised by the plurality of purposes for which torture has been used. In some cases it is hard to determine the main reason for torture. The stereo-type where it is related to forced confession is relatively less. It can vary from a forced confession as in the case of Tibo in Sulawesi who was executed two years ago, to a form of punishment, getting bribes or to exert power to subdue persons. It appears that in cases of robbery/theft or abuse of drugs, torture is used as a punishment – being interpreted as ‘teaching good lesson’, or to get bribes. In these cases the threats of torture or further torture is held to get the suspects to make financial payment. The victims also appear to be more inclined to settle with a payment often to avoid further torture and harassment.

Torture: Mechanism for redress

There is no specific effective, reliable and independent complaint system to investigate allegations of torture by the police. In the internal system of the police there is PROPAM, a mechanism for reporting various kinds of abuses committed by members of the police. Cases can range from bribery to torture. An individual who wants to complain about such abuses can file a complaint to the PROPAM division, which exists in most police offices. The deliberate confusion created by the misleading definition of torture has resulted in the non-establishment of a mechanism for reporting, investigation and punishment that reflects the gravity of the crime, thereby rendering it impossible to obtain redress for the victims. The PROPAM mechanism that is currently available is neither preventive nor remedial and is not specific to each case of torture.

The Asian Legal Resource Centre in collaboration with the help of lawyers in Jakarta, conducted research, utilising questionnaires, in the months of July and August, on the

issue of torture. One of the questions in the questionnaire was related to the awareness of the people and lawyers on the availability of a mechanism for redress in cases of torture. When inquired, some of the lawyers in the country referred to PROPAM. But this mechanism is for all offences committed by the police and is not specifically aimed at addressing complaints of torture. Except for cases of criminal offences, which are referred to the Criminal Investigation Division, the questionnaires revealed a sense of obscurity about the precise method of the functioning of PROPAM or the punishment meted out to the perpetrators. One lawyer rightfully remarked “we make the complaint and we do not know what happens next”. Thus there is no transparency regarding the procedure or the outcome of the investigation by PROPAM. Obscurity regarding its scope or its procedures makes it impossible to make a proper assessment or for people to count on its effectiveness. According to the experience of many of the lawyers and human rights defenders, the punishments given often amounted to temporary dismissal, delaying promotions or other disciplinary measures which in no way reflect the gravity attached to the crime of torture. Technically, hearings of cases where torture or other offences have been committed must take place in public. But de facto, either nobody is informed about the hearings or no one attends them, unless it concerns a high officer. The victims are not entitled to any compensation. Thus, to the ordinary citizens who have suffered torture at the hands of a state agent, the absurdity of going through this legal hassle, whereby the perpetrator is unlikely to be punished, the victim is not compensated or there is fear of further harassment by the perpetrator is apparent.

Even though there is provision for compensation, restitution and rehabilitation for the victims of gross human rights violations under Government Regulation No. 3 of 2002, it does not apply to individual cases of torture. Individual cases of torture as defined under Law No.26/2000, do not fall into the aforementioned category. On the other hand, if the use of torture can be proven to be widespread and systematic, then there is the possibility of Law No. 26/2000 being applied. But this possibility is vitiated by the absence of a mechanism that records and follows up on cases, from which emerging patterns can be traced.

Torture: Failure of the Human Rights Court Law as a mechanism for redress

In the Human Rights Court Law No. 26/2000, there is a provision to address torture, provided it can be shown to amount to a ‘gross human rights violation’. This literally means that there is no redress for individual cases of torture. Since the conditions and the process tied to a crime being declared a gross human rights violation are so cumbersome, it is almost impossible for a case to be heard in court. The Human Rights Court Law is mandated to hear only cases of gross human rights violations as defined in Law No. 26/2000. For torture to be declared a gross human rights violation, certain conditions (e.g. widespread and systematic use, etc) need to be met. It is very difficult to make an assess-

ment of the actual situation, given the failure on the part of the state to make an accurate account of the number of cases or the methods used in torture. Furthermore, an accurate assessment is also hindered by the reluctance on the part of the victims to report cases of torture (due to a variety of reasons). The Human Rights Court Law is the only mechanism that can provide compensation, but it is yet to establish its credibility amongst the victims of gross human rights violations. This demonstrates that the existing laws and mechanisms are thoroughly inadequate with regard to the prosecution of cases of torture.

The absence of a proper mechanism keeps the doors open for the continuing widespread use of torture by state institutions such as the police or the military. The Indonesian state is allowing torture to take place and the attempted explanation and justification given by the state is that quick responses are required to prevent mounting crimes. The state has failed to recognize that the trend of mounting crimes is due to the breakdown of the rule of law. It is due to its inability to prosecute and punish the perpetrators, based on proper investigations, that criminality has increased. The state seems to be following a path of criminality to overcome mounting violence. Instead of employing well trained, skilled and qualified police officers to conduct investigations, the state is following the opposite path by allowing criminality within the forces that use torture to extract confessions. This form of investigation generates further violence and results in a distrust and fear of the state by its citizens.

Torture: The role of Komnas HAM

The National Human Rights Commission (Komnas HAM) is mandated in the country to conduct the necessary investigations in cases of alleged gross human rights violations. But the crux of the problem is that since Komnas HAM has not been able to address individual cases of torture or analysed the existing and the emerging patterns, it has not been able to assess its widespread and systematic characters and to declare it to be a gross human rights violation.. In other words how can Komnas HAM decide whether the use of torture is systematic and widespread without making a proper assessment of the recorded individual cases of torture. This situation is found to be a useful tool for the state to deny its widespread character and then blatantly ignore the responsibility to address the issue, which results in the denial of justice for victims.

For want of an effective and accessible mechanism, victims of torture report cases to Komnas HAM, which are then apparently forwarded to the police. In none of the cases that have been reported to the Asian Legal Resource Centre victims have to date received any redress from these institutions. While Komnas HAM is acceptably excused on the grounds that the lack of legislation or a special mandate prevents them from taking any concrete action, such as determining compensation, it has failed in its major responsibility in intervening with the attorney general to press for appropriate laws criminalizing torture

and to educate the community and the police in all aspects related to the use of torture. The previous administration of Komnas HAM was divided into thematic issues (civil and political rights and economic social and cultural rights). But now, the new administration of Komnas HAM is separated into monitoring, research and mediation divisions, as mentioned in the Human Rights Law. Furthermore, the method by which Komnas HAM receives complaints has not yet been decided by the new commissioner. With the limited resources it has at its disposal, speedy and effective action is hard to be imagined.

For additional information, the system by which complaints are received, under the previous commissioner, is shown below.

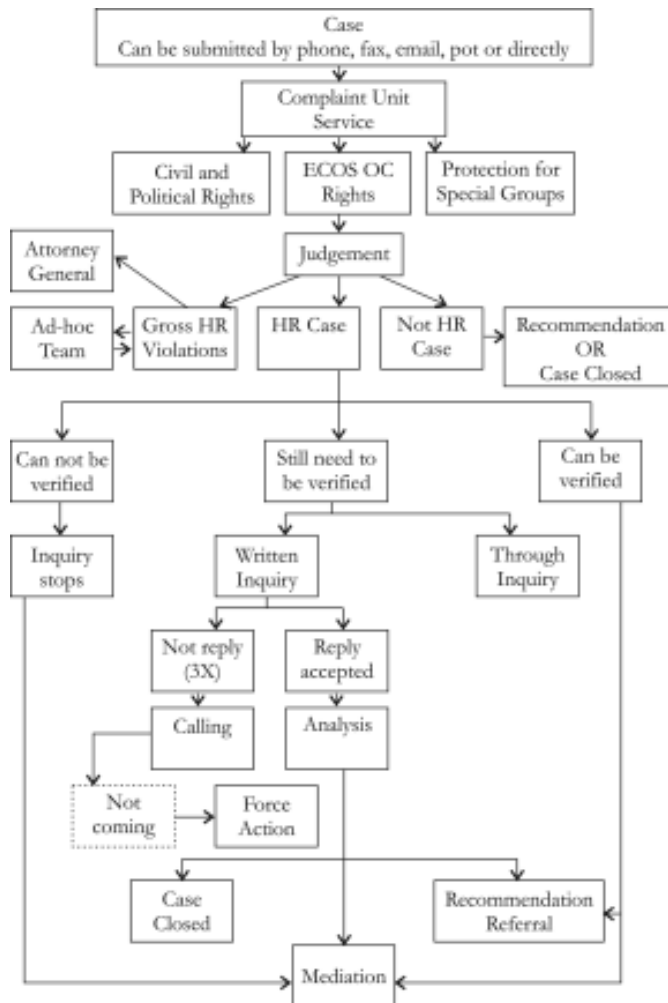


Figure 1 Complaints procedure under former Commissioner of KomnasHAM

Torture: Long periods of detention leading to severe abuses and torture

The existing law allows a person to be detained for 20 days with the possibility of a further 40 days. It is a blank cheque to the authorities. It permits all forms of abuses, including torture (both physical and psychological) and bribes. This period is so long that even scars caused as a result of torture can disappear. There have been reports of victims trying to commit suicide due to the unbearable situation of repeated torture.

This is evident in the case of Mr. Mas Udin, who was detained at the Cengkareng Police Precinct (Kepolisian RI, Sektor Cengkareng, Resort Jakarta Barat) since his arrest on May 28. There were several attempts by the staff of the Jakarta Legal Aid Institute to visit him at his detention cell but they were repeatedly denied entry by the police for various reasons. Their refusal is said to be due to an administration provision, which was not regulated in the Indonesian Criminal Procedure Law.

As the family and their appointed lawyer had been continuously denied access to see the victim, it became impossible for his condition to be ascertained. (See UA-243-2007¹: INDONESIA: Police deny visit of family members and legal access to arrestee). His family was not allowed to see the arrestee until he was eventually tortured to death. This further confirms the position that denial of access to members of the family or legal representation provides the space for torture. This is clearly evident in the following case. Following Teguh Uripno's arrest at around 11:00 am on April 20, 2007, his family immediately went to the Serpong police station. When they arrived at the police station, they were prevented from seeing the victim so they returned the following morning, April 21. However, once again they were not allowed to see the victim. No sufficient reason was given to them by the police as to why they were not allowed to meet him.

At around 3:30 pm on April 21, police representatives went to the house of the victim's family and informed them that he had died while being taken to a local hospital. The family immediately went to the hospital and upon arrival they found marks of severe beating on his body. Medical reports indicate his body showed several torture marks, his arm was broken, he had a fractured skull and severe bruising. (See UA-169-2007²: INDONESIA: Man beaten to death by sector police in Tangerang).

Torture: Illegal arrest is the prelude to torture

On 24 June 2007, the AHRC received information regarding the illegal arrest and torture of Hendrick Sikumbang by the police officers of Pekanbaru police office on 14 June 2007. The methods used in the arrest were more characteristic of abduction than an arrest. The police brutally tortured Mr. Sikumbang after putting him in a vehicle and drove around the city instead of going to the police station or the court. The membrane of his eardrum was

cracked as a result of the torture and he still suffers from the severe injuries that he received to his body. Please see UA-205-2007³ for more detailed information.

The available reports indicate a specific pattern whereby illegal arrests are followed by torture. In the afore-mentioned cases of torture, leading to the deaths of Teguh Uripno and Hendrik Sikumbang, it can be asserted that illegal arrests had been deliberately carried out with the intention of torturing either as a punishment, to extract confession or to get money from the suspects.

On April 11, 2007, at around 3:30 a.m., around 30 unidentified men claiming to be Medan District Police Officers forced their way into Ms. Supiah's (the victim's sister's) home, demanding to see Mr. Suherman, the victim. When Ms. Supiah replied that Mr. Suherman was not at home, the attackers held him and his family at gunpoint while they proceeded to ransack his home. They seized two mobile phones without producing a search warrant. They then forced Ms. Supiah to take them to her brother's home. Barging into Mr. Suherman's home, they promptly arrested him, and again without a search warrant, ransacked his home in a similar fashion.

Ms. Juliana, the victim's wife, and their children were then taken to the Medan Sub-District Police Station where the Police questioned them. Mr. Suherman was taken in the opposite direction to a yet unknown location. At around 6 a.m, Juliana was informed that her husband's dead body had been found. Autopsy reports later showed that Mr. Suherman had been shot in the chest. He also suffered bullet wounds to the left side of the navel and hip. Shockingly, Juliana was not allowed to identify her husband's body, which is a standard police procedure.

It has also been noted that in some cases, illegal detention and torture are carried out in places other than at the official place of detention. This phenomenon lends support to the view that illegal arrests and detention are deliberately used to enable torture in unofficial places, in order to prevent the identification of the location when complaints are lodged. (UA-146-2007⁴: INDONESIA: Medan District Police again bring the Rule-of-Law into dispute with the brutal murder of an innocent man)

Torture: Medical reports

There is no regulation concerning medical reports: no rights and no obligations. Thus there is no person specially assigned or a specific procedure to deal with granting medical certificates in case of torture, except in cases of cell deaths of suspicious deaths. In the case of the latter a post mortem is requested by the police. Such reports can be used as evidence in the litigation.

In cases where family members of the victims would like the attention of a medical doctor, it is simply not possible, as access to places of detention is severely restricted. Restrictions applied to places of detention prevent the possibility of having an accurate picture of how widespread the practice is.

According to the information we have received, Mrs. Ni Ketut Suratni (57), was arrested by East Denpasar Police Sector in Bali on 3 January 2007 when she was shopping in market, suspected of counterfeiting money valued at Rp.50,000 (USD 6) that she paid at the market. The victim was severely hit and kicked by two police officers, Bripka I Made Wiguna and Brigadier Erwin Suprayoga during the police interrogation.

On the night of January 11, the victim was examined by public medical doctors at the police hospital for a “visum et repertum”, a medical report for an injury case that was then issued by the public medical doctors. However, the medical report did not clearly identify the injuries on the victim as having been caused by beating.

The victim’s lawyers then submitted a request for another medical examination for “visum et repertum” by independent doctors as the previous medical report had been issued by doctors from the police hospital. The second examination for the report has not been conducted yet. (UA-020-2007⁵: INDONESIA: Woman severely injured by brutal assault while in detention by police in East Denpasar)

It has also been reported that in most of the cases of torture, when medical practitioners are approached for medical reports, there is a reluctance to produce accurate medical reports. Or else the issuing of the medical reports is purposely delayed as was the case with Mr. Hendrik Sikumbang, who was illegally arrested and tortured by Yusril, a former member of West Sumatera Police Regional office, who is currently stationed at Pekanbaru police office. As a result of beating by the police, Sikumbang suffered severe bruises and scars on the head, face and neck. Moreover, Sikumbang’s ear was bleeding so profusely that according to Dr. Yan Edward, an otologist, the membrane in Sikumbang’s ear had cracked, resulting in hearing loss. To date, the medical report on this case is still being processed.

On 15 June 2007, Sikumbang filed a formal complaint to West Sumatera Regional Police office about the torture by the police. However no action has been taken by them. The delay in procuring the medical certificate constrains the victim from pressing for justice in this case. (UA-205-2007⁶: INDONESIA: Man illegally arrested and tortured by Pekanbaru police)

Most of the lawyers acknowledge that their clients are tortured or induced to pay money to escape torture, but are unable to assert with certainty the gravity of the problem.

Besides, being aware of their long incarceration of 20 days or a possible maximum of another 40 days with the torturers, the suspects tend to succumb to torture as something inevitable and when they are released after one or two months, due to a sense of shame many of the victims do not want it to be divulged. They tend to suffer silently. In particular in cases where the victim of torture has committed a breach of law for example by an act of theft, the sense of guilt makes most victims accept their treatment and such frequent cases are hardly reported to any institution.

Torture: Forced confessions

In the event that a person had already given a testimony in the investigation phase, the person will be asked again at the court and whether s/he wants to change their testimony or not. If the testimony which was testified at the court is different from that which was given at the investigation phase, the judge will use the one that was given at court. Sometimes, the judge may also ask why the testimony is different, and if s/he says that s/he is being pressured by the investigator, and a cross examination will be conducted in the court between the witness and the investigator.

However the reality is in stark contrast to what has been explained above. When the case of the Fabianus Tibo (60), Dominggus Da Silva (42) and Don Marinus Riwu (48), who were later executed in 2006, was heard in Poso, Sulawesi, they complained to the judge of severe torture during the interrogation. This plea was not even heard by the presiding judge. Since there are hardly any instances of cases of torture being considered by the judges, victims actually refrain from making any complaints. This is as good as saying that the forced confessions produce the quickest and the cheapest results.

Torture: Prevention

There are a number of steps to be adopted by the Indonesian state if torture is to be prevented which is crucial for fair trial, to guarantee the right not to be tortured, overcome impunity and for the establishment of the rule of law in the country.

1. amend the existing domestic law criminalising torture. Torture needs to be declared a punishable crime with punishments that reflect its gravity.
2. establish an effective, reliable and independent complaint system to undertake effective investigations and if proven guilty after a fair trial to have the perpetrators to be punished
3. Provide compensation to the victims of torture and ensure their rehabilitation. It must include trauma counselling to the victims and the members of the families in case they suffer trauma.

4. Introduce the much needed police reform. There is a de-jure separation of the two institutions. But de-facto in certain cases the police functions under the control of the military. Furthermore, it has become difficult for the police to overcome its militaristic culture. No serious effort has been made to reform the police despite the creation of the Police Reform Commission. The reform process that was started years ago has come to a halt, and furthermore, the discussion on how the police has to be reformed and what the shortcomings are in its operational procedures that allow human rights abuses such as torture to repeatedly take place is not taking place publicly. Instead of engaging a wide range of civil society stake holders, such as NGOs, in the debate, the reform is left largely to the police itself. It can not be expected that under these circumstances, the reform will limit police power and add safeguards to protect the rights of suspects, perpetrators and other civilians from the police force. An opening process that revives the police reform debate and action is strongly needed.
5. Witness and Victim Protection Laws
The reluctance on the part of the victims and the witnesses to come forward to make complaints of torture comes from the fact that there is no law against which torture can be prosecuted and secondly the fear of further victimization, since there is no witness or victim protection law. Even though the law was passed a year ago, there is reluctance to appoint the committee that is responsible for its implementation. Every citizen must have the guarantee that when her/his rights are violated by the state, there is a mechanism for reporting them without any fear of threats from the alleged perpetrators.
6. This guarantee is quite important given the fact that in cases of violations of rights by the state, for anyone who represents the state, the relationship is a-symmetrical. It is an individual vs. a state case. One is without any power while the other is with absolute power. In such a relationship of inequality, the victim needs all the guarantees that a complaint is recognized, impartially investigated, perpetrators punished and the grieved party amply compensated/rehabilitated without any semblance of the grieved party discriminated or threatened. In the absence of such a guarantee, all credibility in the institutions is lost and the justice system itself collapses, paving the way for anarchy. Even though the law on Victim and Witness Protection was been passed in 2006, its effective implementation depends on the creation of the Witness Protection Agency and the appointment of its members. As is the case in many laws and their enforcement, it is hard to know when this will come into effect, despite the legal requirement in Article 45 of Law 13 of 2006 which requires that the Agency be created within one year of the passing of the bill. The understanding is that the selection committee would present 21 names to the President out of a list of 200, who then would propose 14 to the House of Representatives for 7 persons to be nominated to the Agency. There does not seem to be any urgency on the part of the state to get this constituted. This is typical of the haphazardness with which the laws are passed or enforced.

7. Reduce the length of the pre-trial detention.
8. Access to the places of detention and prisons. There is no law regulating provision in which everyone has access to the places of detention or even prison, but according to Indonesian Procedure Code and Law No. 12 Year 1995 regarding Correctional Institutions, a prisoner has the right to be visited by his/her family, lawyer, and other persons. However, also this right remains without clear enforcement regulations and practice.

Komnas HAM must be mandated to places of detention and prisons both to ascertain the level and type of torture taking place in these places and also a preventive measure. Furthermore, they should be authorised to make investigations and submit the same with their recommendations for compensation, to the Prosecutor General for prosecution.

9. Dissemination/Education. The government is required to disseminate widely the obligations that are tied to the ratification of the CAT and its implications to the judges, the law enforcement officers, medical personnel and the general public.

Through the survey that was conducted, it became clear that in the perception of the general public or even among the law enforcement officers is that torture is not a serious crime. Some would even go to the extent of tacitly approving it. Till recently, a number of TV channels were in the habit of televising torture inflicted by the police without much negative reactions.

Televising of the cases of torture has never been identified as a serious offence by any of the state organs or institutions or even by Komnas HAM. How can a state apparatus such as the police publicly commit an act of torture and have it publicized over the TV, when it has given a commitment to the international community to stop torture and precisely to refrain from using it as a punishment or drive fear into the minds, particularly the children

Komnas HAM in its report of 2006 admits a large scale use of torture by the members of the armed forces despite the various dissemination sessions conducted to them during the year. The report adds that it is the lack of understanding of Indonesia's obligation to apply the Convention which has been ratified by the Law No 5 Year 1998.

Table 1: List of summaries of torture cases received in the last three years

No	Number UA / Title	Information
1	<p>UA-227-2007, 19 July 2007</p> <p>Man arbitrarily arrested and falsely charged after torture by Benteng police</p>	<p>Name of the victim: Sumadi (34), residing at Jl. Baru Luk RT. 04/02. Bakti Jaya District of Cisauk, Tangerang</p> <p>Name of alleged perpetrators:</p> <ol style="list-style-type: none"> 1. Maryono, a member of the Intelligence and Protection Unit of the Metro Jaya police station (Direktorat Intelkam Polda Metro Jaya) in Jakarta 2. Deli and Boy, subordinates of Maryono and work for the Metro Jaya Police Station in Jakarta 3. Unidentified policemen from Benteng Police Station in Tangerang City <p>Date of incident: 4 July 2007</p> <p>Places of incident: In the street outside the Tangerang State Courthouse; In a public transportation on the way to Benteng Police Station; Inside the Benteng Police Station</p>
2	<p>UA-205-2007, 25 June 2007</p> <p>Man illegally arrested and tortured by Pekanbaru police</p>	<p>Name of the victim: Hendrik Sikumbang, a resident of Padang City</p> <p>Name of alleged perpetrators: Yusril and other unidentified police officers attached to Pekanbaru Police Station</p> <p>Date of incident: 14 June 2007</p> <p>Place of incident: In the Kijang car with blue colour</p>
3	<p>UA-201-2007, 22 June 2007</p> <p>Young man tortured in police station at Tegal, Central Java</p>	<p>Name of the victim: Kurniawan (Iwan), 23 years old</p> <p>Alleged perpetrators: Unidentified police officers of Tegal police headquarters, Central Java</p> <p>Date of incident: 3 May 2007 until recently; the torture is allegedly stopped</p>

		Place of incident: Detention room of Tegal police headquarters, Central Java
4	<p><u>UA-169-2007</u>, 23 May 2007</p> <p>Man beaten to death by sector police in Tangerang</p>	<p>Name of the victim: Teguh Uripno, a resident of Tangerang district</p> <p>Alleged perpetrators: First Brigadier Police' Syarifudin and Arifin and other seven unnamed police officers, all attached to the Serpong Sector Police</p> <p>Date of incident: 20 to 21 April 2007</p> <p>Place of incident: Serpong Sector Police Headquarters, Tangerang district</p>
5	<p><u>UA-146-2007</u>, 4 May 2007</p> <p>Medan District Police again bring the Rule-of-Law into dispute with the brutal murder of an innocent man</p>	<p>Name of victim: Mr. Suherman</p> <p>Name of alleged perpetrators: 30 yet unidentified men claiming to be Officers of the Medan District Police.</p> <p>Date of incident: 11th April 2007</p> <p>Place of incident: Mr. Suherman's residence: Trikora 26, Tegal Sari, Medan, Northern Sumatera. Undisclosed location where the murder took place.</p>
6	<p><u>UA-121-2007</u>, 12 April 2007</p> <p>Alleged severe torture of six teenage youth by police over petty quarrel</p>	<p>Name of victims: 1) Mr. Odi Modokh, 2) Mr. Arnoldus Janggur, 3) Mr. Albertus Benda, 4) Mr. Marseinus Janggur, 5) Mr. Dohol Janggur, 6) Mr. Beni Herwanto (All of them are detained at the Manggarai Resort Police Station as of 12 April 2007)</p> <p>Alleged perpetrators: 1. Mr. Eko Chayora, officer attached to the Manggarai Resort Police Station, Nusa Tenggara district, South-Eastern Indonesia 2. One officer responsible for victim 1's unlawful arrest and torture, attached to the Manggarai Resort Police Station (can be identified by Victim 1)</p>

		<p>Date of incident: 29 and 30 January 2007</p> <p>Place of incident: Manggarai Resort Police Station in Nusa Tenggara district</p>
7	<p><u>UA-086-2007</u>, 16 March 2007</p> <p>Brigadier officer assaults hospitalised teenage boy</p>	<p>Name of victim: Mr. Aditya Panji Akbar, 18 year-old</p> <p>Name of alleged perpetrators: Brigadier Officer Simarmata of the Medan City Police</p> <p>Date of incident: 11 January 2007 at around 6:10pm</p> <p>Place of incident: Mental Health Ward of the Bhayangkara (Police) Hospital, Medan City, Northern Sumatra</p>
8	<p><u>UA-068-2007</u>, 28 February 2007</p> <p>Alleged brutal torture and sexual abuse by the Banda Raya police</p>	<p>Name of victims:</p> <ol style="list-style-type: none"> 1) Mr. Hartayo, aged 32, local NGO worker at the Matahari Foundation in Aceh 2) Bobby; Mr. Hartayo's partner <p>Alleged perpetrators:</p> <ol style="list-style-type: none"> 1) Officers attached to the Banda Raya police station in Banda Aceh 2) 16 yet unidentified civilian attackers in Banda Aceh 3) Employee of "Pesona" Café locating below Mr. Hartayo's boarding-house in Banda Aceh <p>Date of incident: 22-23 January 2007</p> <p>Place of incident: Mr. Hartayo's boarding-house residence in Banda Aceh; Banda Raya police station in Banda Aceh</p>
9	<p><u>UA-020-2007</u>, 23 January 2007</p>	<p>Name of the victim: Mrs. Ni Ketut Suratni (57), the resident of Jln. Sulatri No. 29 Kesiman Petilan Village, East Denpasar, Bali</p> <p>Name of alleged perpetrators:</p>

	<p>Woman severely injured by brutal assault while in detention by police in East Denpasar</p>	<p>1. Chief Brigadier I MADE WIGUNA, Police ID: 68010139 2. Brigadier ERWIN SUPRAYOGA, Police ID: 76100156</p> <p>Place of the incident: East Denpasar Police Sector in Bali</p> <p>Period of detention: From 3 January 2007 to date</p>
10	<p><u>UA-022-2007</u>, 23 January 2007</p> <p>Alleged brutal murder of a 14 year-old boy by Jakarta police</p>	<p>Name of victim: Irfan; 14 years-old, worked as a “jockey”</p> <p>Name of alleged perpetrators: Nine officers of the Municipal Administrative Police Unit (SATPOL PP)</p> <p>Date of incident: At around 7:00am on 8 January 2007</p> <p>Place of incident: Pakubowono Street, Southern Jakarta, Indonesia</p>
11	<p><u>UA-320-2006</u>, 27 September 2006</p> <p>Assault of a mother of four-year-old daughter by the Jakarta police</p>	<p>Name of victim: Ms. Sugihart; 31-year-old impoverished mother of four-year-old child, and a “Jockey” (See explanation below).</p> <p>Explanation: Jakarta City Administrative and Police authorities introduced a new regulation in attempts to reduce the heavy traffic congestion in the city-centre, which states that private cars are required to carry a minimum of at least three passengers when traveling on the major urban thoroughfares during peak traffic-hours. However, many drivers in Jakarta openly contested this regulation by hiring “jockeys”; young men and women who can be hired for a fee of a few thousand Rupiah (less than 1 USD) by drivers as a third passenger, thus enabling them to travel during peak traffic-hours, without having to pay the penalty fines for violation of this traffic regulation.</p>

		<p>Alleged perpetrators: Five officers of the Municipal Administrative Police Unit (SATPOL PP).</p> <p>Date of incident: 5 September 2006</p> <p>Place of incident: Menteng District Office, Central Jakarta, Indonesia</p>
12	<p><u>UA-312-2006</u>, 20 September 2006</p> <p>Police and corrections officers torture detainees</p> <p>Updates: <u>UP-215-2006</u>, 30 November 2006 / Police officer found guilty on the count of torture, receives light disciplinary sentence</p>	<p>CASE 1: Name of Victim: Mr. Rudi Sebastian Alleged Perpetrators: Four officers of the Garut Correctional Institution: Ahmad Syarif, Nana, Catur, Oki</p> <p>Date of Incident: 16 August 2006</p> <p>Place of Incident: The Garut Correctional Institution (Lembaga Pemasyarakatan Garut) in Garut district of West Java</p> <p>CASE 2: Name of Victim: Kurniawan, the driver of a public transportation car (Sopir Angkutan Kota)</p> <p>Alleged Perpetrators:</p> <ol style="list-style-type: none"> 1. Officers of the Jati Asih Police (responsible for arbitrary arrest and detention) 2. Brigadier BN and Brigadier Y attached to the Jati Asih Sector Police Headquarters, Bekasi Province (prime suspects for torture) <p>Date of Incident: 8 September 2006</p> <p>Place of Incident: Jati Asih Sector Police Headquarters, Bekasi Province.</p>
13	<p><u>UA-276-2006</u>, 25 August 2006</p>	<p>Name of victim: Denny Leuwol, 30, citizen of Haria hamlet, Saparua, Central Maluku</p> <p>Alleged perpetrators: three officers of Maluku</p>

	Police torture man severely, resulting in his death	Provincial Police (initials AT, RR, QW) and one civilian (OL) Place of incident: Benteng Police Pos Headquarter. Date of incident: August 19, 2006
14	<u>UA-262-2006</u> , 7 August 2006 Illegal detention and shooting incident of two men by the Bangsalsari Sector Police in East Java	Name of the victims: Samo and Mattasan (siblings), farmers by occupation Alleged perpetrators: Officers of Bangsalsari Sector Police, Jember, East Java (one of Butar Butar, two unknown) Period of illegal detention: Arbitrarily arrested in August 2002 and illegally detained about two months without any charges; shot by the police in their legs 6 days after their arrest
15	<u>UA-063-2006</u> , 15 February 2006 Alleged extra-judicial killing of a man by the Resort Police of West Jakarta	Name of victim: Dayus, aged 48, entrepreneur, residing in Jl. Pisangan Baru Tengah IV no. 17, Jatinegara, East Jakarta, Indonesia Alleged perpetrators: The officers attached to the drugs unit of Resort Police of West Jakarta Place of incident: The Resort Police of West Jakarta Period of incident: 24 to 29 January 2006
16	<u>UA-056B-2006</u> , 8 February 2006 A man allegedly tortured to death by the Belu police Updates: <u>UP-087-2006</u> , 20 April 2006 / Perpetrators of torture and murder must be properly prosecuted and punished	Name of victim: Yupiter Manek (alias Igung) Alleged perpetrators: Officers attached to the Resort Police Belu Date of incident: Between 18 and 22 December 2005 Place of incident: Resort Police Belu, East Nusa Tenggara, Indonesia

17	<p>UA-020-2006, 12 January 2006</p> <p>Torture of two villagers by police in South Sumatera over permission letters to buy cows</p>	<p>Name of victims: Arafik Bin Amri (25), Hendri Bin Suandi (20) and Hendra Gunawan (25)</p> <p>Name of alleged perpetrators: Briptu Bram Fahlevi, Briptu Rahmat Dedi Kurniawan, Bripda Meki Daniel Ortega, Bripda Niko Apero Atma, Bripda Hendy Afrizal, Bripda Okky Sakti, Bripda Herwindo, Bripda Andi Triana, the police officers in Sector Police Office of Buay Runjung, South Sumatera</p> <p>Place of incident: Sector Police Office of Buay Runjung, South Sumatera</p> <p>Date of incident: 23 November 2005</p>
18	<p>UA-239-2005, 16 December 2005</p> <p>Custodial torture of ten men by Central Sulawesi Provincial Police</p> <p>Updates: UP-120-2006, 8 June 2006 / Torture victims in Central Sulawesi sentenced to nine years imprisonment</p>	<p>Victims: Sahidu (30), Hasanudin (40), Bambang (21), Lei (35), Nanga (17), Masuna (48), Kahar (21), Raya (29), Asani (45) and Olimin (21), all of whom are farmers from Salena Dusun, Kelurahan Buluri, Kota Palu Central Sulawesi Province</p> <p>Alleged perpetrators: Police officers in the Central Sulawesi Provincial Police Office, one of whom is Brigadier (Bripda) Max</p> <p>Place of incident: Central Sulawesi Provincial Police custody, Jl. Sam Ratulangi Palu, Central Sulawesi</p> <p>Date of incident: 27 October 2005 until UA issued</p>
19	<p>UA-228-2005, 6 December 2005</p> <p>Army personnel attack three hamlets, injuring five residents and destroying village property</p>	<p>Name of victims: Civilian villagers of three hamlets (Dusun Karama, Dusun Bonto Badong, Dusun Ujung Moncong) Desa Banri Manurung, Kecamatan Bangkala Kabupaten Janeponto, South Sulawesi and Police Brig. Syafrie</p> <p>Alleged perpetrators: Army personnel from the 700th Raider Infantry Battalion and other people from outside the villages</p>

	<p>Updates: <u>UP-018-2006</u>, 2 February 2006 / Three soldiers received lenient sentences while other perpetrators are still at large regarding an attack on three hamlets in South Sulawesi</p>	<p>Date and place of incident: 29 November 2005 in Karama, Bonto Gaddong and Ujung Moncong hamlets in Bandri Manurung village, Jeneponto regency, 80 km south of the provincial capital of Makassar, Sulawesi</p>
20	<p><u>UA-213-2005</u>, 18 November 2005</p> <p>A man died of brutal torture following his release from military custody in Central Jakarta</p>	<p>Name of the victim: Bagus Ariyanto (51)</p> <p>Alleged perpetrators: Army officers attached to the Detachment Supplies and Transportation Jaya Raya 44-12, TNI AD (Denhar 44-12, TNI AD), Jakarta Indonesia - 10 persons are military officers, 1 person is a civilian employed in this office.</p> <p>Date and place of incident: 15 to 16 October 2005 at the Army Station of Detachment Supplies and Transportation Jaya Raya (Denbekang Jaya Raya)</p>
21	<p><u>UA-210-2005</u>, 16 November 2005</p> <p>A 28-year-old man tortured and detained over mistaken identity by Resort Police Belitung Timur</p>	<p>Name of the victim: Fitriyanto (Sanep), 28-years-old. He is a driver of a motorcycle taxi (Tukang Ojek)</p> <p>Alleged perpetrators: Some police officers of Resort Police Office Belitung Timur (Mapolres Belitung Timur), Bangka Belitung, Indonesia</p> <p>Date of incident: 12 September 2005</p> <p>Place of incident: Resort Police Office Belitung Timur (Mapolres Belitung Timur)</p>
22	<p><u>UA-148-2005</u>, 22 August 2005</p> <p>Lack of effective remedies for 23-year-old torture victim</p>	<p>Name of the victim: Elfrianus (Alfred) Ulu, 23, student at the Maritime Academy of Kupang, capital of East Nusa Tenggara Province, Indonesia.</p> <p>Alleged Perpetrators: Yupiter M. Bolla; Ferdinand S. Kiuk; Benyamin Lede Kana; Nelson Hatu Riwu;</p>

	<p>Updates: <u>UP-121-2005</u>, 19 October 2005 / Only one torture perpetrator charged with maltreatment while the others are still at large in Kupang</p>	<p>Yusuf Stefanus Dalla, all prison officials of the Penfui Correctional Institution, Kupang</p> <p>Place of the Incident: Penfui Correctional Institution, Kupang</p> <p>Date of the Incident: 5-8 March 2005</p>
23	<p><u>UA-140-2005</u>, 10 August 2005</p> <p>Arbitrary arrest, detention and torture of four persons during the “investigation” into the 28 May-terrorist bombing in Poso, Sulawesi</p>	<p>Victims: Jumaedi (25), Jumeri (23), Mastur Saputra (25), Sutikno (23), farmers from Pandajaya Village, South Pamona Subdistrict (Kecamatan), Poso District (Kabupaten), Central Sulawesi Province</p> <p>Alleged perpetrators: Police Commissioner Rikynaldo, CH Sik, Vice Chief of the Poso District Police (Polres Poso)</p> <p>Officers of the Police Mobile Brigade (Brimob) of the Central Sulawesi Provincial Police, the Anti-Terror Detachment 88 of the National Police, the ‘Buru Segap’ units of the Central Sulawesi Provincial Police and the Poso District Police, as well as officers of the Police Intelligence Service (Intelkam) of the Central Sulawesi Provincial Police and the Poso District Police</p> <p>Places of incidents: 1. Pandajaya Village, South Pamona Subdistrict, Poso District, Central Sulawesi Province; 2. Hotel Mulia – Pendolo, Pendolo Village, South Pamona Subdistrict, Poso District, Central Sulawesi Province; 3. Poso Lake, Pendolo Village, South Pamona Subdistrict, Poso District, Central Sulawesi Province; 4. Subdistrict Police Station Pendolo; 5. District Police Station of Poso</p> <p>Date of incidents: 1 - 10 June 2005</p>

3. The undermining of emerging democracy

The mosque and some members of the minority Ahmadiyah Islamic community in Tasikmalaya were attacked by the mobs from three Islamic sects on 25th June 2007.

The attackers were the people allegedly connected to the Islamic Defenders Front (Front Pembela Islam of FPI), Taliban, and GERAK (an anti-communist movement). When complained to the police, they intervened to prevent continuing attacks but did nothing to investigate the complaint or prosecute the perpetrators.

The Asian Human Rights Commission (AHRC) has been informed of three separate cases of alleged attacks, intimidation and forced disassembly of religious meetings in Surakarta, Central Java. The first case reported involves a seminar conducted by the Interaction of Solidarity between Elements of Society (INSAN-EMAS) working along with the Indonesian Foundation for Legal Service (LPH YAPHI) to promote non violence in society and to prevent attacks on places of worship. A seminar on “Strengthening the Foundation of Civil Society without Violence” was organized on 21st June 2007. The event planners received a phone call wanting the event to be cancelled on grounds that one speaker is a sinner and the other a Marxist. The following day the head of sector police for Colomadu, Kridho Baskara, came to the Taman Sari restaurant and asked the owner to cancel the seminar and he barred any food from being served. Later the arrival of the police disrupted the proceedings and the meeting had to be cancelled. A formal complaint made to the Karanganyar Police Department was never inquired into.

At 28 March 2007, the National Liberation Unity Party (PAPERNAS) was scheduled to hold a demonstration against the Foreign Investment Bill in front of the Shangri-La Hotel, where President Susilo Bambang Yudhoyono was having a meeting about the Millennium Development Goal. However, since the morning, a group of about 100 persons from Front Pembela Islam/FPI (Islam Defender Front), Forum Betawi Rembug/FBR (Betawi Rembug Forum) and Front Anti Komunis Indonesia/FAKI (Indonesian Anti-Communist Front) tried to disturb the declaration of PAPERNAS. This resulted in both sides attacking each other resulting in some persons injured and a number of buses damaged. The police that were present at the occasion took no action to prevent the violence. When Papernas complained to the National Police investigations were promised and so far no inquires have been conducted.

The reports reaching the Asian Legal Resource Centre and its sister organization Asian Human Rights Commission, indicate the continuity of attacks on the minority sect Ahmadiyahs and the National Liberations Unity Party -PAPERNAS. Besides, the prevailing laws require that any religious community desirous of having a place of worship need to have 60per cent approval from the people who are living in the local area where they want

to have such worship place. This in reality makes it impossible for the small communities to get a place of worship as it is impossible for them to secure the required percentage from the members of other religions.

The nascent democracy in the country is constantly threatened by all these above described anti-democratic movements. The democratic freedoms enshrined in the constitution are, as demonstrated by the inaction on the part of the state to intervene and safeguard, continued to be denied to its citizens, particularly to its vulnerable groups. The failure to investigate such complaints confirms the feeling that state agents are far from being committed to the democratic values or institutions. The families of the victims of '65 massacre and those that survived torture, imprisonment in '65 continue to be harassed and some of their rights denied.

What appears rather tragic is to hear of reports of religious, ethnic or language conflicts, as was the case in Sulawesi or the present case in W. Papua are being used to suppress the rights of minorities and justify the presence of the military. It is time that Indonesia realizes that presence of army in various parts of the country is not going to augur the nurturing of democracy that it wants to establish. It is only through the establishment of the rule of law, that the realization of the democratic ideals can be guaranteed.

4. A pervasive culture of impunity

A typical case for impunity for military officers is the rampage of in February 2006. Army personnel went on a rampage and attacked three hamlets, injuring five residents and destroying village property. But only three soldiers received lenient sentences while other perpetrators are still at large in South Sulawesi, see UP-018-2006, dated 2 February 2006. Impunity has been a significant barrier in Indonesia. It has become firmly entrenched since the 1965 Massacre, in which it is thought that hundreds of thousands were killed and as many as several million were affected, including through lengthy detention, torture and other rights abuses. Thousands of survivors continue to be stigmatised and discriminated against and are not deemed worthy of any form of redress. The events in '65 still have a persistent effect on Indonesia society, fomenting ongoing disharmony, distrust, acrimony and prejudices. The perpetrators remain untouched and enjoy power, wealth and the apparent esteem of the members of the upper echelons of society.

There was a glimmer of hope when a Reformation Era was announced in 1998, that the long tradition of impunity was to be replaced by one of justice for victims and punishment for perpetrators. However, this change has not yet come about, as is demonstrated by many ongoing violations accompanied by impunity, such as in the case of Pasuruan¹ in East Java where the marines went on a rampage killing four civilians and injuring several others in 2007. (UA-175-2007: INDONESIA: At least 5 villagers allegedly shot dead by Navy force in Pasuruan, East Java).

The police and the Attorney General have not pursued the initial investigation. The suspicion is that the military institution may conduct internal hearings and hand out punishment that will not reflect the gravity of the violations in question. The members of the families of the victims are yet to be interviewed by the police. The police are generally reluctant to investigate crimes committed by the members of the armed forces, paving the way for the continuation of the culture of impunity.

Recent attempts by the public and some members of the House of Representatives to have a bill passed that would require the crimes committed by the military on civilians be investigated by the Prosecutor General instead of by the military courts, are yet to bear fruit. Military courts' proceedings are typically lacking in transparency and do not guarantee justice to civilians. Besides, during the hearings, the interests of the aggrieved party cannot be represented by lawyers. It is on these grounds that this bill has been mooted, in the hope that this will allow the impunity enjoyed by the armed forces to be eliminated. However, further campaigning is required in order to have the bill passed.

The afore-mentioned attack on the village of Pasuruan is the most recent in a long line of attacks on innocent civilians. The table at the end of this section provides a list of other attacks and killings that have taken place and the status of legal actions concerning these. In all these cases, justice has eluded the victims and their families until now.

The atrocities committed in a number of cities on the members of the Chinese community in May 1998 also remain without effective investigation or remedy. The identities of those behind this well-orchestrated attack on the Chinese remains unclear. Following reports submitted to the UN's CEDAW and CERD committees, visits were made by the Rapporteur of the CEDAW Committee and a number of recommendations were made to the Indonesian government and the NGO community. During the May riots, more than 400 ethnically Chinese women were raped, humiliated in public or burned to death.

Also in 1998, students and civilians protesting against the National Security Bill were shot at either by the police or the military. At least 22 students were killed and hundreds were injured at Trisakti and Semanggi. The families of these victims still continue to press for investigations with regular demonstrations, in order both to have the names of the victims cleared and to put an end to the prevailing culture of impunity in the country.

According to the provisions of the current legislation, either the Attorney General has the option of proceeding in many of the cases with investigation and/or the parliament can decide to set up an ad-hoc human rights court to try past gross violations of human rights. For cases committed after 2000, such a parliamentary decree is not needed. Hence, if no further legislation is passed or existing legislation is amended, torture and crimes against humanity in the past will not be addressed in Indonesia, as political will and leaders who are not connected to past crimes are still lacking

The national human rights commission, Komnas HAM, is not doing enough, claiming that the inquiries into Trisakti and Semanggi have been completed and its findings been submitted to the Attorney General (AG) for further investigations and the potential recommendation to the President that the appointment of the Ad Hoc Human Rights Court should be conducted. The Attorney General however is blaming Komnas HAM for not completing proper investigations. The House of Representatives and the President are also not taking appropriate action and are simply accusing the AG and Komnas HAM of failings, without setting a time-frame for the investigations to be carried out and recommendations to be made. This has been going on for over four years at the expense of the victims and their families. Given its past performance, people are not convinced by promises made by the new members of Komnas HAM concerning inquiries into the gross human rights violations at Talang Sari where attacks on 7 February 1989 allegedly by the members of the military led to torture, disappearance and killing of more than a hundred civilians.

The perpetrators of these crimes still enjoy impunity, without fear of being brought to justice. No senior officers of the military involved in gross human rights violations have so far been prosecuted and convicted. This deeply ingrained impunity leaves the door open for future massacres.

List of gross violations of human rights in Indonesia's past and present.

Time	Event	Short description	Komnas Ham status	Status with the Attorney General's Office	Human Rights Court status
1965	65 Massacre	After Suharto's coup millions of communist suspects such as party members were killed or detained for decades.	Not started		
1984	Tanjung Priok				Finished
1997/98	Student disappearance 97/98		Enquiries finished	rejected	
1998	Trisakti & Semanggi		Enquiries finished	rejected	
1998	May 98 riots		Enquiries finished	rejected	

1989, Feb. 7	Talangsari	Soldiers from Garuda Htam Military Resort Command attack village Talangsari in Lampung with rifles. 246 people killed	Ad Hoc Team for enquiry established in Sep. 07 Enquiry ending expected at the End of November 07, Conclusion in December		
1999	East Timor 99				
2001	Abepura				
2003	Wasion		Enquiries finished		
2004	Wamena		Enquiries finished		
2007	Alastlogo		Enquiries finished Conducted in military procedures. Investigation by the military police. Prosecution by the Military Oditur. By the time I am writing this, the case is still on the Military Oditur.		

5. Plight of the human rights defenders

There have been series of attacks and threats on the lives of human rights defenders from West Papua who have met with the UN Human Rights Defenders Special Representative (see the appeal that was issued by us: UA-209-2007¹ and the update on this case). The last reported attack was on the Chairperson of the Papuan Representative office of the National Human Rights Commission (Komnas HAM), Mr. Albert Rumbekwan on 24th of September 2007 and the Catholic priest Catholic Priest Yohanes Djonga Pr a few days earlier.

It is important to note that these persons are under threat or attack allegedly by the members of the armed forces subsequent to their meeting with Ms. Hina Jilani, Special Representative of UN Secretary General on the situation of human rights defenders. It is understood that these complaints have so far not been effectively investigated. The commitment of Indonesia to human rights is dramatically portrayed by the refusal of President Susilo Bambang Yudhoyono to meet Ms. Hina Jilani. This raises a number of questions regarding the commitment of the Indonesian government to the promotion and the protection of human rights.

Despite the fact that the Indonesian government has indicated its commitment to the upholding of human rights through the ratification of a number of conventions and covenants, the people in the country find themselves not only denied of their rights, but also without mechanisms for redress. If civil society actors are threatened and their complaints to UN rapporteurs and the police are simply dismissed as “mental illusions” by members of the police, then what avenues for lodging complaints about violations can the public expect? This is the main concern that is being raised in this report. The refusal by the Indonesian government to pass appropriate legislation corresponding to international standards with regard to civil, political, economic, social and cultural rights, notably protection from torture and the right to redress for victims will be discussed. Additionally, the related culture of impunity that is still prevalent will be covered, without which the present climate of hypocrisy with regard to rights in Indonesia cannot be understood.

Despite the enormous pressure exerted by the local and international civil society organizations, the prosecution is dragging its feet regarding the murder of Munir. Judging from the various reports that are emerging, despite the secrecy surrounding the legal procedures, it is becoming clear that the highest intelligence bodies are involved in the murder of Munir.

6. Are human rights taboo in West Papua

West Papua is under the strict supervision of the Indonesian army which, while suppressing any dissent, is keen on exploiting its vast natural resources in collusion with multinational

corporations. This has led to a plethora of human rights violations, which are shielded from the eyes of the members of the international community. While the residents of the region are denied the right to participation in decision making processes or governance, they are also being robbed of their vast natural resources. The high handed manner in which these rights are stifled by the military has in a number of cases led to the death of persons, like Theys Eluay, concerning which there is still no form of justice. While it is impossible to document the exact number of victims of disappearances or killings since journalists or fact-finders themselves are being targeted, a large number of persons are estimated to have either disappeared or been killed in addition to significant civilian displacement due to military campaigns.

Additionally a large number of cases of starvation have been reported. The distances involved in communications and the restrictions imposed on the island do not allow any flow of information. The government-sponsored transmigration program and spontaneous migrants in search of better economic benefits have created serious tensions. Most of the economic benefits are being enjoyed by immigrants.

In this context it is imperative that Indonesia come up with measurable strategies to address all the rights that the state has promised to its citizens, and put a halt to serious human rights violations. The control exercised by the military must be replaced by a civilian administration where locals can play a greater role in governance.

How the right to life is threatened

A few months ago, the World Health Organization estimated that the number of suicides in Indonesia reaches 50,000 per year, which is roughly equal to 136 per day. Despite its population of 230 million, this is indeed an alarming rate. Economic deprivation is one of the main contributing factors for many to end their life in such a manner.

The World Health Organization has reported other contributing factors include the widening socioeconomic gap between wealthy families and those living in need, increased mobility as people move from one region to another in search of work, and evictions from their homes. It is believed that these numbers possibly could be much higher than the actual situation, as some suicides are likely to be reported as accidents.

The numbers of suicides are extremely high due to unbearable socioeconomic conditions. This year, the World Bank estimated that at least 70 million Indonesians are living under the poverty line, far exceeding the figures reported by the Indonesian Central Bureau of Statistics. Furthermore, more than half of those living under the poverty line are unemployed. There is a noticeable lack of government presence, while the people are facing dire circumstances.

The majority of these people are living in the cities, sadly, under the presence of regional government officers. Most of these people occupy the slums in the city. For example, in Jakarta, the famous Ciliwung River, which flows through the capital, provides refuge for many that live along its banks. Alternatively, others seek refuge under bridges, at the side of railways, near the bus terminus, or empty spaces close to crossroads.

It is a reverie, a hope for a better future, which leads many to move from their rural homeland to a big city. Many feel that in the rural areas, they cannot earn enough money to survive from cultivating their farms and tending their animals. In reality, the government has neglected these rural villagers and has failed to provide sufficient opportunities for them.

Once they have moved to the city to seek their dreams they then discover that in reality, things are very different. The right to education is entitled to all Indonesians under the constitution, yet many in the rural areas lack the sufficient education. Hence, they soon find they are under-qualified to find a job in the cities and are unable to finance their daily needs. Thus the government has failed to provide the basic rights for its people. The failure of the government to fulfill the people their basic rights has a domino effect. Once people from the rural areas are unable to find a job in the city, they soon turn to begging in the streets and for some, turn to criminal activities. Families arriving from rural areas often resort to using their children to beg. In the worst case scenario, a daughter may become involved in the murky side of prostitution or even trafficking.

Yet Article 27, paragraph 2 of the Constitution clearly stresses that every citizen is entitled to an occupation and an existence fit for a human being. Does this only apply to certain groups in society? Furthermore, Article 28B paragraph 2, states that each child has the right to live, grow up, and develop as well as the right to protection from violence or discrimination. In such poor conditions, it is the children who suffer the most. The World Food Programme in 2007 estimated that at least 13 million children in Indonesia suffer from starvation due to a lack of food, which can be linked to the dire conditions the children live in.

Living in slum areas, (classified as unregistered areas) means that other basic rights are denied; the right to housing and the right to health. Article 28H paragraph 1 stresses that each person has the right to a life of well being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care. But in reality, how many people can really enjoy these basic rights which are guaranteed in their Constitution? In North Jakarta, Teluk Gong, near to Kalijodo Bridge, two roads have been built. The road on the right side of the river is new and still smooth. At the end of the road one can find a large deluxe apartment building. Meanwhile, the road on the left side is a road full of rocks and pebbles, with rudimentary forms of shelter amongst the bushes. In 2001, the developer started to build the apartment block, people living in similar forms of shelter

were evicted and forced to move to live on the opposite side of the river, next to the canal bank. However, there is no water supply and half of the residents do not have electricity. The local government officer has burned down their houses and they have been evicted more than thirty times since 2001, yet they have nowhere else to live.

It is publicly known that poor people have great difficulty in getting treatment in hospital, particularly in government hospitals. Government bureaucracy impedes these poor persons from getting their basic right to healthcare, as they are required to show they possess a “Card for Poor Families” before they can receive treatment and medical prescriptions. Yet many are unable to get this documentation in the first place and so are unable to receive healthcare. There is no moral or legal basis can to justify such ludicrous rationale. Despite numerous promises from parliament members and government officials that poor people will be able to have easy access to healthcare, the reality is quite the opposite. The only exception so far has occurred in Jembrana, Bali.

Jembrana, one of the municipalities in the Province of Bali has successfully provided free education for students from elementary to high school. Moreover, the local government has been able to provide free medical assistance to its people. All Jembrana residents directly obtain a Jembrana Health Insurance Card. Simply by showing this JHI Card, residents can receive a range of basic medical assistance, from hospital to polyclinic, from general doctors to dentists, and both private and government hospitals. Moreover, poor people do not have to pay medical fees if they have to be hospitalized in a local government hospital. The local government is subsidizing the local state budget to compensate for all residents’ health insurance. Despite claims that this is possible only because Bali is a wealthier area because of the tourism industry, Jembrana has managed to do this relying largely upon its farm and fishery commerce.

The aforementioned paragraphs explain the Indonesian government’s lack of protection and promotion of human rights. The government has neglected the basic human rights of its citizens. The incessant ignorance by the government to fulfil its obligation will only lamentably lead to the demise of the Indonesian people and subsequently, the government.

1 Picture with courtesy of KontraS, Indonesia

2 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2523/>

3 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2402/>

4 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2459/>

5 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2367/>

6 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2175/>

7 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2459/>

8 UA-175-2007: INDONESIA: At least 5 villagers allegedly shot dead by Navy force in Pasuruan, East Java
URL: <http://www.ahrchk.net/ua/mainfile.php/2007/2412/>

UP-135-2007: INDONESIA: Fair trial not guaranteed in the prosecution of killers of four villagers under military court
URL: <http://www.ahrchk.net/ua/mainfile.php/2007/2611/>

9 URL <http://www.ahrchk.net/ua/mainfile.php/2007/2465/>

N E P A L

On the brink of bloodshed again, after year-long inertia

1. Introduction

The Human Rights Situation in Nepal in 2007 was expected to improve on the back of significant political developments at the end of 2006, which included the end of a decade-long internal conflict between the country's armed forces and the Communist Party of Nepal-Maoist (Maoist) forces, formalized by the signing on November 22, 2006 of the Comprehensive Peace Accord (CPA) between the two sides. Many of the gross and widespread human rights violations that have been committed in the country over recent years - including over 13,000 killings and thousands of forced disappearances and other serious abuses - were attributable to the conflict.

However, despite the hopes raised by last year's tumultuous events, it became very clear early on in 2007 that violations of human rights, including killings and torture, were ongoing and that impunity remained deeply entrenched for the perpetrators of these acts. Furthermore, political destabilization, in the form of violent uprisings in the country's low-lying plains region, known as the Terai, meant that progress on the political front towards democratisation has been severely hampered, as various political forces within the country have been posturing and undermining each other rather than striving to live up to their commitments under the CPA. This has led to the postponement of planned elections to a Constituent Assembly that was to draft a new constitution for the country to a now-unknown date. Elections had been scheduled for mid-year before being postponed until late-November, but have since been pushed back to an as-yet undefined date. Given that these elections were central to the demands of the popular uprisings in April 2006, the inability of the political parties to hold them represents a significant disappointment. Rather than being a year of progress towards democratic elections and the creation of a climate of security, 2007 has instead been one in which no tangible political advances have been made and where insecurity has in fact grown in several ways.

Although the armed conflict has ended between the armed forces and the Maoists, many new armed groups have emerged and the proliferation of crimes and human rights violations and the degradation of the rule of law have increased during the year. While the number

of forced disappearances by the State has plummeted since the establishment of a field office of the Office of the High Commissioner for Human Rights in Nepal and the popular uprisings in 2006, the number of abductions and killings by armed groups has continued to plague the country 2007. The institutions of the rule of law, notably the police, are failing to address the growing number of such acts, and violence, corruption and impunity continue to rule in Nepal. As 2007 draws to a close, the unfortunate reality in Nepal is there is a growing risk of a return to overt armed conflict and there is very little at the moment being done to prevent this.

It shall be shown through case-studies in the following report that human rights violations are rarely accompanied by any effective responses by the State; there are few if any credible investigations, which means that the prosecution and sentencing of the perpetrators of these acts remains impossible. While political turmoil has been ongoing in the country, the development of human rights has been in stasis throughout the year, with the institutions that are supposed to protect and promote them making use of the political uncertainty to attempt to justify their paralysis and abject failure to protect the rights of Nepal's people. Impunity for past and present violations remains iron-clad, as all parties to the political process have failed to live up to their commitments under the CPA. The Asian Human Rights Commission (AHRC) and its sister-organisation, the Asian Legal Resource Centre (ALRC), have repeatedly pointed out since early 2006 that the only way to secure a transition to a durable and robust democratic Nepal is through the painful but necessary establishment of strong institutions of the rule of law and the provision of justice concerning the plethora of rights violations that mar the country's past and present. Without a foundation built on the values that underlie democracy, notably the value of the individual and his or her rights, democracy itself cannot be built. By pursuing political change without addressing the fundamental needs for such change, notably the people of Nepal's desire for peace, security, development, democracy and justice, as expressed during the 2006 uprisings, Nepal's political actors are destined for failure. It is perhaps not so surprising that the political parties are failing to deliver on the aspirations of the people, as the parties' leadership have not been rejuvenated and continue to act in pursuit of self-interest rather than showing the vision to move forwards towards much needed elections, democracy, security and the enjoyment and protections of human rights.

2007 can therefore only be viewed as a year that promised much but that has been wasted; a year of ongoing grave violations and erosion of the rule of law; a year of inertia on the part of the authorities.

2. Key Events during 2007

2006 will be remembered for many key events, including uprisings in April against the so-called Royal Coup in February 2005, which led to the restoration of Parliament, the side-

lining of the King, the supervision and management of arms, the establishment of an interim government and the inclusion of the Maoists in the political mainstream, culminating in the end to the country's armed conflict and the signing of the Comprehensive Peace Accord, which was expected to set the country on the path to peace and democracy.

2007, however, has from the outset been memorable more for set-backs than for positive developments. These can be attributed to the lack of political will on the part of the parties to the CPA to live up to their commitments and to tackle the issue of human rights as a pre-requisite for progress. In its conclusions in last year's annual report on Nepal, the AHRC wrote that:

*"...from a human rights perspective, much remains to be done. Violations continue to be committed by all sides, and this will remain the case until the culture of impunity that has accompanied the widespread abuses of the past, is removed. In order to ensure that impunity is dismantled, justice cannot be sacrificed on the altar of political expediency. Any and all allegations of human rights abuses committed by all sides need to be effectively investigated and prosecuted in line with Nepal's law and international obligations. Where laws are missing, they must be created. To enable this to be most effective, the institutions of the rule of law must be strengthened to allow them to cope with this sizeable task. Investigations and prosecutions need to be commenced without further delay, as these institutions can develop as they go, through practical experience, as long as there are no undue political restrictions to their actions... The only way to move beyond past grievances is for justice to be done. By sweeping such grievances under the carpet, in order to side-step difficult issues that may threaten ongoing political progress, there may be short-term gains, but ultimately, the door will remain open to a return to violence and insecurity, as those that profited from such a situation will remain protected, and may opt to re-offend in the future."*¹

Following the signing of the CPA, the AHRC has continued to receive cases of serious human rights abuses perpetrated by all sides, including rapes, torture, disappearances and abductions, extra-judicial killings, and these have all been committed with impunity, as cases have not been effectively investigated. While no progress was being made in terms of human rights during the year, the political scene was shifting rapidly.



The remains of a statue of the King in Pokhara.

On January 15, 2007 the Maoists joined the country's Interim Parliament, and came into the mainstream political fold. All 83 Maoist representatives, along with other members of the 330-strong Parliament, were sworn in and during the Parliament's first sitting the 2007 Interim Constitution was unanimously endorsed, replacing the 1990 Constitution of Nepal.

2.1 Unrest in the Terai

Unfortunately, the hope borne by these developments was short-lived and the return to violence and insecurity was not long in coming. On the following day, January 16, 2007, violent political upheaval was witnessed across the country's plain region, the Terai. Protests began in different parts of the Terai after the adoption of interim constitution. A central instigator of these protests was NGOs Madhesi Janaadhikar Manch (MJM), which set in motion the movement, demanding that a federal republic be established in Nepal and the guaranteed inclusion of the Madhesi people – the people that live in the Terai - in all sectors of government. They were also of the view that the interim constitution is flawed and does not appropriately address the problems of Madhesis, Janagatis, and other marginalized communities. This was a clear indication that the failure to effectively address the rights of various groups in the political process, along with a range of other rights, would cause it to falter.

The Terai movement turned violent in many districts, as the State started using force to suppress the uprising, while Madhesi rights activists began setting fires and vandalizing public properties. The authorities that had been swept into power only a few months earlier as the result of popular uprisings, were now engaged in suppressing further such movements. A severe breakdown of the rule of law ensued in a large section of Nepal, as the authorities on the one hand failed to address the genuine concerns of the minority groups and also failed to punish those responsible for violent acts committed by all sides, leading to a situation of increased violence and pervasive impunity.

The significance of the unrest in the Terai, both concerning the political process and the state of human rights in the country cannot be underestimated and persists to the date of publication of this report. On the political front, the uprisings were significant in that they eroded the support that had been enjoyed by the Maoists in the region, which has led to a significant weakening of the Maoists as a political force in the country and has changed the balance of power to the extent that negotiations on



Outbreaks of violence in the Terai have derailed the political process during 2007

critical elements of the CPA have since been affected or obstructed. As far as the human rights situation is concerned, these uprisings gave rise to severe violations but also created a situation in which numerous armed groups representing different political or minority groups sprang up, and these have continued to perpetrate violence and crime in the region throughout the year, gravely eroding what little rule of law was present there before.

The major groups emerging at present in Nepal are as follows – Janatantrick Terai Mukti Morach – Jwala Group (JTMM- Jwala), Janatantrick Terai Mukti Morach – Goit Group (JTMM- Goit), Limbuwan, Khambuwan, Madhesi Janadhikar Manch (MJM), Magar Mukti Morcha (MMM), Tharuhat Mukti Morcha (TMM), Madhesi Tiger (MT), Madhesi Yakata Kobra (MYK), Kirat Works Party (KWP), Terai Virus (TV), Young Communist League (YCL), and the Madhesi Mukti Morcha (MMM). There are many other small armed groups that add further to the complexity of the increasingly violent situation in the country.

The lack of action by the authorities to quell the unrest, violence and the surge in crime in an effective way has led to a deepening of the problem of impunity and lawlessness. This situation is a far cry from the hopes for the country that were present at the end of 2006.

Nepalese human rights NGO INSEC released statistics on November 21, 2007, one year after the signing of the CPA, which underlines this problem. According to INSEC:

“234 persons were killed since 21 November last year of which 28 persons were killed by the government, 23 persons by Maoists and YCL, 18 persons by JTMM-Goit, 27 persons by JTMM-Jwala and the rest were killed by armed groups in Tarai and unknown groups. Maoists and YCL were involved in the abduction of 495 persons while JTMM-Jwala abducted 107 persons and JTMM-Goit abducted 71 persons. It also reported that there were 122 incidents of property capture by the Maoists and YCL, 71 incidents of property capture by JTMM-G and 65 incidents by JTMM-J.”

INSEC also urged to all parties to comply with the CPA, to make the whereabouts of missing persons public, to initiate talks with agitating political groups in the Terai and for the authorities to bring the criminal groups to book. INSEC further demanded the creation of an environment that is conducive to the rehabilitation of displaced persons and for land-mines’ locations to be marked and for them to be defused.

2.2 The Gaur Incident

An example of the upsurge in violence is the Gaur Incident. Violence in Gaur had been predicted, as mass meetings of the rival Maoist-affiliated political group Madhesi Mukti Morcha (MMM) and NGO MJM, were scheduled to take place at the same venue at the same time. The MJM had scheduled a mass meeting at the Rice Mill Field located in Gaur

Municipality ward no. 5, Rautahat district, on March 21, 2007. The meeting was scheduled to last for some ten to twelve days, during which time the MJF chairperson, Mr. Upendra Mahato, was to address the crowd. The MMM, for its part, had also planned a mass meeting at a location in the same field some 100 metres away. The MMM only announced the holding of this gathering two days before it took place, while the MJF had been planning it for several weeks. Local human rights activist and members of Federation of Nepalese Chambers of Commerce and Industry requested both the Maoists and MJF to reach a compromise regarding the dates and venues for the mass meeting, but were ignored. The authorities remained silent and only deployed 14 police personnel under the command of a police Sub-Inspector to control over 10, 000 people.

On March 21, 2007, more than 10, 000 MJF supporters gathered at the Rice Mill Field at around 1 pm. At around 2 pm, some 250-300 Maoists also arrived at Rice Mill Field and, it is believed, detonated a bomb in the northern part of the field where the MJF supporters were gathered - fortunately no fatalities resulted from this. Some Maoists then reportedly threw a socket bomb at the MJF stage, causing panic. Maoist cadres then started beating MJF supporters with bamboo sticks and stones, causing fights to break out all over the field. Unidentified persons then opened fire from the western part of the field at the remaining people – most of whom were affiliated with the Maoists. MJF supporters then rallied and returned to attack the Maoists with sticks, stones and bricks. Five persons died as a result and dozens more were injured.

The Maoists claim that the persons that opened fire on them were royalists and professional killers brought in from India by the MJF, but this remains unconfirmed to date, as investigations by a probe committee are still ongoing.

Following the incident, at around 4 pm, eight male and three female Maoists were lynched by a mob in front of the Bodhi Mai Temple, some 5 kilometres from Rice Mill Field. They were beaten with bamboo sticks, stones and bricks before being covered in hay and set on fire. Separately, two Maoists were beaten to death at Millan Chowk in Gaur Municipality-1, Rautahat district.

A total of 29 people are reported to have been killed in the Gaur Incident. The Maoists claim that the 28 of the dead were Maoist-affiliated, however there are conflicting reports. Maoist leader Mr. Bijay Kishor Pandit claims that Maoists women had their breasts cut off and that they were raped with sugar cane sticks before being killed, although this has been impossible to confirm to date. Deputy Superintendent of Police Mr. Kuber Kadayat of the Rautahat District Police Office, claims that the women were not raped but did not provide supporting evidence, and medical reports concerning the deceased women have not been made public by health assistant Mr. Promod Raya of Rautahat District Hospital. It is reported that the few policemen at the scene did nothing to avert the bloodshed

during the Gaur Incident. The government formed a probe commission on March 23, 2007 under the coordination of a judge of the Patan Appellate Court, Mr. Hari Prasad Ghimire, to investigate the Gaur Incident and report back in 15 days, but the report has yet to be produced. Only 17 of the dead bodies have been identified to date, according to the police.

2.3 Kapilvastu violence: the government's failure to avert bloodshed

Kapilvastu district in the southern Terai region was plunged into violence after the murder of the former chairperson of an anti-Maoist resistance group, Mr. Mohammad Abdul Mohit Khan. He was shot dead by an unidentified armed group at around 8:30 in the morning on September 16, 2007 while he was on his way to his property in Shivapur VDC-3, Kapilbastu district.

Local villages, including Chandraurata, Krishnagar, Devipur, Shivapur, Pathhardaiya rapidly transformed into a battlefield when the Madhesi² and local people of Muslim faith started vandalizing houses, public and private vehicles, especially targeting Pahade³ people. The murder of Mohit Khan soon metamorphosed into widespread ethnic and religious violence, as Mohit Khan was from the Terai and part of the Muslim community.

It is reported that around twenty people died in the violence. About 4000 people have been displaced for months, 55 vehicles were vandalized, 68 vehicles were burnt, and a total of 315 houses were burnt down, and another 100 houses were vandalized. Most of the dead are thought to have resulted from fires, but the exact figures of the number of deaths remain unknown as the State agencies have not released this information to date. Starting from September 30, the victims of the violence called an indefinite strike in Kapilvastu district, which has utterly paralysed normal life there.

The police have been inert and done little or nothing to quell the violence. Chandraurata Bazaar, the place from where the violence originated, is some 200 meters from Area Police Station Chanuta in Kapilvastu district. The Bindhebasani Armed Police Force in Chandurata is some 500 meters from the incident site. The police, however, made it to the site only an hour later. Some locals claim that the police told them to arrange for their safety themselves and left immediately.

A local resident of Chandraurata, Kapilvastu district, Mr. Mahadev Pokhrel, said that a group of about 50-60 people from the Muslim community came to the bazaar at about 8:30 a.m. carrying machine guns and other weapons and started vandalizing shops and houses. He further stated that the security forces did not arrive at the scene of the incident for about an hour even though they had informed the police in time for immediate intervention to have been possible.

Violence also erupted in Chandraurata, Krishnagar, Taulihawa, Devipur, Shivapur, Pathhardaiya, Shivagadhi, Gaguali, Khurariya, Ganeshpur, Bahadurgunj, Birpur, Thuniya, Chanai, Bidhyanagar. Inaction by the police is an undeniable factor in the rapid uncontrolled spreading of the violence.

Some people witnessed around 50-60 Young Communist League (YCL) members vandalizing buildings including petrol pumps and corn mills in Chandraurata, Kapilvastu district. The YCL members were seen leading groups of Pahade people in some villages and were involved in beating Madhesi people and vandalizing their property.

Locals Ms. Tulsari Sunar and Ms. Amrita Sunar said that their husbands were killed in front of them by the mob, who beat in their heads with sticks and chopped firewood. Furthermore, Amrita Sunar, was the subject of an attempted rape during the attack. They claimed they had seen 13 people being killed in the area.

Some of the people killed have been identified as:

1. Shova Ram Sunar, Male, resident of Bishanpur VDC-3, Devipur, Kapilvastu district
2. Dile Sunar, male, resident of Bishanpur VDC-3, Devipur, Kapilvastu district
3. Hari Basnet, male, resident of Bishanpur VDC-3, Devipur, Kapilvastu district
4. Jhabindra Khanal, male, resident of Bishanpur VDC-3, Devipur, Kapilvastu district
5. Mahit Bahadur Magar, male, (resident not known)
6. Dhan Bahadur Thapa, 50 male, resident of Khurhuria VDC -7, Kapilvastu district
7. Hiramani Kharel, male, resident of Ganeshpur VDC – 4, Manpur, Kapilvastu district
8. Arjun Dater, male,
9. Hasan Puri, a police personnel of Chandraurata Armed Police Forced, Kapilvastu
10. Rameshor Chaudhari, resident of Pathardaiya VDC, Kapilvastu district
11. Narudhin Musalman, resident of Pathardaiya VDC, Kapilvastu district
12. Dudh Nath Teli, resident of Khurhuriya VDC, Parsohia, Kapilvastu district
13. Chandra Bahadur Ghartimagar, resident of Shivapur, Kapilvastu district
14. Bal Bahadur Pun, resident of Bisanpur VDC, Kapilvastu district
15. Mohit Khan, resident of Birpur VDC, Kapilvastu district



A victim of unrest in the Terai. Many have died but nobody is being held accountable.

2.4 Maoists join the Interim Government

An Interim Government including the Maoists was formed on 1st April, 2007, with Nepali Congress leader Girija Prasad Koirala as the Prime Minister. Five Maoists were sworn in as Cabinet Ministers: Krishna Bahadur Mahara, Dev Gurung, Matrika Yadav, Hisila Yami and Khadga Bahadur Biswokarma. Leaders of the eight political parties, including the Maoists, agreed to hold Constituent Assembly elections on June 20, 2007. The elections have since twice been postponed. Initially until November 22, 2007. They were later postponed a second time, and a date has yet to be officially announced, although they are unlikely to be held before April 2008.

2.5 Maoists quit the Government

The Maoists decided to leave the government on September 18, 2007 and announced a “nationwide protest movement” stating that the seven-party leaders failed to fulfil their 22 demands. On 20 August, the Maoists had made 22 demands, without which they stated that there would not be a conducive environment for the holding of Constituent Assembly elections scheduled for 22 November, 2007. The major demands included:

1. The declaration of Nepal as a Republic by the interim parliament before the Constituent Assembly elections took place;
2. The nationalisation of the late-King and his family’s property as well as that of present King Gyanendra that was acquired after he ascended to the throne;
3. The immediate punishment of those implicated in the Rayamajhi Commission – the commission formed after the April Uprising in 2006 to investigate the human rights violations during the repression of the movement by the State - including the enactment of a new law permitting this, if necessary;
4. Form a ‘Security Council’ in accordance with the interim constitution to democratise Nepal’s army. Start the process of integrating the People’s Liberation Army with Nepal Army by forming a special cabinet committee;
5. Hold a round table conference including all sections of the society including Janajathis, Dalits, and the Madhesis to discuss and solve their problems;
6. Form a High Level Commission to probe the cases of “disappeared” persons.

All four remaining Maoist ministers at the time submitted their resignation letters to Prime Minister Girija Prasad Koirala after a meeting of the top leaders of the four major political parties - Nepali Congress, the Communist Party Nepal (United, Marxist and Leninist - CPN-UML), CPN-Maoists and Nepali Congress – Democratic (NC-D) - held at Baluwatar failed to address their demands. The Maoist leaders have stated that the nationwide movement would be non-violent and that their People’s Liberation Army will remain in cantonments.

Since the Maoists pulled out there have been increasing concerns about whether they will return to activities that will lead to further human rights violations. At the time of writing of this report, there are indications that the Maoists may be in the process of re-establishing their court system in Nepal, which the AHRC and others have in the past criticised for handing out sentences that are in themselves human rights violations as the result of unfair trials. This would signal a return to a parallel justice system in the country and the spreading of injustice and impunity that accompanies it.

The CPN-Maoists withdrew their proposal on the establishment of a republic and voted in favour of the amendment proposal on the same issue filed by the CPN (UML) as failed political deliberations finally led to a parliamentary vote on November 4, 2007. The House passed the UML's amendment motion on the establishment of a republic and the Maoists' motion for adopting a proportional representation-based voting system, by a simple majority.

The UML amendment motion seeks the announcement of a republic in Nepal from the House and takes steps for the implementation of republican system at the earliest possible time. The two motions were put to vote following an intense debate in the House. However, the discussions are still going on among the political leaders and no progress has been made yet. The Maoists have since put forward new demands saying that the Maoists' People's Liberation Army (PLA) should be integrated into the country's armed forces before Constituent Assembly elections can take place. These types of issues have been at the centre of the stalling political reform process and remain to be solved.

2.6 The Supreme Court's Decision on disappearances and directives to form a high level commission to investigate such cases

On June 1, 2007, the Supreme Court of Nepal ordered the government to immediately investigate all allegations of enforced disappearances, to establish an independent commission to conduct investigations and to enact comprehensive legislation that would criminalize enforced disappearances. However, the government has failed to adhere to the order of the Supreme Court. Instead, the government decided to form the commission under the Enquiry Commission Act of Nepal which, according to the Supreme Court, is inconsistent with Nepal's international obligations. Civil society organizations in Nepal, international organisations and the families of disappeared persons rejected the government's proposed course of action, as it blatantly disregards the decisions of the Supreme Court as well as Nepal's international obligations.

In its June 1st judgment on disappearances, the Supreme Court of Nepal ruled that the existing legal arrangements that would govern any probe commission's inquiries into cases of human rights violations, including disappearances, are currently insufficient and that the current criminal legal apparatus lacks the necessary provisions to deal with these

issues. The Court held that it is imperative to enact a separate law to deal with cases of forced disappearance. The Court directed the government to form a commission on enforced disappearances only after enacting a comprehensive law to govern it and suggested that the government consult the UN Convention of Enforced Disappearance before drafting and enacting such a law. It is recalled that it is a constitutional obligation for the government to follow orders issued by the Court and that the country's Interim Constitution has preserved a mandatory provision that makes any verdict of the Supreme Court binding on the government.

Despite this, the "High Level Probe Commission on Disappeared Persons" was formed on June 21, 2007, under the chairmanship of former-Supreme Court Justice Narendra Bahadur Neupane to investigate cases of disappearances. After strong opposition to this body by civil society, local human rights organisations and the international community, including the OHCHR, the commission has not been working, but has also not been formally dismissed.

2.7 Failure to respect provisions of the Comprehensive Peace Accord

The Government of Nepal and the Communist Party of Nepal (Maoist) signed the Comprehensive Peace Accord (CPA) on 21 November, 2006, ending a decade long armed conflict. However the commitments made within this accord have for the most part not been implemented. The following key commitments are amongst these:

3.4. To adopt a political system that complies with universally accepted fundamental human rights, multiparty competitive democratic system, sovereignty inherited in people, supremacy of the people, constitutional check and balance, rule of law, social justice, equality, independent judiciary, periodic election, monitoring by civil society, complete press freedom, people's right to information, transparency and accountability in the activities of political parties, people's participation, impartial, competent, and fair concept of bureaucracy.

5.2.6. Both sides pledge to abandon all types of war, attack, counter-attack, violence and counter-violence in the country with a commitment to ensure loktantra, peace and forward-looking change in the Nepali society. It is also agreed that both the sides would assist one another in the establishment of peace and maintaining of law and order.

7. Both sides would not be involved in the acts of torture; kidnapping and forcing the civilians in any work and take necessary action to discourage such acts.

As we shall see below, human rights violations continue to a large extent in Nepal and promises by both sides to reveal the whereabouts of persons disappeared during the country's conflict that was ended by the CPA have also not been kept.

3. Human rights violations during 2007

As has been previously stated, serious violations of human rights have continued to be perpetrated with impunity over the last year. Some of the cases that the Asian Human Rights Commission has dealt with through its urgent appeals programme over the last twelve months are presented below, to allow for a greater understanding of the nature of some of the violations being committed. It must be noted that many of the cases cited here and taken up by the AHRC were allegedly perpetrated by the police or military, and in some cases the Maoists. However, it should be added that a great number of killings and abductions are increasingly being perpetrated by a number of new armed groups in Nepal, as stated in the statistics released by INSEC included above. These cases have thus far been difficult to individually document in detail for use in the urgent appeals programme for a variety of reasons, including difficulty of access to victims in remote areas and due to the fear of reprisals in these cases.

In general, the end of the conflict has not resulted in a significant reduction of many of the worst violations of rights, including torture, which remains endemic and is practiced by the police as a method of investigation and punishment in everyday cases. While cases of disappearance have been greatly reduced from the world-leading highs of 2003 and 2004, abductions – often for money – by armed criminal groups are significantly on the rise. The whereabouts of many persons that disappeared during the recent conflict remain unknown.

In a statement delivered to the UN Human Rights Council's 4th session on March 22, 2007, the ALRC and other Asian NGOs highlighted the problem of impunity concerning past disappearances, stating that: *“In Nepal, while disappearances have decreased significantly since the presence of the OHCHR - which must be extended - the army and the Maoists are refusing to disclose the whereabouts of at least 650 and 181 disappeared persons respectively, and there is little to indicate that human rights and impunity are being addressed in reality rather than rhetorically in the emergent system in the country.”*⁴

Extra-judicial killings are ongoing at alarming rates, as are rapes, and as regional and political tensions increase within the country there is a distinct possibility that these will only continue to increase as the criminal justice system is failing to address violations. This climate of impunity and absence of the rule of law are leading the country to the brink of another internal conflict. Many in the country increasingly believe that violence is the only way to get attention and to solve grievances. While many on the outside seem to be of the opinion that the political developments in Nepal over the last 18 months or so serve as a model that other countries should follow, the reality is that there is very little holding the country back from returning to bloody conflict and gross rights abuses. While there have been positive developments during this time, the political situation remains

extremely fragile, and increasing infighting is jeopardising the political parties' ability to deliver on the peoples' expectations. Every time a human rights violation is perpetrated and the justice system fails to make those responsible accountable, the country moves a little closer to a return to violent conflict. This time, it risks being more unpredictable and bloody, as the number of armed groups has increased.

Concerning impunity, which remains the main stumbling block concerning human rights and political progress in Nepal, the political parties are continuing to avoid the question with all their might. The AHRC released several statements throughout the year concerning this. It has been noted that "One of the most perplexing factors is that those who have been deprived of political power are still in positions of power within the military, police and the bureaucracy. Those who have earlier played a significant role in maintaining tyranny are now supposed to play the role of guardians of democracy."⁵

Impunity is in general guaranteed by a lack of investigations, which then renders any successful prosecution of perpetrators impossible. This is a common theme running throughout the following cases.

3.1 Numerous cases of rape, but no resultant justice or redress

The AHRC is surprised by the large number of rape cases that it has received over the last twelve months. In one case, that took place one day after the historic November 8, 2006 so-called six-point agreement⁶ between the seven political party alliance and the Maoists that paved the way for the CPA later the same month, a woman and her daughter were raped by members of the police.⁷

At around 8 pm, two drunken Armed Police Force members, Chakra Bahadur and Padam Bahadur, came to the house of a woman (identity withheld for security reasons) in Kunathari Village Development Committee (VDC), Surkhet district, searching for liquor. They reportedly raped both the woman and her daughter. A First Information Report (FIR) was only recorded on November 16, 2006, and the police authorities initially refused to have the women undergo medical examinations, leading to the loss of crucial evidence. District police officers dealing with the case reportedly said that medical examinations were "not necessary for the investigation of this case." However, they did finally collect the victims' under-garments and send one of the perpetrators, Chakra Bahadur, to the Surkhet district hospital for a medical examination. The police have since failed to further investigate the case.

Chakra Bahadur was released on the orders of the District Court Surkhet on December 3, 2006, on bail amounting to rupees 5,000. He was released on the condition that he later present himself to the court. Padam Bahadur had appeared before the District Court of Surkhet on May 16, 2007. On the same day, the court decided to release him on rupees 7,

000 Bail. The court has not given its final verdict yet concerning this case, but there are concerns that the perpetrators will, as is usual in Nepal, get away with minimal or no punishment.

In another, a 12-year-old girl was allegedly raped by a senior Police Constable in the Mohatari district of Nepal.⁸

Mr. Manoj Chaudhary, a 27-year-old senior-ranking Police Constable stationed at the Gausala Security Base Camp in the Mohatari district, raped the girl at her home at around 8:30 pm on November 18, 2006. The victim's parents returned home and spotted the accused quietly leaving the house, but managed to identify him. They immediately went to the military camp and reported the incident to Police Inspector Bimal Sharma, Inspector of Armed Police Force Kishor Shrestha and Army Lieutenant Min Bahadur Thapa, who denied that Mr. Chaudhary or any of their personnel had been allowed to leave the camp. On November 19, 2006, the girl underwent a medical examination at Mohatari District Hospital but the District Police Office has declared the examination findings null and void and refused to provide them to the girl's family. Instead, Police Inspector Kishor Shrestha has alleged that the victim was having a romantic affair with the accused, and claimed that he possessed several love letters that were exchanged between them. However, he refused to provide the letters as evidence, and at this stage, there is no evidence whatsoever to prove his allegations.

Mr. Chaudhary was however then taken to the Mohatari District Court on the charges of rape of a minor, and was remanded for further investigation. Under Section 2(2) of Chapter 14 of the Civil Code of Nepal (2020) a person can be imprisoned for up to 7-10 years if found guilty of rape of a minor (between the ages of 10-16, under the current serving definition in domestic Nepali legislation).

Manoj Chaudhary was initially taken sent to Jaleshor Jail, Mohatari district. The District Police Office in Mohatari completed its investigations and forwarded the final investigation report to the Public Prosecutor's office on December 14, 2006. Manoj Chaudhari was however released on May 28, 2007 following a decision of the District Court of Mahatori district. The court decision says that the victim and her family made statements to the court stating that the alleged perpetrator had not raped her and he was not present when the incident took place. This contradicts their earlier statements to the police. It is reported that the alleged perpetrators bribed the victim's family with rupees 80,000 to get them to drop their claims. It is also rumoured that unknown people connected to the perpetrators have been constantly threatening the victim's family to get them to withdraw the case.

In another case, a 40-year-old mentally ill woman was allegedly raped by a member of the military.⁹ The woman resides in Ward no. 9, Kavre Village Development Committee (VDC), Kavreplanchowk district, Nepal.

On December 23, 2006, Mr. Bhakta Bahadur Shahi, a member of the Rudradhoj Battalion Dhulikhel, Kavrepalanchowk district, allegedly punched the victim on the chin and dragged her to a nearby jungle where he raped her. On December 24 and 25, several army personnel came to the victim's house offering money in an attempt to persuade her brother to settle the case. On December 26, the victim's family attempted to lodge an FIR at the Kavrepalanchowk District Police Office (DPO), but the police refused to record the case.

Further attempts to lodge an FIR were made on December 27, but Rudradhoj Battalion Colonel Sudarshan Silwal and The DPO's Deputy Superintendent of Police (DSP) Mahendra Pokhrel continued to create obstacles. Colonel Sudarshan Silwal even stated that *"It is better to make compromise rather than going for the legal process. I suspended the army man from his job and kept him in army custody yesterday evening after I had learnt that he had done a mistake. We will give time to the family members to think about the incident before registering FIR to the DPO."* Similarly, DSP Mahendra Pokharel also told the family members to think before registering the case and not to listen to whatever the lawyers said. However, the family was ultimately able to register an FIR on December 27, 2006. Colonel Sudarshan Rijal assured the family that the alleged rapist, Bhakta Bahadur, would be transferred to the DPO, in line with the law, by December 28.

The alleged perpetrator, Bhakta Bahadur Shahi, was eventually taken into custody at the DPO. The victim's family members have been threatened by army personnel and have been displaced for some months.

The case was under investigation and Bhakta Bahadur was detained at Kavrepalanchowk District Jail pending trial, but he reportedly escaped from jail on November 15, 2007. He has still not been found by the police. It is reported that guards were involved in his escape from jail.

This case shows how the authorities attempt to block attempts at registering FIRs. If there is no FIR then there is no requirement for the police to investigate a case, and therefore nothing is done. In this way the police are able to nip in the bud any attempts to have cases investigated where members of the police or military are accused of committing abuses. If they are forced into investigating by certain amounts of pressure concerning the case, then the suspect may eventually evade justice in one of many ways. Escaping from prison is a flagrant way that this may occur. One way or another, impunity prevails.

In yet another case, on June 4 and 5, 2007, a 14-year-old mentally ill girl was reportedly raped by three police constables from the Zonal Police Office (ZPO) and one civilian in Mahendranagar, Kanchanpur district.¹⁰ On June 4, 2007, at around 11 am, the girl asked police constable Harendra Chand for directions. He tricked her into following him and took her to the house of another police constable, Rekham Shahi, where the two policemen

allegedly took turns raping her for about two hours. The victim tried to resist but they threatened to kill her if she did not keep quiet.

They then took her to police constable Janak Mahatara's house, and left her with Janak's wife, Radhika Mahatara, saying that they would come back later. At about 9pm, Janak Mahatara and his nephew Tirtha Dangi arrived home and when Janak's wife went out they allegedly raped the girl repeatedly for most of the night, threatening to kill her if she complained.

Since then, Rekham Shahi and Tirtha Dangi were arrested on June 5, but Harendra Chand and Janak Mahatara are still at large. Radhika Mahatara was also remanded for being an accomplice.

The following case shows the cost of being caught between the Maoists and the police or army in Nepal, despite the conflict having been officially brought to an end in November 2006. All sides are ensuring that impunity for violations continues.

A 15-year-old ninth-grade student from Ramghat Village Development Committee (VDC) ward number 8, in Surkhet District, was reportedly raped on July 19, 2007, by two men - Ram Narayan Bhattari of the Nepal Army and Yadav Thapamagar.¹¹ The girl had reportedly been recruited by the Maoists' People's Liberation Army (PLA) at their camp in Gumi, Surkhet district for 5 months, starting on December 9, 2006, having been assured that she would have a permanent job and a good salary. She left on May 8, 2007 with the permission of the commander, and returned to school. The Maoists had since been attempting to have her join their party and work for the Maoist-affiliated Young Communist League (YCL), but she has refused to do so. She is now facing problems from both the Nepal Army and the Maoists.

On July 19, 2007, the victim was approached by the two men while waiting for a bus in Pipira Chowk, Latikohili VDC, Surkhet district. They travelled on the bus together and got off near Bheri Bridge. Yadav Thapamagar then reportedly took the girl by the arm and dragged her around 100 metres into the jungle, where he threatened to kill her if she made any noise, before undressing and raping her. Ram Narayan initially kept watch by the road but then came down and also raped the girl. The two men then left her naked in the jungle.

Following a medical check-up that shows that she was raped, attempts were made to register an FIR at the Banke district District Police Office (DPO), however the DPO suggested that the victim register the FIR at the DPO in Surkhet. On August 1, 2007, the police questioned her about the incident but stated that they could not register an FIR without having the complete details of the perpetrators - the victim was not able to give them her rapists' home addresses. Registering FIRs with the police is frequently obstructed

for such unacceptable reasons in Nepal, especially when victims are complaining of abuses committed by members of the military or other State-actors. On August 3, 2007, the victim was finally able to register an FIR at the Surkhet DPO against the two alleged rapists. Police Inspector Nain Singh, had at first not accepted the FIR and told the victim to remove the name of the member of the Army, but was eventually persuaded to register the FIR. On August 5, 2007, the Surkhet DPO sent a letter to the Midwestern Divisional Army Headquarters in Surkhet district, calling on the army to hand over Mr. Ram Narayan Bhattari to the police, but to date the army has not responded. The police have also failed to arrest the other suspect, Mr. Yadav Thapamagar.

On August 23, 2006, the District Court Surkhet ordered Mr. Ram Narayan Bhattari to be sent to the District Jail of Surkhet for the further trial. Ram Narayan, however, went to the Appeal Court, Surkhet to challenge the decision of the District Court. The Appeal Court, Surkhet, ordered his release on September 13, 2007.

Women are also subjected to sexual threats and violence as a form of torture by the police during investigations, as is shown by the next case, which again illustrates the terrible damage to lives that the conflict in Nepal has engendered. Ms. Kalpana Bhandari was tortured and molested by the police during investigations into a government vehicle having been set on fire in Kathmandu on 17 May 2007.¹² The 30 year-old victim was arbitrarily arrested from her tent as a suspect in the arson attack.

The police caught her by the hair and manhandled her, and the police inspector in charge then allegedly ordered a police constable to rape her. She was made to lay down on the ground and was kicked and beaten with sticks to her groin and breasts for around one hour during which they also threatened to kill her. She was then dragged 500 meters to a police van in which she was again made to lay face down and then kicked until she fell unconscious.

Ms. Kalpana Bhandari's husband was a sub police inspector before being killed in a clash between Maoists and the security forces in April 2002 at Bhakundebesi of Kavre district. A week later after his death, the Maoists demanded one hundred thousand rupees from his father. As he was not able to pay, he was then abducted and killed by the Maoists. The victim had been working as a police head constable at the District Police Office in Dhulikhel, Kavre district, but she resigned after receiving repeated death threats from the Maoists. She left home with her son and daughter and came to Kathmandu, where she eventually ended up being tortured by the police, as stated above.

The victim filed a case against the alleged perpetrators under the Torture Compensation Act, 1999. However, the Act only allows victim compensation that falls short of international standards and does not provide any means of prosecution or punishment related to cases of torture.

She has received serious threats from the police since she registered the case with the Kathmandu District Court on June 11, 2007, concerning her arbitrary arrest, torture and sexual molestation by members of the police on May 17, 2007.¹³ Police Inspector Hira Bahadur Pandey is reported as having stated to a person he was using to deliver the threat that: “Kalpana has filed a case against us. So, convey to her the message that she must withdraw the case. If she doesn’t withdraw the case, I will arrest her under any charge and treat her badly.”

Separately, Alisha (name changed to safeguard victim’s identity), an 18-year-old woman and permanent resident of Jumla district, was allegedly raped on September 15, 2007, at about 12 noon, by a Maoist health worker whose identity has not been found yet. He was working as a health worker at the Health Department of the Sixth Divisional Maoists Main Cantonment based in Dashrathpur, Surkhet district, in the midwestern part of Nepal.

The man persuaded Alisha to go along with him to the Satkar Hotel at Birendranagar Municipality- 6, Surkhet district, where he raped her.

A First Information Report (FIR) was provided to the District Police Office (DPO), Surkhet, on 21 September 2007, however, the DPO didn’t register the FIR. The Deputy Superintendent of Police (DSP), Mr. Bahadur Janga Malla of DPO Surkhet refused to register the FIR. It is thought that this is because a local Maoists leader named Basant went to the DPO in Surkhet and interfered in the case. Alisha had been in the Maoists People’s Liberation Army (PLA) but had left the PLA in June or July 2006 and joined a training project sewing clothes with the help of a local NGO in Surkhet district. As the FIR was not registered, Alisha later went to District Police Office, and withdrew the case, reportedly having been forced to do so by the Maoists.

3.2 The problem of endemic torture in Nepal

Torture is widespread and is used by the police as a substitute for proper investigations. They instead rely on forced confessions extracted under torture to close cases. Judges ignore claims by victims in court concerning torture and investigations into allegations of the use of torture are stifled by the police before they get anywhere. Weaknesses in the law compound this problem and engender its recurrence. Impunity reigns for torturers, as we shall see in the following cases.

A case that perhaps best illustrates the brutality of torture in Nepal concerns Mr. Bikash K.C., an 18-year-old school teacher, who was arrested at Bidhayanagar in Kohalpur VDC - 2, Banke District at 2:00 a.m. on September 13, 2007, by a group of policemen from the Area Police Office (APO), Kohalpur, Banke district.¹⁴ Bikash K.C. was living in Kohalpur-2, Banke District, with his relative, Sub Inspector (SI) Ganeshman Khadka of the Kohalpur

police. Earlier that night 3-4 strangers had attacked Ganeshman Khadka in his home. The latter then blamed Bikash K.C. for the attack and called the police to have him arrested. Bikash K.C. was taken to the Kohalpur Area Police Office, where he was detained illegally for several days, threatened with death and subjected to grave forms of ill-treatment and torture.

The police provided him with very little and poor quality food during detention. Furthermore, he was reportedly given food mixed with shards of glass and was forced to eat an iron nail covered with paper. He was also forced to stand for long periods of time and subjected to sleep deprivation. Most nights, SI Ganeshman and Assistant Sub-Inspector (ASI) Devi Lal Bohara entered his cell and threatened to shoot him. He was subjected to daily beatings with iron rods. He remained handcuffed throughout detention and was not allowed to meet with any visitors, and was moved to different cells when persons, including human rights activists, tried to visit him.

The Police Inspector in charge of the APO, Mr. Janak Bahadur Shahi, took no action to prevent the arbitrary detention and torture, even stating that it was a private family matter. Bikash was eventually remanded to the District Court, Banke District on September 27 and was charged with attempted murder. He was tortured later on the same day by being beaten with iron rods on his buttocks and back, by three policemen, including Mr. Tilak Sharma and Dipendra Khatri, reportedly on the instructions of SI Ganeshman. SI Ganeshman also beat him repeatedly with a baton during this time. When the victim asked for water to drink he was instead forced to drink urine. Bikash was detained at the APO in Kohalpur, Banke district until he was transferred to the Banke District Jail on 31 October, 2007 while awaiting trial. It is hoped that he will be subjected to a fair trial and that any confession obtained as the result of torture will not be deemed admissible. It is also hoped that those responsible for his torture will be held accountable.

Torture used as the main method of investigation

Given that the perpetrators of torture are not being brought to justice and that any complaints made concerning torture risk causing further problems for the victims rather than any reparation, the use of torture continues unabated, to the extent that in many circumstances the police resort to this practice as the main means through which they conduct investigations. Individuals, most commonly the poor, are arbitrarily arrested and tortured into admitting to a crime they did not commit, while those responsible for the crime remain free to continue with their criminal activities, reinforcing the cycle of injustice and the deterioration of the rule of law in the country.

In the case mentioned in the section on the problem of rape earlier in this report, concerning the molestation and torture of Ms. Kalpana Bhandari, it should be noted that she was not

alone in being arbitrarily arrested and tortured as part of the police's investigation into an arson attack that led to the destruction of a government vehicle. 13 men were also arrested and tortured on May 17, 2007.¹⁵

Mr. Bhoj Raj Timilsina, the coordinator of Maoists Victims Group of Kathmandu, was arrested from Koteshwor, having been accused of being involved in the arson attack. He was first taken to the Gausala Metropolitan Police Sector, Kathmandu then to the Singhadarbar Metropolitan Police Circle. He was tortured and threatened with death or with being detained for 10 years by the police. He was released on May 25 after the complaint against him was dropped.

In another case, Mr. Kalyan Budhathoki was arrested along with 11 other Maoist friends by the security forces in Tinkune, Kathmandu on May 17, 2007. All of them were allegedly beaten indiscriminately with sticks by the police, having also been accused of the arson attack. They were then taken to the Metropolitan Police Circle, Newbaneshor and then to Gausala Metropolitan Police Circle, Kathmandu for the further investigation. Nine persons were released that day, while the remaining three, including Mr. Kalyan Budhathoki, were illegally detained for 8 days and released in Singhadarbar Metropolitan Police Circle, Kathmandu on May 25. Despite having tortured many people in this case, none of those persons were found guilty. The opportunity arising out of the attack was used to torture Maoists as a means of investigation as well as a means of repression and punishment.

There are many other cases in which it is evident that the police resort primarily to torturing persons as part of investigations. For example, Mr. Jonson Gurung and Mr. Raju Rai were both illegally detained and tortured by members of the Hanumandhoka Metro Police Range (MPR), Kathmandu, during theft investigations.¹⁶ Mr. Jonson Gurung was reportedly arrested on March 7, 2007 by some 12-13 traffic police officers in Kathmandu on suspicion of stealing a motorcycle. He was taken to Traffic Police Office, Putalisadak for the further investigation, where a stranger accused him of being involved in stealing gold two years earlier. He was handed over to the MPR on March 8 and tortured into identifying his accomplices and confessing to having stolen the gold. He identified Mr. Raju Rai, who was then arrested and tortured into confessing his guilt. On 16 March, 2007, the Metro Police Range (MPR), Hanumandhoka, Kathmandu transferred both of them to Metro Police Circle at Kalimati, Kathmandu. This case illustrates the arbitrary nature of police investigations. Confession obtained under torture cannot be viewed as being reliable as persons will say anything at such times to avoid further pain.

Serial torturers operate in Morang District Police Office

Perhaps the most revealing cases of torture that the AHRC dealt with during 2007 are the series of cases emanating from the Morang District Police Office (DPO). Numerous

cases, frequently involving the same police officers and methods, have come to the AHRC's attention and despite repeated urgent appeals and requests for interventions from the UN Special Rapporteur on Torture, new cases of torture continue to surface. The AHRC has issued urgent appeals in which it has branded the Morang Police as serial torturers.

Case 1: Mr. Kalam Miya, a 27-year-old manual worker from Pakali VDC-3, Sunsari district, Nepal was detained by the police on July 30 and 31, 2007 and tortured, threatened with death and forced to confess to a robbery.¹⁷ At the Morang DPO, he was locked inside the Women Police Cell room and interrogated and beaten with a stick by three police men, including Sub Inspector Balram Yadav. Mr. Kalam Miya refused to confess to the false accusations, at which point he was threatened with being tortured to death unless he did so. He was again tortured on July 31, 2007, from 9 a.m. and finally, in a semi-conscious state after enduring the severe beatings for around an hour, Mr. Kalam Miya agreed to sign any documents the police wished in order to escape further torture. He was then produced before the Morang District Court on July 31 and remanded for five days. He was remanded for ten more days by the court on August 5, 2007, despite having complained of having been subjected to torture to the judge, who ignored his complaint. The victim was released on August 26, 2007 on the order of the Morang District Court. After he was released, he registered a case under the Torture Compensation Act on 2 September 2007. However, he was repeatedly harassed by the police and has been forced to flee to India. The police's Human Rights Cell has responded to the AHRC concerning this case by claiming that he was not tortured or ill-treated.

Case 2: In this case, another person with the same last name was also arrested and tortured as part of the robbery investigation.¹⁸ Mohammed Pappu Miya, 19, was arrested on September 4, 2007, in Panitanki Chowk, Biratnagar, Morang District. After his arrest he was taken to Morang District Police Office (DPO), where he was tortured into confessing involvement in the crime. He was tortured in the DPO's women's cell, which is in a separate building, by Rajendra Mehata, Bal Ram Yadav, Shyam Chaudhary. On September 5, 6, 7, 8 and 9 he was again tortured into confessing to a large number of other robbery cases. It appears that the police were attempting to solve all of their open cases in one go. He was only allowed to meet members of his family after seven days of detention, was only provided with arrest and detention letters on September 8, and was only presented before Morang District Court on September 9, 2007, on robbery charges. Under law, arrested persons have to be presented before a court within 24 hours of their arrest. He was transferred to the Area Police Office (APO), in Rani, Morang District on September 22, and was sent to Morang District Jail on 5 October, 2007, having been found guilty by the judge on all counts of robbery. The length of his sentence is at present unclear.

Case 3: This case concerns another person with the same last name. Mohammad Rajjabul Hussain Miya, 24, was arrested on September 10, 2007 and then tortured at the Pakali APO

by the same policemen as above, ASI Balram Yadav, Shyam Choudhary and Rajendra Mehata of the Morang DPO. He was tortured until he made a forced confession and signed a piece of a paper, the content of which he was not allowed to read. He was then transferred to the Morang DPO where he was taken to the women's cell and accused of being a thief and a rapist. ASI Balram Yadav reportedly then threatened to kill and rape his family members. He was tortured again until he gave in and accepted the charges of robbery and rape that the policemen had levelled against him, and signed another such paper. Following this his ordeal was not over. He was shown a list of people's names and interrogated about them. When he said he didn't know them, he was again beaten until he confessed to knowing them all. The policemen then hit him until he lost his consciousness. He was woken up a few minutes later and forced to acknowledge his involvement in a series of robberies. On September 10, Mohammad Rajjabul Hussain Miya was admitted to Koshi Zonal Hospital, Morang, for medical treatment, during which he showed his injuries to a medical officer, but a policeman pulled the victim out of the medical room and warned him not to tell anyone about his injuries. He was transferred to the Rani APO in Morang District on September 22, before being sent to Morang District Jail on 5 October, 2007, having been found guilty and sentenced accordingly. The exact length of the sentence is unknown at present.

Case 4: Again, this concerns a man with the same last name. Mohammad Jabbar Miya, 19, was arrested on September 4, 2007, by Morang DPO's Assistant Sub Inspector of Police (ASI) Mr. Balram Yadav and Shyam Chaudhary, on allegations of robbery and rape.¹⁹ He was taken to the DPO's women's cell where he was tortured by as many as 19 policemen, including Balram Yadav, Shyam Chaudhary and Rajendra Mehata. Balram Yadav. The next day, September 5, he was taken to the women's cell, where a woman, the alleged owner of the robbed house, was present, and he was beaten when he stated that he did not recognise her.

Later that day, he was taken to his house, which the police searched to try to find the stolen goods. The police beat and arrested his aunt, 37-year-old Ms. Noorjan Khatun. They were both tortured and threatened with death with guns pointed at their heads. Ms. Noorjan Khatun was finally released on September 10, 2007, following significant pressure on the police from her neighbours. Mohammad Jabbar Miya was beaten regularly during the first five days following his arrest on September 4, 2007. He was transferred to the Rani APO in Morang District on September 22, before being sent to Morang District Jail on October 5, 2007, having been sentenced as the result of his confession extracted under torture.

These cases in Morang DPO that have been committed by the same police officers and show a pattern of grave torture in order to force numerous confessions in order to avoid the need for real investigations are a shocking example of the state of policing in Nepal.

To date, no action has been taken against these police officers and the AHRC continues to receive reports indicating that the use of torture is ongoing in the Morang DPO. The authorities need to immediately take action to prevent further abuses in these cases and to bring those responsible to justice. It is also a serious concern that the victims of torture are being tried and convicted based on evidence extracted under torture. Judges should not consider such evidence as being admissible in court and should ascertain whether persons under trial have been tortured during detention and interrogation before passing judgement. It is also imperative for the Nepalese authorities to immediately take measures to ensure that torture is criminalized in the country, in order to address the problem of impunity concerning this very serious human rights violation, in line with its international obligations.

No-one is spared – children are being tortured in Nepal

The AHRC has also dealt with several cases in which children have been tortured during investigations by the police concerning petty crimes.

In one case, the Kohalpur Area Police Station, Banke district police arrested seven persons, including 5 minors and 2 adults, in relation to a small shop theft. Six of them were arrested on March 11, 2007 from their home in Naubasta Village Development Committee (VDC) - 8 and one was arrested in Bankatatwa VDC-4 on March 10.²⁰ The persons are aged 15, 16, 16, 16, 19, and 26. They were arrested without a warrant and were reportedly subjected to torture under the command of police inspector Mr. Surya K.C. They were initially accused of being involved in a small shop theft, but were arbitrarily charged with stealing a vehicle one month earlier from the Nepalgunj-Surkhet Road, Banke district. The police tortured them to extract forced confessions during which time they had pistols aimed at them and were threatened with death. They were detained by the police until April 6 when they were transferred to Banke District Jail at the court's order for further judicial inquiry. No investigations into the allegations of torture have been launched.

In another case at the Banke District Police Office, 8 young persons, including 6 minors, were arbitrarily arrested on 4 May 2007 in connection with a robbery, and then subjected to torture. The victims' right to receive a medical check-up was denied during their prolonged detention. The denial of access to doctors and prolonged detentions are often intended to conceal physical evidence of torture.²¹ All of them were released on May 23, 2007 on the condition that they present themselves in court when required.

Complainants being silenced

When persons that have been tortured try to file complaints against the police, rather than receiving redress and seeing justice done, they may instead face further abuses by the

same perpetrators, as they remain free and above the law. The situation of 20-year-old Mr. Puradi Prasad Pandey of Kalikot district is a case in point.²²

The victim was arrested three times by members of Kalikot District Police Office (DPO), on suspicion of having murdered his neighbour in December 2006. He was initially arrested on December 16, 2006 and tortured before being released the next day. He was re-arrested on December 22 and tortured, including being suspended upside down from two iron pipes held between two trees and beaten until he lost consciousness, before being released. He was again interrogated and tortured on December 31 and was released on January 3, 2007. Several others, including Narendra Pandey, Ranga Raj Pandey, Tularaj Pandey, Devi Pandey, Dhanraj Pandey, Nanda Pandey, Saur Pandey and Mahendra Pandey, were reportedly also arrested and tortured by the police as part of this investigation. It is clear concerning this case that the police, perhaps acting on a lead, simply arrested everyone with the same last name and tortured them until they had a confession.

The victim has been receiving death threats in order to force him to withdraw the case he filed against the three allegedly responsible police officers - Sub Inspector Mr. Jagat Bahadur Rawal, Police Inspector Man Bahadur Chaudhary and Assistance Sub Inspector Kamal G.C. - under the Torture Compensation Act. The day after a district court summons on February 25, 2007, Assistance Sub Inspector of Police (ASI) Kamal G.C. threatened Mr. Pandey to withdraw the case or face the consequences. Police Sub Inspector Jagat Bahadur Rawal and Police Inspector Man Bahadur Chaudhary also reportedly repeated threats.

In a strange turn of events, on February 27, 2007, four Maoists came to the house of the victim and also threatened him to get him to withdraw the case. Maoist Bhanu Prasad Pandey, who has the same last name as the victim, reportedly told him: 'You have to withdraw the case against the police if not you will lose your life'. It appears that the murder was actually committed by Maoists and that the police did nothing to investigate this effectively, but instead arbitrarily arrested Mr. Puradi Prasad Pandey and tortured him into making a forced confession. Finally, he withdrew his case. From this case we can also see how impunity is serving to protect anyone who commits human rights abuses, whether a member of the police, army or Maoists.

Threats of reprisals are also used to silence human rights defenders who are seeking to shed light on the many violations of rights in Nepal's recent history. Human rights defender Mr. Jitman Basnet of Solukhumbu District, Nepal, was threatened on May 21, 2007. He has previously released a book on his experiences as a disappeared person who survived.²³ Mr. Basnet was arrested on February 4, 2004 by plain-clothed army personnel from the Bhairabnath Army Battalion, Kathmandu, and then arbitrarily detained incommunicado for 258 days, during which time he was tortured. Mr. Basnet published a book entitled '258

Dark Days' in March 2007, with the help of Advocacy Forum Nepal and the AHRC, which tells of his and other detainees' bitter experiences during his prolonged custody in Bhairabnath Battalion's facilities. On May 21, an unidentified man called Mr. Basnet by phone and threatened him, saying: "you are planning to be hero publishing a book and registering cases in court but you will have to bear the results of that soon...so, think more before doing these activities."

Mr. Basnet has been working in favour of conflict victims for several years. He lodged a writ petition of mandamus before the Supreme Court in September, 2006, demanding that a High Level Committee be formed to investigate the human rights violations that took place during Nepal's more than a decade-long conflict as well as the 49 cases of disappearances that the Office of High Commissioner for Human Rights-Nepal (OHCHR-Nepal) submitted to the government in May 2005 for further investigations and prosecution. Mr. Basnet has also lodged a contempt of court writ petition against King Gyanendra and some army officials for supplying false information to the Supreme Court. In cases of disappearances the security forces would in general falsely deny having arrested and detained persons in written replies to Supreme Court habeas corpus writs. He continued to receive threats in August and September and was finally forced to flee to India to protect himself.

Torture on request

Several cases have also revealed that the rich and powerful can make use of the authorities, notably the police, to do their bidding, including by torturing these persons enemies. In one such case, teacher Siya Ram Gachaedar was arrested in Kala Banjar Chowk, Banigama VDC-6, Morang district, by police sub inspector (SI) Jiwan Bogati and members of his team.²⁴ As he was loaded into a police van the victim noted that his school principal, Kagat Lal Chaudhary, with whom he had disagreements, was also there. The police took the victim to the Haraicha APO, where they allegedly started beating and torturing him.

It is suspected that Kagat Lal may be responsible for arranging Siya Ram's arrest, as Siya Ram and other persons had protested against the principal's actions during the recruitment of a teacher on May 31, 2007, during which Siya Ram also had a dispute with SI Bogati. While he was being transported, Siya Ram was threatened with torture and death by SI Bogati, who said: 'we are the persons who fought with the Maoists and I can shoot you dead'. He also told his colleagues: 'we have to hang him to death from the Khorsane Bridge' and when he was told by the driver that they had already passed the bridge, he is reported to have said that: 'he must be killed by using electric shocks.' When they arrived at the police station, he was severely tortured. He later had to pay for all medical expenses himself, having been released later on the day of his arrest.

On August 25, the DPO in Morang called a meeting that Siya Ram, SI Bogati and some locals attended, during which SI Bogati apologized to Siya Ram for his wrongdoings. The DPO gave assurances that departmental action would be taken against SI Bogati. He is reportedly no longer attached to the APO Haraicha following the incident. According to the Nepal Police Human Rights Cell (HR Cell), SI Jivan Kumar Bogati has been reprimanded and four other constables have received formal written warning letters. Given the severity of the beatings and the use of torture in this case, this punishment is derisory and in no way complies with Nepal's obligations under the United Nations Convention against Torture. It is surprising to find that the HR-Cell can consider reprimands sufficient punishment concerning torture. This failure to punish the perpetrators of torture points to the pervasive climate of impunity and the critical need for a law criminalizing torture in the country, without which torture will continue to be perpetrated endemically without being punished.

3.3 Extra-judicial killings continue despite official end of conflict

The problem of extra-judicial killings has continued in Nepal despite the official end of the conflict that began with the signing of the CPA. The problems of torture, forced disappearance and extra-judicial killings are often related – a person may be disappeared, tortured while being detained in an unknown location and then killed, either during torture or in order to conceal the disappearance and torture to which the person was subjected, ensuring that that person can no longer complain or identify the perpetrators.

According to the figures quoted from local NGO INSEC at the beginning of this report, “234 persons were killed since 21 November last year of which 28 persons were killed by the government, 23 persons by Maoists and YCL, 18 persons by JTMM-Goit, 27 persons by JTMM-Jwala and the rest were killed by armed groups in Terai and unknown groups.” The problem clearly remains a significant concern, notably as the perpetrators of these killings typically enjoy total impunity for their actions. Even when armed groups kill persons, the police and other mechanisms of the rule of law have proven incapable of investigating and prosecuting the violators successfully, as political interferences by political or other groups that support or have an interest in the activities of the armed groups, renders them ineffective. Political groups allied with criminal armed groups are creating an environment of increasing lawlessness throughout the country, notably in the Terai region.

Killings also continue to be perpetrated by the armed forces with impunity. An example of this is the case of 12-year old girl Kamala Shah by a member of the Nepalese army on June 23, 2007.²⁵

According to an eyewitness, Mr. Krishna Prasad Acharya, Kamala was washing her hands and face at a tap after having eaten, at around 9:45 am, when she was shot by Mr. Bhimsen Thapa of the Bajradal Battalion, Magdi district, for no apparent reason. Kamala was hit in the lower left cheek by the bullet, which exited from her right ear.

Members of the army initially failed to come to her assistance while she was lying dying. Around half an hour later, army personnel finally took her into the military barracks, but blocked any of the villagers, including her family members, from entering. According to the battalion's Colonel Navajeevan Mahara, Kamala died on the way to Kathmandu while she was being transported there by helicopter. A post-mortem examination was carried out at TU Teaching Hospital in Maharajgunj, Kathmandu on June 26, 2006. Following the incident, Kamala's father, Bharat Jung Shah, tried to register a First Information Report (FIR) at the Metropolitan Police Circle, Balaju, Kathmandu, however the police authorities refused to register the FIR, stating that the incident did not take place in their locality. They wrote a letter to the Magdi District Police Office (DPO) ordering them to register the case.

An FIR was then registered at the District Police in Magdi. The Human Rights Directorate (HRD) of Nepal Army in Kathmandu, in its response stated that soldier Bhim Bahadur Thapa was suspended and handed over to the DPO, Magdi district, on 19 July, 2007, in line with the New Military Act-2063. Bhim Bahadur is currently being detained at the District Jail of Magdi pending trial on the charge of murder. It is hoped that contrary to most cases, the military man will be held accountable in this case.

Another case that shows the extent to which the perpetrators of killings committed during the country's recent conflict are continuing to enjoy impunity, concerns the killing in September 2002 of Mr. Dal Bahadur Thapa and his wife Parbati Thapa.²⁶ The District Police Office (DPO) and the District Administration Office (DAO) in Banke district initially refused to register a First Information Report (FIR) lodged in April 2007 concerning these extra-judicial killings in September 2002 of Mr. Dal Bahadur Thapa and his wife Parbati Thapa. Mr. Dal Bahadur Thapa's 60-year-old mother, Ms. Bhumisara Thapa, has lodged an appeal before the Appellate Court, Nepalgunj. The two victims were allegedly shot dead by members of the then-Royal Nepal Army's Bhim Kali Battalion, Chisapani, Banke district, on September 10, 2002, at around 8.30 pm, while they were sleeping at home. The main reason for the police's failure to register the FIR is because it is against the army, to which the police remain subservient, making the army above the law in reality. The DPO refused to register the case on April 25, 2007.

On April 29, 2007, the DAO's Chief District Officer, Mr. Narendra Raj Sharma, refused to register the FIR, stating that: *"The FIR should be registered at the DPO. You need to prove that the police denied registering it but you don't have any such evidence. There are options to appeal against the DPO within the police administration, try that first before visiting here."* This is a typical hurdle used to render the act of registering FIR frustrating, which leads to many such attempts being abandoned after several attempts have proven fruitless.

Ms. Bhumisara was left with no option but to lodge a petition of Mandamus before the Appellate Court, Nepalgunj, Banke district on April 30, 2007, asking for the court to issue an order demanding that the police observe their legal obligations arising under the State Cases Act 1992 and register the FIR. The FIR concerning the extra-judicial killings in question was against army Major Ajit Kumar Thapa and Captain Mr. Ramesh Swar of the Bhim Kali Battalion, Chisapani, Banke district, who are allegedly responsible for the killings. This is not an isolated case; the refusal to register FIRs is a major barrier to justice in many cases in Nepal and is a key factor that enables impunity for perpetrators. The case was finally registered at the Banke District Police Office on the order of the Banke Appeal Court. On August 7, 2007, a 4-member police team under the command of police inspector Mr. Janak Bahadur Shahi was formed. The team wrote a letter to the concerned barracks, however the military hasn't replied yet.

3.4 Forced disappearances remain unresolved

Despite promises to reveal the whereabouts of hundreds of disappeared persons by the signatories to the CPA in November 2006, the fates of these persons remain unknown and nothing credible or effective is being done to address this.

For example, the Supreme Court directed a committee to investigate the cases of disappearances of four individuals and later a Supreme Court Divisional Bench directed investigations into the alleged disappearance of 49 persons from Bahairabnath Barrack.²⁷ In the process of investigation the committee found records and other evidence relating to a much larger number of disappearances sealed at the district police office of Katmandu. After this discovery a Supreme Court Divisional Bench decided to suspend the investigations relating to the cases at Bahairabnath Barrack. The committee has however, stated that they need more time to investigate the Bahairabnath Barrack cases and that irreparable damage may be done to the discovered documents and other evidence if these are handed back to the police. The Supreme Court has not yet made any order to ensure the protection of the large amount of documents that have been discovered by the committee who was initially commissioned by the Supreme Court itself.

It appears that there is a clear lack of direction from the authorities including the Supreme Court on the investigations into gross abuses of human rights in the past. Lawyers and activists say that overwhelming evidence exists to point out gross abuses of human rights such as disappearances, extra-judicial killings and torture and that there is a possibility of the destruction of such evidence with the view to protecting the perpetrators. The lack of political will to deal with this issue is one of the major causes for the doubts and misgivings about the direction that the country is taking at present.

A flagrant case of ineffective action being taken concerning forced disappearance concerns that of Maina Sunawar.²⁸ In its 2006 annual report on the human rights situations in Asia, the AHRC devoted a section of its Nepal report to the infamous case of Maina, a 15-year-old girl who was allegedly disappeared, tortured, killed and buried by members of the army. For a detailed description of this case please see AHRC's annual report for 2006 (<http://material.ahrchk.net/hrreport/2006/>). Her remains were exhumed on the 23rd March, 2007 at the compound of the Birendra Peace Operation Training Centre, Panchkal Kavre, a well secured military compound. She was arrested in February 2004 by the army and brought to the Birendra Peace Operation Training Centre where it is alleged that she was tortured to death. Her family and human rights activists complained about the arrest to the army and other authorities but they all denied her arrest. Later they admitted the arrest but denied her detention at the Birendra compound. Much later the army admitted the detention but denied the killing. But on the 23rd March, 2007 the remains of what is thought to be her body were discovered at a place which an informer identified as the site where she had been buried. National forensic experts exhumed the remains with technical support from the Office of the High Commissioner for Human Rights (OHCHR). The exhumation of the body is the first step towards a possible prosecution in what could and should be a landmark case. However, these remains have been sent to forensic laboratories outside the country, in India, for DNA testing and other examinations, but the results of these tests have been held up.

On September 18, 2007, the Supreme Court (Judges Min Bahadur Rayamajhi and Ram Prasad Shrestha) made a landmark decision in the case of Maina Sunawar. The court ordered the Kavre District Police Office and the District Public Prosecutor's Office to complete all their investigations within three months. The court also ordered the army to provide a copy of the decision made by the Army Board of Inquiry, under the provision of Right to Information Act 2007. This, for the first time, established that the people have the right to access such a document. However, the alleged perpetrators remain free to date.

3.5 Unpunished violations by the Maoists ongoing

The Maoists have also continued to commit killings during 2007, despite their pledges under the CPA, and justice regarding such acts remains as illusive as it was during the conflict. Even attempts to register FIRs concerning such killings are being blocked by the authorities, who are therefore acting in collusion with their erstwhile enemies to guarantee impunity across the board. The attempts to seek redress made by Purnamaya Lama, whose husband was abducted by Maoists on April 29, 2005 and later killed, is testimony to this problem.²⁹

On 28 June 2007, Purnamaya went to the District Police Office (DPO), Kavrepalanchowk district, to register a First Information Report (FIR) on behalf of her deceased husband, but this was refused. On 5 July 2007, the FIR registration was again refused. Purnamaya then attempted to register the FIR with the District Administration Office. Finally, on July 8, 2007, the FIR was endorsed but a letter given by the District Administration Office reads: “...*the details of the incident do not have any proof and such cases can be investigated under the Article 33 (s) of the Interim Constitution of Nepal 2007.*” Article 33(s) states that the State shall have the responsibility “to constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violations of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in society.” However, as yet, no such high-level Truth and Reconciliation Commission has been set up to investigate such cases.

This means that the police have been shirking their responsibility to carry out investigations and claim that such investigations should be handled by others. This is typical of the inertia and new obstacles that have arisen during 2007, as all parties use perceived political uncertainty to attempt to explain the lack of positive steps concerning the investigation and prosecution of human rights violations. No Truth and Reconciliation Commission can replace the functions of the police, and the lack of such a body should not be accepted as an excuse capable of explaining the failure to investigate by the police.

There is nothing in the Interim Constitution of Nepal 2007 to suggest that the right to seek redress from a Truth and Reconciliation Commission negates the right to call on police intervention into a crime. Purnamaya’s husband’s case concerned abduction and murder, which is a crime in the general law of Nepal, and hence is under the responsibility of the police.

The Maoists continue to use torture, threats and extortion as the following case shows.³⁰ 21-year-old Bir Bahadur (name changed to safeguard the victim’s identity) from Baglung district, joined the Peoples’ Liberation Army (PLA) on June 1, 2005 but left the PLA on November 26, 2006 along with a female cadre. Despite suffering from ill-health that would make it impossible for him to serve, since this time he has been threatened with death and tortured in order to force him to return. In the evening of March 30, 2007, he was captured and taken to local Maoists central leader Dinanath Sharma’s home. His hands were tied behind his back and he was severely beaten for nearly one and half and hours on the chest, back and legs, until he lost consciousness. When he regained his senses, he was again brutally assaulted. He was accused of deserting the Maoists in Nawalparasi district. He was threatened with death if he spoke of this beating.

Many persons continue to live in fear of the Maoists, and the reports that they may be in the process of re-establishing their court system will add to these worries, as it is a sign

that the Maoists are again planning to subject persons to their rule and systems of injustice.

As was the case during the conflict, the Maoists continued to abduct and disappear persons in 2007 and are failing to take credible action against persons alleged to have committed such serious rights abuses. As INSEC's statistics for 2007 show, "Maoists and YCL were involved in the abduction of 495 persons while JTMM-Jwala abducted 107 persons and JTMM-Goit abducted 71 persons." Mr. Birendra Shah, 34, a local journalist from the Bara district and correspondent of Nepal FM, Avenues Television and Dristi weekly, was abducted by Maoists in the evening of October 5, 2007 from Pipara Bazaar, in Kalaiya, the district headquarters of Bara district in central Nepal.³¹ It has been alleged that Mr. Birendra Shah was abducted by local Maoists named Kundan Faujdar, Ram Iekwal Sahani and Lal Bahadur Chaudhary along with several other unidentified Maoists. It is thought that Birendra Shah was abducted for writing and reporting news related to the Maoists. Mr. Ram Dev Das, the editor of the magazine Terai Khabar Patrika, was also kidnapped at the same time as Birendra Shah, but was released a few hours later after being beaten up. He stated that Birendra Shah was also beaten up severely and received death threats.

The Maoist Bara district authorities have reportedly refused to take responsibility for the abductions. They have, however, claimed that two of those thought to be responsible, Kundan Faujdar and Lal Bahadur Chaudhary, had been dismissed from the party before the incident took place, but have made no comment about Mr. Ram Lekwal Sahani.

According to article 7.1.4 of the Comprehensive Peace Agreement between the government of Nepal and the Maoists, "both sides would not be involved in the acts of torture; kidnapping; and forcing the civilians in any work and take necessary action to discourage such acts". According to article 5.2.6 of the agreement, "both sides pledge to abandon all types of war, attack, counter-attack, violence and counter-violence in the country with a commitment to ensure loktantra, peace and forward-looking change in the Nepali society."

As stated above, members of the Young Communist League (YCL), which is affiliated to the Maoists, have been particularly brutal in 2007, committing a large number of human rights violations. The proliferation of splinter or new groups that are committing widespread violations has become one of the most serious threats to human rights and the country's future stability during the year. The situation has become increasingly unruly, to the point that it is now feared that internal armed conflict is again a very real and imminent risk.

In one case, which shows the ongoing climate of lawlessness and retribution in the country, at around 11 am on July 5, 2007, Mr. Prakash Thakuri, 43, a resident of Mahendranagar Municipality ward No. 1 in the Kanchanpur District was abducted by members of the Maoist-affiliated YCL.³² According to Mrs. Janaki Thakuri, Mr. Thakuri's wife, approximately 10 members of YCL entered their home, asking for the whereabouts of her husband. The

YCL members eventually found him in Shiv Raj Rana's house in Suda Village Development Committee ward No. 1 in the same district. They allegedly tied his hands behind his back, slapped him and abducted him using a motorbike.

Mr. Thakuri was a supporter of the King of Nepal and was very active following the so-called the Royal Coup on February 1, 2005. He is also a central committee member of the Federation of Nepalese Journalists (FNJ). Maoist leaders have denied the abduction. On 8 July, his family informed the District Police Office in the Kanchanpur District about the incident, and the police arrested YCL member Mr. Pom Lal Sharma for investigation later on the same day. Mr. Sharma is still under investigation. However, Mrs. Janaki Thakuri, has been denied any information and Mr. Thakuri's whereabouts remain unknown. In response to the AHRC's intervention in this case, the Human Rights Cell of the Nepal Police on July 16, 2007 responded that the YCL had abducted the victim. The police have since taken no action in this case.

In another case, which again shows acts of revenge between groups of foes during the conflict, on July 8, 2007, Mr. Ram Prasad Rana, a resident of Daiji Village Development Committee-6, Jadepani, Kanchanpur District, was abducted by members of the YCL.³³ He was allegedly taken to the YCL office located in Sisiya, Kanchanpur, where his hands and legs were tied and he was severely beaten with sticks from 10 am to 3 pm on July 9, 2007. He was rescued by a team of police from the District Police Office in Kanchanpur at around 11 am on July 10, 2007. Mr. Ram Prasad Rana used to work for the Royal Nepal Army before moving to India in 2004, where he worked at a private production company. Mr. Uddhat Singh Bista, a Kanchanpur local and core member of the YCL also worked in the area. Mr. Bista allegedly threatened to kill Mr. Ram Prasad, who later returned Nepal in 2005. Mr. Bista made a complaint to the YCL against Mr. Ram Prasad, as a result of which Mr. Laptan Rana and other members of YCL tortured him. No investigation has been conducted into this case at present and the YCL has threatened to beat Mr. Ram Prasad's younger brother, who is currently working for the Nepal Army. Nobody has been arrested and no actions have been taken to investigate those thought to be responsible for the violations in this case.

In Nepal, a myriad of armed groups engaged in political vengeance and organised crime are effectively continuing to settle scores related to the conflict. This is a direct result of the lack of effective action by all parties to address past grievances, notably the plethora of grave human rights abuses that took place in the country. This absence of justice has led to many groups taking the law into their own hands and this risks spiralling further out of control unless credible action to improve the rule of law is taken without delay.

3.6 Human Rights NGOs facing obstacles

It must be said that the working environment for human rights defenders has improved in 2007, as compared with the situations of immense fear and possible attacks, closures and arrests that were faced in previous years, notably during the crack-down accompanying the Royal Coup in February 2005 until the King was forced to back down in April 2006. However, NGOs continue to face real threats from various armed groups if they attempt to work on violations being committed by them.

The blocking of NGOs' access to persons in detention and the lack of cooperation by the authorities has also ensured that advances to the human rights situation in the country have not been easy to secure.

Advocacy Forum, one of the leading human rights organizations in Nepal providing legal aid services to detainees, has had its work obstructed and on several occasions been refused access to prisoners. For example, the organisation was accused of meddling with police matters for demanding that their clients be granted access to food at the Kanchanpur detention centre, and their access to these clients was blocked from February 7, 2007.³⁴ Advocacy Forum had been investigating an alleged murder/rape case involving state security forces and believes that they were denied access to prisoners as punishment for pursuing the case.

Advocacy Forum had been providing legal assistance to two victim's family who were killed by security forces on 17 August 2004. Early that morning, security forces allegedly cordoned off the house of two brothers named Nar Bahadur Budamagar (aged 40) and Ratan Bahadur Budamagar (aged 32). It is alleged that the officers beat them and when the two men's wives came to their aid, one was kicked in the chest and pushed inside the house, while the other was taken to a nearby cowshed and raped. The two brothers were then allegedly marched around the village for three hours and finally shot dead in the nearby jungle at Paltekhani of Satya Chautari at around 2:30 p.m. The father and youngest brother of the deceased were also tortured, and the security forces looted 90,000 rupees (USD 1,335) from the mother's house. No investigation was being conducted into the case, so the family members requested the help of Advocacy Forum to have the case registered and investigated.

On February 22, Advocacy Forum's lawyers went to the Appellate Court asking for a court order demanding that the police observe their legal obligations. At the time, Advocacy Forum lawyers were told by several sources that 'you have to be careful' implying that the lawyers security was at risk for their support for the victims and for challenging the security forces. On February 25, the Appellate Court issued a show cause order to the District Police Office and District Administration Office of Kanchanpur regarding the case, which led to access finally being granted to Advocacy Forum again on April 11,

2007.³⁵ While pursuing similar activities elsewhere, Advocacy Forum has again encountered similar obstacles. For example the organisation has been refused access to the Banke District Police Office (DPO) detention centre subsequent to May 29, 2007, soon after the organisation filed an application in court seeking a medical check-up for torture victim Mr. Bablu Rai.³⁶ Access was allowed again following June 10 as the result of campaigns and pressure including an intervention by the AHRC.



Too little, too late. The monarchy attempts to placate the people before being ousted.

4. Conclusions and recommendations

The regrettable conclusion that can be made concerning 2007 is that the many promises that seemed available at the beginning of the year have not led to concrete improvements in terms of the development of a political system and institutions of the rule of law that are better able to promote and respect human rights, prevent violations and combat impunity. Instead, political gamesmanship and a lack of progressive leadership has meant that human rights have been sacrificed while political developments have not been seen. Impunity continues, both for old and new violations by all actors in the country. The number of new armed groups is alarming, as is the degradation of the security situation and the upsurge of violent crime.

Many believe that Nepal may be sliding back towards an armed conflict. The AHRC sincerely hopes that this can be avoided, and reiterates that the only way that this can happen is if human rights problems are addressed in a serious way. While impunity remains, there will be no deterrent against further abuses, and political uncertainty will result from this. Many of the recommendations made in last year's annual report remain salient today.

The AHRC once again urges all political parties to:

- Refrain from supporting or forming any armed groups and dismantle those currently in place in the country;
- Ensure that all aspects of the Comprehensive Peace Accord are implemented without hindrance and in a timely manner;

- In particular, the rights of minorities, such as Dalits and women, must be guaranteed, both in terms of protection from abuse and concerning participation in the ongoing political developments;
- Publicly condemn the practices of torture and forced disappearances and ensure that such practices are immediately halted and that the whereabouts of all disappeared persons are identified without delay;
- Adopt legislation criminalizing torture and forced disappearances, and amend the Torture Compensation Act to bring it in line with international laws and standards; Ensure that weapons remain under lock and key and avoid any return to armed conflict;
- Ensure that the Maoist People's Courts are not re-established;
- Ensure the swift holding of free and fair elections to a Constituent Assembly; Create independent, competent bodies for investigating all allegations of arbitrary arrest, illegal and/or incommunicado detention, torture, custodial sexual violence or death, forced disappearance and summary or extra-judicial killings, and ensure that all sides cooperate fully with such investigations. These investigations should not be limited to recent events, but should cover all allegations spanning back to the beginning of the armed conflict over a decade ago;
- Ensure that all findings by all investigations are immediately made public, and that all necessary actions are taken against persons found to be responsible for abuses, regardless of their rank or status;
- Take legislative and administrative measures in order to ensure that witness protection is provided to all persons involved in the investigation and prosecution of human rights cases;
- Issue orders to the police, armed forces and Maoists to comply immediately and without exception to court orders;
- Ensure that all detainees have access to family members, legal representation, and access to medical examinations (in the latter case, particularly at the time of arrest and release);
- Ensure that accessible and accurate lists are kept of all arrests and persons in detention;
- Ensure that all allegations of violations of civilians' human rights committed by the armed forces and Maoists are tried by independent, impartial and competent civilian courts;
- Ensure that punishments for acts of torture and disappearance are commensurate with the gravity of the offence and in line with international standards; Ensure that adequate compensation is awarded to victims or their families, and in a timely manner;
- Ensure that all recommendations made by UN Treaty Monitoring bodies, Special Procedures and the OHCHR's field office in the country are fully implemented, and that access is guaranteed to all international and regional human rights institutions and organisations.

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- 1 AHRC Annual Report, 2006, <http://material.ahrchk.net/hrreport/2006/>
 - 2 People originally from the Terai region of Nepal – the low-lying plain in the southern part of the country.
 - 3 People originally from the mountainous areas in northern Nepal.
 - 4 See statement at: <http://www.ahrchk.net/statements/mainfile.php/2007statements/972/>
 - 5 See statement at: <http://www.ahrchk.net/statements/mainfile.php/2007statements/984/>
 - 6 AHRC 2006 Annual Report, p. 164: <http://material.ahrchk.net/hrreport/2006/AHRC2006HRReport.pdf>
 - 7 Urgent Appeal - Rape of a mother and daughter: <http://www.ahrchk.net/ua/mainfile.php/2006/2134/>
 - 8 Urgent Appeal - Rape of a 12-year-old girl: <http://www.ahrchk.net/ua/mainfile.php/2006/2110/>
 - 9 Urgent Appeal – mentally deficient woman raped <http://www.ahrchk.net/ua/mainfile.php/2007/2154/>
 - 10 Urgent Appeal – mentally ill girl repeatedly raped: <http://www.ahrchk.net/ua/mainfile.php/2007/2439/>
 - 11 Urgent Appeal – 15-year-old girl raped: <http://www.ahrchk.net/ua/mainfile.php/2007/2534/>
 - 12 Urgent Appeal – Woman beaten and molested by the police: <http://www.ahrchk.net/ua/mainfile.php/2007/2414/>
 - 13 Urgent Appeal Update – Complainant receives threats: <http://www.ahrchk.net/ua/mainfile.php/2007/2472/>
 - 14 Urgent Appeal – brutality of torture: <http://www.ahrchk.net/ua/mainfile.php/2007/2607/>
 - 15 Urgent Appeal – 13 men tortured during police investigation: <http://www.ahrchk.net/ua/mainfile.php/2007/2426/>
 - 16 Urgent Appeal – two persons tortured in theft investigations: <http://www.ahrchk.net/ua/mainfile.php/2007/2293/>
 - 17 Urgent Appeal - Morang's serial torturers, Case 1: <http://www.ahrchk.net/ua/mainfile.php/2007/2537/>
 - 18 Urgent Appeal - Morang's serial torturers, Cases 2 and 3: <http://www.ahrchk.net/ua/mainfile.php/2007/2627/>
 - 19 Urgent Appeal - Morang's serial torturers, Case 4: <http://www.ahrchk.net/ua/mainfile.php/2007/2629/>
 - 20 Urgent Appeal – Children tortured in petty theft case: <http://www.ahrchk.net/ua/mainfile.php/2007/2336/>

- 21 Urgent Appeal – children tortured and denied medical assistance: <http://www.ahrchk.net/ua/mainfile.php/2007/2416/>
- 22 Urgent Appeal – torture complainant threatened: <http://www.ahrchk.net/ua/mainfile.php/2007/2281/>
- 23 Urgent Appeal – threats to human rights defender: <http://www.ahrchk.net/ua/mainfile.php/2007/2408/>
- 24 Urgent Appeal – teacher tortured at school principal’s request: <http://www.ahrchk.net/ua/mainfile.php/2007/2578/>
- 25 Urgent Appeal – killing of 12-year-old girl by the army: <http://www.ahrchk.net/ua/mainfile.php/2007/2490/>
- 26 Urgent Appeal – impunity accompanies killing of couple by the army: <http://www.ahrchk.net/ua/mainfile.php/2007/2365/>
- 27 AHRC Statement - action plan needed to end impunity:
<http://www.ahrchk.net/statements/mainfile.php/2007statements/984/>
- 28 AHRC Statement – case of Maina Sunawar: <http://www.ahrchk.net/statements/mainfile.php/2007statements/984/>
- 29 Urgent Appeal – authorities collude with Maoists to guarantee impunity: <http://www.ahrchk.net/ua/mainfile.php/2007/2487/>
- 30 Urgent Appeal – Maoists torture, threaten and extort: <http://www.ahrchk.net/ua/mainfile.php/2007/2348/>
- 31 Urgent Appeal – Maoists disappear journalist: <http://www.ahrchk.net/ua/mainfile.php/2007/2617/>
- 32 Urgent Appeal – YCL members commit torture and disappearances: <http://www.ahrchk.net/ua/mainfile.php/2007/2484/>
- 33 Urgent Appeal – YCL members commit torture and disappearances: <http://www.ahrchk.net/ua/mainfile.php/2007/2484/>
- 34 Urgent Appeal – NGO access blocked: <http://www.ahrchk.net/ua/mainfile.php/2007/2248/>
- 35 Urgent Appeal – Access granted again: <http://www.ahrchk.net/ua/mainfile.php/2007/2329/>
- 36 Urgent Appeal – Access denied again: <http://www.ahrchk.net/ua/mainfile.php/2007/2418/>

PAKISTAN

A year of turmoil and struggle for the independence of the judiciary

The year 2007 was marked by constitutional and judicial crises; the President as the military leader had used all state power against the judiciary, the Constitution of the country, the legal fraternity and the media. Civil society was the most affected section in the country. Every effort was made to undermine the rule of law.

To promote his autocratic and militaristic actions, General Musharraf, being the chief of staff, has imposed a state of emergency, abrogated the Constitution—the second instance during his tenure—suspended all fundamental rights and issued several ordinances including amendments to the Army Act of 1952, under which any civilian could be court-martialled and military courts constituted as and when needed.

Under the amended law, military courts could hear charges ranging from treason to ‘giving statements conducive to public mischief’. These measures were given retrospective effect by the newly constituted Supreme Court, comprised of those justices who had submitted to the oath of loyalty under General Musharraf’s tailor-made Provisional Constitutional Order (PCO). These justices have not only compromised their personal integrity but the independence of the judiciary as well.

Strict restrictions have been imposed on the media through amendments to the Pakistan Electronic Media Regulatory Authority (PEMRA). Accordingly the print media has been subjected to pre-censorship and the electronic media has been forbidden to discuss the emergency rule. Many media houses have been attacked and their equipment confiscated. More than 1000 media personnel have been arrested and beaten by the police during demonstrations calling for press freedom.

The exercise of the rule of emergency had been aimed at the judiciary and the legal fraternity particularly against the Chief Justice Iftekhar Chaudhry. It was reported that under the state of emergency about 46 judges were under house arrest, but according to the Chief Justice, more than 60 judges of the superior courts have been detained. The children of judges particularly those of Chief Justice Chaudhry and other Supreme Court judges, have also been prevented from attending their schools and colleges.

Besides, under the state of emergency, more than 3500 lawyers have been arrested and many lawyers including retired judges and office bearers of Bar associations have been tortured in custody. Some judges have been attacked by the police and prevented from entering the courts while their cars have been damaged. Chief Justice Chaudhry has also been beaten and manhandled by the police who pulled him by his hair when he was being produced before the Supreme Judicial Council.

The judiciary, particularly the higher judiciary was targeted mainly for taking *sou moto* action on cases of corruption by the authorities, gross human rights violations, and disappearances after arrest by state intelligence agencies and land grabbing by the Army, ministers and even the President. After a long wait, the courts were finally seen to meet the aspirations of the people and providing them with justice. But this proved too much for the military leadership government.

About 8000 people have been arrested after the imposition of the state of emergency, among them members of human rights organizations, political parties and trade unions. Though some were released later, more than 4000 people were still in jail. For the first time in the history of Pakistan, riot police and plainclothes intelligence agents stormed into the apex courthouses and brutalized thousands of lawyers, students, and citizens whose only crime had been to exercise their democratic rights. Hundreds still remain behind bars on fraudulent, non-bailable charges of 'terrorism'.

The question of disappearances was far from being resolved. After observing that those who had disappeared after arrest should be in military custody, the Chief Justice had ordered higher military officials to be present in court and release the detainees. Even though more than 110 persons were released from army detention through the intervention of the Supreme Court, they had not been formally produced in court; instead they were dumped in a precarious condition on roadsides.

Widespread torture has also been a phenomenon in the country. Hundreds of people have been reported tortured in custody, including lawyers. In one of the most shocking cases to be reported in modern times, a villager had his penis severed under police torture and a federal minister was seen protecting the alleged perpetrators from being arrested.

Women and minorities continue to be heavily discriminated by state policies. Honour killings and the holding of Jirga courts have not been abolished and cases of honour killings have increased. Minorities continue to be threatened with blasphemy laws and several young men and women have been arrested and punished under these laws without evidence.

1. Ailing justice system

The judicial system in Pakistan has always been weak and failed to deliver justice to the people. This weakness can be attributed to the continuous interference by successive governments, particularly military governments. The Pakistani judiciary has traditionally always supported those in power, even if they came to power by ousting elected, civilian governments.

Since 1954, when the then-prime minister was thrown out of power and the chief justice at the time, Mr. Munir, sacrificed the constitutional law for the sake of expediency, the judiciary has been forced into the role of being the blind defender of the armed forces rather than the arbiter of justice. However illegal or unconstitutional its actions may be, under the doctrine of necessity, the army could do no wrong. The doctrine of necessity, which came into being at the time to protect the new powerbrokers, has since been used repeatedly to overthrow elected governments and keep the Constitution in abeyance. By subordinating itself to the military, the judiciary has become absolutely divorced from any notion of independence.

Pakistan's armed forces have used the higher judiciary to do their bidding, and whenever members of the judiciary have attempted to assert themselves, they have been punished; by being transferred to Islamic courts, by references being sent to the Supreme Judicial Council (SJC) to have them punished, by being threatened and even having their services terminated. The higher judiciary has never been able to function independently and to deliver justice to people in the country's history. For instance, there were currently over 20,000 cases pending before the Supreme Court alone. There were more than 3,500 other courts in the country, which in total have over one million cases pending before them. Huge delays and inefficiency further degrade the judiciary's image and its relevance for Pakistan's citizens. Cases pending before the courts, particularly the lower courts, take at least 5 to 6 years to be decided, and if a case goes into the appeal process, it may take between 15 and 20 to decide, especially if it goes all the way to the highest courts.

The executive and judiciary have been separated in theory, for example the 2002 ordinance concerning the separation of judiciary from the executive. However, in practice this has not been the case. Amendments have meant that magistrates have been given executive and administrative powers and duties, reducing their independence and causing further delays. In some cases, pre-trial detainees accused of minor crimes have spent far longer time in detention than the maximum sentence imposed for the crime they were accused of committing.

In addition, Pakistan has a dual judicial system: A traditional, secular system derived from the Indian Act of 1935; and an Islamic or Shariah judicial system, both of which run in

parallel to each other, which was frequently the cause of confusion and injustice. Because of the dual legal system, it has been very difficult to achieve justice, especially in an acceptable time-frame. In cases of murder, rape and other serious crimes, interference by Shariah courts was frequent. When Shariah courts make decisions relating to such cases, the judgments by secular court were often superseded, regardless of whether the verdicts were incompatible.

Appointments to the higher judiciary have been performed by the President of Pakistan. This means that, given Pakistan's political instability, the President has often been a member of the armed forces or the civil service. It was rare to find a democratically elected person occupying Pakistan's top job. The judges have been recommended by the Supreme Judicial Council, but were appointed by the President, and the candidates' identities have never been disclosed to the public. These political appointments make judges very much subject to the control of the executive, with profoundly negative repercussions on the functioning of the judiciary as a whole, especially when the military was in power.

2. Shocking violation of judicial independence



The Chief Justice being manhandled by agents of the state (Photo: Dawn)

It was in this backdrop that Iftekhar M. Chaudhry was appointed to an eight-year term as Chief Justice in June 2005. However, contrary to the norm he gradually developed a reputation for judicial independence, making rulings reportedly unpopular with General Musharraf's military junta. For instance, the suspended Chief Justice had taken some remarkable decisions in cases where the government and military had been directly involved, including irregularities in the privatization of the Pakistan Steel Mills. The Supreme

Court had taken up sensitive cases, for example, the issue of land-grabbing by the military and ruling party in Murree, a hill station near the country's capital, as well as disappearance cases. Justice Chaudhry had ordered Pakistan's intelligence agencies to disclose the whereabouts of a number of missing political activists allegedly detained illegally by security forces and also focused attention on the activities of the Army's secret agencies. Reportedly, these actions caused certain tensions and earned the displeasure of General Musharraf who began a campaign through his lawyers against the Chief Justice. Among the actions of the suspended Chief Justice that infuriated the military government the

most was the formation of a human rights cell in the Supreme Court, and the continuing issue of forced disappearances. In February 2007, Justice Chaudhry reportedly stated that General Musharraf could not legally continue as army chief beyond his present term as President if he was returned as President by parliament, instead of through a general election.

This heightening of tension between the executive and the judiciary reached a crescendo on March 9, 2007 when General Musharraf suspended the Chief Justice after accusing him of “misconduct, misuse of authority and actions prejudicial to the dignity of office of the Chief Justice of Pakistan.” In a report based on a week long field visit, the International Commission of Jurists (ICJ) referred to the suspension, which took place after the Chief Justice refused General Musharraf’s request to resign, as “virtually unprecedented in the legal annals of the world” in a country with “well-known and well-documented instances of executive interference in the independence of the judiciary and judicial subservience.”

In a 40-page petition filed before the Supreme Court of Pakistan, the Chief Justice revealed shocking details of the manner in which he was requested to resign from his post and when he refused how he was physically restrained from leaving the President’s camp office for several hours. It also detailed how a reference was fabricated and filed against him in order to prevent him from sitting as the chief judicial officer of Pakistan.

a. The Affidavit: Excerpts from an affidavit tendered by the Chief Justice on May 29, 2007 are worth reproducing as follows:

- On March 9, 2007 the deponent headed Bench No.1 of the Supreme Court as Chief Justice of Pakistan and heard several cases till about 10.30am. The Bench rose briefly and had to reassemble for the day except the deponent who left for the Army House, Rawalpindi to meet the President of Pakistan (hereinafter referred to as “respondent”)
- The deponent arrived at Army House, Rawalpindi at about 11-30am along with his staff/protocol staff. The deponent was shown to a waiting room/visitors room. After five minutes of his arrival, the Respondent, wearing his military uniform came into the room along with his MS and ADC. As soon as the respondent took his seat, a number of TV cameramen and photographers were also ushered into the room. They took several pictures and made movie footage.
- While discussing the SAARC Law Conference, SAARC Chief Justices Conference and the concluding session of the golden jubilee ceremony of the Supreme Court, the respondent said that a compliant against the deponent had been received by him (Respondent) from a judge of the Peshawar High Court. The deponent replied that it was not based on true facts as his case had been decided by a two-member bench and

that attempts were being made to maliciously involve the other members of the Bench as well. On this the Respondent said that there are a few more complaints against the deponent as well. After saying so, he directed his staff to call the other persons.

- On the direction of the Respondent, the ‘other persons’ entered the room. They included the Prime Minister, DG-MI, DG-ISI, DG-IB, COS and another official. All officials (except DG-IB and COS) were in uniform. The respondent started reading from small pieces of paper with notes on them which he had in his hand. There was no single consolidated document. The allegations which were being put to the deponent had been taken from the contents of a notorious letter written by Naeem Bukhari with absolutely no substance in them. The deponent strongly refuted these allegations as being baseless and engineered to defame him personally and the judiciary as a whole. The deponent promptly denied the veracity and credibility of these allegations as well.
- On this the respondent said that the deponent had obtained cars from the Supreme Court for his family. The allegation was vehemently denied by the deponent. The respondent went on to say that the deponent was being driven in a Mercedes, to which the deponent promptly replied ‘here is the Prime Minister, ask him, he has sent the car himself’. The PM did not reply to this answer even by gesture. Surprisingly the respondent went on to say that the deponent had interfered in the affairs of the Lahore High Court and had not accepted and taken heed of most of the recommendations of the Chief Justice of Lahore High Court.
- The respondent insisted that the deponent should resign. The respondent also said that in case of deponent’s resignation, he (the respondent) would ‘accommodate’ him (the deponent). He also said in the event of refusal to resign, the deponent will have to face the reference which could be a bigger embarrassment for the deponent. The deponent finally and more resolutely said ‘I wouldn’t resign and would face any reference since I am innocent; I have not violated any code of conduct or any law, rule or regulation; I believe that I am myself the guardian of law. I strongly believe in God who will help me’. This ignited the fury of the respondent who stood up angrily and left the room along with his MS, COS and the Prime Minister of Pakistan, saying that others would show evidence to the deponent. (This has now been admitted by the respondent in his interview given to *AAJ TV*). The meeting continued for not more than 30 minutes.
- The DG-MI, DG-ISI and DG-IB remained behind and continued to sit with the deponent. They did not show the deponent a single piece of evidence. In fact, no official except DG-ISI had some documents with him but he also did not show anything to the deponent. They, however, said that the deponent had secured a seat for his son in Bolan Medical College when the deponent was serving as a judge of Balochistan

High Court. They (except DG-IB) insisted that deponent resign while the deponent continued to assert strongly that the allegations were baseless and had been designed for a collateral purpose.

- During the subsequent hours, the deponent was forced to stay in that room. Sometimes, all the persons would leave the deponent alone in that room but would not allow the deponent to leave it. It was obvious that the deponent was being watched by a close circuit camera because whenever he tried to open the door to leave, he was confronted by an officer who prevented his exit. Several times the deponent expressed the desire to leave but was told by military officials to remain.
- Once the deponent was even told that the respondent would be seeing him again. At one point, the deponent requested that at least his staff/protocol officer be called inside the room as the deponent wanted to talk to him but was told that he could not come inside. The deponent then requested that his staff/protocol officer be told to pass on the message to the deponent's family that he was at Army House, Rawalpindi and that his programme to go to Lahore had been cancelled.
- Despite several attempts to leave the room and the Army House, the deponent was made to stay there on one pretext or the other. His request to bring his car to the porch for departure was also denied. After the first meeting with the respondent which lasted for not more than 30 minutes, the deponent was kept there 'absolutely against his will' till past 5pm.
- After 5pm, DG-MI came in again and told the deponent that his car was outside to drive him 'home'. DG-MI came out of the room and once outside told the deponent, 'this is a bad day, now you are taking a separate way and you are informed that you have been "restrained to work as a judge of the Supreme Court or Chief Justice of Pakistan"'.
- When the deponent saw the car of the Chief Justice of Pakistan, he discovered that his car had been stripped of both the flag of Pakistan and the emblem flag. The staff officer of the deponent informed him that Justice Javed Iqbal had taken oath as Acting Chief Justice and it had been shown on TV. The driver also informed the deponent that he had been instructed not to take the deponent to the Supreme Court while on way to the residence of the deponent.
- While on the way, the deponent directed the driver to go to the Supreme Court but an Army official prevented the deponent's car near the sports complex from proceeding further. Meanwhile, Tariq Masood Yasin, SP, also appeared; He ordered the driver to come out of car so that he could drive the deponent and also asked the deponent's gunman to come out of the car as well. The deponent said 'okay, I will not go to the

Supreme Court but my driver will drive my car and my gunman will escort me home?. Only then, did Tariq Masood Yasin, SP agree to let the car be driven by deponent's driver.

- The deponent got home at about 5.45pm and was shocked to see police officials and agencies personnel without uniform all over his residence. The deponent also discovered that landline phones had already been disconnected; cell phones, TV cables and DSL had been jammed or disconnected. The deponent and his family were completely cut off for several days from the outside world.
- By 9pm, March 9, 2007, the vehicles which were in official use of the deponent including a Mercedes had been taken away by means of a lifter. Later on, the same night, one vehicle was brought back but the key was not handed over to the deponent or to someone on his behalf.
- On March 10, 2007, the deponent received a 'notice' from Supreme Judicial Council ("Council") whereby the deponent came to know that a Reference (No.43/2007) had been filed by the respondent before the Council. There was also a copy of the Order passed by the Council whereby the deponent had been restrained to function as a judge of the Supreme Court and or Chief Justice of Pakistan. The copy of the aforesaid reference had also been appended with the notice without any annexure or supporting documents for perusal of the deponent.
- It was also surprising for the deponent to note that the aforesaid reference came up for hearing on March 9, 2007 after 6pm in indecent haste. Two members of the Council as was evident from news published in daily *Nawa-i-Waqt* dated March 10, 2007, had been flown to Islamabad in special flights, from Lahore and Karachi simply to participate in a meeting of the Council. In fact, no meeting had been called by the secretary of the Council namely Faqir Hussain. No one had issued either agenda for the meeting or notice thereof.
- The Council, rather than merely scrutinizing the material, and serving notice on the deponent went ahead and passed an order very detrimental to the interests of the deponent as well as the interests of the institution. The deponent was restrained to perform his functions as a judge of the Supreme Court Judge and or Chief Justice of Pakistan.
- The deponent further states that he had been detained along with his family members including his infant child of seven years from the evening of March 9, 2007 till March 13, 2007. The personal and private life of the deponent and his family suffered a great shock and the concept of privacy appeared as if it was an impotent word. The deponent

could not use any vehicle since there was none. The deponent had to walk to the other end of the road when a police officer confronted him and manhandled him.

- The Supreme Court staff attached to the deponent was reportedly missing and had been kept at an unknown place. An attempt was being made to fabricate the evidence through them by coercive means against the deponent. Even other employees working at the residence of the deponent were taken and made to appear before some agency officials. They were released after 2/3 days. The grocery man was not allowed to collect groceries; he was made to wait till an agency official accompanied him to the market and back.
- The chamber of the deponent was sealed and certain files lying therein had been removed and some of them had been handed over to the ISI under the supervision of the newly appointed Registrar. Such an act was contrary to all norms and practices of the judiciary. The deponent being the CJP was entitled to occupy his chamber along with his staff.
- On account of deployment of heavy contingents, no one was allowed to meet the deponent freely, in as much as his colleagues were not allowed access to meet him. Even a retired judge of this Hon'ble Court Mr. Justice (R) Munir A Sheikh was not allowed to meet the deponent. The deponent was not all alone to suffer this agony. Even his children were not allowed to go to school, college and university. The deponent and his family members were deprived of basic amenities of life, i.e. medicines and doctors.
- Even when ordered by the Council, the deponent was deprived of the assistance of his counsel to seek legal assistance regarding legal and factual issues involving the reference. The deponent and his family have been made to go through a lot of mental, physical and emotional agony, torture and embarrassment and words could never be enough to properly and adequately express that.
- All these tactics were used to put pressure on the deponent so that he may tender his resignation from the office of the Chief Justice of Pakistan. But after March 13, 2007 when the deponent succeeded in establishing at least some contact with his lawyers team during a brief appearance before the Council and after March 16, 2007, the on going pressure to 'resign the office' was released to some extent.
- The deponent believes that his entire house has been bugged and at Sindh House which is located opposite the residence of the deponent, the officials of the agencies other than police have established a place therein to keep an eye on those who come and visit me.

- On account of the facts stated hereinabove, the children of the deponents are so scared that they could not go to school or university. As a result thereof, one of my daughters failed to appear in her exams (1st year, Federal Board) whereas my other daughter who is a student of Bahria university is not being allowed to take her examination (1st semester) due to lack of attendance in internal studies. My younger son is also not in a position to attend his school because of circumstances through which I am passing.

The manner in which the military regime has tried to persuade the Chief Justice to resign, the physical restraint exercised against him for five hours in not allowing him to leave and the subsequent reference would all amount to criminal activities if they had happened in any democracy. The executive does not have any power to request the chief of the judicial branch or for that matter any member of the judicial branch to resign. To use such power violates the concept of the independence of the judiciary in a most fundamental manner. While the judiciary has the right after judicial examination to force a government or the chief executive out of power the executive, on the other hand does not have similar power over the judiciary. All that the executive can do, even when there existed extraordinary grounds for the removal of a chief justice or a judge of the Supreme Court, was to follow the procedure of the law and leave the matter in the hands of the courts themselves.

To call the Chief Justice in order to persuade him to resign itself was an act that the executive should be held responsible for. Without the slightest doubt it can be said that this act in itself would amount to contempt of court in the clearest of terms. Suppose the Prime Minister of England or the President of the United States or France were to call the chief justice of the country to their office and make or suggest that he should resign, would that in any way have any other meaning other than a clear affront, not only to the individual concerned, but to the institution of the judiciary itself. What if the judicial officer was further restrained from leaving the executive's office for five hours or for that matter even a few minutes? Clearly any such act in any of the countries mentioned above would lead to an outcry demanding the immediate resignation of the executive who engaged in such an act.

The following words from the Chief Justice's petition demand careful consideration from all persons who support the independence of the judiciary, democracy and human rights: "And this country has indeed seen many a whimsical and arbitrary military head turning in wrath towards independent judges and seeking to subordinate and overawe the judiciary, sometimes to turn around the course of pending proceedings or impending judgments. The entire edifice of the independence of the judiciary would crumble like a house of cards, if contrary view was taken, as any judge about to deliver a judgment against the executive, will run the jeopardy of being effectively and summarily sent home. This has indeed happened in the past in this country in times when the Constitution stood abrogated or had been suspended or held in abeyance.

The move to remove the Chief Justice was unprecedented and unconstitutional. It was a clear demonstration of the complete disregard for the separation of powers within the present military administration of President Musharraf who came to power by a military coup in 1999. After coming into power the President also changed the Constitution to make himself the supreme leader of the country. However, given the complete change of the power structure within the country where the President holds absolute power this decision has been a clear message that the respect for the independence of the judiciary was not part of the political scheme of present day Pakistan. The President clearly wants a judiciary that was subservient to his wishes and under his complete control.

This decision also completely shattered the illusion held by many including some lawyers' associations that independence of the judiciary was still possible in the country. The military dictatorship had completely reshaped the country's legal system and norms. Now it had come within the power of the President to remove the Chief Justice himself without following the usual procedures laid down in the Constitution to ensure that no superior court judges could be removed except through a process of internal inquiries conducted by the Supreme Judicial Council. That model of protection of the tenure of judges from undue interference by the executive was irrelevant within a political scheme in which the President holds absolute power. The present move shows that even the slightest manifestation of independence on the part of judges will not be tolerated by the present regime.

The demand for total subordination was also due to the mass dissatisfaction expressed throughout the country against the military regime, for many reasons. The regime feared that the unrest within the country might lead to various forms of references for judicial redress and thereby open up new avenues for criticism against the existing regime. There was also speculation that the President wanted an extension of the terms of his office and this could lead to challenges in court. In such an event the President would definitely require the assurances of absolute loyalty of the Supreme Court.

b. Country-wide protests to reinstate the Chief Justice

The virtual removal of Chief Justice Iftikhar Chaudhry by President Musharraf and the subsequent curtailing of his freedom of movement by placing him under house arrest resulted in unprecedented protests from lawyers around the country. When he visited the Supreme Court along with his wife and children in response to a call by the Supreme Judicial Council regarding alleged misconduct and misuse of authority which he was accused



Thousands of lawyers parade the streets in support of the Chief Justice (Photo: Dawn)

by the military regime, a large gathering of lawyers greeted him, showering him with flower petals and shouting slogans against the regime. In fact, ever since the Chief Justice was removed, there had been tight security throughout Islamabad with some observing that security arrangements in place seemed as if they were to prevent a major terrorist attack. However it was only in response to the in camera proceedings of the Supreme Judicial Council, which was to hear the charges filed by President Musharraf against Chief Justice Chaudhry.

It seemed that the legal profession was unwilling to bow down to the military rulers. In fact they were intensifying their protests around Pakistan. They also vowed to continue their protests until the government withdrew its decision. In some places Bar association members formed human chains around court buildings to express their resolve to uphold the independence of the judiciary. Some provincial Bars called for a deferment of the reference against the Chief Justice and insisted that the action contravened the Constitution of Pakistan.

The massive response from various Bar associations and lawyers all over Pakistan was a clear indication of the legal profession's perception that the judiciary and the legal profession were being seriously threatened by the military regime of President Musharraf. For a long time, there has been a sense of frustration among members of the legal profession who saw this personal attack on the Chief Justice as a blatant attempt by the military regime to complete its grip on power by silencing every form of legal avenue available to the citizens. The demonstrations against the regime were indeed unrepresented in recent history. This was because; so far the military regime has been able to use its power to crush all opposition on the pretext of 'anti terrorism'. However this time around, the protest was by the legal profession itself. Lawyers in Pakistan have a long history of fighting fiercely to maintain their status and the integrity of the system under which they function. What the lawyers saw in the attack on the Chief Justice was a heightened attempt by the military regime to suppress not only the independence of the judiciary but also the independence of the lawyers.

In the neighbouring country of Sri Lanka over two decades of attacks on the independence of the judiciary has virtually destroyed the independence of the legal profession. Reportedly many Sri Lankan lawyers have withdrawn from active use of avenues of legal redress due to the deterioration that has entered the system. Obviously the lawyers in Pakistan have been determined to avoid a similar suppression of their profession.

All these moves by the government indicated that there was a crisis within the government itself on the move taken by General Musharraf against the Chief Justice. It further indicated that unintentionally the government may have provided a reason for the angry public to come forward and to resist the regime's extremely repressive policies.

On March 19 the AHRC reported that the legal community of Pakistan had rejected a government offer for talks, while demanding the withdrawal of the reference against the Chief Justice and the formation of a national government to hold general elections within three months. The convention of lawyers, meeting in Peshawar, the capital city of the North Western Frontier Province (NWFP), also asked President Musharraf to step down and demanded that he be tried for treason under article 6 of the Constitution. The legal conference appealed to all political parties to end their assemblies and join the lawyers struggle to remove the government. They also demanded the immediate release of all missing people who have been abducted by military and intelligence agencies, while lodging formal criminal cases against those responsible for the abductions.

Meanwhile, when the government of Pakistan began to realise that it was losing total control over its citizenry, it started pressurizing the Supreme Judicial Council to delay the proceedings against the Chief Justice in the hope that the legal community would exhaust themselves and their struggle for the restoration of the rule of law would subside. The government also did not allow the Chief Justice to address the lawyers' convention which was being held in different areas throughout the country. While speaking from the Supreme Court on March 22, 2007, a government spokesman threatened Chief Justice Chaudhry not to 'politicize' the reference against him by addressing different Bar associations in the country. The spokesman, Arif Chaudhry said, "It would be in his own interest that such a sensitive issue was not politicized".

Then came the crackdown on the supporters of the Chief Justice: A Supreme Court lawyer, Ali Ahmed Kurd was detained by the Quetta police at the district court. The detention came when after several attempts by unknown persons to abduct him failed. This effort by the government was however aborted by the lawyers who quickly arranged protests all over the country. Mr. Kurd was the lawyer acting on behalf of the Chief Justice in the Supreme Judicial Council. He was also the Vice President of the Pakistan Bar Council (PBC) which was the driving force behind the support for the Chief Justice. The detention came after several failed attempts to abduct him. He was booked on an eight-month-old case which had never been pursued by the government.

In another violent incident, lawyer, Ghulam Mustafa Kundwal, a Bar association member, was severely beaten by uniformed men and left for dead in a ditch near the Cantonment area in Rawalpindi. It was believed that these two separate incidents were meant as a clear warning to the all Pakistani lawyers to refrain from getting involved in the movement calling for the supremacy of the judiciary over the military government.

The house of Munir Malik, the President of the Supreme Court Bar Association (SCBA) and the lawyer of the suspended Chief Justice, was attacked in the early hours of the morning of May 10, by unknown persons who arrived in a car. The assailants fired so

many rounds that 20 bullets struck within the house. His daughter survived as she was studying in her room. Several glass windows were broken and marks of the bullet strikes were found on the outside of his house. This happened just 20 hours after the office of Mr. Malik was sealed by the Building Control Authority of the Sindh government. It was later ordered to be opened by the Sindh High Court.

The house of another senior lawyer, Akhter Hussien, former President of the Sindh High Court Bar Association also came under attack by unknown persons who fired at his house. The attack came at about the same time as the one on the house of Mr. Malik.

However, the lawyers adamantly refused to be cowed down and took to the streets in large numbers to protest this intimidation by the government. They also vowed to continue their protests until the mala fide reference by General Musharraf to declare the Chief Justice non-functional was withdrawn. The lawyers announced in public that they would not bow down to the 'intimidating tactics of the government' and were ready to sacrifice their lives for the independence of the judiciary. This action indicated the high level of discontent in the country, specially the legal community.

The movement to defend the suspended Chief Justice and the independence of the judiciary in Pakistan rapidly gathered momentum in all parts of the country. Soon mammoth crowds congregated to greet him in the streets and everywhere he went. Correspondingly, the military regime also intensified its violent tactics to suppress this movement.

An organised attempt was unleashed against the lawyers and the people who openly showed their dissatisfaction with the military regime and the suppression of their rights. Lawyers were attacked, media stations were silenced and severe restrictions imposed on the discussion of the military's reference against the Chief Justice before the Supreme Court. In this way the military attempted to wrestle with the most potent challenge it has faced to its authority since it came to power through a coup in 1999.

May 12 was the bloodiest day of the movement to reinstate the suspended Chief Justice when about 51 persons were directly fired upon and killed in Karachi. The violence against the protest march on this day raised further alarm about the already deteriorated legal and administrative systems hitting rock bottom. The aim of such an action was for General Musharraf to claim five more years in power without any hindrance from the judiciary.

In June 2007, hundreds of political activists and ordinary citizens were arrested in an attempt to prevent people from participating in a welcoming rally to in honour of the Chief Justice scheduled to visit Faisalabad, an industrial city in the Punjab province. The Chief Justice was to address the Faisalabad Bar Association on the eve of the golden

jubilee ceremonies of the Supreme Court. The Bar associations of Pakistan announced that lawyers will bring the Chief Justice in a massive procession to Faisalabad city. Expecting the participation of hundreds of thousands of people to welcome the Chief Justice, the government arrested more than one thousand activists from different part of the Punjab province.

In an attempt to infiltrate the people's movement by using factions loyal to him the General had been allegedly using military officers and criminals to open fire at protesting people. Proving his talent to subvert fundamental rights equally by clever and crude means, the General soon appeared in public in civilian dress. The General in his speech conspicuously refrained from making any reference to the state and the administration, he allegedly commands and its role in the current crisis. Instead the dictator tried to trivialise the peoples' protest as a fight between government supporters and a disgraced judge. There was not a word about what action would be taken against those who fired at the protesting crowd.

According to the information received through political parties and media reports about 400 people were arrested in Lahore, the capital of the Punjab province, 300 people on June 11, from Toba Tek Singh, Jhang and Faisalabad, 100 from Mutan city, 55 from Bahawalpur, more than 100 from Rawalpindi city and more than 100 activists from Sahiwal, Okara and Jaranwala during the space of a week. Among the arrested persons were some leaders of different political parties including the Peoples Party, Muslim League (N), MMA and the Labour party. The Punjab High Court on June 12 declared as illegal the detention of six political activists from Multan city but the provincial government has still not released them.

A bomb blast in Islamabad, the capital of Pakistan, close to the venue where Chief Justice Chaudhry was scheduled to address lawyers, killed about 20 persons and injured more than 50, six of them seriously. Immediately following the blast the government announced that it was a suicide bomb attack. However, statements, taken at the scene from eye witnesses and shortly afterwards from witnesses in their hospital beds appear to indicate that it was not a suicide bomb as the explosion erupted from beneath the debris of an building under construction, located next to a reception stall set up by a political party.

The blast happened near the district courts, adjacent to the headquarters of the Islamabad police. Dozens of political workers chanting anti-Musharraf slogans were present at the time, while hundreds of lawyers waited inside the convention venue for the Chief Justice, who was a few hundred yards away. Office bearers of the different legal bodies, including the President of the Supreme Court Bar Association, vice chairman of the Pakistan Bar Council and lawyers of the Chief Justice accused the government of sabotaging the lawyers' movement. As a result the lawyers and their associations decided to boycott the courts throughout the country for the next two days.

The government of General Musharraf attacked the Sindh High Court building on September 10, beating several lawyers and using abusive language against the judges on the bench who were conducting an inquiry into the carnage of May 12, 2007 in Karachi, where more than 50 persons were killed. The same day the attackers also shot dead a senior lawyer, Raja Riaz, outside the high court building as he was proceeding towards the court. These attacks were led by the Mutehda Qaumi Movement (MQM) which has been the leading party of the ruling coalition.

During the last hearing which took place on September 6, at the Sindh High Court full bench, Riaz was threatened by workers of MQM to the effect that he would be killed if he raised the slogan 'go Musharraf go' in court. The Vice President of Supreme Court Bar Association, Khawja Naveed, who has sided with the government after the restoration of the Chief Justice, also had angry words with Mr. Riaz in the High Court Bar room in the presence of other lawyers. Riaz had been threatened to 'behave' or face dire consequences. Under these circumstances there was reason to believe that Riaz' assassination had been planned.

Naeem Querashi Secretary of the Karachi Bar Association was arrested on October 6, near the High Court premises. He was transferred to several police stations during the day and around midnight was taken to the Mari Pur police station in Karachi where allegedly a police sub inspector named Aurang Zeb manhandled him and verbally abused him. The sub inspector had also induced other policemen to assault Mr. Querashi and tear off his clothes. Then, in a perverted turn of events the police took photographs—from different angles—of his naked body. After he was released, Mr. Querashi complained that he and members of his family were constantly harassed by threatening telephone calls in which the callers claimed to be activists of the MQM.

Ali Ahmed Kurd, former Vice President of the Pakistan Bar Council (PBC), the supreme body of lawyers, has been missing after he was taken away by intelligence agents of the Inter Services Intelligence (ISI) on November 5 from the notorious Adiala Jail where he had been detained following his arrest on November 3. Mr. Kurd had been beaten severely while detained in a police lock up following his arrest.

At the time that the Chief Justice was suspended by General Musharraf on March 9, 2007, Mr. Kurd was the Vice President of the PBC. He was one of the leading personalities in the legal community who through their struggle had succeeded in the reinstatement of the Chief Justice. He was known for his fiery speeches against the Army and the General. He was arrested for charges of high treason.

Munir A. Malik, former President of the Supreme Court Bar Association, was arrested on November 3. He was kept first in Adiala Jail, Rawalpindi and then two days later moved to

Attock Jail in the NWFP. Mr. Malik had fainted while inside the jail after being severely beaten. He had been taken to a government hospital in Attock City after traces of blood were found in his urine due to the beatings. Despite his condition, he was prevented from seeing his family members and was booked under sedition charges. He was also one of the key leaders of the movement to restore the Chief Justice.

Jawed Iqbal Burqi, a prominent lawyer in Karachi, was arrested from his residence in Nazimabad on November 4. He was detained in the Nazimabad police station for two days and later transferred to the Central Jail in Karachi on November 6. Mr. Burqi has since been undergoing regular medication for injuries he sustained during the stampede which took place after the suicide bomb attack on Benazir Bhutto's caravan in Karachi on October 18. However, he was not allowed to carry medicines with him and was denied medical care. Despite the seriousness of his condition, the jail authorities gave him no assistance; instead, they cruelly suggested that he should seek medicine from the Chief Justice of Pakistan.

Imdad Awan, President of the Sukkur High Court Bar Association, was arrested on November 4 after participating in a protest meeting with lawyers. Later, he had been tortured and was not allowed to obtain medication for his diabetes and high blood pressure. He had also been deprived of sleep. Hasil Nizenjo, chief of the Balochistan National Party and Yousaf Masti Khan, chief of the National Workers Party, were arrested on November 6 from the Karachi Press Club. They were booked under charge of high treason. At the time of their arrest they were holding a meeting with journalists at the press club. Abrar Hassan, President of the Sindh High Court Bar Association, and retired justice Rasheed Razvi have also been denied medication for high blood pressure and diabetes. Reportedly, they were not even allowed to meet with other persons in the jail.

Two female lawyers, Noor Naz Agha and Jameela Manzoor, were arrested on November 3 and 5 respectively. Ms. Agha, a leading lawyer in Karachi, had been tortured by the police and later transferred to the Karachi prison. She had been kept under incommunicado detention and deprived of sleep by the police who switched on a powerful light in her detention cell all night. Meanwhile, Ms. Manzoor was arrested after a protest meeting in Lahore and charged with high treason. She has been the first female lawyer in the country to be arrested on charges of high treason.

c. Allowing anarchy and chaos by fundamentalists to divert attention from judicial crisis

In the aftermath of the mass protests throughout the country against the action taken by President against Chief Justice Chaudhry, a radical mosque and its affiliated seminaries have greatly increased their influence in Islamabad, the capital of Pakistan. The male and

female students and leaders of Lal mosque and its affiliated seminaries, Hafsa and Fridia, were seen roaming the streets of the capital with sticks, threatening people to observe Shariah laws in their day to day business.

On April 6 after Friday prayers, a group of students and clerics burned audio and video cassettes at a market place and threatened the shopkeepers to close down their businesses or face having their shops burnt down. Before, on March 27 female students of Hafsa seminary abducted three women and a five month-old-baby. Accusing them of running a brothel the women were kept in captivity for three days and severely beaten. The administration of the mosque and seminaries also held two police officers demanding the release of two teachers who had been arrested. The military government had to concede, accept the demands of the seminary officials and release the teachers in exchange for the release of the policemen.

The leader of the Red mosque announced that if the government does not implement Islamic law within thirty days then the mosque will implement Shariah law (Islamic Laws) on its own. Mosque officials also announced that they have constituted an Islamic court and will announce punishments. They threatened that they will instigate suicide squads to enforce Shariah law in the capital. The fact that these Islamic leaders have issued a fatwa against a female minister calling for her death for having hugged a paragliding instructor in public, has been conspicuously ignored by the government and the law enforcement agencies.

On the other hand, sectarian violence has erupted in the northern areas of Pakistan, particularly in Parachinar city of Kurram Agency, close to Afghanistan—represented by both the Sunni and Shi'ites sects. During nine days of bloody fighting and a further six days under continuous curfew more than 50 persons have been killed and the violence has spread to other parts of Kurram Agency.

The situation has led to a sense of insecurity amongst citizens throughout the country. It was deeply shocking that extremist elements have been allowed to enforce their own laws and neither the government nor the law enforcement agencies were taking any steps to prevent them from taking over control of Islamabad. Apparently the government has a friendly relationship with the officials of the Red mosque and its affiliated seminaries and has been allowing them a free hand to challenge the very basis of a civil society.

○ federal minister was even seen entering into a written agreement with the female students of Hafsa seminary who took over the children's library of Islamabad in January 2007 in protest against the demolition of illegally constructed mosques. The mosques were built on land illegally grabbed by the leaders of the seminary. According to the agreement reached between the students and Mr. Aijaz-ul-Haq, Minister of Religious Affairs the

government will stop demolishing illegally constructed mosques. General Musharraf has been taking military action against the people of Balochistan province since 2001 due to their resistance to the construction of cantonments. However, in complete contrast to this hard line stand he now announced that his government was willing to negotiate with fundamentalist militants who were demanding Islamic laws in the capital city rather than taking any action against them.

As the judicial crisis spiralled out of control it has become necessary for the government to divert public attention away from the problem. It has allowed extremist religious elements to do as they wish so that sufficient levels of anarchy and chaos can be maintained to justify military rule. It was under these circumstances that the military government has welcomed the intervention of the extremist religious groups to incite greater tension in the capital.

Shariah law taking the place of civil law and Shariah courts taking the place of the country's common law courts has been an even greater attack on the judiciary than the initial attack on Chief Justice Chaudhry. This displacement of the law and its courts by Shariah law and its courts will have far deeper implications for the future of the country than the military regime may have intended. The move has risked the civil liberties of the people of Pakistan. The most affected section would be the women of Pakistan against whom Shariah law has been misapplied to the detriment of their rights. The present crisis was therefore of tremendous importance from the point of view of democracy, human rights and the rule of law in the country.

d. Historic verdict

Almost four and a half months after the suspension of the Chief Justice and the relentless country-wide protests spearheaded by members of the legal profession, on July 20, 2007 the Supreme Court of Pakistan in a momentous decision declared the suspension of the Chief Justice of Pakistan, Iftekhar Chaudhry, by President, General Musharraf, to be illegal and ordered that he be reinstated.

While saluting the Supreme Court of Pakistan for this bold, upright and historic assertion of the independence of the judiciary, which sets an example for the whole of Asia, the AHRC said that during the last few months the world has seen the courage of lawyers and judges in Pakistan, who have risked everything to defend the integrity of their institutions and professional credibility, in the interests of the entire public. Their stamina and determination will remain indelibly marked upon peoples' memory. They have truly earned the victory that has come today. The AHRC also said:

“It sincerely believed that the enormous trust vested in the Chief Justice by people throughout Pakistan, actively demonstrated in thousands risking and some losing their

lives, will be reciprocated by the upholding of the highest traditions of the courts and legal values. There is no alternative. They have made clear that they want their judiciary to be separate from the executive. They will not tolerate the military bulldozing over every other institution in their country. They insist upon institutions for the rule of law and government through real, not fraudulent, legislative power.

“Dictatorship has today been rejected as a viable form of government in Pakistan. But while the Supreme Court judgment must be celebrated, the task now falls on all serious-minded persons to think and act together and build upon this achievement. There remains much to be restored which has been lost under this military regime. The wisdom expressed in the streets and courts of Pakistan in the last few months, culminating in this judgment, must now give rise to a vision for a new Pakistan where democracy and the rule of law will wholly replace tyranny and injustice. Let us all work towards this goal.”

The following is the judgment of the Supreme Court of Pakistan regarding the challenge made by the Chief Justice regarding his suspension from his post and the reference against him by General Musharraf:

Dates of hearing: 15th to 17th, 21st to 25th, 28th to 31st May, 2007, 1st, 4th to 8th, 11th to 14th, 18th to 21st, 25th to 28th June, 2007, 2nd to 5th, 9th to 12th and 16th to 20th July, 2007.



ORDER

For detailed reasons to be recorded later, the following issues arising out of this petition are decided as under:-

(I) Maintainability Of Cop No.21 Of 2007 Filed Under Article 184(3) Of The Constitution

This petition is unanimously declared to be maintainable.

(II) Validity Of The Direction (The Reference) Issued By The President Under Article 209(5) Of The Constitution.

By a majority of 10 to 3 (Faqir Muhammad Khokhar, J., M. Javed Buttar, J. and Saiyed Saeed Ashhad, J. dissenting), the said direction (the Reference) in question dated March 9, 2007, for separate reasons to be recorded by the Hon. Judges so desiring, is set aside.

(III) Vires Of Judges (Compulsory Leave) Order Being President's Order No. 27 Of 1970 And The Consequent Validity Of The Order Dated 15.3.2007 Passed By The President Directing That The CJP Shall Be On Leave

The said President's Order No.27 of 1970 is, unanimously declared as ultra vires of the Constitution and consequently the said order of the President dated 15.3.2007 is also, unanimously declared to have been passed without lawful authority.

(IV) Validity Of The Order Of The President Dated 9.3.2007 And Of The Order Of The Same Date Of The Supreme Judicial Council Restraining The CJP From Acting As A Judge Of The Supreme Court And/Or Chief Justice Of Pakistan

Both these orders are, unanimously, set aside as being illegal. However, since according to the minority view on the question of the validity of the direction (the Reference) in question, the said Reference had been competently filed by the President, therefore, this Court could pass a restraining order under Article 184(3) read with Article 187 of the Constitution.

(V) Validity Of The Appointment Of The Hon'ble Acting Chief Justices Of Pakistan In View Of The Annulment Of The Two Restraining Orders And The Compulsory Leave Order In Respect Of The CJP

The appointments in question of the Hon'ble Acting Chief Justices of Pakistan vide notification dated 9.3.2007 and the notification dated 22.3.2007 are, unanimously, declared to have been made without lawful authority. However, this in-validity shall not affect the ordinary working of the Supreme Court or the discharge of any other Constitutional and/or legal obligations by the Hon'ble Acting Chief Justices of Pakistan during the period in question and this declaration is so made by applying the de-facto doctrine.

(VI) Accountability Of The Hon'ble Chief Justice Of Pakistan

It has never been anybody's case before us that the Chief Justice of Pakistan was not accountable. The same issue, therefore, does not require any adjudication. All other legal and Constitutional issues raised before us shall be answered in due course through the detailed judgment/judgments to follow.

ORDER OF THE COURT

By majority of 10 to 3 (Faqir Muhammad Khokhar, J., M. Javed Buttar, J. and Saiyed Saeed Ashhad, J. dissenting), this Constitution Original Petition No.21 of 2007 filed by Mr. Justice Iftakhar Muhammad Chaudhry, the Chief Justice of Pakistan, is allowed as a result whereof the above-mentioned direction (the Reference) of the President dated March 9, 2007 is set aside. As a further consequence thereof, the petitioner CJP shall be deemed to be holding the said office and shall always be deemed to have been so holding the same.

The other connected petitions shall be listed before the appropriate Benches, in due course, for their disposal in accordance with law.

Conclusion:

This was indeed a historic struggle by the judiciary and the legal community in Pakistan who having refused to bow down to the extra-constitutional actions of the military regime, have fought to uphold the Constitution, rule of law and supremacy of the judiciary. The struggle of civil society for sanity and against the military cum so called elected civilian dictatorship has become a land mark for other countries in Asia who have also been facing the menace of military hegemony in their civilian affairs. The manner in which the people of Pakistan have supported the movement for the reinstatement of suspended Chief Justice, Iftakhar Chaudhry, from March 9, to July 20, 2007, has demonstrated the people's desire for the rule of law, supremacy of judiciary and civil liberties as well as the freedom of expression and the respect and dignity of human beings. This movement initiated by the lawyers has indeed been a first for the whole of Asia.

Almost every move General Musharraf has made has been for his own political survival that has plunged Pakistan into a greater lawlessness than ever before. Strangely, General Musharraf seems to be convinced that the independence of the judiciary was an obstacle to stability. One of the major reasons for imposing the emergency—which was just another name for martial law—on November 3 has been to render the country's Supreme Court inoperative. Quite openly, he has disposed of the legitimate justices of the Supreme Court and appointed alternative judges who he quite unashamedly expects to confirm his election

as President, thereby bringing the courts under his complete control. The complete control of the judiciary apparently seems an imperative in the new political scheme he has introduced to Pakistan.

One day history will judge whether, at the point of Pakistan's final plunge into lawlessness, it was still possible for something to be done to prevent it; whether the international community did everything it could to prevent it or just contributed to the collapse with its silence. The simple test as to whether the complete collapse will occur was dependent upon whether the ousted Supreme Court of the country will be reinstated or not. Under these extraordinary circumstances, the forthcoming elections will hold no legitimacy and offer little hope for resolving Pakistan's grave crisis of governance.

Recommendations:

- The UN Human Rights Council must take this issue regarding the judiciary as well as the government's action against the legal profession seriously. It must forthwith intervene in the matter and pressurize the government of Pakistan to uphold the independence of the judiciary and follow international norms for maintaining the rule of law.
- Emergency rule should be abolished forthwith the situation before November 3 restored. The Constitution of Pakistan should be restored immediately.
- All Judges of the superior courts must be released from house arrest including the Chief Justice of Pakistan. All Judges who have not taken the oath under the provisional constitutional order should be restored to their original positions.
- All lawyers must be released immediately, and those who have been tortured compensated.
- Release all detained journalists, human rights activists and political workers.
- All ordinances, rules and decisions issued during emergency rule by the judges handpicked by General Musharraf should be withdrawn and efforts by the Musharraf government to make them part of Supreme Court decisions must be prevented.
- In future, no government should be allowed to interfere in the matters of courts and the politicization of the higher courts should be resisted at all costs.
- All successive governments should ensure that lawyers (a) were enabled to perform their professional functions without intimidation, harassment or improper interference; (b) were able to travel and consult with their clients freely both within their own

country and abroad; and (c) not suffer or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. And where the security of lawyers was threatened for discharging their functions, they should be adequately safeguarded by the authorities.

- Lawyers like other citizens were entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion on matters concerning the law, the administration of justice and the promotion and protection of human rights. They should also have the freedom to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.”
- We also note the United Nations Standard Minimum Rules for the Treatment of Prisoners, Article 22 (2) which provides that: Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals. Where hospital facilities were provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment for sick prisoners, and there shall be a staff of suitably trained officers. The duty to ensure effective medical treatment was also part of Pakistan’s binding obligation to protect Mr. Malik’s right to life guaranteed by the Universal Declaration of Human Rights (Article 3) which stipulates that everyone has the ‘right to life, liberty and security of person’.

3. Attack on the freedom of media and expression

The year 2007 has also been one of the worst for journalists: Almost all media houses have been attacked by the authorities, hundreds of journalists arrested and several media personnel beaten or tortured while engaging in their professional duties. Also, during the year, seven journalists have been killed. Apparently, together with the judiciary, the media have been targeted by General Musharraf to be dealt with by an iron fist.



Since March 2007 when the Chief Justice was suspended followed by country-wide protests, the government opened new fronts of attack. In April 2007, it attacked a television station that had been airing open discussions on the latest developments in the political situation and also the judicial crisis. For several weeks since the suspension of the Chief Justice and the crisis in the judiciary, the *AAJ* television station had been airing discussion programmes and talk shows on various related issues. Political leaders, lawyers and experts in different disciplines including representatives of the government had taking part in its programmes which have received wide audience participation. All participants were allowed to freely express their opinions during the broadcasts.

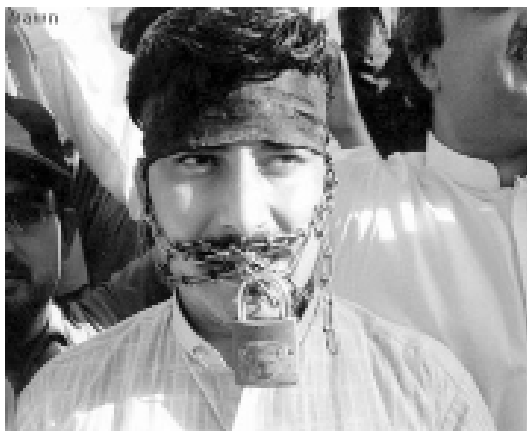
Consequently, the TV station was issued a 'show cause notice' by the Pakistan Electronic Media Regulatory Authority (PEMRA- Sindh Region), a central government agency, informing its management that it had violated four clauses of the PEMRA code of conduct which denied any party the right to criticize the government. The management of *AAJ* Television was given three days to show cause as to why they should not be prosecuted. The action of PEMRA was male fide in that out of the four charges only one pertained to the technical aspect of the broadcast and the remaining three were political in nature and a direct interference in the freedom of expression of any media agency. It was quite evident that the government was unhappy and irritated with the openness with which *AAJ* has allowed various opinions to be aired.

Having discussions or debates on the rule of law and constitutional matters was a right guaranteed by the Constitution of Pakistan and no party, be they pro or anti state has the right to refuse any other party permission to express their views. This was an unalienable right guaranteed not only by the Constitution but by international norms and standards. Clearly, the action of the government of General Musharraf through PEMRA was a ploy to avoid responsibility for the crisis that itself had created by making the Chief Justice of the country, non-functional. Furthermore, this was a blatant attempt by the government to curtail media freedom and the freedom of expression.

Dealing a further blow to the freedom of expression, journalists continued to be beaten by the police on a regular basis. One television station was ransacked by the police even in the presence of the Minister for Information who could not stop the attack. The police treated the minister as if he was a person of little value. About 35 journalists were also arrested during and after the protests that involved lawyers, activists, civil society groups, as well as political parties. Even the President of Pakistan has had to apologise to the Geo Television network which was attacked by the police in the capital Islamabad.

On April 8 Abdul Razzaq Gul, a journalist and a bureau reporter of the *Daily Tamar* in Turbat city, Balochistan province was arrested by the police after his office was raided by policemen who came in two jeeps accompanied by several people in plain clothes and in two private cars.

On May 29, three senior journalists received death threats in the city of Karachi, Sindh province. Envelopes containing live bullets were found attached to the driver's side of the windscreen on two of their cars. In a third, a bullet was found on the driver's seat. The journalists who received the first bullets were Mazhar Abbas, Secretary General of the Pakistan Federal Union of Journalists and correspondent of French news agency AFP; Zarrar Khan, attached to the American news agency AP and photographer Asif also of AFP.



The names of the three correspondents were included in a list of 18 threatened journalists and this list was issued by an organisation called Muhajir Rabita Council (MRC), allegedly a sister organisation of Mutehda Qaumi Movement (MQM), a coalition partner of the government. The list declared 18 journalists as chauvinists and threatened them to change their reported views which were unfavourable to General Musharraf and MQM chief Altaf Hussain. The list appeared after the mayhem of May 12, in Karachi in which more than 50 persons were killed during the visit of suspended Chief Justice Chaudhry.

President Musharraf was then seen affording unprecedented powers to PEMRA allowing it to seize the broadcast or distribution service equipment of television and radio channels and suspending their licences. The ordinance which came into effect on June 4 also displaced the Council of Complaints, the body under which complaints against broadcasters were previously referred to. PEMRA could now make up new rules against any stations that might be opposed to the government without informing parliament. There was also a sharp increase in the penalties for transgressing the rules from Rs. one million to 10 million. Internet Protocol TV, radio, mobile TV, and owners of private TV channels were brought under PEMRA regulations. This effectively placed the electronic media under the direct control of the government (through PEMRA).

Subsequently, Prime Minister Shoukat Aziz suspended the implementation of the amended PEMRA ordinance which was issued by President Musharraf. Placing the new ordinance on hold, the PM constituted a six-member committee to review amendments to the new ordinance. The committee consists of three persons from the media and three from the government. This was indeed a victory for the journalists and lawyers, including organisations from civil society who should be congratulated for their successful protests and demonstrations throughout the country against the restrictions imposed on media freedom through the recently made amendments. But the battle was far from won. As the

AHRC said in a statement issued on this occasion any discussion on the implementation and amendment of the ordinance would be more fruitful if it were to be withdrawn altogether.

June 17, was a black day for journalists in Pakistan as one was shot dead and another was arrested by law enforcement agents and has been missing since then. Reportedly, Abdul Lateef Gola, correspondent of *Daily Jang* in Jafferabad city, Balochistan province was arrested on June 17 by police officers around 1.00 am from his house. The policemen told his family that Major Ali of army core headquarters in Quetta—the capital—wanted him for some questioning about his reports on military activities in the province. To date his whereabouts have been unknown and the police have denied his arrest.

In another case, Noor Ahmed Solangi, correspondent of the daily, *Khabroon*, in Kingree, in Sindh province was shot dead by six men riding motorcycles. He was struck by nine bullets from an AK-47 and died instantly. It was reported in the local press that he had received threats from the tribal leaders of the Junejo tribe two days before his killing. The leaders of the Junejo tribe were members of the Muslim League Q, a political party of the government of General Musharraf.

The house of a prominent journalist, Nadir Shah Adil was attacked by a group of about 30 policemen who came in an armoured car and two police jeeps on August 21, 2007. Mr. Adil had not been at home at the time. Reportedly, the policemen from Kalri and Baghdadi police stations in Lyari town of Karachi in Sindh province entered the house at 4.30 pm after breaking open the front door. They verbally abused the women in the house in abusive language and beat his sons. They remained in the house for more than one hour searching it thoroughly but failed to produce any legal documents or a search warrant.

The police claimed they had received information that some ‘terrorists’ were hiding in the house. However it can hardly be coincidental that Mr. Adil’s editorial appeared in the *Daily Express* newspaper on the day of attack. Among others things the editorial complained about armed gang warfare in Lyari town between drug barons, in which many young persons had been killed. The editorial mentioned that the police were not providing protection to the inhabitants but rather protecting the war lords. It also mentioned the fact that in so-called police encounters in the area, not one policeman had ever sustained injuries.

Even before the judicial fiasco on March 6, a journalist Lal Malhi who produced a documentary on disappearances was threatened and nearly abducted from his office in Umerkot, Sindh by the Inter Services Intelligence (ISI) of the Pakistan Army. Luckily for him the attempt to abduct him was foiled by local journalists who intervened and also helped him escape. When members of the local community heard what had happened,

they began a 4 hour protest throughout the city. There were general strikes in different areas throughout Sindh province including Umerkot city. The protesters agreed to end their strike when local police promised they would charge the intelligence officers concerned; but no such case was filed by the police. In other cases, the Pakistan government allegedly dropped government advertisements from the largest English newspaper *Daily Dawn* since December 2006 due to the newspaper's open policy on editorials. In its letter to the Council of Pakistan Newspaper Editors on January 16 the newspaper management said, "The government has a long list of grievances against the *Daily Dawn* pertaining to its reporting and as a result the government departments and public firms were told to drop their advertisements on the *Daily Dawn*". An alleged reason behind this government action was the continuous reporting in Dawn's columns about the incidents and issues in Balochistan province, where the military operations have been ongoing since 2001.

Editors and publishers of media organizations have also been continuously threatened by anonymous callers using unregistered telephone numbers. One of whom, Shakeel-UR-Rehman, chairman of the Jang Group, has been informed by the intelligence agencies that the operation of his organization would now be subjected to restrictions. The Jang Group was one of the largest media organizations. After defying their warnings, numerous threats on his life have been made by unknown callers. He was told by the callers that the entire office of Jang publications, including Geo Television, would be blown up and that they should be ready for suicide bomb attacks.

Responding to pressures from the international community, media organizations and threats of a worldwide protest by the International Union of Journalist and Pakistan Federal Union of Journalist, the government started calling owners and management of media houses. However, the conditions that they laid out in order for the media houses to resume their work has been totally unacceptable that is, that all their news content for broadcast had to be subject to screening.

Ever since the imposition of emergency on November 3, journalists have been holding protests throughout the country supported by people from all walks of life in their quest for freedom of expression and media. In the aftermath of the clampdown on several television channels, the electronic media have now began to conduct their talk shows on the streets in protest against the imposed bans.

After the announcement of the state of emergency on November 3, 2007, the judiciary, lawyers and the media were prime targets of the military government. All private television stations were stopped from broadcasting transmissions through cable operators which ban was still in force. When people utilized other resources such as dish antennas to watch their favourite channels, the government rushed in to stop channels through the PEMRA ordinance demanding that every print and electronic media house give an assurance that it

will not publish or broadcast anything against the government. When this method was proved unsuccessful the government used its influence on the government of Dubai to stop broadcasting two popular channels in Pakistan.

Mast FM103 was a radio station with a nationwide network broadcasting news and entertainment programmes round the clock to the masses. Earlier, *Mast FM103* was found to be the most popular radio network in Pakistan as per AC Nielson's market survey. On November 3, 2007 MAST FM103's Karachi station was invaded by PEMRA (Pakistan Electronic Media Regulatory Authority) officials in the company of a heavy police contingency. It was forced to shutdown transmission and all broadcast equipment was confiscated. The grounds for the shutdown as stated by the officials of PEMRA were that *Mast FM103* was broadcasting hourly news bulletins and current affairs programmes, from BBC. It was interesting that Despite there being eight other radio stations that have been allowed to continue broadcasting, only *Mast FM103* was shutdown by the authorities. In the past, PEMRA had sealed *Mast FM103's* Lahore and Karachi stations to silence its independent broadcasts.

As a result of pressure from the government of Pakistan officials in Dubai have ordered that the broadcasts of two popular television channels, *Geo News* and *ARY*, be cut as of midnight on November 16. Both channels were based in the UAE but concentrate on news about Pakistan. According to press releases by the management of these two channels, the government of Pakistan had used its influence on the authorities of Dubai to stop the transmissions. According to *Geo News*, a leading Urdu-language broadcaster it was shut down because it had refused to bow down to the dictates of President Musharraf. *ARY* made a similar claim. Earlier *Geo* had been asked to submit all its programmes for monitoring by government officials so that no programme would be aired without clearance. When it failed to comply, the authorities applied pressure on the government of Dubai.

After the imposition of emergency rule on November 3 the Musharraf government stopped telecasts of private radio and television agencies through cable operators and simultaneously issued two ordinances against the electronic and print media. Through PEMRA ordinances, it has been pressurizing the media to agree to new conditions before they can reopen under provisional licenses, and some private channels have complied.

Conclusion:

President Musharraf, not unlike previous military leaders, has claimed that during his eight years of government he has provided greater freedom to the media, while for all intents and purposes, squeezing the arm of media. The year 2007 had witnessed attacks on more than five media houses by the law enforcement agencies; their equipment has been seized or destroyed; hundreds of journalists arrested or threatened including live bullets being

posted to them. Several have been subjected to torture during detention. Freedom of the media had become but a myth.

The journalists and their organisation, Pakistan Federal Union of Journalists (PFUJ), have been striving for many years to secure freedom of speech and freedom of the press. They have been fighting for many years against the black laws curtailing media freedom. During the tenure of the Musharraf government PEMRA was created to monitor the workings of television channels and to use force against noncompliant media houses. Accordingly, seven media houses have been banned and their offices were attacked by the PEMRA authorities: *Geo*, *ARY*, *Sindh*, *AAJ*, *Apna* television channels and *FM 103*, *FM 96*.

After the imposition of emergency rule on November 3, the military government issued two ordinances one concerning the print media through which any publication can be stopped. The next day a largely circulated evening paper, *Awam* was physically stopped whilst being printed by the authorities of the Ministry of Information under the new ordinance. The second ordinance was an amendment to PEMRA under which almost all private channels were stopped by the government except those who had given the required assurances

Recommendations:

- All black laws curtailing media freedom should be abolished including the latest ordinances against print and electronic media issued after the state of emergency.
- All journalists who have been illegally arrested and detained be released immediately and the fabricated cases against them be withdrawn.
- Those journalists who have been killed or subjected to torture by the authorities be provided with appropriate compensation.
- The ministry of information at federal and provincial levels must be abolished as these ministries are seen as the instrument against the freedom of media.
- The Pakistan Electronic Media Regularity Authority (PEMRA)—consisting of mostly retired military and police personnel— should forthwith be disbanded.

4. Torture most horrible

Pakistan, though enjoying its second year as a member of the UN Human Rights Council, has not signed or ratified the Convention Against Torture (CAT). However as a front runner in the war against terror since 9/11 it continues to enjoyed impunity from the international community and organizations. Not one member of the Human Rights Council has objected to its membership despite its dismal human rights record and the fact that that torture in custody, particularly in cantonments of the Army, has become a part of the rule of law.

Torture continues to be widespread in Pakistan. The number of reported torture cases increased from around 1000 in 2005 to 1319 in 2006. This however constitutes only a fraction of the actual figure mainly due to the intense fear of victims to lodge complaints. During the first half of 2007, the practice of torture in custody drastically escalated with professionals such as lawyers and journalists also being subjected to torture by the police and army intelligence agencies.

Testimonies of victims in courts have confirmed that the intelligence agencies of the armed forces of Pakistan were involved in the practice of torture in their camps even in the major cities. Additionally, hundreds of people have disappeared following arrest and allegedly many have been brutally tortured, sometimes even to death, by law enforcement agencies. A few who have been fortunate enough to escape from torture camps maintained by the armed forces have detailed before courts the methods used to torture them during their captivity. The victims have also complained that they were threatened with death by the military if they revealed details of their captivity.

a. Even the Chief Justice has not been spared

Pakistan has been a country where even the Chief Justice of the apex court, was not spared physical and mental torture by the country's law enforcement agencies. Accordingly, Iftakhar Chaudhry Chief Justice of Pakistan was twice physically abused and manhandled by law enforcement agencies—first in Islamabad and then in Karachi.

After he was summoned to Army house by President Musharraf, on March 9, 2007, the Chief Justice was held in detention for five hours and suffered severe mental torture at the hands of five Army generals who threatened and pressurized him to resign. Subsequently on March 13, a reference against him was made to the Supreme Judicial Council (SJC) by President Musharraf. He was taken into custody by the Islamabad police and as he was en route to making his appearance before court, he was manhandled by policemen who slapped him; pulled at his hair and roughed him up before throwing him into a police van before hundreds of his supporters.

b. Torture of lawyers and judges

During protests against the rule of emergency imposed on November 3 scores of lawyers and judges were arrested and some were subsequently beaten and tortured in custody. More than 70 judges of the higher judiciary including the Chief Justice and other judges of the Supreme



Court were kept under house arrest. Their houses were cordoned off by heavy contingencies of armed policemen and military personnel; houses were bugged and their families were denied access to essential medicines. Videos of the private lives of some judges had shamelessly been produced and used to bribe them into taking an oath on the provisional constitutional order of President Musharraf.¹

A prominent human rights lawyer, Syed Hassan Tariq was severely assaulted by the police on instructions allegedly of the provincial chief minister in Nawabshah, Sindh province after he was arrested on November 8. Mr. Tariq had been one of the thousands of lawyers arrested and detained following the imposition of the state of emergency. As a result he suffered bleeding in his lungs and two fractured ribs. There were torture marks on his back and his physicians opined that his chances of surviving were slim.

Ali Ahmed Kurd, former Vice President of the Pakistan Bar Council was arrested on the day the emergency was announced. He had been taken to a torture camp run by the notorious Pakistani intelligence agency, I.S.I. and tortured. Munir Malik, former President of Supreme Court Bar Association had been tortured in jail and later admitted to a government hospital in Attock, a remote area in NWFP, after traces of blood were found in his urine.²

c. A French researcher tortured

A French researcher, Florence Nightingale came to Pakistan earlier in the year to write a book on Buddhism and Sufism. On September 22 her bag containing her research papers and other official documents were stolen. When she went to register a complaint with the police of Thatta District in the Sindh province, her request was totally denied. When she informed the French consulate and attempted to follow up filing an FIR, she was assaulted and slapped until she fainted, by the Thatta District superintendent of police inside the police station. . It was only with the intervention of the French Consulate that she was released and her case registered.³

d. Other cases of torture: The following were a few of the thousands of cases of horrific torture that have been reported from around the country.

Forced to bark like dogs: On July 22, eight persons were arrested by the police in Khaipure Mirs District, Sindh province on charges of stealing a motorcycle. Allegedly the police tied rope and chains around the arrestees' necks and forced them to bark like dogs and bite each other like wild bears. When they refused they were beaten until they obeyed. Those arrested were Gohar Ghulam Murtaza Bhanbhro, Ahmed Ali, Manzoor Hussain, Peerano Rajar, Sobho Bhanbhro, Ali Khan Bhanbhro and Meer Hassan One of them, Bhanbhro, was a government engineer working on an oil and gas field and had been arrested at his place of work. The police also said they were among the 13 suspects named in the complaint.⁴

Torture by castration: On January 26, Hazoor Buksh Malik, 24 and a cook by profession was arrested for not keeping his national identity card in his possession. He was taken to the Market police station at Larkana, in the Sindh province, and mercilessly assaulted in order to force him to pay a large sum of money in exchange for his release. Then, while he was in police lock up, four policemen including the station head officer (SHO) Muhammad Khan Tunio approached the victim in an obviously drunken state and severed his penis with a broken tea cup. Later the victim survived to file a case of torture and attempted murder against the perpetrators but ironically the perpetrators were not arrested as it was alleged they were being protected by the federal minister for anti-narcotics. This minister was also said to have been a major hindrance for the victim to obtain adequate medical treatment. Accordingly the victim suffered from continued bleeding for several months. Since, his overall health condition has deteriorated and he has lost his means of livelihood.⁵

Poisoned through the anus: On January 12, Mohammad Ali Mallah 25 was arrested along with his younger brother Waheed Mallah by the Pir Jo Goth police of Khaipur city in Sindh province, on charges of stealing a motorcycle. The police arrest was based on a complaint lodged by Qadeer Memon the Nazim of Kingri town, against four persons including the brothers. But on January 19 he withdrew the case against the Mallahs and accepted that the initial implication of the brothers was due to a misunderstanding on his part. Notwithstanding, Abdul Sami Vesar, assistant sub inspector (ASI) in charge of the Pir Jo Goth police station, refused to release the two men unless he was paid Rs. 50,000 (USD 833). In a bid to forcibly obtain the bribe the ASI began torturing the brothers whilst in police custody and also forced them to confess to the theft of the motorcycle.

On the night of January 24 and during the early hours of the following day Mohammad Ali Mallah was visited by the ASI who strung him up on the ceiling with rope and assaulted him all over his body. Then he was hung upside down and the beating continued. The dreadful ordeal continued endlessly in the course of which the ASI allegedly also forced the victim to drink lime water and also poured the liquid down his anus. The next day, Mohammad Ali Mallah, was taken to the civil hospital in Khairpur District in an unconscious state but with his hands still cuffed. He remained unconscious for four days. Later when the incident was reported by local newspapers, the people of the neighbourhood vehemently protested against this blatant police brutality of an innocent young man. Following the victim's complaints, some high officials of the Sindh police pressured the victim and his family to withdraw the part of his statement detailing how lime water was poured into his anus. They were warned of serious consequences—including against their women and children—if they refused.⁶

Tortured to death in jail: On February 3, a young man Ali Nawaz Khan was tortured to death at the Malir central jail in Karachi by jail officers for allegedly failing to give them bribe money. The victim and two of his friends had earlier been illegally arrested by the

Gadap police for no other reason but to extract money from them. They were later falsely charge when the bribe was not forthcoming. Reportedly, the day before he died, the jail officers had threatened his family that unless they pay the required bribe, they would receive the dead body of the victim. Mr. Khan's death was attributed to kidney failure by the official doctors but the family found numerous torture marks on his body. Shockingly, despite the promise of the Sindh provincial government to suspend the superintendent of the jail—the main suspect—he was in fact awarded a new position in the Ministry of Interior of Sindh provincial government, and transferred to another city for his new job.⁷

e. Testimonies of persons discovered after 'disappearance' by the military:

Disappearance after arrests by the law enforcement agencies particularly by the military intelligence agencies has become a massive problem in Pakistan. Since 2001, after the military operations in Balochistan province, the Baloch nationalists became the main target of disappearances. Since 9/11 after becoming the forerunner in the war against terror, in the NWFP alone people arrested on charges of terrorism have simply disappeared—sometimes with their tortured bodies found in nearby places. More than 4000 people have been estimated to have disappeared. A few however have either escaped or released after arrest and they have testified to the severe torture they were subjected to in custody as well as to the thousands of people they saw incarcerated in the military camps in different cities of Pakistan. For instance:

Abid Raza Zaidi, 23, a PhD student at the University of Karachi has been missing ever since he was arrested by the special forces on terrorism on October 4, 2006 in Lahore, the capital city of Punjab province. To date he has not been produced before any court of law. This was also his second arrest by the special forces. Prior to his arrest and his subsequent disappearance, Mr. Zaidi had attended a two-day conference on “disappearances and torture” jointly organised by Amnesty International and the Human Rights Commission of Pakistan at Islamabad. During the conference he had narrated the story of how he was first arrested, illegally detained and tortured in custody in relation to the bombing in Nishter Park, Karachi in April 2006. He had been arrested on April 26 along with 12 others belonging to the Shia sect of Islam and illegally detained for 110 days in various military torture camps. He was never produced before any court of law.⁸

Salim Baloch was arrested for the first time on March 9, 2006 and his whereabouts remained unknown until he was released 9 months later on December 14, 2006. Following his release, he addressed a press conference at the Karachi Press Club where he gave details of his abduction, detention and torture by army personnel at different military cells. The high court disposed of the habeas corpus application filed on his behalf on the basis that it was no longer valid as he had been released. The courts failed to order an inquiry into his torture and illegal detention by the Army or require subsequent action locate the other

disappeared persons, who remained in illegal detention at the military torture cells of Rawalpindi.⁹

Following Mr. Baloch's statement to courts however he was once again arrested on December 31 2006 allegedly by representatives of the secret agencies who came in an unmarked red Toyota Corolla vehicle. He was later seen being transferred into a white coloured van bearing registration number 7389 around 6.30 am. Apparently his eyes had been damaged by torture and he could not walk. His whereabouts remain unknown.

f. Methods of torture in custody:

For purposes of obtaining information, forced confessions and/or bribe money from detainees, the Pakistani police have been routinely found to resort to various methods of torture. Detailed below is a sample of the methods commonly applied on detainees in police custody:

- Punching and kicking detainees with bare fists and boots;
- Assault with wooden sticks called "danda";
- Beating with a piece of reinforced leather called "chittar";
- Burning parts of the body with cigarette butts;
- Forcing victims to lie on blocks of ice while someone stands on top of them;
- Verbally abusing victims in insulting and abusive language;

The military has usually been found to use far more intensive methods of torture for much longer durations. For example:

- Forcing detainees to remove all clothing and dance naked before military officials for several hours;
- Forcing detainees to do push-ups the entire night;
- Hanging victims from the roof by their arms or legs;
- Forcing a victim's head under water repeatedly for long durations;
- Putting rats in detainees' pants or pyjamas;
- Forcing detainees to listen and watch audio and video recordings of others being tortured;
- Beating with iron rods;
- Keeping detainees blindfolded for days;
- Stitching of victims lips;
- Preventing detainees from going to the toilet;
- Using a combination of beatings with hands, boots, and sticks repeatedly and using abusive language.

Comments

The above were only examples of how Pakistani law enforcement agencies and the military violate domestic law including the Constitution and all international norms absolutely prohibiting torture. According to Article 14 of the Pakistani Constitution, sub article (a): “No person shall be subjected to torture for the purpose of extracting evidences.” Pakistan was also a signatory to the Universal Declaration on Human Rights of which Article 5 states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Nonetheless by being a member of the UN Human Rights Council and the forerunner in the war against terror the military government of Pakistan believes that it enjoys absolute impunity to freely continue with the violation of the human rights of its citizens. Regrettably, with the exception of CEDAW, Pakistan has failed to sign any of the major human rights covenants or protocols of the United Nations including Covenant Against Torture (CAT).

Recommendations

Based on the aforementioned ground we strongly urge the United Nations to withdraw the state’s membership from its Human Rights Council and also pressurize the government to at least sign and ratify the ICCPR and CAT conventions. We also urge the international community to stop affording impunity to the government of Pakistan merely because of its membership of the HR Council.

5. Disappearances

Enforced or involuntary disappearances have become a major political issue in the country. Disappearances following illegal arrest has been a common phenomenon in Pakistan since the military government took power in 1999. The situation became worse after 9/11 when the Pakistani state became a major player in the US backed war on terror. Subsequently, the government of General Musharraf has truly believed that it has a free hand to randomly arrest people and keep them incommunicado in secret military cells for months and years on end. Eventually, these persons either disappear from the face of the earth or their tortured and mutilated bodies have been found on roadsides.

Throughout the history of Pakistan there have been few reported cases of disappearances; that is, until now. After about 2000 the phenomenon has become common. In Balochistan province alone, where military action was initiated and relentlessly continue to date, more than 4000 persons have disappeared after arrest; in Sindh province about 100 persons mostly nationalists, disappeared while in NWFP more than 1000 persons have been disappeared in the name of the “war on terror”. It has been extremely difficult to accurately

estimate the number of people who have disappeared. According to cases filed in different courts—mainly the Supreme Court of Pakistan—a list of about 300 persons has been compiled. But it must be remembered this was only a fraction of those who have disappeared with different political and religious organizations claiming that to date more than 4000 persons remain missing after arrest.

Earlier, due to the courageous and diligent efforts made by the Supreme Court and some other courts like the Sindh high court, the military government and intelligence agencies have been pressurized to release detainees in custody. Subsequently many who have ‘disappeared’ were found thrown—either dead or alive—on roadsides by their captors. After the abrogation of the Pakistani Constitution and the removal of judges from the higher courts on November 3, 2007 even this check on the illegal activities of state intelligence agencies has been removed, granting the authorities unlimited power to conduct mass arrests and disappearances with added vigour.

Currently there exists little hope that the thousands of persons who remain missing since 2001 will ever be produced before courts of law, released or their whereabouts made known to their families. As a result, the families of victims have lost all hope of finding their missing loved ones. It was also certain that cases of disappearances will increase as there was no authority to hinder the illegal activities of the police and armed forces.

Prior to General Musharraf’s military coup in 1999 forced disappearance of political workers and activists was a rare occurrence. However, thereafter and even before 9/11, the process of disappearances began in Balochistan to curb nationalists’ resistance to the construction of cantonments in sensitive and poor areas. After 9/11 the government took shelter behind the much hyped about ‘war on terror’ and had an easy excuse to brutally deal with any resistance against it. As early as 2002 up to one hundred students, political workers and human rights activists went missing after arrest, mainly from Balochistan province. Later, some were released after being tortured in military camps in Quetta the capital of Balochistan and Dera Ghazi Khan bordering Punjab province.

Disappearances of religious extremists began later when resistance started in bordering areas like South and North Waziristan. On December 5, 2005, the interior minister told the national Assembly that the government had arrested 4,000 persons in Southern Balochistan since the beginning of that year. No list of those arrested was provided and very few arrestees have been produced before court. It has also become impossible to ascertain the number of people who have “disappeared” in counter terrorist operations, particularly since 2005 because of the secrecy surrounding such operations and also because the vast majority of the families of those who have disappeared do not publicize their cases fearing intimidation and retaliation.

The Pakistani authorities have also claimed that more than 1,000 alleged terrorists have been arrested since 2001 by its law enforcement agencies. The government has processed only a fraction of the cases through the prevailing legal system. According to reasonable estimates, hundreds of suspects have been handed over to US authorities, often for sizeable bounties with many ending up at detention facilities such as Guantanamo Bay. These handovers of suspects has been in gross violation of the Extradition Act of 1972 which provides detailed procedures to be followed before extradition of suspects including the holding of an inquiry by a judicial magistrate.

In Pakistan, the role of intelligence agencies, both civil and military, including the Intelligence Bureau (IB), Federal Investigation Agency (FIA) and Inter Service Intelligence (ISI) and military Intelligence (MI), has been significant not only in the field of enforcing law and order but also for their political involvement. Political expediency was probably one of the main reasons for enforced disappearances. The cantonments in major cities around the country including Karachi, the main commercial and industrial city, Rawalpindi, Quetta, Lahore and Peshawar, contain torture camps. The existence of these torture camps as well as places where people have been kept in isolation and severely tortured, have been amply described by those who have been fortunate to survive their ordeal and have been released after many years.

Furthermore, of the 240 odd cases before the Supreme Court relating to disappearances, 105 people have been released; and they too claim to have been detained, interrogated and tortured in military controlled torture cells. Questioned by the higher courts, the government has denied the arrests and to date, the whereabouts of many were still unknown.¹⁰

Recommendations:

It was imperative that the UN Human Rights Council, of which the Pakistan was a member, takes notice of the rapidly increasing problem of disappearances and appoint a monitoring body to inquire into and obtain the release or at least production before court of all persons who languish in military detention centres around the country. This problem cannot be solved by merely making requests from the government. Rather, now was the time for stern action by the UN and the international community for the benefit of the people of Pakistan.

6. Military operation in Balochistan

There has been a continuous military operation in the southwestern province of Balochistan since 2001. There have been reports of the military targeting the civilian population using F16 aircrafts and gunship helicopters. Consequently, several people have been killed and more than 200,000 persons have been forced to migrate to other areas or provinces. Another

consequence of the military operation has been the indiscriminate arrest and disappearance of people; even women, children and the elderly have not been spared. To date more than 4000 remain missing.¹¹



It was without doubt that President Musharraf and his military have been responsible for the worsening conflict in Balochistan. Tensions between the government and its Baloch opposition have grown mainly because of the government's heavy-handed armed response to Baloch militancy and its refusal to negotiate demands for political and economic autonomy. The killing of Baloch leader Nawab Akbar Khan Bugti in August 2006 sparked riots in the region and was likely to lead to more confrontation. The conflict will continue to escalate as long as the government insists on seeking a military solution to what was essentially a political problem; and especially if the US fails to recognize the price that was involved for security in neighbouring Afghanistan.

Tension with the central government has not been a new phenomenon to Balochistan, given the uneven distribution of power, which favours the federation at the cost of the federal units. The Baloch have long demanded a restructured relationship that would transfer powers from what was seen as an exploitative central government to the provinces. But Musharraf's authoritarian rule has deprived them of participatory, representative avenues to articulate demands and to voice grievances. Politically and economically marginalised, many Baloch see the insurgency as a defensive response to the perceived colonisation of their province by the Punjabi-dominated military.

According to the International Crisis Group, although regional parties still sought provincial autonomy within a federal parliamentary democratic framework, and there is, as yet, little support for secession, militant sentiments could grow if the central government does not reverse its ill-advised policies including:

- Exploitation of Balochistan's natural resources without giving the province its due share;
- Construction of more cantonments to strengthen an already extensive network of military bases in the area; and
- Centrally driven and controlled economic projects, such as the Gwadar deep sea port, that do not benefit locals but raise fears that the resulting influx of economic migrants could make the Baloch a minority in their homeland.¹²

While Baloch alienation has been widespread, crossing tribal, regional and class lines, the military government insisted that a few sardars (tribal leaders) were challenging the centre's writ, concerned that their power base would be eroded by Islamabad's plans to develop Balochistan. According to the state therefore, it had little option but to meet the challenge head on. This failure to accept the legitimacy of grievances lay at the heart of an increasingly intractable conflict, as does Islamabad's reliance on coercion and indiscriminate force to silence dissent.

Also exacerbating the conflict was the fact that Akhtar Mengal, former chief minister and head of a moderate Baloch nationalist party has been detained for the last one year. He was being kept in an isolated cell in the scorching heat in one of Karachi's prisons since December 2006. He continues to be denied justice through various delaying tactics. The illegal detention of this prominent Baloch politician has also exposed the courts' inability to act without the influence of the executive. Mr. Mengal has not been arrested on corruption charges or for the misuse of power. He was not an industrialist, loan defaulter or involved in any land scam like many other pro-establishment politicians in the country. Nonetheless, he continues to be illegally locked up.

Furthermore, due to the setting up of hundreds of check posts all around the province, the freedom of movement of the provinces' citizens have been vastly restricted. Even journalists have not been permitted to enter any district of Balochistan without the prior approval of the Army and only after being thoroughly searched. Earlier in the year, Nisar Khokhar, a correspondent for BBC and a local newspaper journalist visited the province to investigate the arrest of seven women in April 2007 by law enforcement agents during a raid on a house in a village in the Dera Bugti district. The women had been detained for more than 20 days in an army camp at Sui town and were released in the second week of May. However, when the women attempted to return home people of the area refused to accept them saying that they were 'dishonoured' as they had been in the camp with army personnel. Such social cost of the military operations has simply been ignored.

Conclusion:

According to credible reports more than 5000 people including women and children have been killed by the indiscriminate bombardments and direct firing on citizens by the Pakistan Air Force and Army. The killing of a renowned politician Sardar Akbar Khan Bugti and some 37 of his supporters in a mountain hideout by the Pakistan military on August 26 has thrown the country headlong into a catastrophe that can only be averted by intense international and national efforts.

As the news of the killings in Balochistan spread, so too has violence against the administration, and between communities. The country now faces the prospect of outright

war between the armed forces and the people of Balochistan, not to mention leaders and peoples in other provinces who have cause to believe that the only way the government knows how to deal with dissent was through bloodshed. Since the latest killings, and particularly after the killing of one prominent nationalist leader, Baloch Marri, Balochistan has been cut off from the world. In response to the violent reaction of thousands of alienated and frustrated youth, more than 2000 people were reported to have been arrested in the last few days of November 2007 with many later killed by state intelligence agencies.

Recommendations:

The military operation in Balochistan province should be stopped and people of the province should be afforded the right to choose their own government. It was time for the international community to take notice of the situation in Balochistan where several thousand people have been uprooted and have suffered untold miseries due to the continuing military activities of the Pakistani military regime.

7. Police encounters

Police encounters have been the easiest method in which the police could conceal their illegal activities including torture, illegal detention and extortion of victims. In 2007 several people were killed in police encounters and by masked men riding motor bikes and vehicles with no number plates. The police have learnt that the easiest method to close a case relating to a high profile personality was to take the arrested suspect to some remote area, kill the person and claim the death occurred during a gun battle—with no injuries to any policeman involved.

During the year, the majority of deaths due to police encounters was reported from the Punjab and North Western Frontier Provinces—either by the police or unknown persons riding unmarked motorcycles, but commonly believed to be from the police.

For example, on March 27 two boys Akhlaq Hussain Sheikh, 15, and Aijaz Ahmed, 13, were riding a motorbike on Cinema road—a busy commercial area of Dharki city in the Ubaro town council of Sindh province—to distribute marriage invitation cards of one of their close friends. They were both shot separately by policemen in broad daylight. The 15-year-old was killed on the spot while the injured 13-year-old was shot dead at point blank range while in a police van en route to hospital. The Dharki police later attempted to cover up the brutal killings by claiming that the boys were killed during a confrontation with the police.

8. Violence against women

According to Lawyers for Human Rights and Legal Aid (LHRLA) a total of 2226 cases of violence against women have been reported from across the country from January to

December 2007. Of these 1739 were acts of physical abuse while 527 included sexual abuse. Of the reported sexual abuse cases—which needless to mention was only a fraction of the actual—295 were rape cases with 160 involving gang rape. In 72 cases, the victims have been brutally murdered after being violated. Among the precious few UN conventions ratified



by Pakistan was the CEDAW pertaining to the protection of women. However the continuing high incidence of violence against women has been a clear indication of the lack of commitment to implement any of the fine words contained in the convention.

A few of the reported cases were as follows:

- In January 2007, 16-year-old Naseema L was kidnapped during daytime from her residence in Obara in the Sindh province. She was taken to private premises called “Autaq” and raped by several men. Villages who rushed to “Autaq” heard the painful cries of Naseema while she was being violated. The perpetrators later threw her out on the street without clothes. The villagers covered her with a shawl and returned her to her home. The police filed a case against the alleged perpetrators only after being pressurized by the local electronic and print media.¹³
- On January 30, 2007 a 15-year-old girl Asma was gang raped over a period of four days by several men from the Layyah town in the Punjab province. The perpetrators included local influential persons and politicians. In another case in January 2007, a 13-year-old was gang raped in Mehar by a person called Shaban Sheikh who was accompanied by two accomplices who helped intoxicate the victim.
- After the victims filed complaints, the influential perpetrators in both the abovementioned cases threatened their families with grave consequences if they pursued the complaints. The area police showed little interest and reportedly vehemently attempted to stop the victims from seeking justice. The victims’ families even claim to have been threatened by the police and this has forced them to leave their homes and villages in fear and seek refuge in Karachi.

Data on violence against women also reveal that from January to August 2007, more than 900 victims have been murdered subsequent to being abused; 809 received serious injuries at the hands of male family members or strangers. Sadly, in many of the reported cases, the media has failed to provide details of the alleged perpetrators.

The data obtained also indicate an interesting pattern; of the total 2226 reported cases, 1244 were against married women and 340 were against single women; 47 victims were divorced while 31 had been widowed. In 604 cases newspaper reports failed to mention the marital status of the aggrieved women. A breakdown of the data according to province shows 1532 cases from Punjab, 542 from Sindh, 179 from NWFP, and 13 cases of violence against women from Balochistan. Major cities reporting violence against their women include Lahore 241; Multan 300; Karachi 222; Sargodha 78; Peshawar 179; Sukkur 115; Gujranwala 161; and Melsi 2007.

Reportedly, President Musharraf has ordered an inquiry into the involvement of a federal minister and local mayor in threatening a rape victim and her family to withdraw their police complaints; but little has come out of it. According to latest information, the child victim was continuously being threatened by the police and politicians to withdraw her complaints. People assisting the victim to file a legal case have allegedly been attacked by relatives of the perpetrators. Although the court had ordered inquiries into the case twice, the police have failed to conduct proper investigations and merely claim the perpetrators were innocent prior to even recording statements from the victim and witnesses. It seems the police have been the major obstacle for women obtaining justice in sexual abuse cases.¹⁴

Protection of Women (Criminal Laws Amendment) Act, 2006: In 2006 President Musharraf signed into law the Protection of Women Bill, which ostensibly placed rape laws under the penal code and did away with harsh conditions that previously required victims to produce four male witnesses and exposed them to prosecution for adultery if they were unable to prove the crime. Ironically, even after the new law, Pakistani women remain no better off than during the existence of the Hadood Ordinance. Currently more than 3500 women were still facing charges under Zina law a part of the Hadood Ordinances which was adopted for the first time in 1979 and made fornication along with adultery a crime against the state, non-bailable and punishable by death.

Conclusion:

Though women throughout Pakistan have welcomed the new laws seeking to protect women, the general condition of the majority of women has not changed. Regarding cases of sexual abuse and rape, law enforcement authorities still seem to follow antiquated methods. Courts still apply old methods for registering cases of abuse and rape; women were still asked to provide witnesses for the alleged sexual offence and continue to be booked for adultery. The number of cases of honour killings, gang rape, abduction and killings of women with the connivance of authorities has increased; ministers and powerful people were involved in violence against women.

Honour killings still form part of the law meted out by Jirga courts (private courts in tribal society) and the victims do not have access to normal courts. The women have been controlled by harsh customs and traditions by religious and sectarian groups. There were more than 3000 women jailed under minor charges and lower courts cannot grant the bail because of the pressure exerted by local religious groups. It seems the implementing authorities still under pressure of religious and powerful people. Through the Finance Act the working hours of women have been increased, forcing them to work until late in the night without any break. Through this law, the previous facilities provided in relation to working hours of women were all abolished. They do not have medical facilities even in the formal sector.

Recommendations:

- Women should be afforded all rights in accordance with CEDAW;
- Jirga courts should be abolished forthwith as well as all customs which were repugnant to the basic rights of all Pakistani women;
- The Finance Act should be abolished and women should be provided protection at their work places; labour laws applicable to men should be afforded to women as well and implemented without distinction.

9. Economic deprivation

As in previous years, the displacements, evictions, denial of access to employment, retrenchments and ill conceived economic planning have affected thousands of people during 2007. About 25,000 people were rendered jobless in the banking, power and steel industries. The share of the informal sector in economic activities has been on the increase and this has drastically affected the wage structures and working hours of the masses. The basic wage as fixed by the government of Pakistan has been Rs. 3500 a month but in the informal sector, most workers were paid more than Rs. 2500 per month. The informal sector has also not allowed trade unions, failed to implement labour laws and offered no job security and medical facilities. These practices have affected more than 100 million workers.

The livelihoods of about 500,000 fishermen will be directly and severely affected and approximately 100,000 persons will be displaced by the Pakistan government signing a 99-year lease with a Dubai based foreign company on the twin Islands—Bhudal and Bhuddo in Karachi, in the Sindh province. The affected fishermen were indigenous people who have been living on the islands for centuries. Reportedly, the company plans to build hotels, casinos and residential resorts. However, the government's action was unlawful as

it did not conduct an Environment Impact Assessment as required by law, before entering into the contract. . And though Pakistan has one federal assembly, one federal senate and four provincial assemblies, the government has not held any discussion for the approval of the project in any of these legislative fora including the Sindh provincial assembly and its own federal Cabinet.

According to media reports, on October 28, 2007 thousands of Pakistani construction workers in Dubai protested the harsh working conditions and labour shortages at their work places. The Ministry of Labour and employers of the construction and petroleum companies warned them that unless they ceased the disruption immediately they would face deportation without wages and other benefits. Reportedly, more than 1,500 workers have already been served with retrenchment letters and cancellation of contracts by their sponsors.

Four thousand workers, already facing the threat of deportation without their legal entitlements were employed by AI Habtoor Engineering Co, and Sun Engineering & Contracting and Construction Co in Dubai. These companies claim to pay skilled workers USD 177 a month and unskilled workers USD 149; however the workers say that they have not been paid more than USD 150 and USD 100 respectively. On the other hand their working hours have been increased to 12 and 14 hours a day in the scorching sun, their break times reduced from 2 and 4 hours to one hour only. Under these vulnerable circumstances, it was little wonder that workers started protesting for better working conditions.

Pakistan Railways has asked the city district government of Karachi to promptly make arrangements to vacate all land in approximately a 100-foot radius on both sides of its railway tracks. Accordingly, in about 30 localities Pakistan Railways and the city government have called people to vacate lands adjoining the railway tracks. Several newspapers in Pakistan and the Urban Resource Centre estimate that more than 20,000 homes will be demolished by the latest action of Pakistan Railways and the city government, resulting in the displacement of more than 140,000 people—without any compensation or plan for rehabilitation. The people have lived in these communities for 30 to 35 years and have electricity and natural gas connections. Some of them have government titles to the land. Moreover, in 2004 the President of Pakistan announced that shantytowns built since 1985 would become legal communities through the law. Notwithstanding such assurances however, these people have now been asked to leave.

Pakistan Railways has been severely criticised by local people and non-governmental organisations (NGOs) for its perceived intentions to acquire the vacated land for commercial purposes as it has done in the past. For example, there were more than 50 structures already inside the 100-foot radius, such as those of Honda Motors, Karachi Shipyard and

Toyota Motors. In addition, several high-rise buildings of private companies, warehouses of multinational corporations and concrete and well-constructed structures of the Pakistan Air force and Army, including a government multi-story building, have acquired land 60 to 90 feet inside the 100-foot radius allocated by the railway company. In some places, the railway company has allowed commercial structures to be built just five feet from the railway tracks. The Railway authorities have not issued any notice nor conducted any survey for the demolition of these commercial structures inside the 100-foot radius of the railway tracks, reflecting the malicious intentions of the company to merely dislodge poor people and sell the land for commercial purposes.

Conclusion:

Recently the government of Pakistan has claimed that poverty in the country has reduced to 28 percent. But independent financial organizations estimate that about 40 percent of the population lived below the poverty line. This partly due to the government's negligence towards the poor and marginalised segments in society; its ill planned policies and the process of privatization without transparency, leaving thousands of people unemployed every year.

Due to the non-availability of opportunities migration from rural areas has increased each year. The overcrowded cities have been unable to cater to the demand for employment and as a result the reports of suicides, attempted suicide as well as crime have been on the increase. Many suicides however go unreported due to the stigma attached. Moreover, the inflation rate has been out of control due to which basic essentials were out of reach of the common person. Agricultural produce has been generally smuggled out of the country causing a scarcity within.

Thousands of children die each year from starvation or malnutrition related illnesses, but their deaths were rarely reported. There have been at least half a dozen cases where women have committed suicide after killing their children, due to poverty and unemployment.

Recommendation:

- The government of Pakistan should focus its fiscal policies towards eliminating poverty which has been increasing every year according to independent estimates;
- Fishermen should be protected and should be afforded continued access to fishing;
- Every person should be provided shelter; if lands were required for business purposes, before people were displaced, they should be offered with alternate and suitable resettlement.

10. Discrimination against minorities

In Pakistan, citizens belonging to minority sects continue to be discriminated. Religious minorities such as Christians, Hindus and the Ahmedi sect of Islam have been regularly charged under blasphemy laws and their residences and places of workshop have been attacked by Muslim religious parties and their supporters.

During the last six months at least eight cases involving blasphemy have been reported from different parts of the country. The majority of these cases have been reported from Punjab; three have been from Lahore, one each in Faisalabad and Gujrat, two from Sindh and one in Islamabad. According to the state department, at least five Ahmedis have been imprisoned on blasphemy charges. In the past year, those attempting to defend persons accused of blasphemy have also received threats. People have also been accused of blasphemy for ulterior purposes. In January 2007, Martha Bibi was charged under the blasphemy laws, allegedly by people who wanted to avoid paying money owed to her. Bibi, a Christian was later released on bail but the charges against her remain to date.

Adding to concerns regarding blasphemy laws has been a draft bill currently before a standing committee of Pakistan's National Assembly that would impose the death penalty for apostasy, or converting from Islam to another religion. The death sentence would be imposed on Muslim men; women would receive a life sentence. The bill, which provides that testimony by two or more adults would be sufficient grounds for conviction, was tabled by Muttahida Majlis-e-Ammal, an alliance of six Islamist political parties. This proposed bill would violate human rights standards because it would criminalize an internationally protected right. Therefore, every effort should be made by the government of Pakistan to ensure that such repressive legislation will not be passed.

Sections 295 B, C and 298, A, B and C, commonly known as the blasphemy laws were added gradually to the Pakistan penal code, between 1980 and 1986 by the Zia regime. The first two sub sections prescribe life imprisonment and capital punishment for offences of insulting the Holy Quran and Prophet Muhammad, respectively. The other sections criminalise the passing of insulting remarks or making signs against the wives, companions and family of Prophet Muhammad—prescribing punishments from three to ten years of imprisonment and a fine. The last Section 298-C prohibits Ahmedis from preaching their religion and 'posing to be Muslim'.

On May 8, Christian residents of a Muslim colony in Charsadda City, NWFP received a letter allegedly from militants asking them to convert to Islam within the next 10 days or leave the area. A later message written on a wall near the local church on May 18 contained the same message. Consequently, several Christian families of Charsadda city fled their homes while others have been living in constant fear. Police claim to have arrested three suspects in connection with the incident but the residents doubt whether the real culprits have been arrested.

On June 12, Christians of Shantinagar village of Khanewal district in Southern Punjab were shocked to receive anonymous letters, written in Urdu, instructing them to either convert to Islam or leave the area. If not, to get ready to face the consequences. Nobody knew what ‘consequences’ meant. Then on June 18 pastor Lamual Daniel’s son received two telephone calls warning him that the Christians of Shantinagar should take these letters seriously and convert to Islam. The first call was received at 10.40 am from the mobile number 034440146448 while the second call was received ten minutes later from the mobile number 03226208456. Leaders of the village decided to go to Khanewal city and inform government authorities of this latest threat.

The elders also visited the district superintendent of police who forwarded their complaint to the security branch for further investigation. The Christians had also requested to file a first information report (FIR) against the culprits but the police had been reluctant. The police have also failed to trace the mobile phone numbers of the culprits of the threatening calls. Christians feel that they have been an easy target for militant groups. Attacks on Christian churches and religious ceremonies have occurred in the past; but receiving threatening letters was a new development. They suspect a militant religious organization with a centre in Kabirwala, about 14 kilometers in north of Shantinagar, was behind these letters.

In another incident, on June 12, Muhammad Qasim who had been accused of blasphemy was killed by a policeman in Gujrat city. On June 9, Shahdra town police registered a case against a mentally-challenged man, Nadir Ali, under blasphemy laws on the complaint of Shahid Maqbool, a relative of the accused who lived in the upper portion of his house on rent. Later the police confessed it had lodged an FIR against Nadir due to pressure exerted by people of the community and confirmed that the complainant actually wanted to grab Nadir’s property. On May 9, Walter Fazal Khan, a 79-year-old resident of Lahore was accused by his adopted son Riaz who lived in the same house, of burning a copy of the Holy Quran. After a case under the blasphemy laws were filed against the elderly man it was discovered that Riaz had actually wanted to grab his property.

According to available data, since 1986, around 400 cases against more than 850 people belonging to different religions—(Muslims = 50%; Ahmedi = 33%; Christian = 11 %) have been registered under blasphemy laws but none of them have been convicted by the Supreme Court of Pakistan. This clearly indicates that most of the cases were registered on personal grudges or disputes. Also the majority of the cases—more than 70 per cent—have been registered in Punjab while Sindh occupies second place with about 25 per cent of the total registered cases. More than 35 per cent of the total accused blasphemers (300 out of 850) belong to districts in Central Punjab of Lahore, i.e. Sheikhpura, Faisalabad, Kasur, Gujranwala and Sialkot. A few cases have been reported from NWFP and Balochistan. It was interesting that the total number of cases registered from 1947 to 1986—the year in

which the strict blasphemy laws were introduced—were only six none of which were about using derogatory remarks about the Holy Prophet or Islam. Ironically, the first case reported was in Dhaka in November, 1956 against one Okil Ali and others who were accused of chopping down a tree deemed sacred by the Hindu community. The accused were convicted with six months imprisonment and Rs 200 fine each.

The Christians of Shantinagar live in constant fear of being attacked by Islamist militants. The apprehension of people were justifiable as this village has been attacked before—on February 6, 1997 when it was attacked by a mob of about 2000 people resulting in the whole village being razed to the ground while about 300 policemen stood and watched, outside the village. The attack was the result of someone announcing from the mosque loudspeaker that the Christians have insulted the Holy Quran. Within hours about 80 percent of the village was damaged; about 800 houses were destroyed and 2500 people adversely affected. In the attack about 2000 Bibles were also burnt. A judicial inquiry was subsequently conducted but its findings have not been made public. Moreover, though the police arrested 97 persons no one was convicted.

The recent incidents indicate that minorities were indeed not safe in Pakistan. The state's response to the violence and threats against them has also been of serious concern. They question when they will be afforded equal citizen status, guaranteed under the Constitution, Article 25 A; when they will be able to obtain adequate protection and allowed to live without fear?

Comments

The religious minorities in Pakistan have been under increasing pressure from different Muslim religious groups and parties but state authorities have failed to protect them against attacks on their lives and properties. According to the Constitution of Pakistan minorities were afforded equal status with any other citizen and no one can be discriminated by virtue of their faith.

Powerful religious personalities have been found to aid the abduction and sexual abuse of girls from religious minorities for purposes of converting them to Islam or claiming that the abductors have married the girls who have become Muslim. No case of abduction of girls from minority communities has been registered due to pressure from religious parties. It has been a common phenomenon that places of worship belonging to minorities have been destroyed by mobs on the instructions of their leaders; mosques were frequently found to concoct news and instigate feelings against minority groups.

It has been interesting that despite claims by the government that elections were held under the joint electoral system minorities still do not have access to electoral lists. People

from the Ahmedi sect have been barred from elections with powerful local groups preventing them from casting their vote. Graves of Ahmedis in common graveyards have been destroyed by the local Muslim leadership. Worse, lower courts have shown an inability to decide independently in cases under blasphemy laws and in other cases in the province of Punjab, and reportedly, decisions were dictated by local Muslim religious groups.

Recommendations:

- The religious minorities should be afforded adequate protection in accordance with the provisions of the UN human rights charter and the Constitution of Pakistan.
- The UN human rights council should adopt a special procedure to stop the discrimination against religious minorities in Pakistan.
- Forced marriages of girls belonging to minority religious groups should be stopped and those people involved in promoting such criminal activity should be forthwith brought before the law.

1 For further details see AHRC's urgent appeal UP-153-2007.

2 For further details of the prevailing situation in Pakistan see UG-008-2007

3 For further details see UA-306-2007

4 For further details see AHRC's urgent appeal UA-249-2007

5 To see AHRC's many urgent appeals issued on the case see UA-032-2007, UP-021-2007, UP-045-2007, AHRC-OL-012-2007, AS-034-2007.

6 For further details see urgent appeal UA-038-2007:

7 See AHRC urgent appeal UA-046-2007

8 For further information see AHRC urgent appeals UA-171-2006, and UP-191-2006

9 For more details read UA-413-2006, and UP-001-2007

10 A list of disappeared persons could be found at AHRC website at http://pakistan.ahrchk.net/pdf/Disapp_PHRC.pdf

11 Details of 400 odd missing people of Balochistan may be found at: http://www.balochvoice.com/information/07-07-25_List_of_Missing_Marri_Baloch_people.html;

12 For a complete report on the situation in Balochistan visit www.crisisgroup.org

13 For further details of the case see AHRC's urgent appeals UA-039-2007 and UP-89-2007

14 For full details of the case see AHRC's website for UA-081-2007: and UP-095-2007.

PHILIPPINES

Systemic failure of investigations aggravates rights abuses

The continued failure to prosecute and punish the perpetrators of extra-judicial killings,¹ forced disappearances and other grave violations of human rights, illustrates how deep the problems concerning human rights are today in the Philippines. Despite repeated assurances, commitments and pledges by the government that it would take action, investigations are cursory at best and legal remedies for the victims and the families of the dead remain beyond reach. In reality, the perpetrators of these killings - whether they are the police, military or paramilitary groups - are not yet being held to account. It is worth recalling that the United Nations Human Rights Council's Special rapporteur on extra-judicial killings, Philip Alston, visited the Philippines in early 2007 and concluded that the military are responsible for a large number of the political killings taking place in the country. The government's pledges to its people and the international community, notably in the Human Rights Council itself, have either proven meaningless or deepened the distrust felt by the victims and their families, as they have not resulted in any substantial progress. A lack of political will and failing institutions of the rule of law are at the centre of the government's failure to address the killings in the country in 2007.

The lack of political will and the ineffective or corrupt institutions explain why, despite the numerous recommendations from various institutions and groups on how to deal with killings and disappearances - for instance, the Melo Commission that the president created, the U.N. Special Rapporteur on extra-judicial, summary or arbitrary executions; the European Union (EU) and several local and foreign organizations - the government is still failing to make progress. The criminal justice system remains deeply flawed and incapable of dealing with crimes committed by State-actors, notably in cases where those actors are committing violations on behalf of the State. The notion of protecting fundamental rights is almost non-existent within this system. Some of the institutions of the rule of law - the police, prosecution and elements within the judiciary - are in state of denial about the practical problems that are undermining the delivery of justice. Their inability to try those responsible for grave abuses and to protect the lives of the victims and witnesses results from deeply rooted systemic failures. Repeated commitments and pledges are not enough if the authorities continue to ignore the root causes of the failure of the country's systems to address

human rights violations. The lack of political will to do this is the main obstacle to the enjoyment of human rights and security in the Philippines at present.

The continuing problem of threats to and violations of the right to life, the failure to punish and prosecute perpetrators, and the lack of adequate remedies to victims, despite a large amount of international condemnation and pressure concerning these problems in the country, are frustrating and further deepening the loss of faith by the victims and their families in the authorities. The failure to hold those responsible to account is without any doubt ensuring that violations continue to occur.

These are the reasons why victims of human rights violations refuse to come out to complain or seek legal remedies. Activists or persons facing continuing threats are forced to take protection into their own hands because of the state's inability to help. The existing mechanisms are unable to address this insecurity, sometimes with fatal results.

Furthermore, there are gaps in legislation that ensure that victims cannot receive appropriate reparation. Victims of torture and enforced disappearance remain unable to seek appropriate remedies due to the absence of laws criminalizing these practices. Workers and labour leaders are forced to give up legitimate struggles to obtain improved rights and welfare due to continuing violence and the lack of protection. As mentioned earlier, a large number of recommendations by various expert bodies have not been implemented to address this lack.

To cite an example, special courts had been created to hear cases of extra-judicial killings but progress has been negligible. How could these courts function when there are no cases filed and complainants are not coming forward, and where prosecutors or the police fail to effectively perform their duties, often resulting in the dismissal of the complaints? The Witness Protection, Security and Benefit Programme (RA 6981) was to be strengthened further, but there are no indications that this is happening at this time. Large numbers of witnesses, the families of the dead and those seeking legal remedies often remain unaware about how they can best do this or who can assist them with this. However, when questioned about the lack of prosecutions, the government often casts blame on these persons for not cooperating.

The legislative bodies have continuously failed to take appropriate action to remedy the prevailing situation by using their power to enact laws and policies to ensure protection of fundamental rights, and to impose punishment and remedies. For many years, bills concerning torture, for example, have been filed in the legislative bodies but have not been enacted. Torture and enforced disappearance are not criminal offences in the penal code. The government repeatedly ignores the gravity of these cases that should long ago have merited the enactment of adequate laws.

Torture has been systemically used as a method of police investigation. Soldiers routinely employ this practice to extract information from persons suspected of committing terror acts, and prosecutors too routinely prosecute innocent persons on evidence and testimonies taken by way of torture. The limited documentation of cases involving how police use torture in investigations does not mean these practices are not widespread. In fact, most victims are so scared that they prefer not to talk or make complaints.

Instead of enacting laws to ensure the protection of rights, the legislature instead sometimes threatens them. For example, the enactment of the Human Security Act of 2007 allows surveillance and labeling of persons and organizations as “terrorists,” and gives enormous power to the police on the pretext of fighting terrorism. It not only poses serious threats to civil liberties, but also places suspects at serious risk of being tortured or forcibly disappeared while in the police or military’s custody. The law empowers the police to arbitrarily arrest and detain persons on mere suspicion of committing or aiding acts of terrorism, with very loose definitions meaning that these powers can easily be abused.

The plight of farmers and workers have also worsened in 2007. Their respective struggles for land reform and the improvement of labour rights and welfare have even proven fatal on occasion. These groups have continued to suffer legal persecution, violent attacks, forcible abductions and extra-judicial killings in seeking their rights. Farmers who fought for land reform have been forced to take desperate measures, such as going on hunger strike, when demanding their rights. They have also been the targets of killings by influential landlords’ armed thugs. Workers and labour leaders engaged in peaceful strikes demanding benefits and improved working conditions are frequently subjected to violent attacks and abduction. These victims are unable to get adequate remedies for the atrocities perpetrated against them. Asserting one’s rights can be a fatal practice in the Philippines.

Farmers and their families struggle to gain ownership of land despite the law requiring distribution of farm lands. Farmers are also met with violence once they started claiming ownership of land to which they are entitled. Many farmers struggle to put food on the table even though they produce food crops, while many others continue to suffer abject poverty and starvation. The failure of genuine land reform and the continuous attacks against farmers asserting their right has pushed them further into such poverty. Workers and labour unions members also suffer, as conditions in many workplaces remains poor, and salaries and wages barely support a family. There have been very few successful struggles for the improvement of rights and welfare.

Legal remedies have been extremely difficult to obtain for farmers and workers for many reasons. For instance, cases involving land and labour dispute drag on for many years because of: excessive delays; influential persons subverting laws and manipulating judgments by quasi-judicial bodies in their favor. During this time the perpetrators of

extra-judicial killings and attacks on farmers and workers continue to enjoy impunity and threaten the victims. Even peaceful demonstrations or protests to expose these systemic abuses have not been tolerated by the security forces, particularly the police.

Police – a major obstacle to the prosecution of cases

The police's role in investigating cases is essential for the effective prosecution of perpetrators. However, the police are failing to perform this fundamental duty, in particular in relation to any case of human rights violation in which State-actors are thought to be involved. Their inaction has become a major obstacle concerning the delivery of justice in the notorious cases of extra-judicial killings. Investigations, if they take place, are cursory in nature, leading to cases collapsing if they go any further in the judicial process.

As clearly stipulated in Chapter III, Section 24 (a and c) of the Republic Act 6975, the powers and functions of the Philippine National Police (PNP) are, amongst others, to:

- a. Enforce all laws and ordinances relative to the protection of lives and properties;
- c. Investigate and prevent crimes, effect the arrest of criminal offenders, bring offenders to justice and assist in their prosecution.

Although the police acknowledge that there is a need for witness protection, they have not taken any action to correct this problem. They are fully aware that the reason why witnesses and families of the dead are reluctant to pursue legal action is because of fear of reprisals and insecurity, but they do nothing about this. The lack of progress and non-prosecution of perpetrators is largely a result of their inaction.

At least twelve cases documented by the AHRC that involve extra-judicial killings, abductions, torture and violent attacks have not either been filed or seen any progress in court due to a lack of witnesses and complainant, which is a direct result of the lack of witness protection.

Take the case of the sole witness into the murder of activist Jose Manegdeg III on November 28, 2005. He recanted his testimony out of fear for his life. He was expected to testify that Captain Joel Castro, who was formerly attached to the 50th Infantry Battalion of the Philippine Army, killed Manegdeg. The witness feared for his life yet the police paid no attention to his concerns, eventually causing him to recant. This subsequently made it extremely difficult for the police to locate or encourage other witnesses to come forwards in this case. The prosecutor handling the case had to subsequently dismiss the case against the soldier for insufficiency of evidence.

Manegdeg's family were also not provided with any protection. His wife and two daughters have had to take their security into their own hands by moving from place to place, following suspicion of being followed by unknown persons. In this urgent situation the police should have taken immediate action to adequately ensure their safety, but they have not done so.

On September 13, 2007 the Deputy Director of the Directorate for Investigation and Detective Management (DIDM), Chief Superintendent Rodolfo Mendoza, wrote to the AHRC, stating that the DIDM would "conduct reinvestigation into the case to unearth evidence that could possibly prosecute the suspect/s". In his letter, he did not mention about what action they would take to protect the victim's family that were facing continuing threats or to protect potential witnesses who could help in successfully prosecuting the case. They pledged to prosecute the perpetrators, but they paid no attention to protecting the victim's family and witnesses who are crucial for the prosecution. No progress has so far been made in this case as a result.

The police have likewise acknowledged that the fear of retaliation has discouraged the witnesses into the murder of labour leader Jesus Buth Servida. Servida was murdered in December 2006, following an ambush of his colleague, Gerardo Cristobal in April 2006. In February 2007, another attempt on the lives of Cristobal and his colleagues was made in Imus, Cavite. The firearm used in shooting them then reportedly malfunctioned. A witness was supposed to testify that those responsible in the recent attempt on Cristobal are the same persons who murdered Servida. The police failed to provide the witness with protection that could perhaps have encouraged him to testify.

The possibility of locating the whereabouts and identifying the perpetrators involved in the forcible abduction of six persons (one of whom was later found dead) in separate incidents are also being prevented by a lack of witnesses and cooperation by the victims' families that results from a lack of protection. The police investigators have acknowledged this, however, no action has been taken to encourage witnesses and victims' families to engage in the process by providing them with protection.

Take the case of activist Gilbert Rey Cardeno, who was forcibly abducted on June 6, and was released two days later in Koronadal City, Mindanao. He believed that the perpetrators were members of the security forces. After he was freed, investigations into his case were brought to an end rapidly by the police after he and his family's supposedly showed reluctance to cooperate. The police blamed the end of investigations on the victim and his family's unwillingness to fully cooperate. On June 11, the PNP's regional director, Chief Supt. Felizardo Serapio, wrote in his report furnished to the AHRC:

“Apparently, the victim gave piece-meal information for he is suspicious that the gov’t had a hand in the incident, though he has no sufficient evidence to prove such suspicion”

They failed to take appropriate action to address the victim’s reluctance to cooperate. They also did not consider other means to gain the victim and his family’s confidence that could have possibly convinced them to cooperate. They did not take action to provide protection to the victim and his family through a credible institution. The victim and his family’s reticence can be understood, as the same police unit had in the past been accused of forcibly abducting or illegally arresting persons. The police investigators halted its investigation, became hostile to Cardeno’s case and filed criminal charges against him. They charged him and his colleagues for their alleged involvement with a rebel group.

A lack of witnesses also hampered the police’s investigation into the abduction and subsequent disappearance of four persons: Ismael Sarip, Datu Abubakar, Ali Barabato and Edgar Sabdula in separate incidents in August and October 2006 in Davao City, Mindanao. One of them, Barabato, was found dead on a nearby island with his body showing torture marks. His hands were tied behind his back with wire. His body and his legs were also wrapped with it. He also had a gunshot wound to the upper section of his forehead and three gunshot wounds to his neck.

On March 19, Senior Supt. Jaime Hermo Morente, Davao City Police Office (DCPO) police director wrote the following to the AHRC:

“[The police] had exhausted all efforts to identify and locate the perpetrators, as well as to established vital witnesses and evidences, however, all their [his policemen] efforts remain in vain.”

Once again, while the police acknowledge the need for witnesses to come forward as being vital for progress in this case, they did nothing to ensure this. Claim that witnesses in the abduction of these four persons could not be found is unconvincing. Three of these victims - Sarip, Abubakar and Barabato - were seen being taken from a crowded market place, while Sabdula was forcibly taken from his house. The latter’s wife and two of his children witnessed his abduction by persons carrying firearms. It is the police’ failure and inaction to take appropriate steps to prove that they could protect the witnesses and the victim’s families that prevented the witnesses from coming forward to cooperate, nothing else.

As a result, there are no indications so far that the perpetrators of the brutal killing of one of the victims and the continuing disappearance of three others will be identified or held to account. Their families, particularly that of Sabdula, who was abducted inside his house in front of his wife and children, are also at risk of reprisals. They suffer continuing threats to their lives in the absence of any protection by the State.

Why investigations are flawed or non-existent?

Investigation is the primary duty of the police. Apart from the provisions of RA 6975 which clearly stipulate the PNP's duties and obligations, there are also existing memoranda regarding the requirement for collection and storage of evidence; and the government is also required to implement the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. These instruments set the minimum requirements and standards to ensure that an effective investigation is carried out by the police or other investigating bodies, notably in cases of killings. The successful prosecution of cases depends on how the investigation and gathering of evidence is being conducted to support cases in court.

The manner in which police investigators have been investigating cases involving extra-judicial killings, enforced disappearances and torture, are falling short of the minimum standards on effective investigation. For example, they routinely and systematically delay the results of investigations, the collection and storage of evidence is poor, the concept of a credible and independent investigation is almost non-existent, and they consider cases as solved once they have been filed, regardless of whether or not these result in successful prosecutions in court.

In August 2006, President Gloria Macapagal-Arroyo gave instructions to the police to resolve ten cases of extra-judicial killings in ten weeks. A year later, Task Force Usig, a special investigating police body tasked to investigate these cases, claimed to having solved 56 cases² by filing charges in court. In none of the cases filed concerning politically motivated killings have perpetrators have been convicted, so these cases cannot be considered as being solved, leading to serious questions out the manner in which they are investigating and handling cases.

No results of the investigation into cases reported to the police since early this year involving the disappearance of six persons and the extra-judicial killings of seven activists³ that happened in different places are known at present. Three of these killings and one disappearance were allegedly perpetrated by the police and military officers. The perpetrators have so far not been identified or charged, preventing the victim's family from getting remedies. The failure of the police to promptly investigate these cases contradicts the UN Principles of effective investigation, which stipulates;

Investigation (9): There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the

investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death.

Even though investigations are sometimes conducted promptly, the collection of evidence and building of the case is conducted so poorly that the cases do not stand up in court. Take the case of murdered activist Jose Manegdeg III. A witness has identified a military captain as being responsible for killing him, but the prosecutor had to dismiss the case. The police reportedly depended heavily on the lone witness' testimony, therefore, when the witness recanted his testimony, the lack of additional evidence by the police prompted the prosecutor to dismiss the case for insufficiency of evidence.

The police also deliberately failed to take action into the murder of a young activist, Nelson Asucena, who was shot dead in front of his family in December 2006. Asucena, an elected youth representative for their village in Rizal, Cagayan, was allegedly shot dead by Lieutenant Marcelo Pascua of the 21st Infantry Battalion (IB), Philippine Army, and five other men wearing balaclavas. The victim's family has filed complaints but the police allegedly did not take action to investigate the case promptly. The perpetrators, despite being identified by the victim's relatives as being responsible for shooting him, have so far not been investigated or charged in court.

The police's crime scene investigation techniques are very poor, particularly concerning the collection of forensic evidence and the proper handling of dead bodies. When activist Alberto Yadan was murdered in December 2006, the police investigators attached to the San Juan Municipal Police Station, Batangas, failed to conduct proper on-site investigation. They simply gathered empty shells left by the weapon that supposedly killed the victim and hauled his dead body into their service vehicle. They took the body to the Municipal Hall and later turned it over to the victim's relatives without subjecting it to an autopsy. No proper investigation or further collection of forensic evidence was performed at the crime scene.

The police's failures in investigating into Yadan's murder are illustrative of many other instances of poor police investigations into cases involving extra-judicial killings of activists. When activist Enrico Cabanit was also murdered in Panabo City in April 2006, police investigators responding to the crime scene deliberately failed to collect all the empty shells. They also failed to produce photographs of the crime scene because the camera they were using was broken. They also did not conduct an autopsy on the victim's body. The body had to be exhumed later to perform the autopsy. The police investigators however stated that their actions did "not constitute a violation of police procedures." The investigation report by the police describing the type of bullet that pierced the victim's head was different from the description of a forensic expert who conducted the autopsy

on his body. They did not conduct an autopsy but were willing to jump to conclusions, as is often the case.

Quality forensic investigations are rarely conducted. This year, there have been incidents of corpses and mutilated body parts being thrown into crowded streets, on river banks, the seashore and elsewhere in many urban areas, particularly in Metro Manila and Davao City. The police's usual practice in investigating these cases of suspicious deaths are aimed more on identifying the victims than those responsible in the crimes, or to determine the circumstances of the victims' deaths. Although corpses are taken to morgues and funeral parlors the purpose is for identification by their families, rather than collection of forensic evidence that could help in investigations to identify the perpetrators.

The Department of Justice (DoJ) Circular No. 16 regarding New Rules on Inquest, under Section 16, which requires the inquest prosecutors to get involved in the police's on-site crime scene investigation of cases of suspicious death are rarely observed. The police carry out their investigations into cases of suspicious death regardless of whether inquest prosecutors are present or not. A forensic expert noted that police investigators who have no knowledge on forensic investigations pretended that they do when carrying out investigations. The investigation into Cabanit's murder is an example. The use of forensic investigation techniques is negligible in most criminal cases, particularly concerning human rights violations.

Given the increasing number of extra-judicial killings and enforced disappearances, the police and prosecutors should have been complying with the legal requirements concerning on-site investigations, but they have failed to do so. Their failure denies victims' families remedies from court and the prosecution those responsible.

The need for impartial investigation

The impartiality and independence of persons or bodies investigating cases of human rights violations are paramount in obtaining an effective investigation. This is an absolute necessity to ensure that the victims and their families receive remedies and those responsible for perpetrating violations are effectively prosecuted court. This is sadly lacking within the police, quasi-judicial bodies, and other authorities empowered to investigate cases of rights violations in the Philippines.

For example, no credible or independent investigations was carried out into the violent attack by unknown perpetrators against persons peacefully picketing in front of their factory inside the Cavite Export Processing Zone (CEPZ) in Rosario, Cavite in June 2007. The CEPZ police, which is responsible for investigating cases taking place within the CEPZ, allegedly failed to promptly investigate the worker's complaint and to protect them

from being attacked. The CEPZ police are not directly accountable to the PNP since they are separate body of the security force. They are responsible to the Philippine Economic Zone Authority (PEZA).

In the past, the workers have accused the CEPZ police of having been involved in violently attacking them, or failing to take action to prevent the attacks on them. These confrontations usually takes place when workers are picketing and demonstrating inside the CEPZ. Some of the workers were brutally beaten - one woman had a miscarriage due to violent beating - by the said security forces and other private guards.

Nevertheless, the CEPZ police concluded their investigation into the June 10 and 11 attacks claiming that those involved could not be identified, and that there are no witnesses to prove the workers' claims that their picket line was attacked and their makeshift tent was destroyed. They concluded that the workers destroyed their own tent. The attack on the workers was apparently designed to harass and frighten them into halting their strike. Those who conducted the investigation in the CEPZ police are from the same police unit that had been accused of inaction and complicity in the attacks against the workers in the past. The latter have filed criminal charges against the police in court.

Therefore, there impartiality of their investigation is highly questionable. However, when the AHRC raised serious concerns on this and subsequently made calls for a credible and independent investigation, the PEZA's Deputy Director General for Finance and administration, Justo Porfirio Yusingco, wrote (on August 31):

“Regarding your concern, we assure you that the investigation was conducted in an utmost professional manner sans any partiality...”

“The PEZA police is being criticized for conducting the investigation of the reported incident because in the past some strikers filed charges against some of them. Be that as it may, this alone should not cast doubt on the credibility of the investigation.”

There are no indications though that the PEZA appointed disinterested persons or bodies that could conduct the investigation in an impartial way. The principle of an effective and impartial investigation is obviously not well understood even by the very institutions empowered to investigate cases. It is clear, for instance in this institution, that by mere “assurances” they feel they can absolve themselves from questions concerning impartiality and carry on with their duties.

Impunity concerning violations by the police and soldiers

The certainty of punishment of those responsible for atrocities is paramount for the effective prevention of crimes and further violations. The failure of the police and military

to promptly hold their personnel responsible for committing violations aggravates the condition of denial of justice to victims and engenders further violations. In recent times, there have been incidents in which the police and soldiers get away with ease with the worst forms of human rights abuses. No actions are taken against them despite serious allegations of extra-judicial killings, enforced disappearances and torture, for example.

In the case of couple Bacar and his wife Carmen who were murdered in September 2004 in Tagum City allegedly by Sergeant Serafin Jerry Napoles and his men from the 404th Infantry Battalion of the Philippine Army, the victim's brother, Talib Japalali, struggled for over three years before those involved were issued with arrest orders by the court. Until then, they were allowed to carry on their usual duties under the same military leadership while the investigation was ongoing. All their superiors did was to transfer them from one assignment to another, but they were still able to carry on their usual duties. Even after arrest orders were issued by the court in November 2006; it took six months before they were served. Had there been no pressure on the military it would have not turned over its personnel facing criminal charges to the police.

The policemen who failed to promptly serve the arrest orders on the soldiers were also not held responsible for their inaction. In December 2006, the policemen already had copies of the arrest orders but failed to carry out the arrests promptly. They waited for the victim's relatives and a group assisting the latter to push them into implement the arrest orders. Even when the arrest orders were served on May 23 at the military's headquarters, the victim's family was prevented from entering the camp. The military later turned over the soldiers charged to the police and they subsequently posted their bail. The military hierarchy's failure to impose sanctions against their men shows their inability to take action into the illegal acts committed by their personnel.

No known actions were taken by the immediate superiors of Lieutenant Pascua and his companions, who stand accused of the brutal murder of youth activist Asucena. Not only did the police fail to promptly investigate this case, the military leadership have also so far failed to take steps against these soldiers.

The policeman and an officer of the public security forces allegedly responsible in the ambush of labour leader Gerardo Cristobal in April 2006 have also not been held accountable following the incident. It was reported that Senior Police Officer 1 (SPO1) Romeo Lara, Chief of the Police Intelligence Office in Imus, Cavite; and Larry Reyes of the Civil Security Unit (SCU), and their companions, were involved in shooting Cristobal. Soon after the shooting took place, the police filed charges of attempted murder against Cristobal. There were no known sanctions imposed on the police and a security officer despite the gravity of Cristobal's allegations. Those who carried out the investigation into the incident were from the same police unit to which the involved policeman was attached. No known progress has taken place in the case.

The policemen attached to the Panabo City Police Office (PCPO) responsible for poorly investigating the case of murdered activist Cabanit have also not been held to account. Despite their admission that they failed to conduct an autopsy on the victim's body, to take photographs of the crime scene and needlessly delayed the investigation, no administrative sanctions or actions have so far been taken against them. They insisted that their actions have not violated any procedures of police investigation.

When the AHRC raised serious concerns about the police's action, a letter dated February 1 was received from Senior Supt. Armando Ramolete of the Department of Interior and Local Government (DILG) stating that:

“Please be informed that we have referred your letter to the PNP Task Force Usig, which deals with cases regarding the killing of activist and leaders of cause-oriented groups in the country for appropriate action”

The DILG is an institution which exercises oversight on the PNP. Months after his letter was received, no known sanctions have been imposed on the policemen involved. Although the DILG did refer the matter to the PNP's Task Force Usig, there are no indications so far that the police's failure would be acted upon anytime soon. The serious concern regarding the police incompetence in investigations has not been addressed adequately. The investigation by Task Force Usig mainly focuses on identifying those responsible in the murder, not on the police's failure regarding the manner in which they conducted their investigations. The policemen involved, despite having not been held to account for their actions, nevertheless concluded Cabanit's case as being solved as the gunman suspected of murdering him was killed in a separate incident.

Those accused of possible involvement in the abduction and subsequent disappearance of Arnold Aliman on May 27 in General Santos City has also not been investigated or punished concerning the allegations against them. Soon after Aliman's abduction, eyewitnesses went to the Pendatun Police Station, and later to the headquarters of General Santos City Police Office (GSCPO) seeking their assistance to investigate the case and locate the victim. Surprisingly, a witness noticed that the vehicle used by the abductors was been parked besides the Intelligence and Detective Management Section's (IDMS) office there.

Even though the testimonies of the witnesses could have helped in locating the victim and identifying the abductors, no credible investigation have so far been conducted into the presence of this vehicle inside the police headquarters. Although the chief of the GSCPO, Senior Superintendent Vicente Bautista, has ordered the head of the IDMS to be relieved from his post, no further investigation has been conducted to compel him or his men to explain the matter.

Pleas for protection deliberately ignored

Under Section 24 (a) of RA 6975, the PNP are obligated to enforce laws for the protection of lives of Filipino citizens. Although the police have this obligation, particularly concerning those facing threats, there is no existing law that requires them to do so. The lack of specific laws and acts of omission by the police aggravates the denial of protection given to victims facing continuing risk and threats, potential witnesses and anyone seeking redress.

A new measure, called the Writ of Amparo, brought in in late 2007 may provide protection where before there was none. The Writ provides temporary relief to persons whose right to life threatened. One of the requirements for applying for this petition is that the respondents should be identified in the petition. However, in most cases those facing threats cannot identify who is threatening them. However, prior to the existence of this mechanism there was no existing policy that required the authorities to provide protection to persons facing threats to their personal integrity. The Writ of Amparo

Although the RA 6981 provides protection, it is limited to persons who are testifying and witnesses in cases filed in court. The lack of protection by the authorities for persons experiencing threats who were not admissible to the witness protection programme has proven fatal in cases in the past.

Even if persons are admissible, in many cases the police have repeatedly, deliberately ignored pleas on behalf of the victims families and potential witnesses for protection. For instance, several appeals were made for the police to provide protection to the wives and children of activists Joseph Matunding and Manegdeg who were murdered on 30 January 2007 and 28 November 2005 respectively. Matunding's wife was also wounded when her husband was attacked.

When appeals were also made to provide protection to Cabanit's daughter, Daffodil and his surviving family, as well as to Cardeno and his family, the police did not respond even though they have investigated these cases. Daffodil, who was shot together with her father Cabanit, had been wounded but was able to survive the attack. She could have been an eyewitness to her father's murder but was not included in the witness protection. Pleas for protection for her and her family immediately after the murder of Cabanit were ignored by the police. She had to move from one place to another and her family had to take their security into their own hands.

Shortly after the abduction and release of Cardeno, appeals were also made for the police to secure him and his family. Once again, these were ignored. Instead of providing them with protection, the police have instead blamed the lack progress in the case on him and his family's reluctance to fully cooperate.

Prejudice, labeling denies equal protection under the law

It is the obligation of the state to protect the lives of its citizens and ensure that victims of violations obtain remedies regardless of who they are. The principle of equal protection under the law requires the authorities to perform their duties without prejudice and partiality. This, while acknowledged by the authorities in principle, is not seen in practice. Prejudice, for instance by the police, has had serious effects on the manner in which they investigate.

Take the case of two members of political party Bayan Muna, Miguel Dayandante and Julio Camero, whose dead bodies were found hogtied, blindfolded and with gunshot wounds on January 22 in Ligao City, Albay. When investigations were conducted into their disappearances and subsequent murders, the police investigated the case in a manner that was prejudicial to the victims. In the police report, they needlessly described Dayandante as a Communist Terrorist (CT), while Camero was branded as being a either supporter or sympathizer of such groups. To describe them in such a manner effectively suggests they are undesirable persons. It effectively denied them equality before the law by investigating their case with partiality.

As expected the police have concluded that the motive of their killings was “purging” by leftist groups, reinforcing their own theory regarding the pattern of extra-judicial killings, which they systematically blame on killings between leftist groups rather than accepting any possibility of blame for State agents. The police’s obligation to investigate cases was affected by their prejudice. Once cases are concluded in this manner the likelihood of the victims’ families receiving legal remedies as the result of prosecutions becomes near-impossible.

Labeling also emboldens and engenders violations of rights against activists or groups once they have been labeled. In many cases, when activists are labeled as being “communists, leftists or enemies of the state” the likelihood for them to be killed becomes far higher. Actors, either from the State security forces or potentially other non-State actors, are encouraged to perpetrate killings and other violations as the result of such branding.

In his preliminary note following his official visit to the Philippines in February 12 to 21, Professor Philip Alston, the UN Special Rapporteur on Extrajudicial Killings, expressed concern about this practice. He noted that:

“Those causes constitute the second level at which an effective national response is required. The first cause has been variously described as vilification, labeling or guilt by association. It involves the characterization of most groups on the left of the political spectrum as front organization for armed groups whose aim is to destroy democracy.”

While Professor Alston reaffirms long standing concerns regarding this practice, there are no indications so far that it will be corrected or that the authorities will prevent their members from continuing to use labeling. In fact, the police's investigation report into Dayandante and Camero cases were signed by Chief Supt. Mendoza on March 2, 2007, after Professor Alston's visit. Professor Alston observed that the military have been involved in making similar remarks and recommended that the government "should immediately direct all military officers to cease making public statement linking political or other civil society groups to those engage in armed insurgencies."

Apart from this practice of labeling, exposing activists into further risks, some elected local officials have also been adopting the practice of making threatening remarks against persons supposedly involved in criminal activities. In recent times, there have been increasing numbers of corpses of supposed criminals found in urban areas in Metro Manila and Davao City following public statements made by local officials suggesting harsh action would be taken against criminals if they fail to reform or move to other places. In Quezon City alone, a news source disclosed that 30 corpses have been discovered between January and August. These statements have effectively encouraged the killings. Most victims were suspected of being criminals or had criminal records in the past. The local officials denied these persons protection under the law by unjustly exposing them to risks by repeatedly making threatening remarks describing them as undesirable persons. This practice is possibly arbitrary, is extra-judicial and negates the principle of presumption of innocence.

When the Melo Commission released its report on January 22, 2007, it recommended the legislation of laws to require all State-actors, including government officials, to be subjected to command responsibility. It sought to penalize those who encourage, incite, tolerate or ignore, any extra-judicial killings committed by a subordinate. However, until this law is passed there are no indications that local officials would halt these practices. For an official to make such threats against suspected or actual criminals does not constitute a criminal offence at present. They have even argued that the presumption of innocence is only applicable to persons facing trial. However, as a result of these practices, many have become open targets for extra-judicial killings. Some of those killed had no criminal records at all.

Pretext of "terrorism" permits illegal arrest, filing of false charges

The frequent bombings in several parts of Mindanao in recent times have also resulted in the routine use of illegal arrests, torture and filing of false charges by the police and the military against victims, most of whom are from the Muslim minorities. When there is a bomb blast, members of the Muslim minorities become suspected by the security forces, often arbitrarily.

Take the case of victims Thos Ulimpain and his cousin Nasser Mendo, who were arrested by soldiers in Midsayap, North Cotabato on May 3, 2007. They were falsely accused of having been involved in a bomb blast in Central Mindanao. The soldiers, without showing any arrest orders or properly explaining to them the reasons for their arrest, forcibly took them from their house. They were handcuffed, blindfolded and forced to the ground. They were taken to the military headquarters in Awang, Cotabato City where they were brutally tortured during interrogation. They were repeatedly beaten on different parts of the body every time they refused to answer a question. From May 3 to 5, they were not given any food.

Another victim, Oting Mariano, was abducted by unidentified persons on January 13 and was subsequently brutally tortured. The perpetrators were later identified as being police officers. While he was in police custody, they tortured him to force him into admitting he was involved in a bomb blast in Makilala, North Cotabato, which had taken place three months earlier. They handcuffed him, blindfolded his eyes and covered his mouth with adhesive tape. He was electrocuted with wires attached to his head and arms. The policemen also wrapped his head with plastic bag, dipped him into a bucket of water and removed him only when he was nearly unconscious. He was, however, released from jail after eight months, after the false charges against him were dismissed.

The enactment of the Human Security Act (HSA) in 2007 that took effect on July 14, 2007, defines acts of terrorism as: 'sowing and creating a condition of widespread and extraordinary fear among the populace.' It has further undermined the protection of civil liberties. The police have already exploited this law by falsely filing charges against persons they have arrested in relation to bombings. For instance, on August 13, the police in Koronadal City filed charges for violations of HSA connected to the bomb blast that took place days earlier against four persons, three of whom are labour activists. The filing of charges was conducted based on a confession made by one of the respondents' fellow workers. The police insist that the bomb blast was motivated by the labour conflict between these persons and their management. One of the respondents, Jaime Rosios, was forcibly abducted and disappeared after the police filed charges against them.

The prosecutor, however, file charges of arson instead of violations of the HAS against the respondents. In this case, the respondents had to face the charges in court as the result of a confession made by one of the respondents, Alex Magbanua, under the threat of being tortured if he refused doing so.

There have been previous cases of persons being illegally arrested, detained, tortured and falsely charged. Soldiers and policemen carry out arrests based on limited intelligence reports. Some of these reports have been proven false and unreliable but the police and military continue regardless. The police and soldiers routinely arrest and falsely charge persons with impunity, which is created and sustained by the lack of legal action against

persons that bring such false charges. They can't be charged for torture because the act is not a criminal offence in the penal code. Although they could be charged for serious physical injuries, most victims choose not to take legal action because it would mean a lengthy trial at great cost.

Although there is an existing legislation - Section 3 (d) of the Republic Act 7309 and an Act creating the Board of Claims - that provides compensation for the victims of illegal arrest, arbitrary detention and torture, most victims choose not to make use of it because its implementation had also been ineffective and dysfunctional. It is a lengthy process and the Board of Claims under the Department of Justice (DoJ) has not gained the faith of persons to date.

The amount that can be claimed is derisory compared with the cost of the process, and is therefore not appealing. For example, for victims of "unjust imprisonment or detention," Section 4 of the Act provides a limit of Php 1'000 (USD 22.54) per month of detention for victims claiming compensation. It also set a maximum amount of Php 10'000 (USD 225.47) for victims claiming compensation, regardless of the nature of their case. Most victims are not even aware that they could get compensation in this way, or where to file claim.

A powerless Congress

In a speech in July, 2007, Chief Justice Reynato S. Puno of the Supreme Court of the Philippines described the legislature as powerless for its continued failure to enact appropriate laws to ensure the protection of human rights. Puno stated that:

"It further revealed that a supine legislature can betray the human rights of the people by defaulting to enact appropriate laws, for there is nothing you can do when Congress exercises its power to be powerless. It is for this reason and more, that our constitutional commissioners deemed it wise to strengthen the powers of the judiciary, to give it more muscular strength in dealing with the non-use, misuse, and abuse of authority in government."

Chief Justice Puno's observation reinforces the long standing common knowledge of the failure by the legislature to enact laws that protect human rights, for instance laws against torture and enforced disappearance. For many years, the enactment of these two proposed laws has been dragging on without result. They have been filed in successive legislatures but have never been passed. The absence of these laws has denied a large number of victims of torture and enforced disappearance from any form of remedy.

The enactment of a domestic law against torture is an international obligation as the Philippines is a State Party to the Convention against Torture (CAT). As such, the government is required to enact adequate laws to address torture, which they have continuously failed to do. Apart from a lack of a law on torture, the legislature has also ignored the need to

pass a law on enforced disappearances. The government also has yet to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

Torture victims cannot get adequate remedies as described in the CAT. The perpetrators, the police and military, who routinely use this as a method of investigation, particularly in relation to acts of terror and armed insurgencies, cannot be charged for torture because the act itself is not a crime. A large number of torture victims have been denied remedies, in particular medical treatment and rehabilitation from the trauma, as a result of this. Although RA 7309 provides for compensation for victims of torture, it falls short of providing adequate assistance to torture victims. The lack of a law, which results from the failure of the legislature, prevents any remedies from being obtained.

The Supreme Court has had to exercise its power to adopt the Rules on Writ of Amparo to address the lack of protection for persons whose right to life and personal are under threat or have been violated. The legislature is supposed to enact laws that provide sufficient remedies concerning violations. The Writ of Amparo was adopted by the Supreme Court to address the lack of remedies for victims of extra-judicial killings, enforced disappearances, and other forms of abuses. Instead of the legislature adopting appropriate laws concerning torture or enforced disappearances, the Supreme Court has been forced to take the initiative to provide at least limited and temporary relief in response the legislature's failings.

Assurance of impunity from torture, abduction

The lack of laws on torture and enforced disappearance allows perpetrators to easily escape from liability for their crimes. The failure of the authorities to promptly investigate cases, and excessive delays, has aggravated the situation.

When a victim accuses the security forces of committing acts of torture, there is little likelihood of the complaint being acted upon promptly and taken seriously. The victim must somehow prove that the torture occurred before any investigation will follow. The police and military easily reject allegations of torture without credible investigations ever being conducted.

For instance, after nine torture victims—two of them minors—were released from jail in La Trinidad, Benguet after they were exonerated from the false charges filed against them by the police, those responsible for brutally torturing them were not held to account. The victims, who were electrocuted, brutally beaten and nearly drowned, had to withdraw their complaint against the police in exchange for plane tickets and money to go back home to Davao City. Their unwillingness to sue the perpetrators does not exonerate the latter, but rather illustrates the victims' vulnerability to pressure to settle the case outside of the criminal justice system. The victims in this case knew full well that they lacked the means for a lengthy and expensive legal battle with few prospects of success, and attendant risks.

Those attendant risks are not small. While these victims spent ten months in jail, there were plots on the lives of two and threats against the others. Yet they were not afforded any protection as no law placed any obligations on any state authorities to do anything special to secure their lives from others. On the contrary, their interests lay only in ensuring that they were not subjected to any action for their alleged offences. Thus a police officer, Chief Supt. Mendoza, on March 6 wrote that

“The alleged involvement of the military, police and militia forces, to the incident of torture of the above-cited civilians is only a fabrication. In fact, on December 18, 2006, the nine complainants with the assistance of their lawyers executed an Affidavit of Desistance pertaining to their complaint against the arresting officers. In their affidavit, they stated that, ‘It is now clear that the arresting officers merely relied in good faith on the identification made by the aforesaid witness and should not therefore be blamed.’”

Similarly, on May 5 a man accused Chief Superintendent Romeo Ricardo, director of the PNP’s intelligence group, of brutally torturing him following his arrest in January. He told the media that he was taken inside the PNP headquarters in Quezon City where police serving under Ricardo beat, kicked, electrocuted and deprived him of sleep. The police shrugged off the complaint and no action was taken against them, by way of an inquiry or otherwise. That includes even as much as an examination of the case through the Internal Affairs Service (IAS), which is empowered to initiate a “*motu proprio* investigation” with or without a formal complaint.

And even when investigations into allegations of torture are made, it can take years for them to be conducted without the perpetrators ever being charged in court. For example, in June 1996 the Commission on Human Rights (CHR) recommended filing of charges against senior police officers accused of torturing five persons: Lenido Lumanog, Augusto Santos, Senior Police Officer 2 (SPO2) Cesar Fortuna, Rameses de Jesus and Joel de Jesus, who were arrested and convicted for the murder of an influential police colonel, Rolando Abadilla. The victims have a petition pending for intermediate review of their conviction before the Court of Appeals in Manila.

Eleven years on, those involved in torturing them—some of whom have already died while others have retired—have not been charged in court. In June, the latest information on the case from the Office of the Ombudsman for Military and Other Law Enforcement Office (MOLEO), which hears cases of complaint against police and military officers, was that it was yet to decide whether or not to file charges. The Ombudsman took over jurisdiction of the case three years ago.

The same sorts of problems drag down inquiries into disappearances. For instance, the soldiers who summoned Alan Bumanglag, a farmers’ leader in Gattaran, Cagayan on the

same day that he is reported to have disappeared have not yet been investigated. On April 26, the soldiers, who are attached to the 17th Infantry Battalion, took him for questioning inside their camp for several hours before he was allowed to leave at around 2pm. Shortly after he was released, three men were seen following him. He has not been seen since, and nor have any investigators. In such cases, the police register a complaint of “missing person” or simply put down the details for the record, but make no effort to investigate or locate the victim.

In most instances police documentation of a disappearance is limited to what information is supplied by the victim’s family. So when the family for various reasons refuses to cooperate, as in the case of abducted activist Gilbert Cardeno, police responsibility ends. They may even use the family’s refusal to cooperate as an excuse for their inaction. The families are thus left to fight things out for themselves.

A policy of violent attack on peaceful protest and assembly

Violent dispersals of protestors peacefully expressing legitimate concerns—for instance, the enactment of laws threatening civil liberties and failures to address labour disputes—are common. They are especially likely when protesters either fail to secure rally permits or do not notify the authorities of when and where they will demonstrate. The existing law, Batas Pambansa 880 or the Public Assembly Act of 1985, requiring permits to be issued prior to demonstrations, has been used to justify violent attacks and legal action against protestors, even in instances where permits are not required or force is not necessary. The police implement their own unwritten rule that all protests without permits deserve to be violently broken up. Local officials have also classified some public places as “no rally zones”, thereby justifying violent dispersal of protestors once they cross these imaginary lines, even empty handed or in small numbers.

For instance, on September 26, policemen maltreated and arrested a doctor while his colleagues were violently dispersed shortly after holding an unannounced demonstration condemning the implementation of the Human Security Act of 2007, at the Mendiola Bridge in Manila. The police violently dispersed them even though use of force was not necessary. The police justified their actions by arguing that the area had been designated as a “no rally zone” and the protestors had no permits.

Several farmers also were injured on September 7 when policemen broke up their peaceful picket in front of the headquarters of the Department of Agrarian Reform (DAR) in Quezon City. The police started beating the farmers and tore down their makeshift tents. Farmer Rinaldo Inolva was taken to hospital after collapsing during the dispersal.

Then on October 10, police arrested seven persons and attacked their companions, who were on their second day of peaceful picketing and were about to start a hunger strike in front of the Department of Labour and Employment head office over the layoff of 575 workers from a telephone company and the subsequent decision by the department to take over jurisdiction of the dispute without acting on the workers' concerns. Police dragged and beat workers and other protestors during the incident, again without justification or restraint.

Conclusion and recommendations

Instead of issuing repetitive yet largely unfulfilled pledges and assurances, the government of the Philippines must take clear action to transform words into reality. It must ensure, among other things, that:

- Investigation and prosecution of each case is properly and thoroughly done to ensure that it will result in a conviction where a party is guilty.
- The definition of a “solved” case is changed from simply having filed it in court to having a successful conviction.
- Actions taken in addressing human rights violations are in conformity with established domestic and international standards.
- Charges are brought promptly against police, soldiers and other government officials perpetrating, encouraging, tolerating or failing to act on violations, particularly on extrajudicial killings, enforced disappearances, and torture.
- The recommendations of the UN Special Rapporteur on extrajudicial killings and also the Melo Commission are realized.
- The principle of command responsibility is brought into law so that senior public officials may be held accountable for criminal commissions or omissions.
- The Writ of Amparo is further developed in the Philippine jurisdiction through laws and policies.
- Proposed laws to protect human rights, notably on torture and enforced disappearances, are enacted promptly and in accordance with international obligations.
- Victims and their families obtain adequate protection and redress.
- Excessive delays in adjudication of cases are addressed.
- Laws and policies undermining and threatening the protection of civil liberties, particularly the Human Security Act of 2007, are amended or revoked.

1 AHRC documented 36 cases of extra-judicial killing since January 2007 up to the time of writing of this report. This represents only a fraction of those believed to have been carried out. Local groups report 60 cases from January to July, for example.

2 Peoples' Tonight news, 7 October 2007

3 Please see the list annexed

REPUBLIC OF KOREA

Human Rights developments in 2007

I. Major development

1. Revision of Criminal Procedure Act

The bill of the Criminal Procedure Act (hereafter ‘ the Revised Act’) has been passed by the National Assembly and will be effect on 2008. The Act has been revised for the first time since it was established in 1954.

Since human rights violations have occurred frequently by the police and investigating prosecutors throughout the entire stage of criminal investigation, the Revised Act stresses the procedural process in which the rights of defense for a suspect are secured, detention of a suspect is legally checked and technical advancements are adapted. Followings are a brief description of revised as well as newly enacted provisions of the Revised Act in the field of the police investigation and gathering evidence.

1. A. The Right of Defense strengthened

a. Adoption of Fundamental Principle of Un-custodial investigation

Article 198 of the Revised Act proclaims that a criminal investigation shall be conducted principally on a suspect in a non-custodial status. This amendment is introduced for the purpose of broadening the availability of an un-custodial criminal investigation by the narrow interpretation of the statutory causes of detention in the article 70 (1). The matters that shall be considered in determining the causes of the detention are: the severity of the crime, dangers of recidivism and concerns for the peril of a victim or important witnesses. Because of this newly adopted clause, suspected criminals have the *prima facie* right of asking for non-custodial investigation against criminal investigations.

b. Suspect's Right to have an Attorney Participated in the Interrogation

Article 243-2 of the Revised Act articulates the suspect's right to have an attorney participated in the process of a criminal investigator's interrogation. This Article demands that a judicial police officer or a prosecutor have to allow an attorney to interview and communicate with a suspect participation in the process of interrogation. This Article is aimed at substantiating the right to attorney in article 12(4) of the Korean Constitutional Law and the codification of the judicial opinion in the Korean Constitutional Court case (2004. 9. 23. 2000 HUNMA 138) recognizing an attorney's legal consultation and communication with a suspect at the request of a suspect who is under judicial officer's interrogation as a part of the suspect's fundamental right to attorney shall be allowed to participate in the process of criminal interrogation even though there are no provisions of law which related to it explicitly. The suspect's attorney, however, is not allowed to interfere with an investigation into the crime other than the suspect's interrogation. Originally the government bill of revision included the process of all the stages of investigation in the area where the suspect's attorney may participate. During the deliberation at the National Assembly, the area of participation had been narrowed by worries that the secrecy of the criminal investigation was compromised too much. The suspect's right to have an attorney participate is significant in that the right allows an attorney not only to be present at the instance of interrogation but also to communicate and give legal consultations instantly, and to deliver his or her legal opinion on all the aspects of interrogation to the interrogator at the final stage of the each interrogation. The attorney may raise the time when that is currently ongoing. All of the attorney's opinions delivered during the interrogation for her client shall be recorded in the interrogation dossier (Protocol) that is the formal document required by the Korea Criminal Procedure Act to be submitted as written evidence at trial and verified by the attorney.

This right of suspect is enormous, and broader than the right upheld in other nations that usually allow an attorney to be present at the place of interrogation. With this right to be substantiated, we hope that all of the interrogating process shall be kept fair and transparent.

c. Video Recording

The Article 244-2 of the Revised Act introduces a technical advancement in video recording system into the criminal interviews with witnesses or criminal interrogation with suspects. Even though the video recording has very limited evidentiary value such as establishing the genuineness of an interrogation document or an interview document those are a part of a dossier based on article 312 of the Revised Act or very limited usage such an assistant material to refresh fleeing memory based on article 318-2 (2) of the Revised Act, it will be utilized to ensure the strict observance of the legal requirement and the deference to the human rights of the suspect in all of the process of the criminal investigation.

Video recordings, however, have a lot of potential to distort the true facts through editing and manipulation of the scene. Considering the risks, the Revised Act strictly requires that (i) a suspect and/or her attorney be informed in advance of the scheduled video recording, (ii) the recording shall be covered all the process of investigation without omitting any scene and also covered objective circumstances with respect to the recording, (iii) when finished, the video recording shall be sealed before a suspect or her attorney and have them signed. This measure is for the purpose of getting rid of the possibility of manipulation.

d. In advance Notification of the Right to Refusal

The Article 244-3 of the Revised Act strictly requires that interrogating prosecutors and police officers give a suspect advance notification that she may refuse to answer questions. This requirement is different from the generally recognized Miranda Warning that is stipulated in article 200 (2) of the Revised Act. This revised article of 244-3 is introduced for the purposes of correcting the actual interrogation practice in which the Miranda Warning is delivered for the sake of formality and ensuring the legality of the investigation process. Because of this provision, a suspect shall be informed in advance of an interrogation against her of (i) her legal right to refusal of answering any one or all the questions, (ii) no unfavorable treatment shall be given to her because of her refusal, (iii) all of the statement given to the interrogator shall be used as evidence against her. The facts that the notification is given and the response from a suspect to the inquiry of whether she exercises her right to have an attorney or not shall be recorded in the dossier. This article will enhance a suspect's awareness of her right with respect to her response to the interrogation.

e. Recording of an Investigation Process

The Article 244-4 of the Revised Act requires that a judicial police officer and an investigating prosecutor record at the separated document items such as (i) the time when a suspect arrives at the interrogating place, (ii) the time when the interrogation is initiated and ended, (iii) other facts that are need to review the process of interrogation. This revision is aimed at ensuring the interrogation process being transparent and thus results in the legality of the evidence, the voluntariness of the suspect's statement, and making review of the investigation easier.

1. B. Reformation in the Process of Arrest, Search and Seizure

a. Request for Warrant after Emergency Arrest

The Article 200-3 of the Korean Criminal Procedure Act allows a prosecutor or a judicial police officer to arrest a suspect without a warrant issued by a competent judge in case of urgency such as finding a suspect by chance and the suspect is: (i) concerned to destroy

evidence, or (ii) on the run or concerned to flee. The previous emergency arrest system has been arguably misused to secure immature confession or a suspect's unprepared answer because a prosecutor has the right to have the suspect detained for 48 hours without a warrant. It is not very difficult for police officers to pretend that they have found a suspect by chance even though she has been under surveillance for a long period time. If the crime cited is severe, a suspect is regarded to be prone to destroy evidences or to flee. Thus, it is necessary to limit the period of warrantless detention by asking a prompt request of warrant. The Article 200-4 of the Revised Act mandates a prosecutor to request warrant 'without delay' when a suspect is under the emergency arrest. This newly adopted article is, however, very limited in its application for the time being since 'without delay' does not have definitive definition in the law. Police officers and prosecutors prefer to interpret the article as 'without delay' in 48 hours'. We hope that a court may narrow the definition in order to prevent criminal investigators from abusing the emergency arrest system.

This article also prepares a measure to prevent a misuse of the system from happening. In case a suspect is released by a prosecutor without requesting warrant, the prosecutor shall notify with respect to the emergency arrest and subsequent release. The released suspect, her attorney, or his or her relatives may review the notification document in order to find any of the illegalities with respect to the emergency arrest.

b. Mandatory Court Hearing on the Arrest

The Article 201-2 of the Revised Act demands that a court shall provide a hearing for all the suspects under arrest. Previously a court hearing was provided only at the request of a suspect. The hearing under this article shall proceed promptly and be finished by the next day if the warrant is requested. With this revision, the criminal procedure system in Korea finally avoid suspicious attention from peers based on the lack of explicit provisions guaranteeing a suspect's fundamental right to be heard by a competent judge before the arrest.

c. Review of Arrest and Detention

The Article 214-2 of this Revised Act allows all the suspects whether they are under arrest by warrant or without warrant because of emergency to have their arrest reviewed by a court. Previously, only the suspects under arrest by warrant were allowed the review of a court. This article also provides notification by a criminal investigator who arrests a suspect to the suspect's attorney, relatives, family members, etc for the purpose of facilitating this review system. Once a suspect asks a review hereof, a court shall finish the review within 48 hours from the time of the request received.

d. Emergency Search and Seizure

Previously, in case of emergency arrest, investigators were allowed to search and seize items in the suspect's possession, custody, or under suspect's management for 48 hours without warrant under the article 217 of previous Korean Criminal Procedure Act. This practice was largely criticized because of its rampant misuses. The article 217 of the Revised Act limits the scope of the emergency search and seizure to be incidental to the emergency arrest that has already been executed. The new emergency search and seizure is allowed when a seizure for a necessary item is time pressed for obtaining warrant for the period of 24 hours.

1. C. Reformation of Criminal Evidence Rule

a. Introduction of Exclusionary Rule

The Article 308-2 of the Revised Act explicitly introduces the exclusionary rule of evidence similar to that of the U.S.A. This article pronounces that any evidence which has been gathered in the violation of due process shall not be admitted as effective evidence. Previously Korea Supreme Court applied this rule on the interrogatory document submitted as a dossier even though there were no provisions in the Korean Criminal Procedure Act. The rule, however, had a limited application by the Court. The physical evidence that is different from an interrogatory document has been accepted as competent evidence to establish a fact in a case based on the reason that the physical character can not be tainted by a violation of the due process. This newly introduced article is not as specific and detailed to clear out the entire dispute on the range of its application. But, the words 'in the violation of due process' signifies that any violations of the investigator in gathering evidence against a suspect shall not be tolerated. We hope the court will fill the gap in this article.

1. D. Investigator's Testimony

The Article 316 of the Revised Act allows investigators to testify on the statement of a suspect. Previously the Korean Supreme Court has not allowed investigators to testify against suspects for fear that the defendant's power of defense would be severely damaged. During the deliberation of the revised article, a conclusion was reached that those interrogators' testimony is desirable if one considered the fact that the interrogators were to be under the cross-examination by defendants. If defendants take advantage of the cross-examination, they may find significant violations of due process and human rights

The Revised Act has more new stipulations and provisions in the process of trial, evidentiary rules, discovery procedure, bailment, judiciary review with respect to prosecutor's decision

of non-indictment, etc. Those other stipulations are closely related to the investigation conducted by a judicial police officer and an investigating prosecutor. The Revised Act has several fundamental principles such as trial centered process, protection of human rights, due process, speedy trial, jury trial, etc. A criminal investigation shall be performed in the light of these principles.

2. Conscientious objection to military service

On 18 September 2007, the Defense Ministry announced its plan to allow conscientious objectors to perform social service instead of mandatory military service. The Ministry said it plans hold public hearings and opinion polls before revising laws governing the military service for conscientious objectors by the end of next year, and the revision is subject to the legislature's approval. The decision expected to take effect as early as January 2009 if approved. The Defense Ministry's plans require conscientious objectors to reside and work in special hospitals and care for senior citizens, as well as the disabled, lepers and mental patients.

As of October 15, it is reported that 708 conscientious objectors are serving jail terms after being convicted with charges under the Military Service Act of 2003, while 131 similar cases are pending in various level of courts. Under the current law, all physically fit South Korean men ages 18 to 30 must serve at least two years in the military.

According to the Special Report published by the Human Rights Without Frontiers, total 12,324 conscientious objectors were convicted with jail-term from 1950 to 31 May 2006 and the total jail term awarded to them is 25,483 years. Out of these persons, 289 reportedly served jail terms twice on the same charge of failing to fulfill the mandatory military service.

It is also reported that more than 3,760 young South Korean men, mostly followers of the Jehovah's Witnesses Christian denomination, have refused to perform military service in the past five years, and nearly 95 percent of them served more than 17 months in prison.

The UN Human Rights Committee has maintained its clear view on the conscientious objection that nations in accordance with international law must allow citizens to practice their beliefs on matters of conscience, and that conscientious objection should therefore be respected.

In its Concluding Observations, the Committee expressed its concern that *“(a) under the Military Service Act of 2003 the penalty for refusal of active military service is imprisonment for a maximum of three years and that there is no legislative limit on the number of times they may be recalled and subjected to fresh penalties; (b) those who have not satisfied military service requirements are excluded*

from employment in government or public organizations and that (c) convicted conscientious objectors bear the stigma of criminal record (art.18)."

The Committee also recommended that the Korean government *"should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service. It is encouraged to bring legislation into line with article 18 of the Covenant In this regard, the Committee draws the attention of the State party to the paragraph 11 of its general comment No. 22 (1993) on article 18 (freedom of thought, conscience and religion)."* – Para. 17, Concluding Observations of the Human Rights Committee, 28 November 2006, CCPR/C/KOR/CO/3)

In its view on the case of Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi, who were arrested in 2001 and charged under article 88(section 1) of the Military Service Act and finally convicted by the Supreme Court in 2004, the Committee also noted that *"under the laws of the State party there is no procedure for recognition of conscientious objections against military service (Para 8.4)"* and concluded that *"the facts as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant. (Para.9)"* The Committee also stated that the Korean government *"is under an obligation to avoid similar violations of the Covenant in the future. (Para 10)"* – Human Rights Committee Views on Communications Nos. 1321/2004 and 1322/2004, 23 January 2007, CCPR/C/88/d/1321-1322/2004)

While the Defense Ministry's plan to allow the alternative social services to conscientious objectors is a great achievement, some concerns still remain. First, the period of social service is double than that of ordinary conscripts. This is against the views of the UN Human Rights Committee which consider that it is punitive when the period of alternative social service is more than one and a half times than that of ordinary conscripts. The Ministry also excluded men currently doing the military service from beneficiary of its plan. Besides, it does not guarantee the conscientious objection to the mandatory reserve forces training, which means the conscientious objectors are possibly punished again even after fulfilling social service. The Korean civil groups also shows its concern that the Ministry's plan tends to only consider the conscientious objectors based on religious reason as the beneficiary of the plan.

II. Major Human Rights Issues

1. Rights of Migrant Workers

The number of migrant workers is estimated to be over 420,000. It is estimated that some 224,000 out of the total migrant work force are undocumented workers. The Ministry of Justice publicised a policy that the Immigration office, which is under the MoJ, started arresting undocumented migrant workers and detaining them in a Protection Center before

forcible deportation. It started its operation in August 2007. Several cases of human rights violation by immigration officials have been reported during its operation.

On August 20, immigration officers questioned 5 foreigners near Seong-su subway station. They did not show their identification when asked. Even though the five arrestees showed their document indicating legal status, the officers forcibly arrested them. During this process, the arrestees were assaulted. Bystanders called the police and all were brought to near the Seong-su police station. A lawyer went to the police station and asked to meet them but was denied access. Later, one of arrestees was charged with obstructing official duties.

Mr. Ayhya, an Indonesian migrant worker, went to Gyeongin Office of Ministry of Labour to report that the owner of his company did not pay his retirement allowance upon his leaving the company on August 20. He came to South Korea as an industrial trainee in 2000 and worked with the company for 7 years. However he was arrested for overstaying and detained. Likewise, migrant workers facing delays in payment or health problems in the workplace have, in practice, nowhere to report their existing problem.

Mr. Waleed, a Pakistan migrant worker, was working at a company in South Korea. Some immigration officers came into the company without a warrant on August 23 and Waleed was brought to their car. They forced him to sign a letter without informing him as to the contents of the letter. Waleed asked them to bring him to a hospital due to the pain in his ankle. However, they allegedly assaulted him and only later that evening took him to a hospital. The doctor examining his left ankle found it was broken and asked to admit him to surgery. However the police refused to admit him to hospital and took him to Mokdong Immigration office and later released him.

On August 28, Ms. Lee, a Chinese national, was arrested in a restaurant on the charge of an undocumented stay by the police from Seongnam Sujeong police station. She and her seven-month-old daughter were taken into custody and put in a so-called 'protection room' in Seoul immigration. She asked to go to a hospital because her daughter had a high fever due to enteritis but immigration officers refused and she was denied any medical treatment unless she could first pay a deposit for ten million Korean won (USD 10,780). As this case was well known and a protest was held, Seoul immigration firstly denied that they were detaining the mother and daughter but later her family verified the fact. Then Seoul immigration received three million Korean won (USD 3,230) from her husband as a deposit and they released the mother and daughter.

At the same time, the MoJ made an advance notice of legislation to revise Immigration Act on 8 November 2007. Some of the major controversial articles of the revised act are reported below:

According to the article 46-2 of the revised act, immigration officials may enter an office, business premises, workplace or similar places if they have substantial reason to believe a foreigner violating under article 46-1 of the same act is on the premises. They can investigate foreigners, employers or relevant persons, and have the right access to necessary materials such as documents for employment or ask for their submission. This article empowers the immigration officials to enter any premises without a court warrant which is contrary to the stipulation in article 12 and 16 of the Constitution of the Republic of Korea.

In addition, according to article 63, the head of an office, branch office or that of foreigners' protection center may "protect" a foreigner who has received an order of forcible deportation in a foreigners' protection facility, center or a place where the Minister of Justice designates until they are able to deport them if they are unable to immediately deport them, for instance in cases where persons do not have a passport or a guaranteed means of transportation. The protection facilities are allowed to hold foreigners for up to 6 months and they must apply to the Minister of Justice to have this period extended before the 6 months expires. The Minister of Justice can allow for the extension of their term for another 6 months. This renewal process is in theory inexhaustible and foreigners can be held for an unlimited period of time as long as the Minister of Justice renews the order for their "protection". In practice this can lead to gross violations of the right to liberty and freedom from arbitrary detention.

As these have been reported, members of the Migrants' Trade Union (MTU) have started holding protests against the immigration officials' abuses in front of the Seoul Immigration Office every Tuesday for the last three months. Due to their activities, Mr. Kajiman Khapung (42), Nepali, President of the MTU, Mr. Raj Kumar Gurung, (38), Nepali, Vice-President of the MTU, and Mr. Abdul Basher M Moniruzzaman, (41), Bangladeshi, General-Secretary of the MTU have been arrested on 27 November 2007 and detained at Cheongju Foreigner's Protection Center waiting for their deportation. (For details, see: AHRC's Urgent Appeal numbered UA-337-2007)

2. Rights of irregular workers

The issue of the irregular works is one of the most burning human rights issues in the year of 2007.

The Republic of Korea already has one of the highest percentages of irregular workers in its labour force. According to the statistics of Working Voice, a center for irregular worker, there are 8.5 million irregular workers in South Korea, accounting for 55 percent of the nation's entire workforce. Their monthly wages average is just 64 percent of what regular workers earn. Only 40 percent of them benefit from national health insurance and make contributions to the National Pension Fund. In this context, OECD and IMF have expressed

a deep concern about the labour market conditions in South Korea and called for the government to act quickly to address the situation. To deal with the problem, the Korean government has introduced new legislation titled “Irregular Workers Protection Law” that came into force on 1 July 2007.

In the process of introducing this Law, the Korean government ignored the recommendation of the National Human Rights Commission of Korea (NHRCK) which said that the bill should be re-drafted, that irregular forms of employment should be adopted only exceptionally and in a limited way, and that the principle of equal pay for equal jobs should be implemented in order to root out widespread discrimination against irregular workers.

Lawmakers in November 2006 passed three bills aimed at protecting the rights of so-called ‘irregular workers’, which include temporary workers and those who do full-time work but don’t enjoy the benefits received by regular, full-time employment at large South Korean companies. The law, which went into effect on July 1, stipulates that companies must grant regular status to irregular employees after they have worked for the company for two years. In addition, if irregular labourers who work as much as regular employees experience discrimination in their salary or working conditions, they can report their cases to the Labour Relations Commission and then the employer who fails to comply with the order by the Commission have to pay 30 million won (approximately 33,500 US\$) in a fine for default.

This law may be designed for goodwill, but there are great concerns that it contains several loopholes that may worsen the situation rather than protecting irregular workers.

As the first loophole to be found in this law, labour union pointed out that the law could be abused by employers, instead of protecting irregular workers, it would lead to mass dismissals as companies to avoid hiring them as regular workers. Before the July 1 implementation date, several companies fired irregular workers to avoid their wage-burdens and sought outsourced labour.

Secondly, there is no protection for irregular workers who report discrimination by their employers and no monitoring system to check whether discrimination has been made. Also, there is no legal arrangement and enforcement to redress any discrimination against irregular employees.

Lastly, it fails to restrict the scope of occupations that can use irregular workers. As the provision on the criteria of jobs for worker dispatching was re-worded, adding the new element “nature”, the new law would result in a great expansion in identifying what kinds of jobs are allowed for worker dispatching and what kinds are not.

Besides, women are more vulnerable to the non-regular employment. According to the official source provided by the Ministry of Labour of the Republic of Korea (refer to Table 11-5. Scale of Non-regular Employment by Gender (as of 2004), CEDAW/C/KOR/6), out of the total number of women employees, women non-regular employees occupies 43.7%, while the men non-regular workers are 32.2%. The Human Rights Committee also expressed its concern on “the high number of women employed in small enterprises who are categorized as non-regular workers”. (Para 10, CCPR/C/KOR/CO/3)

Despite increasing concerns from various sectors including labour unions, the government was stick to legislate the law in the name of protection for irregular workers. Their worries transformed into reality just before the law went to effect. Even before the law went into effect July 1, conflict began to arise and the problem has become serious in small and medium businesses as they are trying to lay off irregular workers due to financial cause for higher wages and better working conditions.

A most prominent case illustrating the problem of irregular workers; rights would be the E-Land group (For details, see: AHRC's Urgent Appeal numbered UA-246-2007). According to the information received, due to a new labour law stating that irregular workers would automatically be granted regular status if they worked for a company for more than two years, a company called ‘New Core Outlet’ dismissed about 300 irregular workers before the law came into force and another company called ‘Homever’ dismissed at about 500 irregular workers after the law was enacted. Both are subsidiary companies of E-Land Group. Most dismissed workers were women, supermarket and department store cashiers and sales assistant workers of the company under the Group with very insecure employment conditions. After the mass dismissal, the E-Land Group substituted them with employees outsourced from temporary employment agencies.

Since July 1, the labour union at the E-land Group continued their sit-in protest at ‘New Core Outlet’ department store complex in central Seoul and ‘Homever’ in World Cup Stadium in Seoul until July 20 against the mass dismissal of irregular workers. The strike at the ‘Homever’ lasted for 21 days and the strike at the ‘New Core Outlet’ continued for 14 days.

On July 20, more than 7,000 policemen broke down reconstructed barriers set up by the striking workers and moved in to forcibly remove the striking workers from the store. The police took 169 protestors from the two companies to several police stations and they were released. Some workers were injured in the 30 minutes during this process. Only 9 days after the demonstration was broken up, members of the union once again started a sit-in protest at ‘New Core Outlet’ in Seoul, on July 29. The government sent its riot police again to crack down on the protesters from ‘New Core outlet’.

Three core members of E-Land trade union, the president named KIM Kyung-Wook (37), the vice president Mr. LEE Nam-Sin and general secretary Mrs. LEE Kyung-Oak were arrested on charges of organising an illegal strike when riot police stormed picketing protestors. Moreover, other E-Land unionists are allegedly threatened to be arrested and huge individual compensation claims have been filed by the employer for business interference and losses incurred by the sit-in strikes.

According to the fact-finding report carried out by a various professors and lawyers regarding the workers' rights 12 July 2007, it is reported that E-Land has falsified employment documents with individual workers so that their contracts would not have to be transformed into a regular basis. The report says that E-Land management has forced irregular employees to sign up under other people's names after having worked for a year in the company's stores. Also the workers were forced to sign for the contract without describing exact contract period, such as 'blank contract' (without filling out the period of contract) which is obviously illegal. Therefore, they are deprived of the chance to qualify for a regular contract after two years of employment, as provided by the new labour law.

Another good example is the Korea Railroad Corporation (KORAIL), the nation's largest public enterprise. On March 1, 2006, approximately 400 female train crews on the Korea Train Express (KTX), who are short-term contract employees, began a strike to demand the end of discriminatory and unjust outsourcing practices of the KORAIL. These female attendants were irregularly employed under outsourcing agreements, but KORAIL officials led them to believe that they would be hired as permanent employees of KORAIL after one year. However, this promise was not met. Despite strong and long-lasting protest by the KTX female crews, KORAIL continued to refuse the union's demands for gender equality, safe working conditions and secure employment. On 2 July 2007, 31 union members then began a hunger strike.

The case of KTX does not only violate the workers' rights but also expose the discrimination against the women workers. It is reported that KTX women train attendants were subject to lower wages, harsher working conditions, and heightened job insecurity. The NHRCK stated that KORAIL must redress its 'gender discriminative employment structure.

Due to huge outcry from the civic society inside and outside the country, Labour Minister LEE Sang Soo and KORAIL CEO Mr. LEE Chul, agreed to turn the employment status of female workers to direct and permanent at the outsourcing company. However, the protesting KTX female crews turned down this agreement, demanding the direct and permanent employment by the KORAIL.

These two cases is a good examples of how the main purpose of the act is being disregarded and actually turned against irregular workers. It is predictable that other disputes like E-Land and KTX could occur if the new law is not revised and current disputes have not been solved.

Meanwhile, the government abused excessive force and forcibly cracked down on the irregular workers' protests in several occasions.

The AHRC is of opinion that the government should identify the primary causes of the labour strike and play an active role in providing a safety net so that companies cannot easily avoid the law. Also the government must come up with complementary measures by imposing restrictions on outsourcing and simultaneous, massive lay-offs by companies. In the meantime, companies should put more effort in embracing irregular employees to create an atmosphere for win-win cooperation with them.

3. Freedom of expression and National Security Law

Under the existence of National Security Law, the people of Republic of Korea have continued to suffer from freedom of expression. The HRC and Committee Against Torture (CAT) have expressed their concerns over the National Security Law (NSL) in their Concluding Observations in 2006.

Especially, the HRC concluded in November 2006 that prosecutions continue to be pursued, in particular under article 7 of this law. Under such provisions, the restriction placed on the freedom of expression does not meet the requirements of article 19, paragraph 3 of the ICCPR. So the Republic of Korea should as a matter of urgency ensure the compatibility of article 7 of the NSL, and sentences imposed there under with the requirements of the Covenant.

In addition, the CAT is concerned in July 2006 that specific provisions of the law remain vague and that ruled and regulations regarding arrest and detention continue to be applied in an arbitrary way. Therefore, the CAT recommended the Republic of Korea should continue to review the NSL to ensure that it is in full conformity with the Convention, and that arrests and detentions under the law do not increase the potential for human rights violations.

Regardless of several jurisprudences and concluding observations by HRC and CAT, the government of Republic of Korea has continued to apply the law without attempts to amend or abolish it and prosecution has continued.

Mr. Yu Byung-Moon, a spokesperson of Korean Federation of Student Councils (Hanchongyeon) had been wanted by the police since 2005 and arrested in 2007. On 6 September 2007 he was sentenced three years probation by Incheon District Court.

Hanchongyeon was a nationwide association of university students formed in 1993. The Supreme Court ruled that it was an “enemy-benefiting group” and an anti-State organization within the meaning of article 7, paragraphs 1 and 3, (2) of the NSL. However in the jurisprudence by the HRC in regard to individual communication of the case of Lee Jeong-Eun who was also a member of Hanchongyeon in 2005, the HRC concluded the government’s violation and recommended the government to amend article 7 of the NSL, with a view to making it compatible with the Covenant.

Mr. Jang Song-Hei, a representative of Hanchongyeon arrested on charge of forming and joining “enemy-benefiting organization” was sentenced to three year probation by a District Court in September 2007.

Mr. Kim Gwang-Sun and Mr. Jo Seong-Bong serving mandatory military are receiving non-custodial investigation respectively on charge of having “enemy-benefiting materials” which is one of provision of NSL.

A professor, Kang Jeong-Gu was arrested on charge of violation of NSL by writing an article in 2005. On 13 November 2007, he was sentenced two years, stay of qualification for 2 years and three years probation by the Appeal Court.

Mr. Lee Si-Woo, an author and a photographer, was arrested on charge of leaking military and national secrets as well as for alleged violation of the National Security Law of committing acts benefiting North Korea by producing and contributing articles. However the book that he had published has old documents which are able to get from the U.S. State Department and the website of U.S. Department of Defense. He takes photographs to disclose the illegality of the civilian passage restriction line and the problems caused by the U.S. military bases in South Korea. He also alleged that more than 3 millions depleted uranium were stored in U.S. military bases. After arrest, he had hunger strike for 48 days in the custody. Now the case is pending.

It is reported that the number of arrest under the NSL is 152 since 2003. Even though the government of Republic of Korea has received several recommendations by the Committees with regards to NSL, it has continued applying for the NSL and not shown any sincere steps to amend or abolish NSL.

4. Restriction on the freedom of assembly

As the AHRC has already discussed in its 2005 Human Rights Report, the Korean government continues to maintain laws severely restricting the freedom of assembly. The government's revision bill for the Law on Assembly and Demonstration on 29 December 2003 severely restricts the Korean people's right to the freedoms of assembly and expression. There was reportedly no legislation announcement, nor was there public hearing by the government until the Home Affairs Committee of the National Assembly approved the revision bill of the Law on Assembly and Demonstration on 19 November 2003.

The main contents of the revision bill include: a) allowing police agency supervisors to ban street marches that may cause major traffic congestion on 95 roads in key cities across the nation; b) authorizing the police to ban future rallies of an organization and all other rallies protesting the same issue, if a civic group stages a protest that obstructs public order or becomes violent; c) allowing the police to ban a rally believed to substantially damage facilities such as public schools (e.g. 2,229 schools only in Seoul), foreign embassies and military compounds at the request of nearby resident(s); d) providing for the punishment of an organization and no more than six-month imprisonment/or fine of no more than fifty thousand Won of its speaker if the level of noise at any given demonstration exceeds 80 decibel volume prescribed by an executive order. (The volume of a normal conversation of two persons is around 60 decibel.) The AHRC expresses its views that the law violates Article 21 of the ICCPR, which recognizes the right to peaceful assembly.

Under the situation, rallies and protests were banned as illegal or severely restricted by the police in several occasions during the year of 2007. The police reportedly termed even peaceful demonstrations illegal and cracked it down by force in a few occasions. The protesters and human rights defenders are also easily exposed to legal action or harassment by police under this law. Such strict restriction or ban on the demonstrations and the police's abuse of excessive measures sometimes led the protesters to be violent, in the demonstrations involving labour disputes and Free Trade Agreement between the Korea and United States.

5. Absence of definition of torture

There are various institutions such as Human Rights bureau under the Ministry of Justice, Human Rights Centre under the National Police Agency and NHRCK. However, law enforcement agencies responsible for acts of torture are punished under the name of 'misuse of power' or 'private assault' by the article 125 of Criminal Law not punished under the torture due to the absence of definition of torture in the Republic of Korea. In addition, a case of torture and inhuman or degrading treatment or punishment occurs in the prison, only 'mayhem' or 'general assault' applies for the prison officers.

The Committee Against Torture (CAT) has continuously pointed out the government bring the specific definition of the crime of torture to its domestic law however all acts of torture are not criminalized. However the government has not considered it.

6. No domestic mechanism to implement the international jurisprudences and laws

The Human Rights Committee (hereafter ‘ the HRC’) has given ten jurisprudences to the Republic of Korea. Seven cases out of ten have been found violation under the International Covenant on Civil and Political Rights (ICCPR) since 1994. Those cases are Sohn v. Republic of Korea (CCPR/C/54/D/518/1992), Kim v. Republic of Korea (CCPR/C/64/D/574/1994), Park V. Republic of Korea (CCPR/C/64/D/628/1995), Kang v. Republic of Korea (CCPR/C/78/D/878/1999), Shin v. Republic of Korea (CCPR/C/80/D/926/2000), Lee v. Republic of Korea (CCPR/C/84/C/1119/2002) and Yoon & Choi v. Republic of Korea (CCPR/C/88/D/1321-1322/2004).

However, the Korean government has so far failed to provide substantial remedies for the victims except in an administrative work such as publicizing the HRC views translated into Korean and given response to the HRC such a domestic condition. Due to the failure, the authors of cases have been suffered from the lack of domestic mechanism to implement the views of the HRC or provide redress to the victims. In further, the government has stuck its position that there is no way to implement under the current legal system. At the same time, the NHRCK has criticized the government’s position and recommended the government to establish a special law to implement to the views of the HRC. Stalemate of the government position has continued without sincere consideration to solve this problem existed in its legal system.

7. Other Concerns

In recent year, discriminative practice against the minorities in the society has been brought to light. The issue of the migrant workers are already mentioned the above. Another significant concern is the increased number of international marriages, which may lead to foreign women being trafficked into the Republic of Korea for purposes of marriage and exploitation. The prevalence of domestic violence in such marriages should be also noted.

The UN Committee on the Elimination of Discrimination against Women urged the Korean government in its concluding comments “to speedily enact the draft law to regulate the activities of marriage brokers and to develop additional policies and measures to protect foreign women from exploitation and abuse by marriage brokers and traffickers, and by their spouses”. The Committee also recommended the Korean government “to provide women with viable avenues of redress against abuses by their husbands and permit them to stay in the country while seeking redress”. – Para. 21-22, Concluding comments of the

Committee on the Elimination of Discrimination against Women: Republic of Korea, 10 August 2007, CEDAW/C/KOR/CO/6

Besides, there are concern about the abuse of sexual minority in the military and discrimination against the disabled.

SRI LANKA

Human Rights violations escalate further in 2007

The situation of human rights, the rule of law and the independence of the judiciary deteriorated further during the year 2007. In the Asian Human Rights Commission's State of Human Rights Report of 2005 and 2006 many questions regarding the human rights situation of Sri Lanka were raised. There were no improvements in any of the areas relating to human rights and the rule of law, in fact, even the discourse on human rights suffered a serious setback as the Sri Lankan government refused to engage in any meaningful discourse about the improvement of the situation with the local human rights groups, international human rights groups, the Human Rights Council and with Louise Arbour, the High Commissioner for Human Rights who visited Sri Lanka in October this year.

1.1 Comments by Louise Arbour, the High Commissioner for Human Rights

Perhaps the full text of her speech at the end of this visit is worth reproducing as an indication of the situation in the country:

I wish to thank His Excellency the President for inviting me to visit Sri Lanka and the Government of Sri Lanka for facilitating my program. I would like to thank Minister Samarasinghe and the many government officials, representatives of political parties, religious leaders, members of civil society and UN colleagues who have taken the time to share with me their perspectives. In particular, I would like to express my gratitude to the many individuals who approached me with testimonies of their own experience.

Yesterday I visited Jaffna. I am grateful to the military authorities for facilitating my visit and my particular thanks are due to the Bishop whose warm welcome and hospitality I very much appreciated.

I regret that time did not permit me to visit the Eastern Province. I also regret that I did not have the opportunity to visit Killinochchi, where I would have liked to convey directly to the LTTE my deep concern about their violations of human

rights and humanitarian law, including the recruitment of children, forced recruitment and abduction of adults, and political killings. I am very concerned by the many reports I have also received of serious violations by the TMVP and other armed groups.

I was struck in my discussions by the fact that broader human rights issues affecting all communities on the island have largely been eclipsed by the immediate focus on issues related to the conflict. These include issues of discrimination and exclusion, gender inequalities, the low participation of women in public and political life, the rights of migrant workers and press freedom. These challenges will remain before and after any peace settlement, and they are deserving of greater and more focussed attention.

Sri Lanka has many of the elements needed for a strong national protection system. It has ratified most of the international human rights treaties. It has justiciable human rights guarantees in the Constitution. It has longstanding democratic and legal traditions. It has had a national human rights commission for more than a decade. Sri Lanka has an active media and benefits from a committed civil society. However, in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There is a large number of reported killings, abductions and disappearances which remain unresolved. This is particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiry on how to safeguard against such violations. While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end.

While Sri Lanka has much of the necessary human rights institutional infrastructure, critical elements of protection have been undermined or compromised. The application of treaties in domestic law has been questioned by the Supreme Court in the Singarasa case. The Government's proposed legislation to address this problem, tabled this week in Parliament only partially addresses the issues and risks confusing further the status of different rights in national law.

Throughout my discussions, government representatives have insisted that national mechanisms are adequate for the protection of human rights, but require capacity building and further support from the international community. In contrast, people from across a broad political spectrum and from various communities have expressed

to me a lack of confidence and trust in the ability of existing relevant institutions to adequately safeguard against the most serious human rights abuses.

Some of the institutions themselves acknowledge their limitations in this respect. Members of the Commission of Inquiry pointed out to me that some state officials had failed to appear in response to their requests. They also stressed that the absence of an effective witness assistance and protection system was a major constraint on their work. The Commission would, in my view, gain greater public confidence and support by conducting public hearings. In any event, the Commission of Inquiry is an ad hoc response to a series of particularly shocking incidents and should not be a substitute for effective action by relevant law enforcement agencies.

Nor should it divert from the need for a forward looking, comprehensive and effective human rights protection system.

The Human Rights Commission has in the past played an important role in this respect. However, the failure to resolve the controversy over the appointment of commissioners has created a crisis of confidence in the HRC both locally and internationally. The HRC's failure to systematically conduct public inquiries and issue timely public reports has further undermined confidence in its efficacy and independence. Indeed, the Commission may lose its accreditation to the international body governing these institutions.

In my view the current human rights protection gap in Sri Lanka is not solely a question of capacity. While training and international expertise are needed in specific areas, and I understand would be welcomed by the Government, I am convinced that one of the major human rights shortcomings in Sri Lanka is rooted in the absence of reliable and authoritative information on the credible allegations of human rights abuses.

Many state that the LTTE is quick to manipulate information for propaganda gain. In my view this only accentuates the need for independent information gathering and public reporting on human rights issues.

OHCHR is willing to support the Government of Sri Lanka in this way. I am aware that there is a lively national debate about the need for international support in human rights protection. In light of the gravity of the reported ongoing abuses, and in particular of threats to life and security of the person, I believe that we should urgently resolve our ongoing discussions about the future of a productive relationship between OHCHR and the Government of Sri Lanka.

A final observation: It would be highly desirable for the government to consider an

early ratification of the new International Convention for the Protection of All Persons from Enforced Disappearance. In light of the documented violations of international humanitarian law, Sri Lanka should seriously consider joining the 105 countries which have ratified the Rome Treaty creating the International Criminal Court.

1.2 United Nations Press Release – Special Rapporteur on Torture Concludes Visit to Sri Lanka

The comments of Dr. Manfred Nowak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment equally highlights the very urgent need for the prevention of torture in Sri Lanka.

SPECIAL RAPPORTEUR ON TORTURE CONCLUDES VISIT TO SRI LANKA

29 October 2007

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, issued the following statement today:

“I was invited by the Government of Sri Lanka to undertake a visit to the country from 1 to 8 October 2007. The purpose of my visit was to assess the situation of torture and ill-treatment in the country, and to strengthen a process of sustained cooperation with the Government to assist it in its efforts to improve the administration of justice.

I express my appreciation to the Government for the full cooperation it extended to me. I further express my gratitude to the United Nations Resident Coordinator and his team for the excellent assistance provided throughout the mission.

Meetings and places

I held meetings with Government officials, including the Secretary of Foreign Affairs, the Minister of Disaster Management and Human Rights, the Minister of Justice, the Chief Justice of the Supreme Court, the Attorney General, the Inspector General of Police, the Commissioner General of Prisons, the National Human Rights Commission, the Army’s legal advisor on human rights, and the Secretary General for the Secretariat for Coordinating the Peace Process. During the mission I also met with a broad range of civil society organizations, lawyers, medical professionals, and representatives of international organizations and the diplomatic corps.

I wish to take the opportunity to thank the Inspector General of Police and the Commissioner

General of Prisons for opening up the prisons and police detention facilities without restrictions, including the carrying out unannounced visits, and enabling me to conduct private interviews with detainees. In Colombo and vicinity, I visited Welikada Prison, Colombo Remand Prison, the New Magazine Prison (Female Ward), the Criminal Investigation Department (CID), the Terrorist Investigation Department (TID), Mt. Lavinia Police Station, Ratmalana Police Post, and Panandura South Police Station. In Galle, I visited the TID detention facility at Boossa. In Trincomalee and vicinity, I visited Trincomalee Prison, Trincomalee Police Headquarters (including CID), China Bay Police Station, Kantale Police Station, Polonnaruwa Police Station, and Polonnaruwa Prison. In and around Kandy, I visited Bogambara Prison, Katugastota Police Station, and Wattedgama Police Station.

Context and challenges in the promotion and protection of human rights

At the outset, I should state that I have full appreciation for the challenges the Government faces from the violent and long-lasting conflict with the Liberation Tigers of Tamil Eelam (LTTE). Notwithstanding the difficult security situation the Government is faced with, Sri Lanka in principle is still able to uphold its democratic principles, ensure activities of civil society organizations and media, and maintain an independent judiciary.

Scope of the visit

I should explain that it was my intention at first to assess the situation of torture and ill-treatment in the entire territory of the country, and to examine not only torture and ill-treatment allegedly committed by the police and other security forces of the Government of Sri Lanka, but also those allegedly committed by or on behalf of other parties to the present conflict, including the LTTE. Indeed the most serious allegations of human rights violations that come to light, including those related to torture and ill-treatment, are in relation to the conflict and are alleged to be committed by both Government and non-State forces, including the LTTE and the TMVP-Karuna group.

However, since the Government insisted that the armed forces no longer kept detainees within their facilities and therefore no identifiable detention facilities existed, and also did not permit me to travel to Kilinochchi in order for me to conduct meetings with the LTTE leadership and visit their detention facilities, I am not in a position to draw conclusions in relation to the practice of torture and ill-treatment in the particular context of the conflict. The primary focus of my findings therefore relate to torture, ill-treatment and conditions of detention in the ordinary context of the criminal justice system, including with respect to the Emergency Regulations.

The practice of torture

Though the Government has disagreed, in my opinion the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practiced in Sri Lanka. Moreover, I observe that this practice is prone to become routine in the context of counter-terrorism operations, in particular by the TID.

Over the course of my visits to police stations and prisons, I received numerous consistent and credible allegations from detainees who reported that they were ill-treated by the police during inquiries in order to extract confessions, or to obtain information in relation to other criminal offences. Similar allegations were received with respect to the army. Methods reported included beating with various weapons, beating on the soles of the feet (*falaqa*), blows to the ears ("telephono"), positional abuse when handcuffed or bound, suspension in various positions, including strappado, "butchery", "reversed butchery", and "parrot's perch" (or *dharma chakara*), burning with metal objects and cigarettes, asphyxiation with plastic bags with chilli pepper or gasoline, and various forms of genital torture. This array of torture finds its fullest manifestation at the TID detention facility in Boossa.

Intimidation of victims by police officers to refrain from making complaints against them was commonly reported, as were allegations of threats of further violence, or threatening to fabricate criminal cases of possession of narcotics or dangerous weapons. Detainees regularly reported that habeas corpus hearings before a magistrate either involved no real opportunity to complain about police torture given that they were often escorted to courts by the very same perpetrators, or that the magistrate did not inquire into whether the suspect was mistreated in custody. Medical examinations were frequently alleged to take place in the presence of the perpetrators, or directed to junior doctors with little experience in documentation of injuries.

Accountability and prevention

In general, I note that Sri Lanka already has many of the elements in place necessary to both prevent torture and combat impunity, such as fundamental rights complaints before the Supreme Court in relation to Art 11 of the Constitution, indictments and prosecutions based on the 1994 Convention against Torture Act, bringing suspects before magistrates within the statutory 24 hour period, formal legal medical examinations by trained forensic experts (Judicial Medical Officers), and investigations and visits by the National Human Rights Commission (NHRC).

The commitment of the Government to prevent torture is also demonstrated by the establishment of mechanisms by the Inspector General of Police and the Attorney General's Office specifically to investigate allegations of torture (e.g. the Special Investigations Unit and the Prosecution of Torture Perpetrators Unit). Moreover, with respect to my mandate the Government regularly continues to provide clarifications and up-dates with regard to communications related to such violations.

However, a number of shortcomings remain, and most significantly, the absence of an independent and effective preventive mechanism mandated to make regular and unannounced visits to all places of detention throughout the country at any time, to conduct private interviews with detainees, and to subject them to thorough independent medical examinations. It is my conviction that this is the most effective way of preventing torture. In the case of Sri Lanka, I am not satisfied that visits undertaken by existing mechanisms, such as the NHRC, are presently fulfilling this role, or realizing this level of scrutiny.

I appreciate that by enacting the 1994 Torture Act, the Government has implemented its obligation to criminalize torture and bring perpetrators to justice. I am also encouraged by the significant number of indictments filed by the Attorney General under this Act. However, I regret that these indictments have led so far only to three convictions. One of the factors influencing this outcome is reportedly because of the Torture Act's high mandatory minimum sentence of seven years; it is effectively a disincentive to apply against perpetrators. Other factors are the absence of effective ex-officio investigation mechanisms in accordance with Art 12 CAT, as well as various obstacles detainees face in filing complaints and gaining access to independent medical examinations while still detained.

Given the high standards of proof applied by the Supreme Court in torture related cases, it is regrettable that the facts established do not trigger more convictions by criminal courts.

Conditions of detention

As far as conditions of detention are concerned, the Government provided me with statistics indicating severe overcrowding of prisons. While the total capacity of all prisons amounts to 8,200, the actual prison population reaches 28,000. That poor conditions of detention can amount to inhuman and degrading treatment is well established in the jurisprudence of several international and regional human rights mechanisms. In Sri Lanka the combination of severe overcrowding with antiquated infrastructure of certain prison facilities places unbearable strains on services and resources, which for detainees in certain prisons, such as the Colombo Remand Prison, amounts to degrading treatment in my opinion. The lack of adequate facilities also leads to a situation where convicted prisoners are held together

with pre-trial detainees in violation of Sri Lanka's obligation under Art 10 of the International Covenant on Civil and Political Rights. Although the conditions are definitely better in prisons with more modern facilities, such as Polonnaruwa and the Female Ward of the New Magazine Prison, the prison system as a whole is in need of structural reform.

During my visit of various police stations I observed that detainees are locked up in basic cells, sleeping on the concrete floor and often without natural light and sufficient ventilation. While I am not concerned about such conditions for criminal suspects held in police custody for up to 24 hours, these conditions become inhuman for suspects held in these cells under detention orders pursuant to the Emergency Regulations for periods of several months up to one year. This applies both for smaller police stations, such as at Mt. Lavinia, and especially for the headquarters of the CID and TID in Colombo, where detainees are kept in rooms used as offices during the day-time, and forced to sleep on desks in some cases.

Corporal punishment in prisons and the death penalty

I appreciate the recent abolition of corporal punishment in Sri Lanka, however, in Bogambara Prison I received disturbing complaints of cases of corporal punishment corroborated by medical evidence. I am pleased to report that the Government has initiated an inquiry to look into this matter. On the death penalty, I am encouraged by the policy of Sri Lanka not to carry out death sentences for over thirty years. Nevertheless, courts continue to sentence persons to death, which leads to a considerable number of condemned prisoners living for many years under the strict conditions of death row.

Preliminary recommendations

On the basis of my preliminary findings I recommend, inter alia, that the Government:

Design and implement comprehensive structural reform of the prison system aimed at reducing the number of detainees, increasing prison capacities and modernising the prison facilities;

Remove non-violent offenders from confinement in pre-trial detention facilities, and subject them to non-custodial measures (i.e. guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgment);

Ensure separation of remand and convicted prisoners;

Ensure separation of juvenile and adult detainees, and ensure the deprivation of liberty of children to an absolute minimum as required by Art 37 (b) CRC;

Reduce the period of police custody under the Emergency Regulations;

Establish appropriate detention facilities for persons kept in prolonged custody under the Emergency Regulations;

Investigate corporal punishment cases at Bogambara Prison as well as torture allegations against the TID, mainly in Boossa, aimed at bringing the perpetrators to justice;

Abolish capital punishment or, at a minimum, commute death sentences into prison sentences;

Develop proper mechanisms for the protection of torture victims and witnesses;

Establish centres for the rehabilitation of torture victims;

Ensure that magistrates routinely ask persons brought from police custody how they have been treated and, even in the absence of a formal complaint from the defendant, order an independent medical examination in accordance with the Istanbul Protocol;

Ratify the Optional Protocol to the Convention against Torture, and establish a truly independent monitoring mechanism to visit all places where persons are deprived of their liberty throughout the country, and carry out private interviews;

Expedite criminal procedures relating to torture cases by, e.g., establishing special courts dealing with torture and ill-treatment;

Allow judges to be able to exercise more discretion in sentencing perpetrators of torture under the 1994 Torture Act;

Ensure that all allegations of torture and ill-treatment are promptly and thoroughly investigated by an independent authority with no connection to the authority investigating or prosecuting the case against the alleged victim;

Ensure all public officials, in particular prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, to report ex officio to the relevant authorities for proper investigation in accordance with Art 12 CAT;

Ensure that confessions made by persons in custody without the presence of a lawyer and that are not confirmed before a judge shall not be admissible as evidence against the persons who made the confession;

Establish an effective and independent complaints system in prisons for torture and abuse leading to criminal investigations;

Ensure security personnel shall undergo extensive and thorough training using a curriculum that incorporates human rights education throughout and that includes training in effective interrogation techniques and the proper use of policing equipment, and that existing personnel receive continuing education; and

Establish a field presence of the Office of the UN High Commissioner for Human Rights with a mandate of both monitoring the human rights situation in the country, including the right of unimpeded access to all places of detention, and providing technical assistance particularly in the field of judicial, police and prison reform.

I encourage the international community to assist the Government of Sri Lanka to follow-up on these recommendations.”

The Special Rapporteur shared his preliminary findings with the Government at the close of his mission, to which the Government responded with constructive comments. He is pleased to report that the Government will appoint a high-level task force to study his recommendations, consisting of public sector stakeholders and members representing judicial and civil society sectors. The Special Rapporteur will submit a comprehensive written report on the visit to the United Nations Human Rights Council.

Mr. Nowak was appointed Special Rapporteur on 1 December 2004 by the United Nations Commission on Human Rights. As Special Rapporteur, he is independent from any government and serves in his individual capacity. The Commission first decided to appoint a special rapporteur to examine questions relevant to torture in 1985. The mandate, since assumed by the Human Rights Council, covers all countries, whether or not they have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Mr. Nowak has previously served as member of the Working Group on Enforced and Involuntary Disappearances; the UN expert on missing persons in the former Yugoslavia; the UN expert on legal questions on enforced disappearances; and as a judge at the Human Rights Chamber for Bosnia and Herzegovina. He is Professor of Constitutional Law and Human Rights at the University of Vienna, and Director of the Ludwig Boltzmann Institute of Human Rights¹.

1.3 No local or international investigations into human rights violations

The Sri Lankan government resisted attempts by several government and human rights organisations to convince it of the need for an international human rights monitoring mission in order to break the deadlock that exists regarding investigations into human rights issues. The government's resistance was so vehement that it declared all such requests for international monitoring amounted to threats to the sovereignty of the nation and were ill-motivated. The words, invasion, intervention and a plot of the imperialists, were used to denigrate these requests. Besides, the situation of Iraq and Afghanistan was used as places where the UN should engage in human rights monitoring rather than Sri Lanka. Governments that showed a keen interest on promoting UN human rights monitoring mission were told that their own past human rights records did not qualify them to request human rights monitoring in Sri Lanka.

The United Kingdom was reminded that it was once a colonial power, Germany was reminded that it once had a fascist dictatorship and Switzerland was told that its neutrality in the Second World War did not qualify it to talk about human rights; the United States was reminded about its war in Iraq. And everyone was told that they were intentionally or otherwise engaged in assisting LTTE terrorism by pursuing this proposal for monitoring. The Sri Lankan government and its propaganda machinery carried out an extensive campaign internationally and locally to create a very bleak picture about the need for any UN human rights monitoring.

Meanwhile, all attempts to have local investigations were shut down. The Presidential Commission of Inquiry, which had been instituted to investigate into several well known cases did not make any progress and in fact, the public impression is that this commission is being used merely for creating an incorrect assumption of there being some investigations when, in fact, no such investigations are taking place. The IIGEP made three important public statements (see annexure) in which the limitations of the commission and particularly the role of the Attorney General's Department was severely criticised. No steps were taken to correct this situation despite of this criticism being repeated.

The Asian Human Rights Commission summed up the situation regarding the absence of both local and international investigations in a statement issued on October 20, 2007 entitled, SRI LANKA: Disappearances day, October 27 – denial of local or international investigations.

SRI LANKA: Disappearances day, October 27 – denial of local or international investigations²

On the 27th October the day for the disappeared will be commemorated by the Families of the Disappeared and Right to Life together with the Asian Human Rights Commission. The monument for the disappeared was established at Raddoluwa Seeduwa, near Negombo in the year 2000 as a symbol of the disappearances which have become a common phenomenon in Sri Lanka since the early 70s.

Disappearances have been occurring on a large scale in the south, north and the east of the country and during this year's commemoration family members of the disappeared will gather near the monument to pay respects to the dear ones who have been lost, perform religious ceremonies and also hold public gatherings to discuss issues of accountability relating to these disappearances. A number of organisations such as the Law Society and Trust, INFORM, CPD, the Civil Monitoring Commission, the Association for Disabled ex-Service Personnel, the Neelan Tiruchelvam Trust and the Meepura Newspaper have also officially joined in.

Perhaps on this occasion a number of salient features of disappearances in Sri Lanka need to be recaptured:

Disappearances are, for the most part, preceded by abductions – the structuring of disappearances is designed in such a way to as to deny liability. Those who conduct an abduction, which is the first step in a series of actions that lead to a disappearance, disguise themselves and also use vehicles which cannot be easily recognised. In this way the legal obligations relating to arrest are circumvented. Any arrest, according to law, has to be carried out by officers who can be identified and who are obliged to reveal their identities. Some instructions to law enforcement agencies have gone to the extent of requiring the arresting officers to give a receipt of arrest. They are also required to fax details of the arrest to the higher ranking police officers and the Human Rights Commission. The law enforcement officers are expected to travel in their official vehicles with are clearly identified. Only law enforcement officers authorised by their immediate superiors are allowed to carry out arrests. However, abductions are often done without following any form of written authorisation by superiors and often persons who are do not belong to the law enforcement agencies also carry out abductions with the direct or indirect approval of some officers of these agencies.

Abductions are not reported to courts – there are very strict regulations relating to the production of persons before court within the times stipulated by law. In the case of persons who are abducted with the ultimate purpose of making them disappear, no such reports are made to courts. This again demonstrates deliberate design in dealing with disappearances.

The places of detention are kept hidden – under normal law places where persons may be detained is clearly demarcated. To hold persons in a place other than an authorised centre of detention amounts to a criminal act. However, when persons are arrested for the purpose of making them disappear they can be kept in a place of the choice of the persons who engage in such activities. When law enforcement officers engage in such activities it implies that the higher authorities are authorizing them to do so. Thus, this also indicates a clearly designed activity that takes place with the approval of higher authorities.

No written records are kept – under normal law there are clear legal provisions requiring the police or military officers who make arrests to make detailed notes about the arrest, detention and interrogation. Higher authorities are expected to examine these records and to take appropriate steps on the basis of the information provided in these records, either to take legal action against the suspects or to release them. The higher authorities also bear responsibility to ensure proper medical attention is given to the suspects.

Killings in custody – every disappearance in which a law enforcement agency is involved directly or indirectly is a killing in custody. It is a violation of the law as well as the international law as provided for in the Geneva conventions. It is a murder with deliberate intention as the entire process is organised in a way to culminate in the killing of the arrested person while in the custody of a law enforcement agency. Once again, the higher authorities of the law enforcement agency, whether it be the police or the military, are responsible for each killing. They are complicit in designing the process of such killing and also the carrying out of the killing.

Illegal disposal of bodies – disappearances imply not only killings but also the secret and illegal disposal of bodies. Once again the whole process of illegal burials is part of the design of disappearances. Thus, in this process too, the higher authorities of the particular agency bear responsibility. To claim ignorance of such a well designed process at the very least amounts to culpable negligence.

There are also some disappearances which have been carried out either by terrorists or criminals. In these activities the law enforcement agencies do not bear direct responsibility for the act. However, they and the state bear responsibility for their failure to prevent such crimes and to take effective action to investigate, arrest and prosecute the offenders.

State responsibility – large scale disappearances, as they have been happening in Sri Lanka continuously since 1971, can only occur when there is political approval for such activities by the regime in power. Law enforcement agencies engage in such acts. Thus, it can be said that those involved in serious breaches of the law do so only when they have the assurance that those who hold power will ensure that no investigations or prosecutions will take place. This assurance has become the cornerstone of the relationship between the political regime and the police and military during this long period.

There is today an entrenched political and legal culture in which firm undertakings not to investigate or to prosecute disappearances and other gross abuses of human rights remain a foundation stone. It is an unwritten code that politicians will do all that is within their power to stop investigations into allegations of disappearances and other related matters. The operation of the criminal justice system takes place only outside the boundary of this agreement between those in power and the police and military.

It is this agreement to ensure that investigations into these matters will be prevented that has created the obstacles to the local criminal investigation system to the extent that it has become dysfunctional. The officers of the Criminal Investigation Division (CID), who, being propelled by their professional obligations try to undertake investigations into this forbidden territory, put themselves at serious risk. The numbers of persons whose careers within the investigation field have suffered serious setbacks, either due to their lack of understanding of the rules of this forbidden area, or due to their defiance of these rules in the pursuit of the best traditions of their profession, are many. An entire psychology within the criminal investigation machinery in the country has become completely twisted due to these experiences. Today investigations into cases where state agencies are involved would be considered an act of great disloyalty to the police and the military.

The political reasons for objecting to any form of monitoring by the United Nations agencies are merely an extension of the rule that exists within the country that these matters should not be subjected to any investigations or prosecutions. However, it is also completely accurate to say that if the state has the will to pull away from this attitude it definitely has the capacity to conduct the investigations. It is common knowledge that in the past Sri Lanka has been able to develop the capacity of its investigating officers to successfully deal with very serious crimes. Investigations into former Prime Minister's Bandaranaike's assassination and investigations into the 1962 attempted coup to overthrow the government of the day are clear examples of the capacity of the Sri Lankan law enforcement agencies to deal with such matters. There are many officers who have now been scattered to various places due to punishment transfers or displacement from their professional roles for many mysterious reasons who, if they were allowed to do so would be able to bring many of the perpetrators of the disappearances of the recent decades to justice. But they all know the reality within their establishment now, which is that there is a forbidden territory about criminal investigations into which they should enter only at their peril.

If a state has the will and the capacity to carry out investigations into gross violations of human rights such as forced disappearances there is no justification for the United Nations human rights agencies to request intervention in order to do such things. However, if the will or capacity is missing to ignore such issues it will be to dishonour the obligations of such agencies by those who hold authority within them. The obligations of the UN agencies

to deal with the human rights violations in Sri Lanka arise, not from the incapacity of local agencies, but by the lack of will of the state to deal with these violations.

What the propaganda industry for the Sri Lankan government says against the UN High Commissioner's request for negotiations for assistance on this matter is that Sri Lanka has the capacity to deal with such investigations. However, what has been shown by the non-investigations is that the state is deliberately obstructing them, which clearly indicates that the state does not have the will to do so.

Under these circumstances it is legitimate to ask as to the reasons why the political authorities in Sri Lanka have created such a forbidden area relating to criminal investigations. A close study would suggest that this is because the military, which has been used by various regimes for their own purposes, have acquired 'rights' to obstruct any attempt at such investigations. Serious investigations into disappearances are perceived by the political authorities as a possible cause for an enormous rift between them and the military. The political system, which was built since the time the new constitution was made in 1978, cannot survive if serious investigations into police and military conduct take place.

The rough treatment Ms. Louise Arbour, the High Commissioner for Human Rights received in the country, as well as the huge misinformation campaign carried out by the propaganda industry of the government, can only be explained within this understanding that exists between the political leaders of the state and the police and the military. It is in this area that much more research and study is needed if the present obstacles to the protection and promotion of human rights within Sri Lanka are to be successfully countered.

Local people when affected by gross human rights abuses try to make complaints to local police authorities. The Criminal Procedure Code of Sri Lanka has laid down the detailed procedure for the recording of complaints, their investigation and the prosecution of criminal cases. When local people resort to the provisions in the local law regarding forced disappearances and similar types of human rights abuses, mostly done by the police or the military, they discover the hidden agenda that has developed over the last decade not to investigate or to prosecute these matters as explained above. After having exhausted all attempts to find legal redress, when they realise that locally, nothing will happen, they begin to seek help from human rights organisations and others to take these matters to the United Nations human rights agencies. When this happens, the same state that denies them the investigations locally, declares that international agencies need not interfere as there are local legal mechanisms to deal with these matters. Thus the citizen facing these problems has nowhere to turn to. They are deprived of access to local as well as international systems to find a solution to the tremendous wrongs they have faced.

The placing of citizens in this helpless situation without a remedy, locally or internationally

is thereafter portrayed as a matter of sovereignty. If the United Nations human rights agencies question the state about complaints of violations by the citizens, they are told not to interfere with the sovereignty of the state. The propaganda industry goes into full swing claiming that these complaints can be dealt with locally. However, those involved in the propaganda industry know full well that nothing, in fact, will be done.

The propaganda industry therefore naturally treats national and international human rights organisations with resentment for exposing and publicizing the narratives about the violations of human rights faced by the local citizens because that makes their job of falsification all the more difficult. They want to silence the human rights organisations and in fact all critics who merely record and publish what the citizens are complaining about. Thus, silencing of human rights organisations is only an extension of the silencing of citizens.

The propaganda industry therefore is not only engaged in spreading misinformation, they are an essential part of the machinery of repression. One arm of the state commits disappearances and abuses of human rights while the political leadership, the other arm, assures and guarantees the police and military that their actions relating to disappearances and other matters will not be investigated. The propaganda industry, the third arm, then takes all efforts to make it appear that either the reports of such abuses are exaggerations or that tough measures are taken locally to deal with such abuses. While those who cause disappearances use physical violence, politicians use political power to authorise such violence and to prevent investigations, the propaganda industry use their pens to silence citizens and anyone who extends their support to the victimized citizens.

This year's commemoration of the disappearances should be a day of reflection for anyone who cares for a decent way of life to prevail within Sri Lanka and about the actual reality of repression within the country. It is only when larger numbers of people see through the actual situation that they have been pushed into that they will find means to free themselves from these chains. Even master craftsmen of the propaganda industry will be able to do very little once the citizens begin to see through the means by which they have been not only denied their rights, but also humiliated when they try to find solutions to the problems they face.

1.4 A year of disappointments

At the beginning of the year the human rights groups linked to the AHRC issued the 'wish list' given below. However, none of these wishes have been fulfilled by the government of Sri Lanka. The government's performance in 2007 has been a complete disappointment and this neglect has ended in disastrous results to individuals, groups and the society at large. During this year Sri Lanka was once again ranked as a failed state, it also went up in the corruption index and the index on violations of freedom of expression.

New Year Wish List 2007

1. That fundamental rights guaranteed in the Constitution be fully honoured; the right against illegal arrest (Article 13.1), the right against illegal detention (article 13.2), the right against torture (Article 11) to be fully respected and implemented, that steps are taken to ensure the right to personal security; that extrajudicial killings and abductions and disappearances be brought to an end by special and firm measures. That the freedom of expression and publication and the rights of the media are fully respected, protected and fulfilled.
2. That all crimes and abuses of human rights will be promptly and competently investigated according to the procedures required by law and the independence and the security of the investigators be guaranteed.
3. That the Attorney General's Department will be provided with all the necessary human and other resources to ensure speedy prosecution of all cases with particular emphasis on cases relating to human rights abuses.
4. That the right to fair trial be ensured by ending the delays in courts, the absence of witness protection, the reinstatement of the hearing of a trial from beginning to end without undue postponements, resolving of problems relating to resource limitations in courts and bringing about the necessary legal amendments to overcome obstructions for the implementation of fair trial.
5. That the problems of the displaced persons will receive national attention and speedy measures to ensure respect for their dignity under human rights and humanitarian law.
6. That the rights of children be ensured with adequate measures to implement the relevant laws and the improvement of those laws.
7. That practical measures are taken to end discrimination against women in relation to education, employment and participation in social, cultural and political life.
8. That measures are taken speedily to realise equality to all minorities and that practical steps are taken to ensure the easy use of languages that will guarantee fairness to all.
9. That the constitutional crisis over the independent institutions created under the 17th Amendment is brought to an end with the appointment of an independent Constitutional Council and that measures are taken to restore the rule of law through practical measures to improve all the institutions.
10. That practical measures are taken to bring about a law in order to make the views of the United Nations Human Rights Committee implementable within the legal framework of Sri Lanka.



11. That the state accede to the Convention for the Prevention of Forced Disappearances and the Optional Protocol to the Convention against Torture (CAT)

2. Human rights violations

Any sensible discussion on the human rights situation in Sri Lanka needs to be divided into three parts on the basis of territorial authority exercised by the Sri Lanka government in separate areas. We will refer to these three areas as the government controlled areas – south, government controlled areas in the east and the north and the LTTE controlled areas in the north.

2.1 Human rights in the government controlled areas of the south

2.1.1. Torture: the AHRC has continued to observe the human rights violations at the police stations in the government controlled areas of the south. In the past the AHRC has made several reports on this issue. The year 2007 did not see any improvement of the situation regarding the elimination of torture; in fact, the situation regarding the state investigation mechanisms into allegations of torture significantly deteriorated.

The Urgent Appeals desk of the AHRC received 47 cases of allegations of torture. This is a very small fraction as the source from which the AHRC obtains its information is still limited to some areas in the country. However, analysis of the narratives of these cases provides an insight not only into the reasons for which people are being tortured but also how widespread the practice is.

The reasons for torture revealed in these narratives are as follows:

- i. A police officer acting at the instigation of a friend to harass a victim.
- ii. Assaults without giving any reasons – probably with a view to fish for some information.
- iii. To intimidate a complainant who is pursuing a case against some police officers in court.
- iv. Trying to fish for information about a murder.
- v. To force a confession about a robbery that the victim has not been involved in – probably in order to create a substitute accused for a case that the police are unable to resolve.
- vi. Assaults as the point of abduction which has resulted in a disappearance – perhaps with the view to subdue the suspect and to take him/her away as soon as possible.
- vii. Shooting to death for failure to follow road instructions.
- viii. Assault while asking questions as to where the illicit liquor is hidden.

- ix. To chase fishermen out of a fishing area, allegedly for security reasons.
- x. To obtain a confession that the suspect stole jewelry – it has been commonly reported that persons are randomly arrested in some areas, particularly if they are young males as part of an attempt to stop snatching of chains and other jewelry.
- xi. Assault of a mentally retarded man demanding from him stolen goods – random assaults on persons with the hope that some discovery of theft or other crimes can be made has been a common cause of assaults in our previous narratives.
- xii. Assault by three policemen without any explanation – probably on mistaken identity.
- xiii. On allegations of stealing a gold chain.
- xiv. For parking a three-wheeler near the car of a senior police officer.
- xv. Three officers assaulting a person to falsely implicate him in a petty crime.
- xvi. A driver assaulted for non-payment of a bribe.
- xvii. Assaulted in front of a complainant who has made a complaint about the loss of TV cassettes – in earlier years also, there have been cases where persons were assaulted in front of complainants which seemed to be for the purpose of impressing upon the complainant that the police officers concerned are in fact trying to solve the crime. Why the persons are assaulted in front of the complainant may be due to close links between the police officer and the complainant or due to bribery.
- xviii. On questioning about theft.
- xix. For preventing a complaint being made to the police on a traffic accident – under the influence of the person who is alleged to have caused the accident in order to prevent further proceedings.
- xx. On suspicion of theft to fish for information.
- xxi. Assaulted by military personnel on mistaken identity.
- xxii. In order to obtain a confession about possession of five bullets – it is often reported that the police produce from their possession bombs, bullets and other weapons when they want to implicate some persons in crimes which are non-bailable. In these cases the police use confessions as evidence to create the impression that it is a genuine case.
- xxiii. Assaulted with reason and not even filing a case thereafter – perhaps the motive was to fish for some information which might accidentally be revealed due to wanting to escape the assault.
- xxiv. Assault due to some land dispute in which the police take the side of one party – under Sri Lankan law the police have no authority to deal with civil matters such as land disputes. However, there are many allegations of such interference quite often.
- xxv. Assaults by four police officers without given reason.
- xxvi. Requesting for illicit liquor (kasippu). When persons are suspected of the sale

- of illicit liquor they are forced to provide samples of it so that the police can, from time to time, file cases against them. There has been several instances reported in the past where persons who have given up such trade are forced to provide samples with a view to file further cases on such persons. The police either do not believe that they have given up the trade or they are desperately in need of some cases for the sake of their records.
- xxvii. A member of a local government office (Pradesiya Saba) who in the course of his official duties questioned a Sub Inspector of Police about allegations that the office was engaged in the illicit liquor business, the local government representative was severely beaten.
- xxviii. When questioning on an inquiry into murder about which the suspect alleged that he has no connection.
- xxix. For refusal to implicate a person that the police wanted to implicate in the sale of illicit liquor.
- xxx. A man assaulted by a drunken policeman.
- xxxi. A man assaulted at the instigation of a complainant.
- xxxii. Assaulted because of a land dispute in which the police have taken the side of one party.
- xxxiii. Assaulted for refusal to a request to give a bribe.
- xxxiv. For possession of a gold chain in his pocket – at random searches when a person is found with something that the police think suspicious they often resort of assault in order to obtain a confession that the property is stolen.
- xxxv. A man severely assaulted as the police intervened to settle a family dispute.

Injuries

According to the narratives given in these cases the injuries to persons in most instances have been extremely serious warranting hospitalization. Beatings with hands, boots and poles are frequent in all these narratives.

In some cases the suspects have been taken to hospital by the police themselves, perhaps after the intervention of superior officers. However, there are also several instances in which the police merely take a person to a Judicial Medical Officer or District Medical Officer and get some papers signed without the doctor properly examining the victim or prescribing treatment. However, a marked feature in the cases recorded this year is that in several instances the victims have told the doctors about their assaults. In the past the victims used to be more afraid in making complaints fearing that they may be assaulted even more after returning from the medical examination. This year also, there were several cases of such assaults due to making such allegation to the doctor. In one instance the person was assaulted in front of the doctor himself.

Inquiries

In all these 47 cases complaints were made by the victims themselves as well as human rights organisations on their behalf. Human rights organisations have made complaints to the Inspector General of Police, the Attorney General's Department and the Human Rights Commission of Sri Lanka. In some instances complaints are also made to the National Police Commission. However, the Asian Human Rights Commission is not aware of any serious investigations into any of these allegations leading to prosecutions under the CAT Act, Act No. 22 of 1994. In previous years there had been more investigations by the Special Inquiry Unit (SIU) of the Criminal Investigation Division (CID) however, the Asian Human Rights Commission is not aware of any inquiries into allegations of torture in cases reported in 2007.



Result of injuries received when the police went to the victim's house to inquire into a domestic dispute

As for the Human Rights Commission it has lost its credibility even further this year as a competent body capable of investigation into these allegations.

The police higher authorities have begun to appeal to the public to understand the situation of their police officers and not to demoralize them by public criticism. The claim is that due to terrorism and the increase of organised crime the duties of the police have become more difficult and that they are unable to observe the niceties of proper policing under the present circumstances. The failure on the part of the higher police authorities to enforce discipline with the force and the failure on the part of the political authority to ensure accountability within the force remains the reasons for the constant practice of torture as well as other forms of lapses in discipline. The year 2007 saw a further degeneration in this regard.

The National Police Commission ceased to exist as an independent body after the provisions of the 17th Amendment to the constitution for the purposes of the appointment of the commissioners to the NPC. This remains one of the more important reasons for the state of this public institution which due to politicisation and a long period of degeneration is today, unable to provide even the basic services required.

2.1.2. Extrajudicial killings at police stations - Quite regularly reports appear in the press of persons in police custody, having tried to attack the police with grenades or other weapons, being shot dead. The Gampaha police are reported to have killed two persons who, while in a police cell, tried to escape. These two persons were arrested regarding an attempted bank robbery according to the police. The police had recorded statements from

both the suspects and had allegedly taken them to find some objects when they tried to attack the police, who then shot them dead.

The Modara police shot dead a suspect who was alleged to have killed a young mother living in the area. He too was arrested and it is alleged that while he was taken to identify a wooden pole used in the killing he tried to attack the police and was then shot dead. The suspect was a deserter from the Sri Lankan army who had served as a lance corporal.

A further case was reported of a suspect who had been killed after arrest when trying to escape from the custody of the Weligama police. Yet another person who was taken after arrest by Waduwa police to find a weapon jumped from the boat in which he was traveling in Bolgoda Lake, allegedly committing suicide. All these cases were reported to have happened during this month (October 2007) and in police stations quite close to the capital, Colombo.

One of the cases that received wide publicity was the killing of the two alleged suspects of the Delgoda family massacre. The officer in charge of the Megahawatte police submitting a report to the Magistrate's Court of Gampaha gave the following description of the incident:

“On the basis of a statement made by Amaradasa, to the effect that the weapons were hidden at No. 277A, Kaduboda, Delgoda, when the police went to find the weapons a bomb, hidden in that place was taken [by the two suspects] to kill the police officers. On the orders of Sub Inspector Nishanka, PC27273 Wijeratna and PC 34334 Gunwardena shot with their T56 [light] sub-machine guns bearing number 28030808 and 29041767. After the shooting as the two suspects had been wounded they were taken to hospital where they died.” The two suspects were shot in the chest and the head.

Subsequent to the incident several villagers contacted human rights organisations and gave different versions of the death of these two persons. While some villagers claim that one of the suspects was beaten to death at the police station and the other was shot dead in some remote place, both bodies were then brought and dumped at the alleged place of the incident. These villagers also stated that they suspect other persons having been involved in the family massacre who are still at large.

In all these cases the magistrates accepted the versions given by the police and entered verdicts of justifiable homicide. The magistrates decided the correctness of the versions given by the police before the cases had been brought to trial at a High Court and before all the evidence was examined.

Such deaths which have become quite a common occurrence indicate that the police

higher authorities approve of such practices. The fact that the government or the parliament has not taken any visible or effective action to question this practice also suggests that there is direct or indirect political approval of such killings. The former Inspector General of Police (IGP) quite publicly approved this practice and the present IGP has spoken of stopping crime by 'hook or by crook'. Neither was taken to task by the government or parliament. In some countries such as Bangladesh and India where shootings by the police has come to the notice of the judiciary, the Supreme Court as well as other courts has made numerous attempts to evolve means to intervene and has rigorously tested the police when such incidents are reported. In Sri Lanka there have been no such attempts and this practice goes on unchallenged.

The practice of killing after arrest is not new in Sri Lanka. In 1971, in the repression unleashed on an insurgency, thousands of persons were arrested and killed. In the period between 1986 and 1990 at least 30,000 people disappeared meaning that they were abducted and killed while in police or military custody. In the north and the east this practice has gone on from the late 70's until now with, it can safely be said, the tacit approval of the police and military establishments and no serious inquiries take place.

It appears that now if a person is killed by way of torture at a police station this is also portrayed as a case where the person had tried to attack the officers and therefore the police took the necessary measures to protect themselves. In this way even the possibility that there was in the for investigations into custodial deaths have become even more difficult as these are presented as deaths that occurred outside police stations and particularly in scenes of investigations into crime.

The present practice of accepted self defense by the police as the reason for a killing by the magistrates in several courts makes it even more difficult to identify the place of death as well as the circumstances surrounding it.

The Asian Human Rights Commission wrote an open letter to the Judicial Service Commission regarding the habit of magistrates pronouncing justifiable homicide regarding the killing of persons in police custody.³

2.1.3. Disappearances – the scourge of Sri Lanka

In January 2007, the former Foreign Affairs Minister Mangala Samaraweera said publicly that a person is abducted every five hours in Sri Lanka.⁴ He also added that "kidnappings, abductions and killings have become common incidents and that no matter who did it, as a government we were responsible for it". Later he was removed from his post and the government merely dismissed his claims as being 'politically motivated'.

Regardless of any political underpinning to his statement, the irrefutable fact is that abductions, disappearances and extra judicial killings have become the living reality experienced by thousands of Sri Lankans during the past few years. Since mid 2006 when fighting intensified between government military forces, various paramilitary groups and the Liberation Tigers of Tamil Eelam (LTTE), thousands of civilians have been abducted. Many have subsequently disappeared and the mutilated bodies of others have been discovered throughout the country—but specifically in the Northern and Eastern Districts of Sri Lanka as well as in the main city of Colombo and its Suburbs. In Jaffna alone, according to the Jaffna Human Rights Commission at least 835 civilians were kidnapped between December 2005 and May 2007 and about 600 are still missing.⁵

Among the victims are media personnel, members of the clergy, parliamentarians, businessmen, humanitarian workers and academics including the Vice Chancellor of the Eastern University. Few have been released allegedly after paying large sums of money or after being severely warned by their captors not to pursue their professional activities. Even foreign nationals have not been spared and according to a startling revelation by the Australian Television programme, “Dateline” 18 Australian citizens or permanent residents (former Sri Lankans), have also been abducted whilst visiting the country. Apparently, victims’ families remained tightlipped about what happened, due to intense fear regarding the fate of loved ones (those who have not been released) or reprisals against family members, if they spoke out. Majority of the victims however, are the ordinary men, women and even children, of Sri Lanka.

Media reports refer to the dreaded white van without number plates—already ingrained in people’s psyche as a symbol of the terror era (*beeshana yugaya*) of 1987 to 1991, during which period between 30,000 (official) and 60,000 (unofficial estimates) disappeared—has made its reappearance in Colombo as well as in the North and East. One Jaffna family’s encounter with the ominous white van is as follows: ⁶

On September 11, 2006 about 12:15 am the family was awakened by barking dogs. About fifteen men broke down the front door and entered their home. The men were heavily armed and wore black trousers and black shirts. The family thought they were thieves, and pleaded with them to take all their possessions but leave them unharmed. The gunmen had a powerful torch with them. The family had only two kerosene lamps.

Suddenly the men pulled a member of the family—30-year-old Suresh⁷—by his shirt. The family cried that he was innocent and also had a family of his own. But the men pointed their guns at them and threatened: ‘if you shout, you will be ‘wiped out’’. They questioned Suresh asking him his name, age and occupation. The intruders spoke in irregular and unfamiliar Tamil but fluent Sinhala.

His mother hugged him strongly; she begged them not to take her son. She was pulling her son back while the men dragged him forward by his shirt. Eventually they hit her on the head with a weapon and she fell down bleeding. Suresh was hit on his chest and he also fell down. Then they dragged him by his leg for about 50 metres and forced him inside a vehicle. Ever since, Suresh has not been seen or heard of, though his family has complained to the police and other authorities.

The men had come on two motorbikes and a white van. They came during a government imposed night curfew in the Jaffna Peninsula.

Parliament reintroduced Emergency Regulations in August 2005. Since mid-2006, these draconian laws have facilitated the arbitrary arrest and detention of thousands of people—mainly young Tamil men suspected of being LTTE members or supporters. But increasingly others have also met with the same fate. The number detained under Emergency Regulations, including those reported as disappeared, is unclear. Harsher and more sweeping Emergency Regulations were introduced in December 2006. Called the “Prevention and Prohibition of Terrorism and Specified Terrorist Activities”, these laws allow the criminalization of a range of activities that are protected under Sri Lankan and international law. The regulations could be used to justify a crackdown on the media and civil society organizations, including those working on human rights, inter-ethnic harmony, or peace building. The state could even use the wide immunity clause to exempt from prosecution members of the security forces deemed to be acting in ‘good faith.’⁸

The government seems deaf and blind to this colossal tragedy facing its people. Either it is unwilling or incapable of dealing with the problem. Despite numerous complaints lodged, letter written and meetings attended with the representatives of the people, little action was initiated to prevent the incidents or apprehend the culprits. In the face of obvious lethargy on the part of state authorities including the law enforcement agencies, in September 2006 several prominent personalities of different communities and political ideologies joined together to establish the Civil Monitoring Committee (CMC) as a voice on behalf of the voiceless victims of abductions and disappearance, as well as their family members.

Despite one of its members being gunned down in the heart of Colombo two months later, the Committee has nonetheless been monitoring incidents of killings, abductions and disappearances around the country and making complaints to the authorities on behalf of the grieving families. They have protested on their behalf for the return of those still missing as well as urging government and law enforcement authorities to investigate complaints and apprehend those responsible. The CMC has also conducted their own investigations and identified some of those involved in the abductions and thereafter induced the police to apprehend the perpetrators. Later there were allegations of plans to

release the gang leader and claim he escaped from police custody. The very fact that it was a civil society monitoring group that had to investigate and uncover information relating to the identity of the abductors is a severe indictment on the government, the AHRC later said in a statement.

In June 2007, the Sri Lankan police arrested 16 people, including four policemen and a member of the air force, in connection with the abductions and disappearances occurring in and around Colombo, after their identities were revealed in Parliament. While disappearances and abductions showed a temporary lull in Colombo, in the North East, families continued to report abductions of relatives by unknown persons and their subsequent disappearance. The National Human Rights Commission in Jaffna reported that, in the first three weeks of August 2007 alone, 21 cases of enforced disappearances and 13 cases of unlawful killings took place. On September 3, the ICRC reported that in the previous three weeks, it had documented 34 such abductions countrywide. Currently, dozens of people are seeking protection at the Jaffna Human Rights Commission offices, not only against threats from the LTTE but also the Sri Lanka armed forces. At the present rate the state is fast galloping towards achieving the highest rates of disappearances in the world; that is, if this mark has not already been achieved.

On August 23, 2007, the CMC together with two other prominent local civil society groups, Law & Society Trust (LST) and the Free Media Movement (FMM) published a Report on some of their findings.⁹ The document which would be updated hereafter on a regular basis was presented to the authorities including the President, Human Rights Commission and the Presidential Commission of Inquiry appointed to probe 16 cases of human rights violations (COI) and the IIGEP headed by Justice Bhagwati. Its compilers warned that this was by no means an exhaustive study but was only the tip of the iceberg.

According to this report, 547 persons were reported killed and 396 persons disappeared during January to June, 2007. The largest proportion of people killed in the first six months of 2007 was Tamil—70.7% across the island, as compared with 9.1% Sinhalese and 5.9% Muslims. The gravity of this situation becomes even more pronounced said the report considering that the Tamil people make up only 16% of the total population. Men were killed in much larger numbers than women (89.9% vs. 9.7%) while by district, Jaffna was worst affected by killings, followed by Batticaloa and Vavuniya.

Data on humanitarian workers and religious leaders killed reflects the overall trends in killings, with minority Tamils disproportionately affected as compared with Muslims and Sinhalese. Killing of members of the clergy was highest in Trincomalee, during the period January 1, 2006 to August 21, 2007. However, it is notable that religious leaders of three of the four main faiths have been killed since last year—viz. Father Jim Brown (August 2006), Selliah Parameshwaran Kurukkal (February 2007), Handungamuwe Nandarathna

Thero (March 2007) and most recently, Father Nicholaspillai Packiyaranjith, (September 2007).

As with the killings, according to the report, Tamils suffered disproportionately from abductions – 64.6%, compared with 3% Sinhalese and 3% Muslims. Men represented nearly 98% of all missing persons. By district, Jaffna was again worst affected by disappearances (49.5%) with Colombo next worst affected at 17.7%. Nearly 19% of persons abducted were taken from their homes. The vast majority of these were in Jaffna but there were a few abductions from home in other parts of the country. Where times were specified, these were for persons who disappeared in Jaffna, which has been under curfew since before January 2007.

Two days after the report was published, Mahanama Tillekeratne, Chairman of the Commission appointed by the President to investigate killings, disappearances, abductions and unidentified dead bodies (the ‘one-man’ commission) and former high court judge, was quoted in the media as claiming that 1,425 out of the 1,992 people thought to have disappeared since September 2006 to June 2007 had returned.¹⁰ He was echoing the sentiments of the government who earlier proclaimed that 90% of those gone missing have returned home while others had gone abroad. That is, on May 31, 2007, the President alleged that many of those people who are said to have been abducted are in England, Germany, or elsewhere abroad. They have made complaints that they were abducted, but when they return they don’t say.¹¹

Mr. Tillekeratne has never elaborated, as to whether he interviewed any or all of those he claims to have returned. Nor has he ascertain whether (a) in fact they had been abducted; and if so the identities of or information regarding the perpetrators, (b) payment of ransom had been made, or (c) the returnees were coerced into divulging sensitive information or participate in crimes, thus posing a security threat to the state. He was also silent as to whether he called for investigations into the incidents to ascertain whether any person had falsely reported an abduction or disappearance. If so, legal action should have been instituted against those found to be making frivolous complaints and misleading law enforcement authorities, the commission as well as the public.

Mano Ganesan Convener of the CMC addressing the UN Human Rights High Commissioner, Louise Arbour, at the UN office in Colombo on October 11, 2007 challenged the government to prove and publish details of abductees the government claimed to have ‘returned home’ as well as those who are supposed to have gone abroad and numbers of their passports issued by the Controller of Immigration and Emigration. He went on to say that though the list of institutions, committees and commissions to investigate human rights abuses in Sri Lanka was very long none of them had produced tangible results. Investigations were conducted in a half-hearted manner and the culture of impunity was obvious, promoting the continuation of abductions, disappearances and extra judicial killings.

In fact currently, there exist several entities appointed or designated by the President and the government to conduct hearings and inquire into reported cases of human rights abuses. They are: (1) the Human Rights Commission of Sri Lanka (2) Ministry of Human Rights (3) Ministerial Advisory Committee of Prominent Persons and (4) the Mahanama Tillekeratne Commission. There is also the (5) Special Presidential Commission on 16 selected incidents (COI), (6) The International Independent Group of Eminent Persons (IIGEP) appointed to observe COI proceedings and (7) the Ministerial Committee on Disappearances. Progress made by any of these entities have not revealed to the public and have become farcical considering that violations are continuing with impunity.

The Presidential Commission of Inquiry (COI) for example, though established early this year has not made much progress in relation to the 16 cases its members have been mandated to investigate. Its proceedings are not conducted are not open to the public. Despite its mandate ending in November 2007 the Commission has not completed its first inquiry—that of the massacre of 17 aid workers of Action Against Hunger (ACF) in Mutur, Eastern Sri Lanka. The IIGEP issued three public statements raising several serious questions regarding the functioning of the Commission. The IIGEP said that the government was not taking adequate measures to address crucial issues, such as the independence of the commission, timeliness and witness protection; there also existed inconsistencies with international norms and standards. The conflicting roles played by the Attorney General's Department and its lack of impartiality were highlighted with the IIGEP concluding that investigators 'may find that they are investigating themselves'. None of the points raised by the IIGEP have been addressed. Unwarranted criticism of the IIGEP by the Attorney General—prompting the Chairman, Justice Bhagwati to want to resign—seemed the only response of the state.

The Presidential Commission of Inquiry is also not a deterrent for on-going human rights abuses as the commission is only advisory in nature. Its mandate is limited to making recommending to the government, including the Attorney General, but there is no legal obligation for the President to act on its recommendations or make them public. On October 13, 2007, in a press statement at the conclusion of her visit to Sri Lanka, the High Commissioner for Human Rights Louise Arbour commented that the public will have greater confidence in the COI if it conducted itself publicly. She nonetheless observed that the COI was an ad hoc response to a series of particularly shocking incidents; but the commission should not be made a substitute for effective action by relevant law enforcement agencies. Nor should it divert from the need for a forward looking, comprehensive and effective human rights protection system, she said.

Ms. Arbour was of the view that in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity was alarming. The large number of reported killings, abductions and disappearances

which remained unresolved was particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiries. She also noted that while the government pointed to several initiatives it had taken to address these issues, there was yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it was hard to see how this would end she said.

Finally the High Commissioner for Human Rights urged the government to ratify the new International Convention for the Protection of All Persons from Enforced Disappearance as well as ratify the Rome Treaty establishing the International Criminal Court.

2.1.4. Denial of fair trial

Denial of fair trial remains a frequent experience of persons complaining of crimes as well as of the accused due to the following reasons:

- i. Extrajudicial killings and forced disappearances (as mentioned above). Both extrajudicial killings and forced disappearances are forms of summary punishment. This summary punishment is meted out by the police, military or other agents carry out such punishment. Under the Sri Lankan Constitution the right to punish persons is given only to the judiciary subject to due process and appeals. However, this is very much deviated from.
- ii. By failure to investigate. In cases of serious violations of rights such as massacres, and political killings, the absence of adequate investigation has become the common practice. This is also extended to many instances of serious crime. One of the reasons for extrajudicial killings or alleged criminals is to give the impression that the alleged criminals have been punished and therefore no further inquiries are needed.
- iii. Delays in adjudication. Delays in adjudication in Sri Lanka often amount to denial of justice. Delays take place for many reasons such as delays in investigations and also delays in trials. Delay provides the opportunity for witness intimidation or provides various incentives to witnesses not to come to court or to change their original version of the evidence. Often the complainants themselves are intimidated or lose interest due to the hazards faced over a long period of time. Observers have attributed also the reasons of private interests of lawyers to postpone cases as being done without resistance from the presiding judges. Judges sit in courts, in many instances, only for a short time during the day and the non-utilisation of available court time is also a factor in delays. The net result of delay is the people's loss of respect for the courts and the lowering of their expectations of justice. The result of all this is the poor performance in prosecutions the success rate of which is only four percent.

Absence of witness protection

Despite of many promises no adequate witness protection law or programme has been introduced to Sri Lanka. The Asian Human Rights Commission has repeatedly called for the enactment of such a law but at the same time has also pointed out that the absence of such a law is deliberate. Given the extent of human rights abuses by the police and military as well as the extent of the corruption by the politicians and other officers, any encouragement given to witnesses to come forward will create serious problems to those in authority. Therefore the government follows a deliberate policy of not implementing an adequate and effective witness protection programme in Sri Lanka. The result is that the criminal trials suffer greatly due to the absence of witnesses. This on the one hand contributes to failure in prosecution and on the other hand encourages lynching by civilians or summary executions by the police and the military.

2.1.5. Lawlessness

In every aspect of society lawlessness has become a marked feature and there were some glaring instances in which this became sharply manifest.

The Delgoda family massacre

On May 26, 2007 five persons belonging to the same family were chopped to death in their own home. According to reports the alleged cause of the multiple murders was a land dispute which had gone on for some time.

The following day, according to reports, a group of people arrived from outside the neighbourhood in a bus and burned three houses. The same day two suspects were arrested by the police and within a few hours they had been shot dead and their deaths were announced through electronic media to the whole nation. Within 24 hours of that event the magistrate of the area pronounced that the two deaths amounted to justifiable homicide in self defence.

Within the two weeks around this event there have been several murders of families in various parts of the country. In fact extra ordinary forms of crimes are taking place reflecting an extremely abnormal situation.¹²

The killing of the two suspects frightened the villagers and prevented them from coming forward to let the authorities know about what they knew about the incident. Some families related to the alleged suspects have been chased away from the village and the police have told them not to return, stating that they (the police) are unable to provide them with protection.

Several villagers have contacted human rights organisations and have expressed their skepticism about the police inquiries into this matter. According to some written statements given by these villagers the actual culprits in this massacre are still at large and there are serious allegations that one prominent politician is also connected with this murder. However, the villagers feel that they will not receive protection if they were to make statements to the police on this issue. Human rights organisations have written to the Inspector General of Police to cause an independent inquiry through the Criminal Investigation Division into this massacre but so far there is no indication that any measures have been taken to ensure a credible investigation.

There were many similar family massacres in several places. In all these instances some small disputes have been the alleged reason for the killing of whole families. What is revealed through these incidents is the absence of trust in the police by the residents of various areas and even the erosion of trust among neighbours due to the bewildering absence of the rule of law.

Lynching

Mr. I.G. Pushpakumara was beaten to death by a mob who believed that he was trying to escape after committing the theft of a mobile phone. The post mortem inquiry revealed that he suffered serious head injuries and injuries at the base of the skull and lower jaw by attacks with blunt instruments. There were severe injuries also to the chest and the back.

There were many incidents reported throughout the year about mobs dealing with alleged thieves or errant drivers who had caused injuries to the public. In all these instances people have taken the law into their own hands and the reason often stated is that resort to the police will be of little use.

Allegations of corruption and absence of investigations

Throughout the year there were constant reports of massive levels of corruption and also questions arising from the report of the Committee on Public Enterprises (COPE) which alleged corruption involving billions of rupees. However, no powerful person was brought to court under the country's law on bribery and corruption. Several petty officers meanwhile were charged in courts and some even sentences for long years of imprisonment. The belief that no serious inquiries will take place into such corruption is quite widespread and this results in discouragement and demoralization of the citizens. The general disbelief in the rule of law is very much a result of the absence of any trust that any significant action will be taken to deal with widespread corruption. The country's law and the intuitional framework within the Commission on Bribery and Corruption is inadequate to deal with this situation. The adoption of an effective corruption control legislation followed by

implementation will contribute not only the illumination of corruption but also to the improvement of law and order. On this issue the AHRC commented on May 22, 2007 about the epidemic lawlessness in Sri Lanka.¹³ The AHRC also commented on the lack of proper direction from the police hierarchy on dealing with the issue of absence of discipline within the police which contributes to the countries lawlessness.¹⁴

2.2. Human rights violations in government controlled areas of the east and some part of the north

Some parts of the country earlier controlled by the LTTE was brought under the control of the Sri Lankan government by the military and also there are areas in the north, some of which are still controlled by the LTTE and others which are under the authority of the government.

Some features common to both areas is that the pressure of the armed conflict is severely felt in these areas and the control of the areas is virtually under the military. There has been constant allegations of abductions, disappearances, constant searches and displacement of persons (regarding displacement please see section 3).

A marked feature of the east in particular is that there are many paramilitary groups operating in these areas and they maintain their own armed groups. As there is collaboration between these groups and the military against the LTTE the enforcement of the rule of law on these groups remains a difficult task. The disarming of these groups has been declared as an aim of the government. However, this disarming has proved difficult due to the cooperation between the armed forces and these groups with regard to the issue of the LTTE.

There has also been allegations of the recruitment of child soldiers by one group, generally known as the Kuruna Faction.

The civilians constantly complain of harassment from these armed groups as well as from the military. The maintenance of the rule of law and the functioning of the mechanisms of the rule of law is yet to be achieved.

Louise Arbour make her concerns know about the human rights situation in the eastern province:

I am very concerned by the many reports I have also received of serious violations by the TMVP and other armed groups.

2.3. The territory controlled by the LTTE is entirely a military zone and all movements to and from this area is completely controlled.

The security considerations of preventing attacks from outside remain the paramount consideration affecting all areas of life within this territory.

Although the LTTE claims to have policing and courts these are pure ad hoc arrangement and are not based on any principles of the rule of law. The area remains a territory outside the framework of the rule of law.

The LTTE has been blamed by various UN agencies, the government as well as human rights organisations for the recruitment of child soldiers. The human rights concerns were expressed by Louise Arbour during her visit:

.....I also regret that I did not have the opportunity to visit Killinochchi, where I would have liked to convey directly to the LTTE my deep concern about their violations of human rights and humanitarian law, including the recruitment of children, forced recruitment and abduction of adults, and political killings. (See 1.1).

3. Displaced Persons—The nightmare of Sri Lanka's nowhere people

Since mid-2006, Sri Lanka has witnessed one of the largest internal displacements in Asia with more than half a million people displaced in a population of 20 million. Hundreds of thousands were forced to flee their homes when fighting escalated between government forces and the Liberation Tigers of Tamil Eelam (LTTE). Tamil and Muslim people in the Batticaloa, Trincomalee and Jaffna districts have been the most affected.

Estimating how many civilians were displaced by the war, the tsunami as well as the conflict before and after 2006, is somewhat difficult. The Internal Displacement Monitoring Centre (IDMC) has estimated that about 520,000 people were victims of conflict-induced displacements at the end of 2006. Vigorous efforts by the government to resettle them and portray a sense of normalcy, somewhat reduced this figure, but by August 2007 there were still 460,000 internally displaced persons (IDPs) in the country.¹⁵

There are also the 'invisible' IDPs, people displaced from their homes and living with host families and the 'night IDPs'—those who leave home at night for the safety of the jungles or welfare centres because they believe that the risk of being abducted or killed rises after nightfall. The number of civilians displaced both due to the tsunami and the civil war, in LTTE-controlled areas is not known. Additionally there are 100,000 odd Sri Lankans who have fled the conflict and sought refuge in India.

Most displacements occurred when massive military operations were launched against the LTTE to drive the Tigers out of the Eastern Province. Fierce fighting broke out necessitating entire communities to flee their villages, to avoid being caught in the crossfire or targeted by bombings and air raids. Throughout the two and a half decades of armed conflict between the government and the guerillas, scant respect has been shown by both sides for the welfare of civilians caught in-between. In late 2006, during the battle to take control of Vakarai in the Batticaloa district, 35,000 civilians were caught in the crossfire with many including children, the elderly and the sick compelled to make long and treacherous journeys out of Vakarai to government-controlled areas. In November 2006 army artillery hit a school housing 2000 IDPs, killing 62 and injuring 47. The only justification offered was that it was in retaliation to an LTTE attack from the vicinity. No investigations were conducted and no one was held accountable.

In April and May 2007, several fact finding missions to Trincomalee and Batticaloa by local human rights and other groups revealed inter alia that there was a near-total absence of planning and preparation on the part of authorities to deal with the crisis of civilian displacement.¹⁶ Apparently, though military offensives to recapture territory had been meticulously planned, little thought was afforded to dealing with the humanitarian disaster that would invariably follow.

Forced Return: Continuous fighting during the latter half of 2006 and early 2007, led to thousands of displacements of civilian from the Trincomalee and Batticaloa Districts. The government then began a massive drive to forcibly resettle the displaced in violation of the UN Guiding Principals on Internal Displacement—Principles 14 and 15. Reportedly, they herded reluctant civilians into buses and transported them like cattle to the slaughter, back to their unsecure villages or more often than not, transit shelters situated elsewhere. According to Human Rights Watch (HRW)¹⁷ in September 2006 the government forcibly returned between 15,000 and 25,000 displaced persons back to their homes in and around Mutur in Trincomalee district.

The next wave of forced returns took place in March 2007, when the government moved displaced persons from eastern Batticaloa district to areas around Trincomalee. Some were returned to their original homes, but hundreds of IDPs from Sampur and East Mutur, were sent to transit sites in Kiliveddy where there was a shortage of food, sanitation and a lack of security. There was little doubt that most IDPs longed to return to their homes and villages and regain some normalcy into their lives, but they did not want to return when the government was forcing them to, due to fears of renewed fighting and being out of reach of much needed assistance.

The returns were accomplished in gross violation of both international humanitarian and human rights law. The victims say that government and military officials threatened to

withdraw humanitarian aid, water and electricity if they refused. They were told security forces would no longer be responsible for the security of those who stayed behind. There were also reports of military personnel beating displaced persons with sticks to force them onto buses. Some had been misled that they were returning home when they were only transported to a transit site. Others had not received any information and no one was aware of their right to remain if they wished. The IDPs were merely rounded up and transported away in buses.

After these blatant violations of an already traumatized people, leaflets enumerating their rights were distributed among IDPs in Batticaloa in the Sinhala, Tamil, and English languages. However these leaflets were not received by IDPs in Trincomalee. By May 2007 reports of forcible returns largely reduced, even thereafter, IDPs complained of visits by military personnel warning them of 'trouble' if they refused to return. The return process had also been highly militarized with the civil administration and humanitarian workers playing only marginal roles. The forced return of IDPs was subsequently acknowledged by Resettlement and Disaster Relief Minister Rishard Badurdeen.¹⁸

The dubious nature of the forcible resettlement of IDPs is also evidenced by the fact that initially even humanitarian workers were not permitted to accompany the IDPs to their places of return, on security rounds. This begs the question as to why IDPs were being sent to areas deemed unsafe for others. Also, showing shocking callousness, the authorities failed to move adequate stocks of food and other basic necessities to the identified sites. They did not ensure suitable shelter and sanitation was available. Neither were humanitarian organisations assisting the displaced informed of the government's plans; they were simply expected to provide whatever assistance they could.

The following affords a glimpse into the nightmare faced by Sri Lanka's IDPs:¹⁹

Food crisis: Early arrivals at some transit camps were issued with family ration cards while others were not. In some camps food was cooked communally but when the weather or other contingencies hindered the preparation of food on such a large scale, only a single meal was provided for a day. People complained of having to sell their possession like jewellery to buy food. In March 2007, the World Food Programme (WFP) reported that feeding such a large IDP population severely challenged its resources and consequently it had to put on hold its other feeding programmes. In the northern peninsula of Jaffna, closure of the A9 highway linking the area to the rest of the country in August 2006, as well as restrictions on fishing and farming, left large displaced communities in Jaffna at serious risk of starvation.

Sanitation: There was a gross inadequacy of toilet and bathing facilities at many IDP sites. In Arthiviravar camp in Batticaloa, only eight latrines were available for

1400 people with camp officials complaining of overflowing toilets and incidents of diarrhea. Overcrowding was a problem in some camps (e.g. Arthiviravar and Thiraimadu) with one tent being shared sometimes by two or three families. Mainly, there were two types of shelters—tents and tin-roofed abodes. During heavy rain, the earth became water logged and seeped through the tents, making life within intolerable; otherwise, the scorching heat within the tin-roofed shelters became unbearable.

Disrupted livelihoods: Fishermen were not allowed to use motor engine boats and fishing had been restricted to 1 km from the shore. Farmers and farm labourers were hard hit by the lack of fertilizer and also being denied access to their lands within the High Security Zones (HSZ). Additionally, they have to go through security points at dawn and dusk to obtain their daily permits to fish. Some families discouraged the male folk from venturing outside the camps in search of work for fear of arbitrary arrest or abduction.

Education: Displacement had disrupted the education of more than ¼ million children not only of the IDPs but also the host communities, due to welfare sites being set up in schools.

Forced recruitment: Reports indicate that both the LTTE and Karuna faction were continuing to recruit children with the alleged connivance of government forces—in the latter case.²⁰ Though there are complaints of abductions by the Karuna faction, Incidents of forcible conscription are probably much higher than reported, due to the ‘culture of silence’ adopted by families who fear reprisals. Consequent to the LTTE’s demand for ‘one person per family’, early marriages are reported to be on the increase in areas under its control.

Mental health: The constant violence, squalor and insecurity resulted in not only individual but also collective psychosocial problems among IDP communities. In December 2006, WHO predicted that 2% of these populations would require mental health services and also warned that suicides might increase—in a country that already has one of the highest suicide rates in the world.²¹

The security situation continued to be precarious for most displaced communities plagued with the real fear of extra judicial killings, abductions, disappearances and threats. Concern over their safety and security was also one reason for displacement, with IDPs opting for the safety afforded in numbers at the welfare centres over returning home. And in most instances their fear was justified. In Lingapuram, a small village in the Trincomalee District, the village headman who spoke on behalf of the IDPs, disappeared. In Kanguveli another Tamil village, people reported that at least one killing took place every month—despite an

army camp situated in close proximity. Allegedly no investigation or inquiry has been held into the incidents. Paramilitary groups are also reported engaging in abductions and extortion, but most incidents go unreported due to the fear of reprisals.

At many transit shelters, state and military officials were busy collecting information, documents and a family photograph to register IDPs, while the people feared that information collected would somehow fall in to the hands of paramilitaries and be used for abduction and forced recruitment. Security at most sites was poor, providing easy access to armed groups to infiltrate, terrorize and carry out their nefarious activities. Being situated close to an army camp was no deterrent for abductions by armed groups.

Though enshrined in the Constitution, freedom of movement was a luxury IDPs did not enjoy with their movements severely restricted by both the government and LTTE. In September 2006 Muslim families fleeing Mutur town in the Trincomalee District were halted by the Army. In August 2006 the A9 highway was closed isolating almost 600,000 residents of Jaffna who were rendered utterly helpless in the face of shelling, abductions, disappearances, shortages of food and other basic supplies. In the Vanni, the LTTE continued to prevent people from leaving the area. When a person was permitted to leave temporarily, a family member had to be left behind to guarantee his or her return.

Movement was also restricted within large tracts of land declared by the military as High Security Zones (HSZs). In the North and East, more than 109,000 people have been displaced as a result leading to the loss of their agricultural land, livelihoods, homes and villages. There have also been blatantly unfair and discriminatory practices such as in May 2007 when an area spanning 90 km² in the Mutur East and Sampur areas were declared as a HSZ. IDPs whose homes were situated within the area but had fled the fighting during the previous months were now forbidden to return. But the same areas cordoned off for military reasons were allegedly demarcated as a Special Economic Zone by the government and opened to large local and foreign investments. Consequently, there is a growing fear among the people this is an effort by the government to alter the demographic map in Trincomalee, to the detriment of the Sampur Tamils. The fact that senior government agents of the area including the governor of the Eastern Province were ex-military officials only exacerbated tensions.

During the year, numerous organisations, both local and international, have visited the affected areas and experienced firsthand the misery and mass human suffering of the nowhere people in Sri Lanka. They have made recommendations to the government as well as the other players involved, urging all parties to do their utmost to uphold international humanitarian and human rights law as well as the UN Guiding Principles on Internal Displacement of 1998 vis-à-vis the IDPs.²²

However, as one analyst points out, Sri Lanka is currently, one of the worst places in the world for civilian caught up in armed conflict and human rights violations. Therefore what Sri Lanka urgently required is an international dimension in the form of a field based presence of the UN-OHCHR because there was no local institution or institutions that commanded the respect, trust, confidence or resources to the task of salvaging the country from this humanitarian crisis.²³

4. Serious concerns affecting the Sri Lankan judiciary

Introduction

Sri Lanka's legal system was originally a combination of the Roman-Dutch Law and English Law. The present system of judicial administration and organization is based on the current Constitution, introduced in 1978. The judiciary comprises the Supreme Court, Court of Appeal, Provincial High Courts, District Courts, Magistrates' Courts and Primary Courts. The Supreme Court is the country's highest court, headed by the Chief Justice and comprising between six and ten judges. The Supreme Court's major jurisdictions include constitutional, final appellate and fundamental rights jurisdictions.

Politicisation of the Office of Chief Justice

On September 16, 1999, then-Attorney General Sarath Silva was appointed Chief Justice by President Kumaratunga. There were serious substantive questions with regard to this appointment and two motions alleging misconduct and seeking to remove his name from the roll of Attorneys-at-Law were pending against him at that time. The Supreme Court had, in fact, appointed two inquiry committees to look into the allegations.

National and international experts expressed concerns about the appointment; among them Dato Param Coomaraswamy - the Special Rapporteur on Independence of the Judiciary - who advised the government not to proceed with the appointment pending the conclusion of the misconduct inquiries. This advice was disregarded by President Kumaratunge, with whom the Attorney General had close personal contact. Between October and November 1999, three petitions were filed challenging the appointment of the Chief Justice, which were also later dismissed by a bench of the Court that had been handpicked by the Chief Justice.

Two impeachment motions filed against the Chief Justice, alleging specific instances of abuse of power while in office respectively in 2001 and 2003, were rendered nugatory by President Kumaratunge having prorogued and then dissolved Parliament.

Arbitrary Conduct by Chief Justice Sarath Silva

Authoritarian powers in listing of cases and determination of Benches

The Supreme Court sits in Benches of three judges for the hearing of cases. The Chief Justice who approves the Bench list and nominates judges for Benches consisting of three judges or appoints a fuller bench (a bench of more than three judges) for special matters warranting a Divisional Bench. This power has been increasingly arbitrarily exercised by the Chief Justice. For example, with regard to the rights petitions challenging the Chief Justice's appointment, he appointed a Divisional Bench of seven judges, in ascending order of seniority, excluding the four senior-most judges. The petitions were dismissed by this Divisional Bench, which relied on the concept of constitutional immunity afforded to presidential appointments in order to refuse relief.

The senior-most judge of the time, Justice M.D.H. Fernando, who had been bypassed as a result of the appointment of Sarath Silva as Chief Justice, was excluded in almost all important constitutional cases. This led to his premature retirement in early-2004, two and half years early. A letter written to the Prime Minister by 45 leading civil society organizations called for the appointment of a Parliamentary Select Committee to examine the circumstances that led to the resignation of Justice Fernando, but no action was taken either by the Executive or the Legislature concerning this issue.

Arbitrary control of the Judicial Service Commission

The Judicial Service Commission (JSC), headed by the Chief Justice, generally consists of two other senior-most judges of the Supreme Court. Since Sarath Silva became Chief Justice in 1999, he has exercised powers of virtually unilateral decision-making along with two other junior judges of the Supreme Court, despite the fact that the Court had senior judges including Justices M.D.H. Fernando and Dr. A.R.B. Amarasinghe serving on the Bench at that time, and despite judicial tradition that decrees that senior rather than junior judges should form a part of the JSC.

Under the Constitution, the JSC exercises the powers of appointment, promotion, dismissal and disciplinary control of judges of the lower courts. However, there are no disclosed criteria. The International Bar Association Report 2001, entitled "Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary" gives examples of instances where original court judges were arbitrarily disciplined and even dismissed by the JSC headed by the Chief Justice. The IBA Report concluded that "the perception of a lack of independence of the judiciary was in danger of becoming widespread with extremely harmful effects on the rule of law in the country."

In his April 2003 report to the UN Commission on Human Rights, Param Coomaraswamy, then-United Nations Special Rapporteur on the Independence of the Judiciary wrote, *The Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges (which is set for hearing on 27 February 2003). E/CN.4/2003/65/Add.1 25, February 2003.*

In January 2006, two senior judges from the JSC resigned from the Commission over, what was widely known as conflicts of opinion with the Chief Justice. Dr. Shirani Bandaranayake and T B Weerasooriya, had indicated that they had resigned their positions on the Commission ‘in accordance with their conscience.’ No public explanation has yet been given for the reason for these resignations.

Undermining the Fundamental Rights Jurisdiction of the Supreme Court

In recent years, the flood of fundamental rights applications that had previously been filed before the Supreme Court, resulting in a rich body of jurisprudence enhancing rights of citizens even during times of emergency, has progressively decreased. The isolated ‘rights friendly’ judgments that are now delivered, award small amounts of compensation, and in many cases settlements are evidenced by judicial coercion of lawyers and/or petitioners.

Arbitrary Use of Contempt Powers and Refusal of Sri Lanka’s Supreme Court to adhere to International Treaty Obligations

Contempt of court has become an increasingly powerful weapon used by the Court and in particular by the Chief Justice to stifle justifiable criticism. On February 6, 2003, a lay litigant, Anthony Michael Fernando, who made the Chief Justice a party in a fundamental rights case, was sentenced to one year hard labour by a bench comprising the Chief Justice and two other judges for raising his voice in court and filing applications. The United Nations Human Rights Committee, in considering a communication submitted by Mr Fernando under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), concluded that Mr. Fernando’s right to a fair trial under article 9(1) had been violated, (Sri Lanka, Case No 189/2003, Adoption of Views on 31, March, 2005). The Optional Protocol to the ICCPR enables the Committee to receive and consider individual communications from any individual that is subject to Sri Lanka’s jurisdiction.

The Government of Sri Lanka (GOSL) stated however that, at the time that Sri Lanka decided to become a Party to the Optional Protocol, it was not envisaged that the competence of the Human Rights Committee would extend to a consideration, review or comment of any judgment given by a competent Court in Sri Lanka, in particular on findings of fact and on sentences imposed by such a Court upon a full consideration of evidence placed

before it, and regretted that it was unable to give effect to the views of the Committee under Article 2, Paragraph 3 (a) of the ICCPR.

Other such Communications include: *Sarma v Sri Lanka* No 950/2000, Adoption of Views on 31 July 2003; *Jayawardene v Sri Lanka*, Case No 916/2000 Adoption of Views on 26 July 2002; *Ivan v Sri Lanka*, Case No 909/2000, Adoption of Views on 26 August 2004; *Sinharasa v Sri Lanka*, Case No. 1033/2004 Adoption of Views on 23 August 2004 and *Rajapakse v Sri Lanka* Case No 1250/2004, Adoption of Views on 26 July 2006. However, there has been no implementation of any of these Views by the Sri Lankan Government.

In addition, a recent decision by the Supreme Court (SCM 15.09.2006, judgment of Chief Justice Sarath Silva) on a review petition filed with respect to the *Sinharasa* case, ruling that the presidential act of accession to the Optional Protocol to the ICCPR was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee, has proved to be extremely inimical to the domestic impact of the Committee's decisions.

Ignoring Constitutional Provisions Safeguarding the Independence of the Judiciary

The 17th Amendment to the Constitution that was enacted in 2001, decreed that the President's nominees to the Court of Appeal and Supreme Court need to be ratified by the Constitutional Council (CC), a ten-member body comprising six members appointed by parliamentary consensus and four *ex officio* members.

Since March 2005, the CC has been defunct due to President Mahinda Rajapakse's refusal to fill the vacancies in the CC on the basis that the smaller parties have not yet nominated the body's one remaining member. Currently, there is litigation pending in the Court of Appeal challenging this inaction. However, the Court of Appeal has refused interim relief in one petition invoking the constitutional principle of immunity for acts of the President and the other petitions have been pending before the Court for well over a year. In early June 2006, the President appointed one new judge to the Supreme Court and two other judges to the Court of Appeal, on the recommendation of the Chief Justice, bypassing the CC.²⁴

Allegations of corruption

Transparency International in their year 2006 report devoted a chapter of the issues of corruption affecting the Sri Lankan judiciary titled *Corruption in Sri Lanka's judiciary*²⁵

5. Serious concerns affecting the Attorney General's Department

On June 1st the International Independent Group of Eminent Persons (IIGEP) submitted its first Interim Report to the President of Sri Lanka. The report contained the observations and concerns of the IIGEP about the Presidential Commission of Inquiry to Investigate and Inquiry into Alleged Serious Violations of Human Rights (The Presidential Commission). Among other things the IIGEP expressed concern about the role of the Attorney General's Department as legal counsel to the Commission.

“We are concerned about the role of the Attorney General's Department as legal counsel to the Commission. The Attorney General's Department is the Chief Legal Adviser to the Government of Sri Lanka. Members of the Attorney General's Department have been involved in the original investigations into those cases subject to further investigation by the Commission itself. As such, members of the Attorney General's Department may find that they are investigating themselves. Furthermore, it is possible that they be called as material witnesses before the Commission. We consider these to be serious conflicts of interest, which lack transparency and compromise national and international standards of independence and impartiality that are central to the credibility and public confidence of the Commission.”

This observation regarding the conflict of interests faced by the Attorney General in relation to the Presidential Commission should be an occasion to inquire into the much compromised situation of the Attorney General's Department as it stands today in terms of prosecution relating to abuse of human rights, as well as the prosecution of crime in general.

The Attorney General's Department is today functioning in the following areas (among others); it is the legal advisor to the government; it is the country's premier prosecuting agency regarding all serious crimes and it is also the legal advisor to the government with regard to the state's treaty obligations to the United Nations human rights agencies. Often the department becomes the chief spokesman on behalf of the state during official meetings of such agencies where its officers accompany the diplomats representing the government. As the government's legal advisor it also relates closely to senior staff of the government agencies, particularly officers of the police and armed forces; the role of the government's legal advisors has changed radically in recent decades to mean the legal advisor of a particular regime which often implies having to give legal advice and even prosecute cases which are very politically motivated.

Before we comment on these roles it is fitting to note the change of public perception about this department which has taken place over the past few years. Today the public does not perceive the Attorney General's Department as an independent department. On

issues of very great importance the department's independent role has been compromised for a long time now. The colossal crisis the country has faced has brought into question the role of the chief prosecutor. Large scale crimes such as the disappearances of tens of thousands of persons and gross forms of human rights abuse that were considered necessary by successive regimes have reduced the Department, at best, to that of a spectator. However, it was often even more compromised than that when extremely controversial emergency regulations were brought in, for example like the one in 1988 which gave authority to officers of the rank of ASP and above to order the burial of a body without any reference to a court; the Department has not been seen on record as opposing or objecting to it. It is not an exaggeration to say that the department now lacks a moral credibility which is an essential attribute of any organisation that has to play the function of the public prosecutor. The role of the advisor to the government

On the role of the advisor to the government the public have witnessed that on many occasions of great constitutional importance the opinion of the Attorney General's Department has been rejected by the government. One glaring example was on the issue of the appointments relating to the 17th Amendment. On this issue the position taken by the Attorney General was not honoured by the government and the appointments were made, ignoring the provisions of the Constitution itself. The basic position of the government seems to be that the role of the legal advisor is to conform to whatever devices the government arbitrarily decides to undertake. Under these circumstances playing the role of an independent legal advisor is not possible.

The role of the public prosecutor

The role of the public prosecutor requires that the department is able to prosecute all cases on the basis of legal criterion. However, in recent decades this position has changed significantly. Political convenience has become an enormously important factor in prosecutions. In the case of over 30,000 disappearances in the south in the late eighties the role of the department was a negative one. Even regarding the limited number of cases which were recommended for prosecution by the Commissions of Enforced Disappearances there had been no successful prosecutions. There was a unit established within the Attorney General's Department under public pressure but that was just a show piece and not a genuine prosecuting branch.

Even on purely criminal cases regarding prosecution and bail matters there is widespread suspicion about various forms of influences that can enter into the decisions relating to such matters. A regime's pressure and the pressure of politicians are not the only ones. Various forms of societal links and other undue influences are also suspected as reasons for decisions not to prosecute, to delay prosecution, for files to go missing and many other similar allegations.

The role of advisor to officers of the state

Perhaps this is area in which the department has been compromised most in the past. Several insurgencies in the south, north and the east have raised many allegations of extrajudicial killings, disappearances, torture and the like against officers of the state.

In the eighties in particular, there were many habeas corpus applications in which serious allegations were made against senior police and military officers. It was during this time that the department made the fatal mistake of assigning some state counsels to advise officers facing such charges on how to make false affidavits denying the allegations. It may have perhaps been the first time that officers facing serious allegations were helped in this manner by the department. Naturally, under such circumstances senior officers who receive such advice would have lost whatever fear they might have had regarding the high standards of integrity that the department should adhere to in dealing with all matters of law and discipline. When the prosecuting branch and officers facing serious criminal charges come to an understanding to help each other then the very existence of the department is threatened. Observers believe that it was this move, more than anything else that damaged the department. The fact that no open admission has been made about such bad practices and no serious apologies have been made on this score also helped to perpetuate a bad image, not only for outsiders but also for those who know the inside story.

A spokesman at UN human rights bodies

Meetings of UN human rights agencies often becomes an occasion at which the Sri Lankan government takes a completely defensive position and attempts to deny all the allegations that are made by international agencies as well as local critics. UN sessions are not meant to be such an adversarial process. They are in fact meant to be a dialogue where the state can admit to its limitations, including even serious violations of human rights, and express resolve to overcome such problems. Such a frank approach requires a will on the part of the government to improve the human rights situation and also to take concrete steps regarding various types of violations.

As the government is firmly resolved not to do anything to improve the conditions within the country giving rise to such violations it engages in trying to refute such allegations and to give an image of extreme innocence about its human rights practices. It also tries to portray that the allegations are not well founded and even malicious. This unfortunately is the approach that the Sri Lankan government has adopted on many an occasion. Often formulating such responses of denial becomes the function of some officers of the Attorney General's Department. In recent years some of them have acquired quite an expertise on this issue. Reading some of the statements made to treaty bodies will be quite bemusing to any Sri Lankan who is familiar with the actual situation of the country. However,

when a professional agency committed to the enforcement of the rule of law has to engage in such exercises of falsification it affects the very nature of the institution itself. The contradiction that the department faces in this situation may be illustrated by an example. In recent years the department has filed over fifty cases against state officers regarding torture under the CAT Act (Act No. 22 of 1994). That is an illustration of how widespread police torture is in the country. However, when the department's officers made submissions before the Committee against Torture they tried to portray that there is no such serious problems regarding torture in Sri Lanka. They even went on to deny some of the cases decided by the Supreme Court. A prosecutor's role calls for strict respect for facts, a propaganda officer's role on behalf of a government that is denying facts calls for callous disregard for the fact. When both these roles are done by officers of the same department then the department itself places itself in a dubious position.

Attorney General's Department as a confused institution

All these many roles have turned the AG's department into a very confused institution. That is quite a natural result of having to play contradictory roles and also having to justify each of those roles. It is quite natural for the public to look at these many roles and to be confused. When this happens to the country's most important legal office the result is that the role of law becomes confused. In fact, the Attorney General's Department now contributes in a very significant way to create confusion about the law and its operation in Sri Lanka. We are aware that such an allegation is one of a very serious nature. However, observing what has happened to this department over the recent decades, it is not possible to avoid the observation that today this department itself is confused and is in turn creating a great deal of confusion locally and internationally about the role of the law and its operation in Sri Lanka.

Other factors adversely affecting the Attorney General's Department

It would be unfair to put the entire blame of the degeneration of the Attorney General's Department on internal factors within the department. While it is starkly clear that several heads of the department since the late 70s have played pivotal roles to lower the standards of the department, it is not possible to separate such negative contributions from political and legal developments that have taken place in Sri Lanka in recent decades.

The cumulative effect of the many changes that have taken place in Sri Lanka since the 70s is that many of the basic concepts relating to law and its enforcement have now become very confused. Let us take a few examples: What is the place of the Constitution of Sri Lanka? Is it the paramount law of the country? The manner in which the 17th Amendment has been ignored and the presidential decrees contrary to constitutional provisions have been given effect to implies that the reference to the constitution as the

paramount law has little meaning. The strange nature of the 1978 Constitution itself is that it prevents challenges to the constitutionality of actions as long as they are done by the executive president. The 1978 Constitution has also created confusion about the very nature of the constitution. Is it a liberal democratic constitution or not? The creation of the position of the executive president with absolute power and without checks and balances as available within the American or French constitutional systems has had the effect of diminishing the roles of the legislature as well as the judiciary. Any student of civics or constitutional law may wonder what this constitution is all about. Such confusion about the paramount law of the country affects all areas of the operation of the law.

There is also serious confusion about some aspects of the law that directly affects people. For example, what is the meaning of murder in the present context of Sri Lanka? Over 30,000 disappearances which the Commissions to Inquire into Enforced Disappearances has termed as abductions followed by killing and disposal of bodies are not treated as murder. When arrested persons are killed by the police on one pretext or another, such as them trying to attack the police who in turn kill them in self defense, such actions are treated as justifiable homicide at the inquest stage, thus preventing any further inquiries into such murders. Here, the concept of defense in criminal cases is allowed to be taken and proved at the inquest stage itself. This is a complete alteration of the concept of a defense in a criminal trial as understood in the criminal law in the country in the previous decades.²⁶

6. Media freedom in Sri Lanka. . . or the lack of it. . .

Media freedom in Sri Lanka has been dealt a severe blow ever since the current government came into power in 2004 and specifically after the ceasefire agreement between the government and the Liberation Tigers of Tamil Eelam (LTTE) was tossed aside in favour of renewed hostilities between the two sides.

Since August 2005 eleven media personnel have been killed; to date no serious investigations have been carried out and no one has been convicted for any of these killings. This has afforded total impunity to the perpetrators. According to *Reporters Without Borders* (RSF) investigations into the murder of journalist Tharmaratnam Sivaram, editor of the news website TamilNet and columnist of the Daily Mirror, abducted and killed in April, 2005, have been blocked by the authorities. Two suspects—members of a pro government Tamil militia—have not been charged by the police though they were identified by the investigators.²⁷ On October 30, 2007, a web reporter attached to the *Sirasa* Network was shot and later admitted to the Colombo General Hospital in a critical condition.

Thoroughly terrorized and fearing for their lives, many journalists have stopped working and fled the country. In December 2006, photographer Anuruddha Lokuhapuarachchi of the Reuters news agency sought refuge in India after being threatened for highlighting the

plight of people in the north and east of Sri Lanka. A few days earlier, journalist Rohitha Bashana Abeywardene fled to Europe to escape death threats. Numerous other media personnel have also complained of being threatened including senior journalists such as Lasantha Wickramatunga Editor of the Sunday Leader Newspaper; Victor Ivan, Ravaya Newspaper Editor and Sunanda Deshapriya of the Free Media Movement.²⁸

Sri Lankan journalists have not escaped abductions either. In August 2006 Nadarajah Guruparan, news editor of a privately owned radio station *Sooriyan FM* was abducted and detained for one day by unknown persons who threatened him including, against revealing details of his abduction.

Jaffna

According to a *Reporters Without Borders* (RSF)²⁹ press release titled '*Jaffna's media in the grip of terror*' the murders, threats, abductions and censorship in Jaffna Peninsula in northern Sri Lanka made it one of the world's most dangerous regions for the press. Media personnel faced pressures from all sides of the conflict be it the LTTE, other para-military groups or the government security forces. With their reporting and writing, they were expected to please all of these groups and as this was not possible they invariably faced the wrath of someone.

A fact-finding mission to Sri Lanka in June 2007 had revealed that the intensification of the conflict led to the militarization of Jaffna which in turn has severely eroded the human rights situation. At least seven media workers have been reported killed since May 2006; one journalist was missing and at least three media outlets were physically attacked. Many journalists have fled the area or abandoned their vocation. No serious investigation has been conducted into any of these incidents even though in some cases suspects have been identified.

Ever since the attack on the *Uthayan* newspaper office, on May 2, 2007 when gunmen entered the premises and randomly shot at workers, killing and injuring several, a fear psychosis has engulfed the scribes of Jaffna. Some newspapers have closed down while others have lost about 90% of their staff. Currently most newspapers preferred to carry more national and international news than local reports because journalists were scared to report on local stories. Most Jaffna journalists were confined to their offices dared not go out to investigate incidents including possible security forces involvement. If they did, they risked a visit from the 'unmarked white van' wryly commented a journalist.

Coupled with extremely trying working conditions and the dearth of journalists, the Jaffna press was also hit by a shortage of newsprint between August 2006 and May 2007. In August 2006, the A9 highway linking Jaffna to the rest of the country was closed and

residents of Jaffna received food and other supplies through sea and air. Initially, the military refused to classify newsprint and ink as required items in Jaffna and most newspapers suffered severe shortages. Some were forced to reduce their newspapers from 8 or 12 pages to four; others used coloured paper; one even converted to ‘wallpaper’ where a few copies were printed and pasted on walls of tea shops and other meeting places where people could read them. In May 2007, faced with international pressure, the ban was lifted.

Due to this inaccessibility to Jaffna and other conflict areas the Jaffna media believed that coverage by many local and foreign media of the war and its consequence on people’s lives was incomplete and biased. As a result there was a lack of understanding and insensitivity to the intense sufferings, oppression and the horrendous violations of international human rights and humanitarian law in conflict-afflicted areas.

Elsewhere in Sri Lanka

On May 1 2006, Sivanathan Sivaramya, a part time announcer at the state run Sri Lanka Broadcasting Cooperation (SLBC), was arrested at the World Press Freedom Day conference organised by UNESCO. Despite producing her official ID card, she was arbitrarily arrested on suspicion of attempting to kill a minister attending the function. After being detained for five days in police custody, she was released on bail as a result of local and international pressure. On June 2, the case against her was withdrawn as the police found no evidence against her. After her release, she filed a fundamental rights petition to the Supreme Court. On July 16, 2007 the Supreme Court concurred that her arrest was illegal and ordered the two policemen involved to pay Rs. 50,000 as compensation for the violation of her rights. But with all the adverse publicity and headlines that screamed her ‘terrorist’ involvement, her reputation has been damaged beyond repair.

On November 22, 2006, Munusamy Parameshwari, a journalist attached to the Sinhala language newspaper, *Mawbima* was arrested by the Terrorist Investigation Division (TID) on suspicion of assisting an LTTE suicide bomber. She was held in custody for four months without charges being brought against her. After four months in custody, on March 23, she was released after a fundamental rights case was filed in the Supreme Court. There was no conceivable reason for the arrest except that she was of Tamil origin—a good enough reasons these days to get arrested on allegations of supporting terrorism. The main reason for being targeted though was because she had been writing on human rights violations, including enforced disappearances. The clear message to rights-minded media personnel intent of exposing the plethora of human rights violations committed by state law enforcement officials and the military was: BEWARE, YOU WILL BE THE NEXT.

Iqbal Athas, a veteran journalist was the associate editor and defence correspondent for the *Sunday Times* newspaper and also a frequent contributor to *CNN* and *Janes Defence Weekly*. On August 14, 2007 his weekly column made a shocking revelation of a mega fraud relating to the purchase of military aircrafts involving a Ukrainian middleman. He wrote that though the Ukrainian government had initiated inquiries into the dubious arms deal the Sri Lanka government was yet to do so though it stood to lose billions of dollars as a result. The day after his article was translated into Sinhala and published, security personnel, assigned to him since 1998 due to the precarious nature of his work—was suddenly withdrawn. When queried, the government replied it was because he faced no threats now. Ironically, immediately thereafter Mr. Athas complained of being followed by unknown people and that he feared for the safety of his family.

Mr. Athas continued to be targeted by the government. On September 30, 2007 he reported among other things, on the resistance government troops were meeting from the Tiger guerillas, about casualties among the soldiers—a contiguous issue with a government intent on portraying a rosy picture on the battle field—as well as some of their successes. Soon after, the Ministry of Defense carried a lengthy attack on its website against him and also accused him of ‘promoting terrorism’. The message this time seemed to be: IF YOU REPORT FACT, YOU ARE A TERRORIST.

In September 2007, the state controlled television station *Sri Lanka Rupavahini Corporation* (SLRC) sent four journalists on compulsory leave after they submitted a letter alleging their professional rights had been disrespected and damaged. Here, it must be mentioned that the state run media including its tri language newspaper press, radio and television, have in recent times been converted into little more than the mouthpiece and propaganda machine of the government. There were so many successful legal claims for defamation made against Associated Newspapers of Ceylon Ltd (ANCL) that reportedly it was encountering difficulties paying the large amounts ordered by court. SLRC claimed the journalists were distributing leaflets pertaining to the letter during working hours. But the Free Media Movement insists that they were distributing the leaflets outside the SLRC premises before working hours.

On October 12, 2007 some journalist prevented from covering the scene where people had gathered outside the UN office in Jaffna to meet the UN High Commissioner for Human Rights, Louise Arbour. Reportedly security officials grabbed a camera and deleted all photos of the incident. Again, on October 17, 2007 when photojournalists attempted to photograph a military truck carrying munitions overturned in an accident, the camera was grabbed by military personnel and the film exposed. On October 26, 2007 the government arbitrarily suspended the radio licence of five FM Radio stations operated by the Asian Broadcasting Corporation (ABC) after a controversy about a news report.

On October 21, 2007 Arthur Wamanan a young journalist of the *Sunday Leader newspaper* wrote a story of how the mobile phone charges of a deputy minister's wife ended up in the Gem Authority expense account. Three days later, he was arrested by a special CID team alleging that he attempted to blackmail the minister. The only evidence they possessed was the ministers complaint made—only after the article was published. Shockingly the journalist's mother was also arrested. On October 26, the CID—which has become another pawn in the governments attack on the media—produced him before the Mt. Lavinia Magistrate and attempted to obtain a remand order not based on additional evidence obtained after thorough investigations, by because 'the suspect was a Tamil and granting bail to him would raise public outcry. The Magistrate however rightly refused their application while observing that just because some people are embarrassed by a news report, the media cannot be restricted. She also rapped the CID for creating a dangerous precedent by arresting people merely on the basis of a telephone call.³⁰

Finally, according to reports, over the past year the President has held regular breakfast meetings with media editors. Sometimes he admonishes editors for their "unpatriotic" writing. But his brother the defence secretary being more direct, telephoned the editor of the *Daily Mirror*, Champika Liyanaarachchi in April 2007 and warned her that he would 'exterminate a journalist who had written on human rights issues. Reportedly no inquiry was held, and no action was taken against him. This incident, as well as the others aforementioned, and the reported and unreported dozens more, definitely seem like the death knell of media freedom in Sri Lanka.

7. The Human Rights Commission of Sri Lanka (HRCSL)

7.1. The following comment was made by Louise Arbour:

The Human Rights Commission has in the past played an important role in this respect. However, the failure to resolve the controversy over the appointment of commissioners has created a crisis of confidence in the HRC both locally and internationally. The HRC's failure to systematically conduct public inquiries and issue timely public reports has further undermined confidence in its efficacy and independence. Indeed, the Commission may lose its accreditation to the international body governing these institutions.

During 2007 the HRC itself took several measures with the view to virtually abdicate some of its important responsibilities. By an internal circular bearing No. 7 dated 20/6/2007 addressed to all directors, regional coordinators, legal officers and investigating officers, the secretary of the HRCSL laid down a prescriptive period for the receiving of complaints of three months from the date of the incident. This short circular reads as follows:

Period of prescription of receiving petitions

The Board at its meeting held on 18.6.2007, decided that the period of receiving petitions should be restricted to 3 (three) months from the date of incident of violation of Human Rights.

You are kindly requested to give publicity to this decision among the members of public and also abide by the above decision. The petitions already accepted should be inquired into irrespective of the date of incident.

Any exceptional matters should be referred to the Commission for decision.

The AHRC made the following comment on this circular:

One human rights activist commented, "If the HRCSL receives fewer complaints, then it can create an impression around the world that the human rights situation in the country has become better." International human rights groups place much reliance on the statistics given out by the HRCSL in trying to gauge the situation of human rights in the country.

The implication of this circular is that complaints regarding torture, extrajudicial killings, forced disappearances, gross violations of the rights of children and women, complaints relating to discrimination and violations of the provisions for equality before law, are all prescribed unless the complaints are made within three months.

The HRCSL is a statutory body created for the purpose of the protection and promotion of human rights and is expected to work within the framework of the Paris Principles relating to national institutions. However, the HRCSL in recent times has not in any way conformed to these principles, either about its independence, or on the implementation of international norms and standards relating to the observance of human rights by the state.

A national human rights commission is expected to monitor human rights violations and to make recommendations to all government bodies on the steps that need to be taken in order to better facilitate respect for human rights. This is a function that the HRCSL has failed to carry out, regardless of the extremely difficult circumstances relating to human rights faced by people throughout the country. Instead of monitoring human rights it is in fact, by its most inefficient methods of work, discouraging complainants who wish to pursue their rights. The advantage of such inaction goes to the perpetrators of the violations.

There is no basis for setting prescriptions against acts of torture, extrajudicial killings and forced disappearances. These are heinous crimes and gross violations of human rights. The Board of the HRCSL has acted in violation of the basic norms and standards for the protection of human rights in imposing a period of three months as a period of limitation for the acceptance of complaints by the Commission.

Given the situation of the extreme alarm that prevails in the country today there is likely to be many persons who may not dare to make complaints immediately out of fear for their lives. The government had admitted the absence of witness protection in the country and its adverse consequences on all witnesses. Under such circumstances it is natural for people to wait for more secure conditions before they make a complaint. Individual complainants may want to ensure for themselves a place of safety before they make complaints relating to serious violations of rights. Also, particularly, people living in rural areas and more distant parts of the country, will find it difficult to keep to such a deadline. In conflict areas the situation can be even worse. How is it possible for refugees and other displaced persons who suffer the worst forms of human rights abuses to keep to such a deadline?³¹

7.2. The Human Rights Commission also withdrew some services such as visits to police stations and the twenty-four hour hotline which the previous commissioners started in order to enable complaints to be received by the commission speedily. The reason given was lack of funds. Provision of funds for the HRC is the duty of the state. However, the political reason for withdrawal of these functions is to convey the message to the general public not to have high hopes of human rights protection through the commission. The creation of low expectations with regard to human rights is a policy adopted to discourage complaints being made. This particular feature of the discouraging of complaints has spread into all areas, not only to the HRC. It can be said that this is part of the state policy. The purposes of this policy are two-fold. One is to prevent local or international human rights groups and even UN agencies from having information on human rights violations and also to encourage a culture of impunity. As the HRC statistics have been widely used in the past as a indicator about disappearances, torture and the like there is a clear attempt to discourage the making of complaints so that statistics provided by the commission will appear more favourable to the government.

7.3. A blackout on information is reported to have been imposed by the HRC on its sub-offices and particularly on the office in Jaffna. The following report which appeared on October 21, 2007 in LAKBIMAnEWS reveals the gag order on human rights abuses imposed by the HRC:

Ranga Jayasuriya

The Sri Lanka Human Rights Commission has imposed a blackout on information regarding abductions and disappearance, LAKBIMAnEWS learns.

Specific instructions have been sent from the HRC Head Office in Colombo to its Jaffna office, last week, ordering it to refrain from releasing information on human rights violations to the Media and other public interest groups.

The latest communication was part of the gag campaign and was ordered by the government.

The HRC branch in Jaffna has been ordered to direct callers seeking information to the HRC Head Office in Colombo. The HRC in Colombo, however, maintains an unofficial blackout on the details of human rights violations, especially regarding abductions and disappearances.

Several requests to the HRC by LAKBIMAnEWS to seek information on complaints on abductions and disappearances were turned down.

LAKBIMAnEWS contacted the Director of Investigations and Inquiries of the Human Rights Commission, Ms. Samantha Wijemanna for statistics on abductions and disappearance in the Jaffna peninsula. She replied that she was not in a position to provide information and that a written request should be made to the Human Rights Commission. The request will be taken up at a board meeting which would decide as to whether the request should be granted or not, we were told. However, inside sources said that the Jaffna HRC branch gives a daily update to the HRC headquarters on the developments related to the human rights situation in the peninsula. Several HRC officials told LAKBIMAnEWS that the latest position by the HRC came into effect following instructions given by the government.

“The government is worried that these statistics could be used to discredit it,” one officer said.

Several officials reasoned that they had to comply with the instructions issued by the government, though they are not in the best interest of human rights in the country.

7.4 Furthermore, in a article published in the Daily Mirror on October 26, 2007 the following comments were made on the performance of the HRCSL

Activists, academics denounce HRCSL track record as failure

Thirty three community and city based activist organizations comprising a network of activists and academics have called upon the International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights in Geneva, not to lend credibility and legitimacy to the Human Rights Commission of Sri Lanka (HRCSL).

They say the Sri Lankan HRC has become an institution that has failed to live up to its mandate and has been unwilling and unable to respond to the severe human rights crisis facing the country.

The organizations include Suriya Women's Development Centre, Batticaloa, Law & Society Trust, Colombo, Movement for Defense of Democratic Rights (MDDR), Colombo, Kurunegela Citizens Committee, Kurunegela, Mannar Women for Human Rights and Democracy, Mannar Mothers and Daughters of Lanka, Colombo, National Fisheries Solidarity Movement, Negombo, Centre for Policy Alternatives (CPA), Colombo, Centre for Human Rights and Development (CHRD), Colombo Association of Family Members of the Disappeared (AFMD), Colombo, Centre for Society and Religion (CSR), Colombo, Centre for Women and Development, Jaffna, INFORM Human Rights Documentation Centre, Colombo, Institute of Human Rights (IHR), Colombo and the International Centre for Ethnic Studies (ICES), Colombo

The letter has been submitted prior to the ICC's review of the re-accreditation of the HRCSL this week. The United Nations Office of the High Commissioner for Human Rights (OHCHR) functions as the ICC Secretariat and a Sub-Committee of the ICC is scheduled to examine the re-accreditation this week.

In a recent visit to Sri Lanka, United Nations High Commissioner Louise Arbour pointed to the fact that the failure to resolve the controversy over the appointment of commissioners has created a crisis of confidence in the HRC both locally and internationally. She warned that the HRC's failure to systematically conduct public inquiries and issue timely public reports has further undermined confidence in its efficacy and independence and stated that the Commission may lose its accreditation to the international body governing these institutions.

Reflecting these concerns, the letter written by these organizations to the ICC observes that Sri Lanka has witnessed a steady erosion of the independence and effectiveness in many of its democratic institutions including the police, public service, Parliament, Attorney General's Department, Judiciary and most recently, the HRCSL.

They point out that none of the members of the HRCSL appointed by the President, (disregarding the pre-condition of approval by the Constitutional Council); have a human rights background and the criteria for selection have not been known. This process violates the general observation of the Sub-Committee on accreditation which emphasizes that the selection of members to an NHRI should be through a transparent and inclusive process.

8. The impact of the denial of rights on citizens

We reproduce below stories of the struggles of five persons to seek redress for human rights abuses in Sri Lanka and the hazards they faced over the years. These cases are a demonstration of the general collapse of the entire system of justice within the country and the nightmares people are forced to face due to this situation.³²

8.1. The Case of Amitha Priyanthi.

When you meet Amitha Priyanthi, it is difficult at first to tell if you are in the presence of hope or bitterness. A woman of exceptional dignity and determination, Amitha's bearing—formal, measured, precise—betrays little of her inner life. This is by design, one senses. Amitha conveys the presence of powerful emotions precisely by withholding all emotion from view. Her assertions and explanations of things—events of the past, plans for the future—always reflect years of careful consideration. But this same feeling as she has pursued the cause of justice in the name of her late brother, and what she feels as she looks to the future, are not made available. One does not know, equally, whether to feel hope or bitterness oneself as Amitha tells her story. Only at the end, when Amitha brings events up to the present and explains the way forward, does the recognition come: Hope and bitterness are not separable in Sri Lanka. The pursuit of justice in Sri Lanka brings both, even in victory.

There are many deserters from the Sri Lankan army—a consequence of the long, senseless war in the North and East between government troops and the Liberation Tigers. And it is with an act of desertion that Amitha's story begins.

Her younger brother, Lasantha, was a soldier. He seems not to have held a strong view about the war, although he opposed it and did not wish to fight in it. Stronger were his feelings about his wife and newborn baby. In the spring of 2000, while serving in the north, near Jaffna, Lasantha was refused leave to see his family. Instead he was given a few days to travel to his village, then ordered to return to his unit. Lasantha went home but never returned.

“He was granted a short holiday,” Amitha said when we discussed these events. “He had no intent to go back.”

On June 12, 2000, the police arrested Lasantha in Payagala, the village south of Colombo where he lived. Eight days later he died in a hospital, still under remand, of injuries sustained while he was in police custody. The cause of death was acute renal failure: Lasantha's kidneys had been irreparably damaged when the police beat him with a wooden pole.

Seven years later, Amitha was still fighting for justice in the case of her brother. There had been victories and defeats. She had gone from police station to police station, from court to court, from one session of the Sri Lankan Medical Council to the next. And there would be more to come.

In August 2003, a case she had pursued in the Supreme Court on behalf of her widowed sister-in-law ended successfully. It created a precedent regarding the rights of the next of kin to seek redress through an application to the Supreme Court based on the fundamental rights clause in the Sri Lankan constitution. The court held that the police were responsible for torturing her brother and granted compensation to the widow and child from their marriage.

Amitha also won a case in magistrate's court when a doctor testified that her brother's death was homicide—death by assault. Criminal charges—culpable homicide—were then filed against one police officer. But complications accumulated in this case. The non-summary inquiry into the homicide case took six years—until March of 2006. The case had gone to the high court, but by the summer of 2007 the Attorney General had yet to file an indictment. In the course of these delays, the officer charged absconded—disappeared, as Lasantha had done when he went on unauthorized leave.

In a district court, Amitha followed another strategy. She filed a civil claim against three police officers, the Inspector General of Police, the Attorney General and the Commissioner of Prisons. She also filed a further civil action against the Judicial Medical Officer (JMO), the Attorney General and the Administrative Secretary to the Ministry of Justice, whom she claimed were complicit in her brother's murder. A civil case such as this involves prolonged litigation; anything from 5 upto 20 years.

On July 26, 2007, Amitha had another breakthrough. This occurred when the Sri Lanka Medical Council ruled on the case of the doctor charged with examining Lasantha while he was in police custody. The council had been deliberating this case since October of 2001—nearly six years. It finally found the examining doctor guilty of eight offenses and suspended him from practice for three years.

Doctors of this kind are known as Judicial Medical Officers, and in this capacity they have quite specific responsibilities. This doctor's offenses as a J.M.O. in Lasantha's case are

telling in themselves: They were mostly matters of omission. He had not asked Lasantha for his consent before examining him. He did not ask Lasantha the names of the police officers who assaulted him. He failed to give Lasantha a comprehensive examination—neglecting even to take his blood pressure. He failed to record any diagnosis nor to recommend hospital admission. In all, the doctor appears to have spent fifteen to twenty minutes with Lasantha. But we do not know, for that is by the doctor's account, and he made no record of his procedures.

One of the doctor's offenses involved what he did, not what he failed to do. He examined Lasantha in the presence of the police officers in the station where he had been tortured.

The facts of Lasantha's case, and of Amitha's long search for justice, are matters of record now. And Amitha, as she pursues the cases still pending, will add more to these facts and records. What do we see when we look closely at them? What do the records tell us about the matter of justice in Sri Lanka?

There is, first, the question of time. And related to this is the question of care and carelessness as they exist side by side in Sri Lanka.

Lasantha was dead within eight days of his arrest in the spring of 2000. Whether or not a court would have found him guilty of an offense we will never know, because he never got that far. Guilty or not, he was deprived of justice. And we now know that the examining physician spent all of fifteen to twenty minutes (and quite possibly less) examining the patient. As the medical council concluded, a proper examination would very likely have saved Lasantha's life.

These facts stand against the seven years it has (so far) taken Amitha to bring justice to the case of her brother.

The medical council's ruling in the summer of 2007 is the most recent to be issued in Lasantha's case. When we read it, we cannot but be struck at the meticulous care taken in the council's deliberations over a period of several years, during which all efforts were made to provide the examining physician an opportunity to defend his conduct.

All Sri Lankans are due the amount of time that is required, however much, in the delivery of justice. All Sri Lankans deserve the attention to procedure the medical council brought to the case of the J.M.O. who examined Lasantha. But when this time and attention are placed next to the swiftness of Lasantha's torture and death and the carelessness with which the doctor handled his case, a paradox emerges: When time and attention to procedure are given to some and withheld from others, they stand as a perversity.

We must also recognize in the records the presence of what many civil society activists concerned with the judicial system term “the network.” The network consists of judges, lawyers, police, and doctors who work in concert—not for the proper administration of justice, but for the benefit of one another. A judge will collude with the attorney who is supposed to represent a defendant. Or he will collude with the police. Or the lawyer for the defendant will collude with the police. Or (as in this case) a doctor will collude with the police in his official capacity as a J.M.O.

Note the doctor’s evident attitude in Lasantha’s case. The examination was cursory by any reasonable measure. The physician examined Lasantha in the presence of the police. He failed to recommend hospitalization because (as his counsel testified) he assumed the police would continue to hold him. These attitudes, these assumptions, this kind of conduct—all are prevalent in the Sri Lankan system. It is how the network functions. The presence of the network is the reason many of Amitha’s friends and acquaintances advised her not to embark on her search for justice in the first place.

But here we come to a question that is everywhere evident in the record even if it is nowhere stated. This concerns the power of the powerless. We must not overstate the present position. Abuses—police abuses, medical abuses, and judicial abuses—are thought by many to be increasing in Sri Lanka, not declining. Amitha is in many respects something other than typical. Many cases such as hers do not end in justice. But Amitha brought sufficient courage and determination—a certain hardness, we can say—to her search for justice. And she proved that the powerless can assume power over their lives and circumstances.

There is another way to put this: If Sri Lanka is to cure itself of its ills, Amitha represents the future, while the guilty in the death of her brother represent the past. Or still another way: In Amitha, a person of complex emotions but someone who is also in control of them, we find a certain kind of hope. It is the possibility of hope without bitterness.

8.2. The Case of Anthony Fernando.

The picture of Anthony Michael Fernando most commonly circulated shows a young, smiling man looking slightly down into the camera. So perhaps, one surmises, he is tall. He wears a sport shirt, open at the neck, and his hair is neatly trimmed. In the background are what appear to be Gothic windows: He is standing, perhaps, in front of a church facility, or a community center.

One searches this small snapshot in vain for some suggestion of the extraordinary fate that befell Tony Fernando, as he is known, when he entered the space of the Sri Lankan justice system. But there is none. So, in the end, it is the ordinariness of this man that bears

interpretation. In Tony Fernando we find the tragic ordinariness of extraordinary injustice in Sri Lanka—its reach into everyday lives.

Tony Fernando's story extends back many years now, for justice delayed is a considerable part of it. In 1997 he was employed as the Christian Emphasis Secretary of the Young Men's Christian Association in central Colombo. One day he fell and suffered injuries—a regrettable but common enough experience. Little that happened afterward was common, however—at least not by any reasonable standard. Tony Fernando fell at the Y.M.C.A., one might say, and did not stop falling until he landed in exile in Canada, where he now lives.

After his injury at the Y.M.C.A., Fernando filed a claim for workman's compensation. When the matter came before the Deputy Commissioner for Workmen's Compensation, an amount of offered which Fernando found unacceptable and his claim for compensation for a work-related injury was thereafter dismissed.

Legal motions followed—Fernando filed four of them. The first two alleged that the deputy commissioner's ruling violated his constitutional rights.

Time passed. In November of 2002 the Supreme Court considered the two motions jointly and dismissed them. Two months later Fernando filed a third motion relating to a legal point: He alleged that that the consolidation of the first two claims and their joint dismissal effectively denied him a fair trial. This motion was dismissed almost immediately: Fernando's fourth and most fateful motion followed in February of 2003. In it Fernando objected that the chief justice, Sarath Silva, and the two other judges who considered his third motion had no right to do so: They were the same judges who had dismissed the first two motions. This point would later receive the support of numerous legal experts, including the U. N.'s Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy.

But it is at this point that the substance of the case, one way or the other, is lost—or changes fundamentally in nature. From this point forward the question ceases to be Fernando's compensation claim and becomes the nature of justice (or injustice, more properly) in Sri Lanka. "I am not going into the merits of the case," Cumaraswamy would say later. "The question here is whether it is proper for the chief justice, after having been made a party to a case, to sit on the panel and adjudicate on the matter."

We mentioned that the fourth motion was fateful, and indeed it was. With it, a fall while on duty at the Y. M. C. A. became, perversely enough, an international cause *célèbre*.

Fernando filed his final motion on February 5th. The following day the motion was heard, and during the proceedings Chief Justice Silva, a man of wide and controversial repute,

considered that Fernando spoke too loudly in addressing the court. Silva issued a summary judgment: Fernando was sentenced to a year's "rigorous imprisonment"—that is, hard labour—for contempt of court. He began serving his sentence that day.

Tony Fernando faced abuse almost as soon as he entered prison. He developed an asthma condition that went untreated. He was forced to sleep on the floor with his legs chained, which worsened his medical condition. On being transferred from a prison hospital back to his cell, he was repeatedly assaulted, which resulted in spinal injuries. In less than a week he was unable to get out of bed.

A month after his incarceration, Fernando filed a case alleging violation of his fundamental rights according to the Sri Lankan constitution. He also appealed Silva's contempt ruling. The rights case, at writing, is still pending; the appeal on the contempt charge was dismissed in July of 2003, four months after it was filed.

Tony Fernando was released from prison eight months into his sentence, in October 2003. While in prison custody, he filed three legal complaints: one with the U. N. Human Rights Committee regarding the contempt charges and the torture that followed; one (noted above) with the Supreme Court alleging torture while he was imprisoned, and one a criminal case against two prison guards allegedly responsible for his torture. At the time of writing the fundamental rights case before the Supreme Court is still pending and the criminal charges against the two prison guards has not been pursued by the state and the United Nations Human Rights Committee has made its decision, holding that Sri Lanka as the state party has violated Tony Fernando's human rights by illegal detention, despite of the court decision to imprison him and requesting the government to pay compensation for the violations of his rights. The government has refused to pay the compensation on the basis that since the imprisonment was a result of a judgment of a domestic court it is not in a position to take any action on the matter.

Events unfolded swiftly at this point. In December of 2003 he received anonymous death threats by telephone, during which time he was told to withdraw all three cases. A month later the U. N. Human Rights Committee appealed to the Sri Lankan government for Fernando's protection. (None was forthcoming.) A month later there was an attempt on Fernando's life, when an unidentified man attacked him on a Colombo street and covered his mouth with a handkerchief containing a substance that proved nearly lethal.

On 30th August 2004, Tony Fernando appealed for asylum in Hong Kong. He left Sri Lanka on the 16th June 2004, and seven months later settled in Surrey, Canada where he now resides. His wife and children joined him in Surrey on the 16th December 2004. He still awaits two judgments.

There is a striking pettiness in the Tony Fernando case. Why did the Supreme Court act to turn such a minor matter into a case with international implications in the first place? A pettiness and a lack of all reasonable proportion. Sri Lanka, unlike India and numerous other jurisdictions, has no law covering contempt of court procedures. Judges can rule as they see fit and sentence defendants accordingly. It was in this circumstance that Tony Fernando received a year's hard labour (and then all the mistreatment that went with it) for the alleged offense of raising his voice in court. Again, the question is, "Why?"

Some fundamental features of Sri Lanka's critically dysfunctional judicial system are evident in the Fernando case. To understand them is to answer the above-noted questions. To understand them is also to recognize the fundamental problem of hierarchical consciousness in Sri Lanka and how it is manifest through a judicial system that is nominally based on modern procedure.

The most prominent of these characteristics is an obsession with form within the system. One finds among attorneys and judges alike in Sri Lanka an almost pathological preoccupation with rules and procedure. Form, in this sense, is ordinarily essential for the delivery and administration of equal justice. In the Sri Lankan case, form as we mean it here performs a different function. Its purpose is to mask what amounts to a near anarchy of injustice in Sri Lankan courts. So long as form is observed, practically anything goes.

Tony Fernando's true offense was to insist that law and procedure be applied as they were originally intended. This amounted to an attack on another of the core features of the Sri Lankan system: its impulse to preserve the prerogatives of arbitrary power. So we arrive at the essential contradiction exposed in the Fernando case—that is, behind the curtain of rules that the judiciary so carefully maintains, there are no rules.

The question of arbitrary power is related to another involving distance. Distance between ruler and ruled is, in essence, a feature of pre-modern political systems. It is by way of distance that arbitrary power is maintained. And it was another of Tony Fernando's offenses that he denied the judiciary's right to a distance it considered customary.

What is finally brought to light in the Fernando case is the problem of impunity and the judiciary's underlying desire to preserve it. The true tragedy of Tony Fernando's journey through the courts—even before it has ended—is that there is nothing out of the ordinary in it.

8.3. The Case of Lalith Rajapakse.

It is common, when making one's way among the many victims of official abuse and human rights violations in Sri Lanka, to find people who have been waiting for three, four,

or five years for their cases to be decided. Injustice may arrive swiftly—without notice, within a few seconds, out of nowhere. Then the years go by as the victim seeks redress. It becomes, in the end, another form of victimization, another form of injustice, not unrelated to the matter of official impunity. One is made a victim of abuse, and then one is made a victim again in the course of seeking to rectify the wrong.

Lalith Rajapakse was nineteen on the night of April 18, 2002. He is, at this writing, twenty-four, physically impaired and psychologically traumatized and still awaiting justice in the events that ensued.

On the night in question, several police officers arrived at the door of a friend's house, wherein Lalith was sleeping. For no reason evident to him at the time he was awakened, arrested, and taken to the police station in Kandana, a town about 20 kilometers north of Colombo. The torture that was to become central to his case began immediately: Lalith was beaten even in the jeep into which he was bundled outside his friend's house.

The U. N. Human Rights Committee later detailed Lalith's treatment at the police station: "He was forced to lie on a bench and beaten with a pole; held under water for prolonged periods; beaten on the soles of his feet with blunt instruments; and books were placed on his head which were then hit with blunt instruments."

These kinds of torture are familiar to those who study police practices in Sri Lanka. The last is intended to inflict internal injuries without leaving external marks. In Lalith's case, his grandfather eventually came to the police station and found him, slumped and lifeless, in a cell. He lay unconscious in a hospital for fifteen days afterward and was unable to speak coherently for nearly a month. He remained in treatment for another month; thereafter, the psychological stress prevented him from work. For two years Lalith lived in hiding, and he and his family survived on charity.

Three charges were filed against Lalith, and the torture was intended to extract a confession validating them. But none held up. There were two allegations of theft, which collapsed nearly a year and a half after they were filed, when it turned out the supposed victims of robbery had never claimed Lalith had stolen anything from them. The third charge was for allegedly obstructing the police in the discharge of their duties. It was not quite three years before a magistrate court acquitted Lalith of this charge.

Lalith took action on his own part. In May of 2002, just out of the hospital, he filed a case in the Sri Lankan Supreme Court charging that his fundamental rights, as guaranteed under the constitution, had been violated. His grandfather was a party to the case. A few months later the Attorney General, in apparent response to pressure from the U. N. Human Rights Committee, ordered an inquiry into the events that had led Lalith and his family into the courts. This led to a case in the High Court.

But the delays and irregularities have been many. Chief among them has been the pressure applied to force Lalith to withdraw from the legal process.

Threats against Lalith and his family have been more or less constant. And there are other details—bizarre, petty details that reflect certain routines the police often follow. A month after Lalith filed his fundamental rights case, a local fish trader (and a longtime acquaintance of Lalith's grandfather) was asked by the Kandana police to poison the fish the grandfather next bought. The fishmonger was also asked to let the police know where the grandfather liked to drink, so that his liquor, too, might be poisoned.

A few months later came threats to Lalith's life. These arrived by way of anonymous figures claiming to speak for the Kandana police—a claim the police denied. All the while, the police officers alleged to have tortured Lalith were permitted to continue serving in their customary posts. It was not until December of 2004 that Sub Inspector S.I. Peiris in Kandana and two other officers were barred from service and transferred. Sub Inspector Peiris was also indicted under the Torture Act of Sri Lanka.

Lalith's efforts to pursue justice have been more successful than those of many other Sri Lankans. And it is because of this partial success that his case affords us a particular window into the judicial system, its workings, and the limits of international authority.

In May of 2005, the U. N. Human Rights Committee accepted Lalith's appeal, overruling the objections of the Sri Lankan government as to the admissibility of the case on the grounds that his human rights were violated. A little more than a year later, the committee ruled in Lalith's favour: "The delay in the disposal of the Supreme Court case and the criminal case amounted to an unreasonably prolonged delay," the committee noted in its decision.

This represented a significant victory for Lalith, for his family, and for those human- and legal-rights organizations that have supported Lalith since he first filed his cases. But at this writing, in September of 2007, neither the Supreme Court case nor the criminal case against Sub Inspector Peiris has been settled.

Justice delayed, as the age-old principle holds, is justice denied. Yet for many Sri Lankans, justice delayed is all there is in the best of outcomes: It is a rare case that is accepted at the U. N. or by any other international organization devoted to upholding the rule of law. Most of the time, the universe of the law ends at the national borders.

Lalith's cases thus underscore a very uncomfortable truth in the struggle for justice in Sri Lanka: Even when cases of abuse and human-rights violations are taken up at the international level, the impunity with which the Sri Lankan authorities have long acted can still prevail.

In September of 2006, with Lalith's cases still pending (along with many others), Chief Justice Sarath Silva sought to elevate this impunity to the level of legal principle. Once again, the thought appeared to be that anything was permissible so long as it had the appearance of proper procedure.

Chief Justice Silva's ruling came in the case of a man charged with conspiracy to overthrow the government—a case connected with the war between the government and the Liberation Tigers. The defendant, having been sentenced to ten years of “R. I.,” or rigorous imprisonment—that is, hard labour—successfully appealed to the U. N.'s Human Rights Committee. The committee ruled in the defendant's favour—a ruling Sri Lanka is legally committed to respecting. Silva, in an especially tortured instance of contorted legal reasoning, responded by invoking “the sovereignty of the People” to assert that Sri Lanka was, in fact, not bound to respect the U.N.'s rulings, despite being a signatory to the relevant covenants!

Among human-rights and legal-rights advocates and activists, the 2006 decision is considered a landmark in the all but complete corrosion of Sri Lankan justice.

8.4. The Case of Palitha Tissa Kumara.

Excess is a common feature of the Sri Lankan justice system. In one form or another one finds it in almost all the research one may conduct into the workings of the police, the lawyers, the judges, and the doctors. There is violence, there is abuse of a defendant's rights, there are threats and intimidation, there is false testimony, there are excessive sentences, there are unwarranted delays. Every so often we find a case that reminds us of the pathology underlying these forms of excess. At its root, the problem of injustice in Sri Lanka is a psychological problem. If we look at this carefully, there are suggestions that the contempt authority displays for ordinary citizens, are a form of self-contempt.

The case of Palitha Thissa Kumara is such a case. There is no other way to explain some of its grosser excesses but by way of a psychological analysis.

Some of the facts in Palitha's case will by now be familiar in our brief readings of other cases. The case begins on February 3rd, 2004.

Palitha was a craftsman from Matugama in the district of Kalutara. He was skilled in the arts of painting and stone carving. On the morning of February 3rd, six police officers arrived at his home and asked him to come to the station in Welipenna, a nearby town to paint the police emblem on the stationhouse in preparation for Sri Lanka's celebration of its day of independence. Palitha agreed. Any aspect of Palitha's encounter with the local police end at this point in his story.

Before the officers and Palitha reached the jeep in which they were to drive to the station, one officer turned and, out of nowhere, pistol-whipped Palitha to the point of causing an open wound on his chin. The police thereupon threw Palitha to the ground and assaulted him further before piling him into their vehicle.

On the way to the station the police stopped to arrest another man, known as Galathaga Don Shantha Kumar. Don Shantha would soon become a prominent figure in Palitha's case. He, too, was tortured; he, too, was accused of plotting robberies.

At the police station, an all too predictable round of torture began. According to Palitha's account, the police officer who had pistol-whipped Palitha beat him with a cricket pole on his neck, arms, head, spine, and knees. He then began demanding—again, out of nowhere—that Palitha surrender the bombs and weapons in his possession—bombs and weapons he had planned to use in the armed robberies he had been plotting. Don Shantha was there. The police officer made it known that the same would be coming to him.

The torture continued for approximately two hours, according to Palitha's later testimony, during which time Palitha repeatedly denied any knowledge of bombs, weapons, or robbery plots. The abuse stopped only when about eight other officers intervened, one of them taking the wicket from the violent officer's hands.

The assaulting officer then brought another detainee into the room. His name was Thummaya Hakuru Sarath, and he suffered from tuberculosis. The officer then issued what must stand as one of the most grotesque orders in the long, often-grotesque history of police abuse in Sri Lanka. Sarath was to expectorate into Palitha's mouth so as to infect him. More than a year later, when the matter was in dispute, Sarath gave a statement confirming that he had been forced to act in a manner deliberately intended to contaminate Palitha. It also emerged the Sarath, too, had been beaten—a victim himself.

Unable to stand, in and out of consciousness, Palitha remained in a jail cell for several days, during which more torture ensued. He was finally taken to hospital—or, rather, hospitals, for there were two, both of which refused to admit him (one refusing twice) despite injuries that were by this time evident.

Back at the jail cell, the assaulting officer produced a grenade. Palitha was forced to leave his thumbprint in wax, whereupon the print was transferred to the grenade. The officer had already forced Palitha to sign a confession of guilt without reading it to him.

It is now the 6th of February, three days after Palitha was taken from his home. He is taken back to one of the hospitals that had refused him admission. There “a man wearing a pair of shorts,” according to court documents, signed some papers. Palitha was then returned to the police station and later that day made a brief pass through a magistrate court before being admitted at a third hospital—a prison hospital in the town of Kalutara.

Palitha remained in prison until his release on bail in July 1, 2004, after 4 months and twenty five days in jail. But during that time, he had filed two cases. One was a fundamental rights case alleging that the police had violated his rights as guaranteed in the constitution. The other, filed by the Attorney General in High Court, charged Kaluwanhandi Garwin Premalal Silva, a sub-Inspector and Palitha's principal assailant while in police custody, with causing torture by beating him with a pole and forcing a T.B. Patient to spit into his mouth.

Predictably enough, the threats against Palitha and his family began almost immediately. In mid-June he was offered five hundred thousand rupees, about five thousand American dollars, to withdraw his cases. In two separate incidents, he and his family received messages via third parties that his wife and child would be killed if he did not cooperate by dropping his complaints.

The court proceedings in Palitha's cases are excessive in their own right. The Supreme Court heard Palitha's fundamental rights case during several sessions in the course of 2005. The man in the shorts at the hospital, who had routinely signed police papers, turned out to be an assistant judicial medical officer, or A.J.M.O. His report on Palitha listed thirty-two separate injuries on all parts of the body, from scalp to feet. Among them were lacerations, multiple contusions, tinnitus in one ear, and a fractured anklebone. All but the fractures were judged "non-grievous." Yes, the doctor noted in his report, these injuries could have been sustained as the victim claimed they were.

The police presented an entirely different story. Palitha had been armed with a grenade when they arrived at his house, and it had been necessary to subdue him. The injuries sustained reflected the use of the minimum force required under the circumstances. There had been no torture; there had been no incident involving Sarath, the man with TB.

Palitha won a modest victory in his fundamental rights case. On February 17th, 2006, the Supreme Court ruled that, given the danger Palitha presented when he was arrested—meaning the grenade and the threat he would set it off—the violence at the time of his arrest was justified. The appearance in magistrate's court, although required by law within twenty-four hours of arrest, was lawful. However, the court accepted Palitha's account of torture at the police station and ruled that his constitutional rights had been violated. The judgment—excessive in its paucity, one might say—called for restitution in the amount of five thousand rupees from the police officer who assaulted Palitha—about fifty dollars—and twenty-five thousand rupees from the government as damages and compensation for costs.

Those supporting Palitha's case, despite its disproportionate award and the partial findings in the police officer's favor, counted the Supreme Court ruling an advance. But an unusual

thing occurred some months later. On October of 2006 the High Court found in the police officer's favour. Sub-Inspector Silva was acquitted of all charges of torture—the judge ruling, in effect, that violence to the extent evident in Palitha's medical report was not excessive. The High Court judgment is, at this writing, on appeal.

We can but speculate, at this writing, as to Sub-Inspector Silva's motivations in his handling of Palitha's case. It may have been that a crime had been committed and he was desperate to find a perpetrator to demonstrate his efficiency. Such often occurs. But it is not clear in this case. What is clearer are aspects of the case that require no further evidence.

There is a pathology of disturbance in Palitha's case. The excess of violence—against three detainees, not only Palitha—is to be seen in numerous other instances. It is, indeed, not the worst case on record in this respect. The attempt to pass on a potentially lethal disease is another question. It indicates a depth of contempt that requires professional, clinical consideration.

The problem of injustice in Sri Lanka is, of course, a legal matter. There are also clear questions of a political and sociological nature. A case such as Palitha Tissa Kumara's, however, urges the prominent inclusion a psychological perspective. The problems associated with a dysfunctional police apparatus and a similarly impaired judicial system cannot be solved without reference to questions such as contempt and self-contempt, the self and the "other" in Sri Lanka, and the consciousness of hierarchy that infuses every human relationship with a dimension of "above" and "below." It is such complexities of consciousness that lead police officers to act as Sub-Inspector Silva did—and judges to defend him as they did in two separate courts.

8.5. The Case of Angaline Roshana.

"The laws of the country are too weak." This observation was not made by one of Sri Lanka's uncounted victims of police abuse or official torture. Nor did a lawyer defending a victim in court articulate the thought. The remark belongs to a police officer who was, at the very moment he made it, in the act of torturing an ordinary citizen. Weak laws were the reason Angaline Roshana, who was twenty-five at the time, had to be assaulted in police custody and deprived of her legal rights. This was a police inspector's reasoning on December 4, 2000, when Angaline was in police custody in the suburban town of Narahenpita, in the hub of central Colombo (zone 8). The law had to be broken to keep the law.

As it happened, in Angaline's case the law did not prove to be too weak. She eventually won a fundamental rights case in the Supreme Court and, much later, a High Court judgment against the officers charged with assaulting her. Her story, then, ends with justice being served. But it is a rare story, an exception in Sri Lanka that regrettably proves the rule.

Angaline was at home on the evening of December 3, 2000, when at around 7:30pm, a group of men in civilian clothes arrived in a private vehicle and forced her to accompany them to the police station. No reason was given. When Angaline's family protested, questioning the identity of the men, one of them (a man who later turned out to be the Officer in Charge (OIC) of the Narahenpita Police Station) threatened to break their teeth, and forced Angaline into the vehicle before speeding away.

The police station was not their immediate destination. Instead, Angaline was taken to the home of an affluent local woman for whom she had previously worked as a washerwoman. The woman had complained to the police that some jewelry had been stolen and had accused Angaline of the crime. Among the missing items was a watch, which the woman said was worth half a million rupees—about five thousand American dollars.

The woman accusing Angaline was a lawyer and appeared to be familiar with the police officers—perhaps by way of her legal work. While the woman, her family, and the police officers drank and socialized, Angaline was forced to search for the watch over a period of four to five hours.

Having denied any knowledge of the theft, and having failed to find the missing property, Angaline was then taken to the police station shortly after midnight. There she was detained overnight, severely tortured, and forced to sign a confession. Throughout the course of her detention, the police officers frequently threatened to hang her up and beat her; these threats were usually made when the Angaline's former employer visited the police station.

Mr. Sanjeewa, a lawyer from the Human Rights Institute, and Dr. Nali Swaris visited Angeline while in detention, and demanded that Angaline's legal rights be observed and that she be produced before the court without further delay. OIC Shelton Saley supposedly laughed sarcastically, and remarked; "the laws of the country are too weak. We are breaking the law to strengthen it."

The act of taking a person into custody, without showing any police identification or wearing the police uniform, amounts to kidnapping. Moreover, Roshana was not informed about the reasons for her kidnapping or arrest. Furthermore, she was tortured to obtain a confession, and she is still being illegally detained.

Only on the following day, December 5th, did Angaline appear in the magistrate court. On the magistrate's orders, the Judicial Medical Officer (JMO) conducted an official medical examination of Angaline's injuries. The JMO's formal report identified seven contusions; the left shoulder, left upper arm (front and back), right shoulder, left and right buttocks, and upper left thigh. The report also indicates that Angaline's injuries were two-four days old, and caused with a blunt object consistent with the assault. His report is dated 7th December 2000.

At the trial Roshana herself, and several other persons gave evidence. The police officer also gave evidence, accepting the arrest but denying that any torture had taken place. The trial was protracted and lasted for a period of almost six years. The High Court judge held that the charges were proved beyond reasonable doubt.

Having received legal assistance from the Asian Human Rights Commission from the time of her arrest onward, Angaline took her case to two courts. The Supreme Court ruled in June of 2002 that Saley, the OIC accused of her torture had violated Angaline's fundamental rights by way of torture and illegal detention; compensation of 100,000 rupees was awarded.

In apparent retaliation, the police subsequently charged Angaline with theft in the magistrate's court—a case that was dismissed for lack of any evidence. In July of 2007, the court found OIC Saley and police Constable, Stanley Tissera, guilty of committing a gross human rights violation against Angaline. It is believed to be only the third such conviction under the UN Convention against Torture (CAT) Act of 1994, to which Sri Lanka is a state party. The act calls for a mandatory sentence of seven years' "rigorous imprisonment," or hard labour. Both officers were so sentenced; an additional year was added for each officer in lieu of fines in the amount of ten thousand rupees.

Angeline Roshana and those who supported her can count her long ordeal a victory. What is the truth at the core of this outcome?

Angaline triumphed, in effect, by subverting what must be recognized as the existing order. She did this by upholding the law, not by breaking it. So does her case lead us to the paradox at the heart of the Sri Lankan legal system—a paradox perfectly captured in the police inspector's remark to Angalin's family friend while she was in detention.

The paradox is very simply this: Those charged with enforcing the law in Sri Lanka are the very people who least respect it. Those who are supposed to uphold the law are the very people who often, and dangerously, break it. At the core of their reasoning is a distinction between law and order that is not valid.

The convictions Angaline won under the CAT Act are to be welcomed. But given the established record of the nation's police and courts, three convictions under these laws over the period of thirteen years is simply not enough. The police inspector was wrong: Sri Lanka's laws require strengthening, certainly, but as Angaline demonstrated, they are sufficient to deliver justice. It is their enforcement that is critically weak.

9. Recommendations

General Comments

Under the present circumstances it may seem even futile to make any recommendations to the government for adherence to international norms and standards on human rights as the government has clearly demonstrated that under the present circumstances, which in the view of the government, is one of dealing with “determined terrorism”, it is not possible to give priority for the respect for human rights, honour constitutional obligations to safeguard human rights or to comply with international human rights and humanitarian law. The government has clearly demonstrated that human rights are dispensable under these circumstances. The propaganda arm of the government vehemently criticised the United States, some countries of the European Union and also international and local human rights lobbies for acting in the interests of terrorists by trying to lobby for the protection and promotion of human rights in Sri Lanka.

In the course of the government’s attack against any scrutiny of its human rights record the government has repeatedly declared that human rights is a western imperialist enterprise. Despite of being an elected member of the Human Rights Council and despite of the government’s own pledges to the council the government’s critique of the very foundations of the human rights mechanism of the United Nations continue. One senior government official even went on to publically state that Sri Lanka has signed UN human rights conventions due to being bullied into doing so. The government did not disassociate itself from the comments of this senior officer.

Internally this same policy was followed by the discouragement of the police investigating mechanism from inquiring into human rights abuses. The Attorney General’s Department collaborated with the alleged perpetrators of human rights by not presenting a fair and correct version of the events to the Presidential Commission of Inquiry and this issue was taken up several times by the IIGEP. The judiciary still stood by the judgement in the Singarasa case and did not demonstrate any extraordinary interest in dealing with the human rights issues despite of serious violations being reported constantly.

Under these circumstances obtaining any positive action for the improvement on the part of the government will require considerable pressure both from the Sri Lankan people as well as the international community. Without a change of will on the part of the government the present impasse will continue and will even deteriorate. Local and international action needs to be adequate a change of will on the part of the government to force it to recognise its obligations to respects the human rights of its citizens under all circumstances.

Some specific recommendations:

International Obligations

9.1.1. To comply with the obligations under the optional protocol to the ICCPR the government must promptly enact legislation to enable the views of the Human Rights Committee to become implementable in Sri Lanka. In the light of the Singarassa case enactment of such legislation should be treated as a matter of urgency. Without the enactment of such legislation the citizens of Sri Lanka will be deprived of the rights they have gained to complain to the Human Rights Committee on violations of the ICCPR, particularly in the light of the Supreme Court judgement relating to the decision of the Human Rights Committee on this case.

The introduction of the Bill to Give Effect to the International Covenant on Civil and Political introduced to the Sri Lankan parliament recently does not adequately address any of the issues raised by the Supreme Court judgement on the Singarasa case, as Louise Arbour mentioned, “the government’s proposed legislation to address this problem, tabled this week in parliament only partially addressed the issues and risks confusing further the status of different rights in national law.”

9.1.2. That a parliamentary sub-committee be assigned, to which all recommendations of treaty bodies are submitted soon after they have been made to the government by any of the treaty bodies. To begin with all the recommendations made by the Human Rights Committee after periodic reviews, the CAT Committee, CEDOW and others which have already made many recommendations be referred to this parliamentary sub-committee. This sub-committee should be mandated to supervise the state response to such recommendations and to report to the parliament on all matters relating to such recommendations and the measures taken by the state to implement them.

Investigations

9.2.1. Investigations into all human rights violations are primarily the duty of the Inspector General of Police through the department of the police. Except in some cases regarding police torture by lower ranking officers, the police have failed to investigate human rights abuses as required under the Criminal Procedure Code (CPC) of Sri Lanka. This failure demonstrates serious disorganization within Sri Lanka’s criminal investigation system. This failure has been investigated by various commissions appointed for the purpose since the late 1940s. However, the situation in recent decades has further deteriorated rather than being improved. One of the major reasons for such deterioration is the state sponsored violence by way of abductions, disappearances, torture, the creation of mass graves and the maintenance of torture chambers within detention centres (particularly military detention

centres). State sponsored violence has created two types of problems. One is that the police officers themselves including high ranking officers have taken part in such violence on a large scale. The other reason is that when the state itself is involved in such violence there is severe constraint to investigate such acts. This problem of the investigating unit is the key issue that guarantees immunity to perpetrators. *This issue needs to be addressed if there is to be any improvement at all.*

KINDLY NOTE: there are all sorts of attempts to avoid this problem by such suggestions as giving the function of human rights investigations to the Human Rights Commission of Sri Lanka (HRCSL) or by the appointment of various commissions which have been assigned with fact finding functions or supervisory functions relating to investigations into abuses of human rights. One such commission has even been given international experts to observe it. The AHRC does not believe that any such commissions can be a substitute for the restoration of the criminal investigation function which is vested by law with the Sri Lankan police. The AHRC has further constantly expressed the view that these attempts cannot by their very nature achieve the aim of conducting credible investigations into human rights violations. Whether intended or otherwise, such measures only serve to delay the investigations and thereby to dissipate the complainants by the pursuit of their complaints. Over a period of time the public pressure initially generated by such incidents also dissipates. At the end the problem returns to its original position which is the absence of investigations into abuses of human rights. The AHRC has struggled very hard to impress upon the government as well as the local human rights lobby and the international human rights lobby about this problem which is at the crux of dealing with human rights violations. The AHRC is deeply disappointed that the government, the local human rights lobby as well as the international human rights lobby has not paid adequate attention to this basic issue. The AHRC is also of the view that until the government, the local human rights lobby and the international human rights lobby take this issue as the central issue regarding human rights redress in Sri Lanka no significant improvement will happen, rather the situation will degenerate further.

9.2.2 To achieve the above objective the following problems in the Sri Lankan policing system need to be addressed.

9.2.3. The collapse of the exercise of command responsibility by officers of higher ranks as required by the Department Code of the police as well as the normal practices of any policing system that has a credible record of investigations into crime. There is a serious problem at the very top of the policing system in terms of the quality as well as the

willingness of the top ranking officers to exercise their responsibilities. The neglect of the duties of the top ranks has also contributed to the allegations of serious corruption in some of the top ranking officers of the police. There are further allegations of direct criminal involvement of some such officers. Without resolving the problems that lie at the very top of the policing system it is not possible to get this system to function in a manner that the law requires. All these problems of top layer of the police seep down to the lower ranks. As a result the entire system today suffers from dysfunctionality. The AHRC has through constant communication tried to highlight this issue. On this too the AHRC is disappointed that neither the government nor the local human rights lobby, nor the international human rights lobby on Sri Lanka has taken this issue as a significant one in dealing with human rights violations.

9.2.4. As a result of the above mentioned problems and others serious criminal investigators within, the policing system does not get the internal support as well as the security it needs to conduct investigations into serious crimes including serious human rights abuses. Such investigators are in danger of their lives from outside forces such as organised crimes, including alleged terrorism and also they suffer from internal problems of betrayal in their organisation itself. This has resulted in the waste of much talent and training that has gone into the creation of crime investigating capacity within the premier law enforcement agency in the country. Once again the AHRC notes that neither the government nor the local human rights lobby or the international lobby on human rights in Sri Lanka have paid sufficient attention to this problem.

9.2.5. The National Police Commission when functioning under the commissioners selected in conformity with the constitutional process were able to create a sense of protection to the law enforcement officers that the NPC is capable of protecting them from undue influences of their own higher officers as well as from political interference. The non-appointment of the constitutional council resulting from the inability to follow constitutional process has led to political appointments to the NPC itself. It has destroyed the moral authority that the earlier commissions had built to some degree during their term in office. Now the police officers will not turn to the protection of the NPC and therefore their subservience to a degenerated system has been reinforced. *The revival of the implementation of the 17th amendment is a precondition to begin a process of recovery of institutional independence of the country's basic institutions.*

The Attorney General

9.3.1. The Attorney General – The failure to prosecute serious crimes including serious abuses of human rights is a failure on the part of the country's prosecuting office which is vested with the Attorney General. This failure and the way to remedy it have not yet become a key concern of the government or the local and international human rights

lobby. The excuse of the Attorney General's Department is that it only prosecutes when evidence is made available by the police investigators. Its claim is that it also has no duty to ensure investigations. Therefore, when investigations do not taken place for the reasons stated above the Attorney General's Department claims that the prosecutors are not responsible for this situation.

Legislation needs to clearly define the role of the Attorney General in cases of criminal prosecutions. It must clearly lay down the duties of the Attorney General as the head of the prosecuting branch to ensure that the criminal branch undertakes investigations into all crimes and that from the very start of such investigations the Attorney Generals's Department plays a supervisory role to ensure the investigations into each of such crimes. The legislation must ensure that the Attorney General cannot claim ignorance about any of the allegations of serious crimes including Human Rights abuses and that the department has the duty to inform the Government and the public of progress into investigations into such crimes. Such Legislation is Essential in order to break the present deadlock regarding investigations within the policing system as well as the present denial of responsibility by the Attorney General's Department.

9.3.2. An alternative to the suggestion made in the above paragraph is to create an independent public prosecutor's office vested with the power to prosecute all cases of serious crimes which itself should be clearly specified. The head of such a department should have the independence to conduct prosecutions without the control of any other agency including the Attorney General himself. The 1973 model of the public prosecutor with suitable amendments to exclude the department being under the AG's department would result in such as institution. Such institution should have personnel and any material resources to perform its duties.

9.3.3. The two alternatives made in the previous paragraphs do not in any way imply that the prosecuting function and the investigating function should be combined. Given the massive extent of human rights violations in the country as well as the nature of organised crime it would be impossible to create an institution having both functions in one organisation. What is suggested is only that the prosecuting agency should be closely linked to the investigating agency and should have supervisory responsibilities clearly defined by law.

9.3.4. Out of the two propositions made in paras C.i. and C.ii. above it is suggested that as the most implementable proposal in at least the transitional period is the suggestion made in paragraph C.i. which is to make legislation relating to the prosecuting function of the Attorney General clearly laying down the AG's responsibilities in this area.

The Judiciary

9.4.1. The judicial role in ensuring fair trial by preventing abuses of the investigating process and the prosecution is one of the areas which requires great attention in dealing with the present situation of the collapse of criminal justice. Clearly there are provisions of the law as well as judicial decisions dealing with the judicial role to some extent. However, the role has not been expressed so clearly as in the Indian case known as the Best Bakery case decided by the Indian Supreme Court. Please see *Zahira Habibulla H Sheikh and Anr (Petitioner) vs. State of Gujarat and Ors (Respondent) CASE NO: Appeal (crl.) 446-449 of 2004* decided on 12/04/2004. In this case the Supreme Court insisted on the duties of a trial court to deal with issues of perfunctory and not impartial investigations, improper conduct of trial by public prosecutor, state failures to provide witness protection as all aspects that go into the duty of the state to ensure fair trial. In a lengthy judgement the court detailed the obligations of a trial judge not just to be a recorder or passive observer but to play an active role in ensuring fair trial in criminal cases emphasizing that those cases which affects the public security such as the massacre which took place in Gujarat where organised Hindu mobs killed Muslims, as matters of extreme importance from the point of view of maintaining rule of law and public confidence in law. It is unlikely in the present circumstances that there will be a clear articulation of these duties in Sri Lanka by way of a judicial decision to bring on legislation to improve the criminal procedure law by more clearly articulating the duties of a trial court to address issues regarding proper investigations and prosecution of crimes. This would contribute a great deal to resolve some of the problems regarding investigations and prosecutions mentioned above.

9.4.2. It has also been observed that in recent times in the case of alleged extrajudicial killings, where the police or the military claim that the death took place due to the suspect attempting to escape, the magistrate has made decisions on the matter at the very early stages of the inquest itself. Clear instructions need to be issued to the magistrates in dealing with suspicious deaths and particularly those deaths which are alleged to have been carried out by law enforcement officers. Such instructions should clearly lay down that the decision on culpability should lie with the trial court, which will have arrived at such decisions only after hearing all the evidence available.

9.4.3. There have also been emergency laws and anti terrorism laws, which deprive the magistrates to intervene into the cases of suspicious deaths under certain circumstances. In the past some regulations have allowed the police officers of some rank to permit disposal of human bodies. This virtually amounts to facilitating the carrying out of forced disappearances. There should be a bar to making such emergency or anti terrorism laws, which take away the most essential powers of the judges to safeguard the liberty of persons.

9.4.4. The procedures for habeas corpus applications are beset with serious limitations. The possibility of quick access to the judiciary, for example in the Philippines where habeas corpus applications can be made to the nearest magistrate at any time of the day even outside court, and other such practices need to be brought in to improve the judicial capacity to intervene into the cases of abductions and alleged disappearances. A law more clearly defining the provisions of the habeas corpus law and procedure is very much needed.

9.4.5. The applications under Article 126 of the Constitution to the Supreme Court on fundamental rights is beset with serious problems. Despite constitutional provisions for speedy disposal of fundamental rights issues, there are great delays in the disposal of such cases. The work load of the Supreme Court is usually given as the cause for such delays. Practices have also developed, such as postponing the hearing of fundamental rights petitions until criminal cases relating to the same issue are disposed. Thus, the delays in High Courts also affect the delays in the Supreme Court. Further it is still very difficult for people living in various parts of the country to come to the Supreme Court by way of such applications. The present situation makes the people more dependent on the lawyers in the city and this also often implies payments of high costs to the lawyers, which most victims of human rights abuses coming from the poorer classes of society cannot afford. Although there are some legal aid schemes they are not adequate at all to provide a competent and speedy service. There are also many allegations of corruption in the administration of such services. There is also the problem in recent times that many lawyers do not want to undertake applications on human rights issues or on public law, which are averse to the ruling regime to the courts. Further the Supreme Court rulings on compensation to torture victims do not reflect the international law on these matters. Further the Supreme Court decision on the Singarassa case has also created discouragement for the pursuit of international norms and standards before the courts of Sri Lanka.

9.4.6. The absence of a clearly defined law of contempt has also resulted in the intimidation of citizens as well as lawyers, who pursue matters relating to rights issues in a forceful manner. The Human Rights Committee decision on Tony Fernando's case (Communication 1289/2003) has not been implemented by the Sri Lankan government. The lawyers are officers of the court and are an essential part of the functioning of a justice system. If the citizens cannot find lawyers who are willing to take up difficult problems of human rights violations and public law before courts, this seriously affects access to justice. The inability of the lawyers to participate actively in the rights of their clients may depend on matters arising from a lack of competence or unwillingness on the part of the lawyers. Unwillingness may arise from professional concerns for security and fears that they will be adversely affected if they take up such cases vigorously. It may also arise due to intimidation where either powerful state officers or organised criminals may make them targets. It may also arise from sheer lack of proper remuneration for such work. It may also arise from a

realization that professional lawyers organizations are weak and unworthy of being relied upon for the defence of professional rights. All these factors seem to be combined in the present situation of lawyers in Sri Lanka. Without radical improvement in the professional involvement of lawyers brought through genuine encouragement by the judiciary as well as serious defence of professional rights by lawyers associations, the present situation cannot be changed for the better. The high demoralization that is spread throughout the country among the lawyers needs to be an issue that must concern all persons and organizations, including international human rights organisations and the United Nations, in trying to find solutions to the present impasse relating to human rights in Sri Lanka.

Witness protection

9.5.1. None of the issues mentioned regarding investigations, prosecutions, judicial functions and lawyers' obligations will have much effect without a serious attempt to improve witness protection in Sri Lanka. Witnesses are the eyes and the ears of courts as mentioned by Bentham and of course known to any person with common sense who knows about legal process. The requirements for the improvement of witness protection are as follows. A clear and comprehensive law creating obligations of protection and the supervisory duties of all agencies, including the prosecuting authority and the judiciary. The law must also clearly lay out the organizational responsibilities of maintaining a witness protection programme. It must also clearly lay down the obligations to provide alternative safe houses, the possibility of changing places of abode for short or long periods, livelihood issues affected by the conditions of secrecy and anonymity required in being witnesses on some occasions, the possibility of maintaining pseudo names or non revelation witness identities and all other such matters which are associated with witness protection in modern times. The law must also specify where the fund allocation for such an operation is to take place. *Perhaps it may be said that the most primary need to make a difference to the present situation lies in the creation of an authentic witness protection scheme.*

Monitoring

9.6.1. To remove the obstacles to monitoring local human rights bodies, including human rights organisations and international human rights monitoring, given the extremely collapsed nature of Sri Lanka's investigating and prosecuting branches, the major role in monitoring human rights violations will lie with civil society initiatives, media initiatives and international human rights initiatives. Without the mediation of these elements it is not possible for any of the institutions mentioned above to function. At present there are severe restrictions by way of death threats and actual execution of such threats to all persons engaged in such monitoring and lobbying. A climate of fear is created on the basis of propaganda on war and pseudo security. This is an area in which particularly the international human rights lobby can play a major role in trying to create a greater space for local human rights

monitoring and lobbying. The need for an international monitoring mission is primarily to create this local space for many persons to participate freely in the affairs of the country. To portray international human rights monitoring as an interference in sovereignty completely belies the fact that the sovereignty of the people has been lost by massive violence and intimidation. And the very purpose of an international monitoring mission on human rights is to revive this internal capacity. The experiences from Cambodia, East Timor and Nepal shows how effective the international human rights intervention can be to revive local spirit and to unleash local resources.

Not to overestimate the Human Rights Commission of Sri Lanka

9.7.1. Falsification on human rights protection in Sri Lanka often happens when the state claims that greater responsibility will be given to the HRCSL. In fact according to the words of the present Chairman of the HRCSL, S. Anandacoomaraswamy, [This commission has] “neither legislative, executive or administrative or judicial powers..... commission has no enforcement powers.” While the commission claims thus, the government at international forums claims to put all the burden of human rights protection on the Human Rights Commission. Sometimes the suggestion is that the law will be amended to improve its powers. However, the AHRC’s position consistently expressed over several years that an ombudsman like institution like the HRCSL cannot be a substitute to police criminal investigations, prosecutions and responsibilities of the judiciary. In the developed liberal democracies the ombudsman function was created only after solid foundations for police investigations, the prosecutory functions and judicial responsibilities were established. The functions of the ombudsman can be performed only on the basis of the infrastructure of justice already well laid. It is unfortunate to note that even the local and international lobby on human rights in Sri Lanka has failed to expose the great fallacy of trying to attribute an important role to the HRCSL for human rights protection. It can play some marginal role like for example visits to places of detention, assistance to victims in early stages of their violations by helping them with medical, psychological and legal assistance and by playing the role of a spokesman which can be a critical voice on the defects of the justice system in dealing with protection and promotion of human rights. However, at present the HRCSL does not have moral or constitutional credibility as it has been appointed against the provisions of the constitution itself.

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- 1 For further information on the mandate of the Special Rapporteur, please visit the website: <http://www.ohchr.org/english/issues/torture/rapporteur/index.htm>
 - 2 For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1238/>
 - 3 For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1036/>
 - 4 Reported in the Sunday Leader, January 28, 2007.
 - 5 Reporters Without Borders (RSF) press release, August 24, 2007
 - 6 AHRC Statement AS-213-2006 of September 13, 2006; also published in the Daily Mirror of September 16, 2006.
 - 7 The name has been changed and the family's identity is not revealed for security reasons.
 - 8 HRW Report titled "Return to War" September 2007.
 - 9 Reported in the Daily Mirror, August 30, 2007
 - 10 Daily Mirror, September 1, 2007
 - 11 An interview with *Al Jazeera's* Teymoor Nabili, "Peace Through War in Sri Lanka".
 - 12 Further information may be found at: <http://www.ahrchk.net/pub/mainfile.php/delgoda/>
 - 13 For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1027/>
 - 14 For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1035/>
 - 15 In a Report titled "Civilians in the way of conflict: Displaced people in Sri Lanka", September 26, 2007.
 - 16 Reports of fact-finding visits to Batticaloa and Trincomalee by representatives of the Centre for Policy Alternatives, INFORM, IMADR, Law & Society Trust, and Women & Media Collective, April & May 2007
 - 17 Report by Human Rights Watch (HRW) dated August 2007.
 - 18 Reported in the Daily Mirror, March 20, 2007 titled "IDPs moved against their will?"
 - 19 Reports of fact-finding visits to Batticaloa and Trincomalee by representatives of the Centre for Policy Alternatives, INFORM, IMADR, Law & Society Trust, and Women & Media Collective, April & May 2007. See also the IDMC report of September 2007 and Reports by Human Rights Watch (HRW), August 2007; and South Asians for Human Rights (SAHR), August 2007.
 - 20 Report by Human Rights Watch (HRW) dated August 2007.
 - 21 World Health Organisation (WHO) Report titled, "Response to the Crisis in Sri Lanka", December 15, 2006. Also see "Collective trauma in northern Sri Lanka: a qualitative psycho-social-ecological study" by Prof. Daya Somasundaram, October 2007.
 - 22 For example, see Report by the Internal Displacement Monitoring Centre titled "Civilians in the way of conflict: Displaced people in Sri Lanka", September 26, 2007.

- 23 Dr. P Saravanamuttu, in “Coming Back Home to a Truth more Dangerous than Fiction”—*Morning Leader*, of June 6, 2007.
- 24 For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1043/>
- 25 For further information please see: http://www.transparency.org/publications/gcr/download_gcr#7 (page No. 275)
- 26 For further references on the Attorney General’s Department please refer to articles in *Human Rights Solidarity* Vol.17 No. 4 (July 2007) *Kafkan Metamorphosis of the AG’s role and Compromising Position of the Attorney General*. www.hrsolidarity.net
- 27 Reporters Without Borders (RSF): *Sri Lanka Annual Report 2007*
- 28 BBCSINHALA.com dated January 23, 2007. Other who have received threats are Bandula Pathmakumara Swarnawahini; Sri Ranga MTV net work; Ruwan Fernandez Maubima and the *Sunday Standard Newspapers*; Sandaruwan Senadeera Lanka E news;
- 29 Press Release of Reporters Without Borders and International Media Support dated August 24, 2007
- 30 Reported in the *Daily Mirror*, October 27, 2007.
- 31 For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1121/>
- 32 These stories were based on the work that the AHRC and its partner organisations have done to assist victims of human rights abuses to seek justice. On the basis of materials collected by the AHRC over several years these stories were written by Patrick Lawrence, a journalist.

THAILAND

Fondness for authority undoes constitutionalism

Writing around a decade ago, leading political scientist Chai-anan Samudavanija observed how Thailand's military and bureaucracy historically had held exclusive legitimate authority to organise and mobilise large numbers of people. Political parties, by contrast, had been viewed with hostility and warned away from the sorts of activities with which they are ordinarily associated in other countries, such as calling for big meetings and building durable policies through coherent public debate. Laws were introduced to delimit the ability of secular groups to obtain popular support. "The military's main strategy was to allow for very limited political participation at the national level," Chai-anan observed. "For the military, the power of the state and political power were different matters." The appearance of representative democracy was belied by an amalgam of institutions designed to keep real authority located elsewhere.

However, even as Chai-anan wrote, things were changing rapidly. The military was on the back foot after the downfall of the previous coup leader after bloody protests in the capital during 1992, and growing numbers of civil rights groups together with conservative liberal forces managed to push through a charter that they hoped would balance new public demands with the interests of established powerful institutions and persons. The 1997 Constitution was the first to introduce notions of genuine constitutionalism, judicial review and popular involvement in all areas of social and political life in Thailand.

In 2006 that constitution was abrogated. Throughout 2007, the military and its allies have thoroughly and decisively reasserted their prerogative to determine the shape and direction of the country. Authoritarianism is back with a vengeance.

Old order versus new

For Thailand's old guard, the government of Pol. Lt. Col. Thaksin Shinawatra proved to be a sobering lesson in the dangers of someone aspiring to merge political strength with the actual power of state, through blatant use of personal and public capital. His shrewd blending of strategies for control worked in part because of his ability to manipulate the

components of the 1997 Constitution, which had been written with a view to defending human rights and promoting the rule of law, but which for Thaksin were implements which could either be used for personal advantage or ignored.

To prevent Thaksin—or anyone else like him—from resurfacing, the military has concluded that it is necessary to deny any version of constitutional government that may again open the door to his methods. In short, this means denying any form of genuine constitutionalism at all, as it would necessarily oblige the military and its allies to be answerable to the legislature, not vice versa.

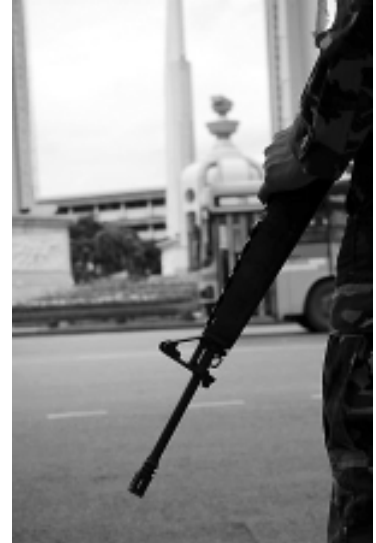
The thinking of the old order which underlay the coup was later summed up by a former coup leader, General Suchinda Kraprayoon. The general led the prior military takeover, in 1991. He was forced out of the prime ministership that he took unelected in 1992 after massive protests in Bangkok, in which hundreds were killed and injured. Around six months after the latest takeover, the *Matichon* newspaper asked him whether or not he still agrees with the idea that it is not necessary for the prime minister to be elected. Suchinda replied that he agrees “100 per cent”, and continued

“And I don’t agree with a constitution so full of details that it is impossible to move. The constitution shouldn’t have many sections, only what’s necessary. It should be written broadly... I also don’t agree with holding public hearings, because what will the people know? Even I myself haven’t read the previous constitutions, because I’m not a person who’s interested in politics. Go and ask the people how many sections there are [in a constitution]—they don’t know. So for what reason will you hold public hearings? What do the people know?”

In its plainest terms, the coup leaders thinking in both 2006 and 1991 consisted of the following givens: ordinary people know nothing; politicians have no legitimacy; constitutions are irrelevant. The question that must then be asked is what kind of constitutionalism can be developed under persons who have no genuine interest in constitutions?

Constitutionalism by force

In a special report in the middle of 2007, Basil Fernando, executive director of the Asian Human Rights Commission (AHRC), observed that legal systems exposed to extremely



A soldier next to the Democracy Monument in Bangkok (Chiang Mai 108)

adverse conditions for a long period of time might, like some ecological systems, become unrecoverable. Among those causes of such conditions, he noted, is incessant meddling with the constitution:

“One of the most serious ways of interrupting the flow of a legal system is by constantly replacing or amending its written constitution. Where the constitution is subjected to repeated meddling, and particularly where it is changed every time a new government comes to power by force, it is very difficult for a sound legal tradition to be established. If constitutional life is characterised by constant changes over a long period of time then people fail to obtain the knowledge and habits associated with genuine constitutional government. This is particularly the case where changes are made to the constitution at the behest of military rulers who are intent upon restricting the powers of the judiciary and legislature. Ultimately, they may succeed in causing widespread disillusionment and all but cease attempts at recourse through the parliament and redress through the judiciary.

“Displacement of constitutional law affects public law. Citizens’ rights to challenge government actions depend upon constitutional protections. Where these are removed, restrained or subjected to repeated alterations, the practical activities of lawyers and human rights defenders in using the courts to defend human rights also are undermined. Judicial review of government actions may be tightly controlled or altogether eliminated. Restraints may be imposed on the use of writs or their equivalents. As the constitutional law on what constitutes abuse of power is shifting and confused, people steadily lose confidence and interest in the capacity of the courts to protect their interests as against those of the executive. Ultimately, notions of abuse of power may cease altogether, and confidence in the capacity of the courts to intervene in the interests of the public may be all but lost.

“While a constitution is suspended or being altered and public law is being diminished, the military and other extant authorities will have many good opportunities to expand their powers through the introduction of state security laws, emergency laws, anti-terrorism laws and other measures and institutions to block the flow of the legal system. These all serve to remove whatever measures may have existed through the courts and other institutions to prevent or inhibit arbitrary arrest, detention, torture, extrajudicial killing and forced disappearance. Such laws may go so far as to remove the possibility of judicial inquiries into suspicious deaths, or render the inquiries pointless by granting impunity to the perpetrators, no matter what the findings of the courts. Thus, the authorities may keep some legal measures for defence of rights on the ordinary statute books for the sake of appearance, knowing full well that any complaints lodged under them will anyhow be futile. In this way, not only the flow of constitutional law, but ultimately that of the entire criminal justice system is reduced and polluted.”

And he further warned:

“At this point, the danger posed to the legal system should be obvious to all, although as in the case of ecological systems under threat there will still be some naysayers insisting that everything is perfectly normal, or that things are not as bad as they appear. Some may say that this is all part of a natural cycle: hot then cold, coup then constitution. However, the reaction of ordinary victims of abuse will show otherwise. From observation and experience, people will come to realise that lawyers, courts and even members of parliament cannot guarantee their rights. As life is now under the control of other agencies, the only way to obtain some redress is by appealing to them directly, even where they are the same ones responsible for wrongdoing. Thus a person whose son has been killed by the police may go to a senior police officer to request justice, instead of the courts. A person who has been tortured by soldiers may be taken to another agency or authority within the army to request some compensation and disciplinary action against the alleged perpetrators. Not only the legal system as a whole, but also the persons associated with it—judges, lawyers, public prosecutors and other judicial officers—are thus reduced in value in the eyes of the public. They may have the same titles and sit on the same chairs in the same buildings as before, but over time it becomes public knowledge that they too are powerless. In their stead we see the re-emergence of feudal behaviour, as the sophisticated legal system needed for survival of a healthy and functioning modern society is steadily reduced in size and capacity: even where its external appearances remain, below the surface its life is gone. Once at this point, talk about defence of human rights through institutions of justice is meaningless. Redress depends not upon order and rationality but upon circumstance and dumb luck.

“Ultimately, the notion of a constitution being replaced by military force is, from a legal perspective, an absurdity. While government propaganda may try to give the appearance of a decent and harmless coup, the effect of removing the paramount law of a country by force is to make clear that the country is lawless. The final arbiters in any conflict are not the courts but those with the firepower. The constitution, whatever constitution, has no real value. By implication, all the laws of the country, which are established under the constitution, are of limited worth, compared to that authority obtained by the barrel of the gun. Thus the country has devolved to an extremely primitive condition that will have lasting bad effects for generations, which, as in the case of ecological systems, can be reversed only through deliberate systematic measures to mitigate the damage already caused and prevent further harm from occurring.”

The least dangerous branch

Many persons have wrongly interpreted the new constitution as giving dangerous authority to the judiciary in Thailand by virtue of a gamut of new powers it affords senior judges. Nothing could be further from the truth. By virtue of these powers, the upper courts are today far more compromised and weaker than before.

In 1787, Alexander Hamilton wrote in *The Federalist* that where powers of government are properly separated the judiciary poses the least threat to constitutional rights:

“Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

The judiciary has no physical force of its own. Even for its judgments to be effected it relies upon police, corrections officers and bureaucrats. But although liberty has nothing to fear from the judiciary alone, Hamilton continued in the same passage, it has everything to fear from its union with other parts of government. A truly independent judiciary is a safeguard; a non-independent one is a grave threat:

“This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that ‘there is no liberty if the power of judging be not separated from the legislative and executive powers’ [Fn: Montesquieu, *The spirit of laws*, vol. 1, p. 181]. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone [it] would have everything to fear from its union with either of the other departments...”

Some decades after Hamilton and his peers successfully advocated for their draft constitution, a French aristocrat observed that the great strength of America’s political system lay in its courts. Alexis de Tocqueville marveled at how judges’ authority was invoked at every turn, yet the constitution granted them no overt political powers:

“What a foreigner understands only with the greatest difficulty in the United States is the judicial organization. There is so to speak no political event in which he does not hear the authority of the judge invoked; and he naturally concludes that in the United States the

judge is one of the prime political powers. When, next, he comes to examine the constitution of the courts, he discovers at first only judicial prerogatives and habits in them. In his eyes the magistrate never seems to be introduced into public affairs except by chance, but this same chance recurs every day.”

Constitutional rights were guarded through strict interpretation of law and adherence to judicial practice. In this way, he concluded, the courts formed the strongest barrier against the rise of tyranny.

One event speaking to the diminished position of the senior judiciary and the facade of legality that the military regime has sought to throw across itself came at the end of May 2007, when senior judges participated in a charade to dissolve the former ruling party that was not of their making but was, thanks to their acquiescence to the country’s military regime, made to appear one of their doing.

The military-appointed Constitutional Tribunal—comprising of six Supreme Court judges and three Supreme Administrative Court judges, including their presidents—on May 31 dissolved the Thai Rak Thai party on grounds of endangering and acting against the democratic state under the 1998 Organic Act on Political Parties, and removed the electoral rights of over one hundred party board executives, including Thaksin, for five years in accordance with Announcement No. 27 of the military coup group. Thus a group of judges appointed by an unelected and antidemocratic military regime made a decision on the actions of an elected political party that was alleged to have undermined democratic process. The decision was made on the basis of law established under a constitution that was scrapped by that very same military regime, with punishment approved and meted out to a group of individuals under one of its orders.

The May 31 decision brought to mind an important and highly relevant precedent, although not one from among those of the former military takeovers littering the modern history of Thailand that the tribunal’s judges cited in their ruling. Rather, it is from the Supreme Court of the United States, which in 2000 was asked to decide on a handful of votes in Florida upon which the presidency was to be decided. Although the court upheld the petition of the current incumbent, four dissenting judges made clear that they should never have taken up the matter in the first place. Justice Breyer opened his dissenting opinion by flatly observing that, “The Court was wrong to take this case.” He continued

“Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.”

He concluded that above all else in cases of immense political importance the courts should be extremely wary to wade in and find a solution without carefully examining their standing and the consequences of their actions:

“Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the ‘strangeness of the issue’, its ‘intractability to principled resolution’, its ‘sheer momentousness, . . . which tends to unbalance judicial judgment’, and ‘the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from’. Bickel, [*The least dangerous branch*, 1962], at 184. Those characteristics mark this case.

“At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present... And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself... we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.

“I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary ‘check upon our own exercise of power’, ‘our own sense of self-restraint’. *United States v. Butler*, 297 U. S. 1, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, ‘The most important thing we do is not doing.’ Bickel, *supra*, at 71. What it does today, the Court should have left undone.”

Justice Stevens went further. What underlay the petition to the Supreme Court, he said, was “an unstated lack of confidence in the impartiality and capacity of the state judges” to do their jobs. And he continued,

“The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”

It is worthy to note just how many of Justice Breyer’s and Stevens’s observations are applicable to what happened in Thailand this May (leaving aside the fact that the tribunal in

Thailand had no constitutional principle to consider, in the absence of any constitution worthy of the name). Notwithstanding, the warning about the dangers to public confidence caused by incautious handling of a highly-politicised and loaded case went unheeded in Bangkok as it had done in Washington DC.

The coup of September 19 was itself an enormous demonstration of a lack of confidence in the capacity of the senior judiciary to resolve thorny political and legal problems and review the legality of government actions in Thailand. By appointing a new tribunal in the stead of the Constitutional Court and in the absence, for practical purposes, of any constitution at all, setting it on the former ruling party, the coup group cynically called upon the tribunal members not only to endorse the army's displacement of the preceding political order, but also its attack on a nascent legal order that may in time have posed a threat to its interests. By complying, the judges wounded their own authority and greatly risked lasting damage to public confidence in their integrity. Whether or not time will one day heal the wounds in Thailand remains to be seen, but as in the United States seven years earlier the identity of the real loser was undoubtedly the nation's confidence in the courts. Indeed, given the amount of attention it received, the decision will have caused a great deal of confusion about the role of the judiciary in its entirety.

Justice versus legality

In the lead up to the tribunal's May decision, the King of Thailand spoke twice about the importance of judges "maintaining justice". The king pointed out that more than ever there was a question of public confidence in the judiciary and that the courts would be vital to the peace and survival of the country.

In light of the circumstances, the question that these remarks naturally prompt is whether or not it is possible to maintain any kind of justice in the contaminated moral and political atmosphere of a military dictatorship? What happens to justice when the army throws away the only genuine constitution that the country ever had? What happens to justice when it shuts down a higher court and sets up something else in its stead?

Here the distinction between justice and legalism is important. A strict adherence to legality is certainly possible under any kind of government, as observed by a British law lord, Steyn, in a speech from April 2006:

"History has shown that majority rule and strict adherence to legality is no guarantee against tyranny... in Nazi Germany, amid the Holocaust, pockets of the principle of legality (for what it was worth) sometimes survived. In Nazi Germany defendants sentenced to periods of imprisonment before the Second World War were left alone during the terms of their sentences. Only when their sentences expired did the Gestapo wait for them at

the gates of the prisons and transport them to the death camps. So even in Nazi Germany an impoverished concept of legality played some role...

“In the apartheid era millions of black people in South Africa were subjected to institutionalised tyranny and cruelty in the richest and most developed country in Africa. What is not always sufficiently appreciated is that by and large the Nationalist Government achieved its oppressive purposes by a scrupulous observance of legality. If the judges applied the oppressive laws, the Nationalist Government attained all it set out to do. That is, however, not the whole picture. In the 1980s during successive emergencies, under Chief Justice Rabie, almost every case before the highest court was heard by a so-called ‘emergency team’ which in the result decided nearly every case in favour of the government. Safe hands were the motto. In the result the highest court determinedly recast South African jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls.

“Another example is Chile. Following the coup d’etat in September 1973, thousands were arrested, tortured and murdered on the orders of General Pinochet. The civilised and constitutionally based legal system of that country had not been formally altered. It was not necessary to do so. The police state created by General Pinochet intimidated and compromised the judiciary and deprived citizens and residents of all meaningful redress to law...

“Here I pause to summarise why I regard these examples of some of the great tyrannies of the twentieth century as containing important lessons. They demonstrate that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society. Even totalitarian states mostly act according to the laws of their countries. They demonstrate the dangers of uncontrolled executive power. They also show how it is impossible to maintain true judicial independence in the contaminated moral environment of an authoritarian state.”

Thus, simple adherence to the law is not in any way sufficient to ensure justice. This is the fundamental distinction between the rule of law, and the rule by law. So upon what does justice, as opposed to legality, depend?

First, justice depends upon all persons being subject to ordinary laws and courts. But today in Thailand, certain categories of persons are beyond the law. Soldiers, police and other officials acting under emergency regulations in the south, or martial law that remains in effect in over half of the country, are protected from prosecution for acts that would otherwise be considered criminal. The coup leaders have also had an immunity clause for themselves inserted into the interim constitution, which will be carried over in some form or another after their time is up. Hence, there are no grounds upon which calls for justice can be made in Thailand until these differences before the law are addressed.

Second, justice depends upon some kind of judicial review of executive and legislative actions. It means that the courts are capable of commenting upon the legality or illegality of actions by the other parts of the state. Before the army took power last September 19 there had been a strong acknowledgment of the need for judicial review, in light of the many abuses of the former administration. Since that time, all discussion of the notion has ceased. As previously, the superior courts quietly acquiesced to the military takeover, and the judiciary was again made a subordinate, rather than an equal, of the other branches of government: the May 31 ruling being the superlative example of its compliance with the demands of the rulers of the day; hence, rule by, rather than of, law. As in South Africa during the apartheid era, the judges of Thailand have demonstrated to the regime that their hands can be safely relied upon. Thus, until this much more difficult problem of judicial subordination to other parts of government too is addressed, there can be no reason to anticipate a functioning “justice” system in Thailand soon. And unfortunately, whereas the 1997 Constitution had laid the foundations for the building of an independent judicial department of equal strength with the legislature and executive, no such thing can be expected of any constitution devised under the current military regime, no matter how hard it—and the drafters of the charter—may try to make it appear otherwise.

Martial law, emergency regulations, computer crimes, internal security and other patent ambiguities

On 27 September 2006, eight days after the coup, the country’s ambassador to the United Nations told the General Assembly that we could “well expect that one of the first tasks of the new civilian government will be to do away with martial law”.

Not only was no civilian government installed, martial law was kept in place across almost half of the country for over a year. It was also not lifted for the referendum that was held to endorse the military-backed constitution, which was passed by only around one third of total eligible voters in the country. It remains in effect in a number of parts of the country where it has evidently been used not for security purposes but to delimit the space available for persons to actively campaign against military interests, be they direct or indirect, including environmentalists opposed to industrial projects on public land.

Under martial law, military authorities are exempted from ordinary laws and criminal process. They have the power to search and seize property and vehicles anywhere and anytime; stop and search persons at will; and reside in, destroy or relocate a dwelling. They can prohibit public gatherings, publications, advertisements, use of roads or public transport and communications. They can order someone to be held under house arrest. They can evict anyone from anywhere. And they can detain suspects for up to seven days for interrogation without access to a lawyer or courts, in contrast to the 48 hours provided under the ordinary criminal procedure law.

There were many reports of soldiers exercising their powers under martial law throughout the referendum to prevent campaigning that was viewed as hostile to the new constitution. Residences were raided, vehicles stopped and materials confiscated. Nonetheless, the results of the August 19 ballot were far less favourable towards the military than it might have expected, for all of its efforts and spending of public money to obtain the required Yes vote. Just over 14 million people out of the country's 45 million eligible voters crossed the box in favour of the charter. As only 25 million bothered to turn up at the poll booths, despite the saturating propaganda campaign in the weeks beforehand, this number was sufficient to carry the draft. This number of voters was far lower than in previous recent elections, which have all been at least 62 per cent. In fact, the last time that there was a less than 60 per cent voter turnout was in the March 1992 general election that was hosted by the previous military dictatorship; its leader then took over as prime minister and was ousted by massive street protests a couple of months later, precipitating the period of nascent democracy and moves towards genuine constitutionalism of the 1990s, culminating in the abrogated 1997 Constitution.

In the south, the emergency decree that remains in force over two years after it was introduced by the former government not only permits but also obliges extraordinary detention of suspects, by providing that, "Competent officials shall be empowered to arrest and detain suspects for a period not exceeding seven days... in a designated place which is not a police station, detention centre, penal institution or prison..." The effect of this clause—together with other parts of the decree—is to all but guarantee the use of torture, forced disappearance and extrajudicial killing, for which state officers need not fear consequences as they are anyhow exempt from prosecution if they have acted in "good faith". As the decree is so vague that anything could be construed as good faith, as victims are unwilling to complain, as police won't investigate and as judges are unlikely to hear any cases this amounts to a blanket impunity clause.

In June the regime also passed the Computer Crime Act BE 2550 (2007), ostensibly to prevent violations of computer privacy and block the spread of pornography through the Internet. These objectives are well and good; however, the act grants enormous powers to persons designated as "competent officials" to obtain, search and copy computer data, and seize hardware. It also obliges Internet service providers to preserve all user records for 90 days, in the event that the said officials wish to access them. Section 14 imposes a maximum of five years' imprisonment on anyone found to have imported data that might "damage national security or cause public alarm". Section 20 allows that where data are disseminated that "might be contradictory to the peace and concord or good morals of the people" a competent official can seek a court injunction to stop this activity. Nowhere in the act is there any description of what exactly—or even broadly—might cause damage national security or contradict peace and morality. By contrast, section 21, on the restriction or destruction of data containing "undesirable instructions" stipulates what these constitute or may be found to constitute.

The passing of this so-called “act” again raises questions about the notion of law in Thailand, not least of all under the present military dictatorship. One of the key features of law, as it is properly understood, is certainty. This is a reason for its written codification: so that everyone may be informed of its contents and features, and so that the average person may be able to guide their behaviour accordingly. Where an act is so vague as to ensure that anything that the state deems threatening to its interests can fall within its ambit, upon what grounds can a person decide what to do or what not to do to stay within the confines of the law? Can it properly be called a law at all? This is the same feature of the emergency regulations over the southern provinces of Thailand, and the proposed new national security legislation, that have caused so many difficulties and so much anxiety.

Another basic principle of law is its enforceability. An act that cannot be enforced is good for nothing; in fact, it may have the opposite effect of what it intended, reducing the credibility of law-enforcement agencies and respect among the public for the notion of law itself. In this regard, section 17 of the new computer-related crimes act is particularly problematic, as it prescribes that persons not residing in Thailand responsible for offences under its other parts may also be “penalised within the Kingdom”. How they would be investigated and penalised remains a mystery; however, in including this section the drafters are perhaps hoping to take aim at the international supporters of the former government, who have been running circles around it throughout cyberspace and getting their version of events through to people in Thailand via their computers at a time that the broadcast media—which is for the most part under the control of the armed forces and bureaucracy—is telling nothing, and the print media is telling only part.

Meanwhile, a national security law has been tabled that owes much of its contents to the emergency decree operative in the south. The latest draft of the bill permits the head of the revamped Internal Security Operations Command (ISOC) behemoth—at the end of 2007 being the coup leader, General Sonthi Boonyaratglin, despite his having stepped down from the post of army commander—to curtail undefined security threats without requiring anything other than a wave of approval from the cabinet. It grants him powers to shut roads and stop vehicles, close public gatherings, keep someone under house arrest, order employers to report on employees, oblige the police and civilian officials to cooperate with the army wherever and however necessary, issue preventive arrest orders, summon anyone to appear before a designated official on any grounds, search persons or vehicles or premises at will and seize anything.



**General Sonthi
Boonyaratglin**

None of this would require a declaration of emergency, as in the south, or even martial law, which remains in effect in many parts of the country, and there will be no recourse

through judicial or legislative means. As in the south, all officers working under the security law will be protected against legal action.

General Sonthi has said that he wishes to remodel ISOC on the new US Department for Homeland Security, apparently either unaware or unconcerned about the amount of unease caused by the department among persons in the US concerned by excessive government and military power and declining civil liberties. And that is in a society with an active and genuinely independent legislature and judiciary, unlike those in Thailand. The bill that brought the department into effect was at least the subject of some sort of genuine debate, Senator Patrick Leahy referring to its provisions, like those in Thailand, as allowing for “vague, incoherent, or even obviously fictitious threats” to be used as a pretext for violating citizens’ fundamental rights.

The key feature of all this is the pretence of legality. This pretence consists in the fraudulent notion that merely by describing something as law it is thereby made in to one, even when its contents are at best incoherent and at worst absurd. It consists in the fraud that by retaining some kind of legal procedure, citizens’ rights are protected, even when established institutions for justice are bypassed. It consists in the special authority bestowed upon persons by simple fact of their being named “competent officials”, even when the effect is to place them beyond the limits of ordinary law. Everything is thus arranged so that the appearance of legality persists in its absence, and each individual state officer can be simultaneously complicit and blameless. Thus, bad things only happen to bad people.

The pretence of legality is the opposite of the principle of legality, although it is characterised by superficial likeness. “The principle of legality,” Leandro Despouy, U.N. special expert on judges and lawyers, has written, “Relates to the need to have in place and to observe clear and precise provisions relating to [a] state of emergency.” This can only be done through strict application of sound law and judicial oversight. Where law is vague, the courts marginalised, and ordinary procedures for obtaining evidence and detaining suspects are suspended, abuses are inevitable.

Feudalism comes before courts

According to an Associated Press news report in the middle of the year, police had arrested and charged a sergeant of the Royal Thai Army who was among a gang of around 30 that assaulted three British men in Nakhon Sawan, north of Bangkok, on 19 July 2007. No reason for the assault, which reportedly left one of the three seriously men injured, was given in the brief article; however, the interim prime minister of Thailand, General Surayud Chulanont, was quoted as saying that the police should thoroughly investigate it.

In another article around the same time, from the Prachatai news service, General Sonthi was reported as having ordered that a committee be set up to investigate allegations of

torture at the Ingkhayuthboriharn army camp in Pattani Province. At least 100 persons were being held at the camp without charge under emergency regulations. The general had reportedly said that if allegations of torture are found to be true then they will be referred to “the justice system”.

In August, a television station broadcast images of a group of soldiers in the north assaulting a teenager. In the August 11 footage shown by MCOT, a soldier at a checkpoint in Lamphun Province, south of Chiang Mai, knocked 17-year-old school student Ronachai Chantra off his motorcycle. Thereafter around ten of the troops stood around and kicked him in the head repeatedly as he knelt on the ground next to his fallen bike. Afterwards, he was seen wheeling it away, with a swollen and bloodied face; he was stopped and questioned by police before being



taken to the local station to record details of the incident. According to an MCOT Chiang Mai radio broadcast of August 15, Lieutenant General Chirdej Kojarat, commander of the Third Army Area, said that an investigation had already been conducted and the soldiers had been warned and told to apologise to the victim. He said that the soldiers, from the 7th Infantry Division, had mistakenly thought that the teenager had thrown a bottle as he went past. In October the AHRC received a letter from the attorney general’s office indicating that as of that time, “For this case the process has not yet passed from the inquiry official [the police] to the public prosecutor...”

Earlier, in response to the shooting of a group of youths in the south on April 9, an army officer was quoted as saying that the armed militia personnel were justified to fire in self-defence. Two young men and two boys died and a number of others were wounded when Village Defence Force volunteers shot at them in Bannang Sata, Yala. Explaining the incident, Colonel Akara Thiprot is reported to have said that the volunteers were right to shoot as the youths had attacked them with “sticks and stones”—a far cry from the standards set down in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, that non-violent means must be used before shots are fired; even then, where the use of guns is unavoidable, law-enforcement officers are supposed to exercise restraint in proportion to the seriousness of the offence and respect and preserve human life. This means that shooting in self defence is justified only “against the imminent threat of death or serious injury” or where the person is threatening to cause similar harm to others. The principles stress that, “In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”, and that, “Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.”

Just a few days later, two teenagers were killed and three wounded in the neighbouring Pattani Province after they were shot without warning by passing troops. Personnel from Task Force 2 shot dead Sucheep Rabprayoon and Chemoosor Salae, both 15, on April 13 as they were playing with friends in Bana Subdistrict. The local authorities, including Governor Panu Uthairat, municipal council members and village-level officials all acknowledged that the soldiers were in error, as did the army, but no legal action was taken against those involved.

The question that naturally arises from all of these cases is why have soldiers accused of criminal acts apparently been treated differently from ordinary citizens? An alleged crime, whether assault on the street or torture in an army camp, obliges a criminal inquiry. The “justice system” is not a secondary, optional set of institutions upon which the army may choose to call after having conducted its own inquiries to determine innocence or guilt. In the first case, perhaps due to the fact that the victims were foreigners, the police and judicial process have rightly come in to the picture from the start; in the second they have been kept at bay by an army that is patently disinterested in having anything to do with either notions or institutions of justice where allegations pertaining to systemic torture, arbitrary detention, abduction and murder arise.

The proposal by General Sonthi to establish a committee to investigate cases of torture was nothing other than the same method of using fraudulent non-criminal investigations to displace and undermine the judicial process as was used by the former government. After the 2004 killings at both Krue Se and Tak Bai, the then-prime minister ordered the setting up of political inquiries. Although these pointed the finger at certain army officers, not one has ever been held criminally liable for the hundreds of deaths and injuries that occurred on those occasions, 78 of them in army custody. This is despite the fact that a post-mortem inquest in 2006 identified General Pallop Pinmanee and two of his subordinates as the officers responsible for the Krue Se killings, thereby obliging the public prosecutor to refer the case to the police for criminal investigation; nothing has been heard of it since.



General Pallop Pinmanee

Nor was there any further evidence of actions by the police or prosecutor by the end of 2007. On the contrary, General Pallop was reappointed to a senior post in the Internal Security Operations Command, of which he was deputy director at the time of the killings in 2004. He has since made it known that he intends to stand for parliament in forthcoming elections.

Together these cases speak to the level of impunity enjoyed by all state officers in Thailand, and the decrepit and deformed condition of its investigative agencies. In a functioning legal system, a police force goes to work irrespective of the identity of the accused; in Thailand, it is apparently first necessary for it to be reassured by senior persons that it should do its job. Thus, what should be the norm must instead first be insisted upon before being done. In the last few years, the AHRC has documented literally hundreds of cases that prove this point: not one has yet been properly investigated and successfully prosecuted.

In response to the killings in Bannang Sata, Colonel Akara was quoted as saying that there would be no legal action against the volunteer militia personnel as they had acted according to the rules of engagement. This much is correct. The rules of engagement, such as they exist in southern Thailand, give all security personnel a free hand to kill, detain, search and destroy with complete impunity. Thus, feudalism reigns over the courts, impunity over law.

Police reforms without public participation or commonsense

During 2007 the interim prime minister repeatedly stressed the need for extensive police reforms. Few people would disagree; even police officers themselves acknowledge that the force is in need of an overhaul. The problem is that his government has not been the one to do it.

One of the most important reasons that the proposed reforms will not work is that not only the police but the public have no conviction in them.

Reforming an entire police force is an enormously difficult task for any society, not least of all one where it has heavy entrenched power at all levels and has been built upon corruption and self-financing, and it is one that can only succeed through strong and active public involvement and backing. The police will naturally be opposed to anything that makes them more accountable or subject to outside control, but where the public is the driving force behind change and is unprepared to tolerate their excesses any longer then it becomes more difficult for them to resist.

The experience of Hong Kong in reforming a much smaller and less powerful force than that in Thailand is informative. In the 1960s the Hong Kong police had unparalleled power and influence, and were enormously corrupt: they were involved in all areas of crime in the territory, including illicit trading in drugs, gambling and prostitution. In the early 1970s the public rallied and demanded change after a senior officer fled with millions of dollars obtained through illegal activities. He was extradited and jailed. In the process, the Independent Commission Against Corruption was set up, with the police force as its first

target. In its early days the commission's headquarters was literally surrounded and stormed by outraged police, forcing it to reach a compromise on prosecutions of many officers. And in 1977 its investigations provoked a mass police walkout. In different circumstances, such incidents may have been enough to kill off or severely weaken this important fledgling agency. However, the critical element was the public interest: the people of Hong Kong were not prepared to go back to the old days. They would no longer accept that policing had to be corrupt and contrary to their interests. With overwhelming support, constant media attention and intense pressure from all quarters, reforms ultimately proved a success; today Hong Kong has one of the most efficient and law-abiding police forces in Asia.

By contrast, in Thailand there is no evidence of public support for the proposed police reforms at all. This is in large part because the participation of ordinary persons there in matters affecting their day to day lives—other than contrived participation for the purposes of the regime's propaganda—has been suspended since the September 19 coup of last year.

Another reason that the reforms will fail is that they consist largely of generic solutions that they don't address the real problems. Decentralisation of policing may be a good idea in principle but in Thailand it may prove to be highly regressive. The police in Thailand had their origins as a decentralised force. Local governors organised and used units as their personal security and paramilitary forces. Over time power became concentrated in Bangkok in order to diminish the control of governors, local politicians and others over the police. Thus, the capacity of national-level politicians, including the former prime minister—himself once a police officer—to influence and control the police increased, without really rubbing out the influence of local authorities. The current proposal may well end in a reversion to the earlier model of locally politicised police, rather than nationally politicised ones, and no change in the overall level of influence and corruption.

The real issue for the police in Thailand is command responsibility. The notion that superior officers should be held fully accountable for the wrongdoing of subordinates has not yet entered into the system of policing there in any significant way. On the contrary, command responsibility is understood largely as senior officers defending their subordinates against allegations of wrongdoing, even in the most absurd circumstances: such as when a police station commander sued a senior forensic scientist for implying that his men had shot and killed someone illegally. There is no way that the problem of command responsibility will be addressed through the current proposed reforms, under the current interim government, and nor does it appear to be given the weight that it deserves by any concerned agencies, including United Nations bodies.

In February the AHRC director, Basil Fernando, wrote a letter to the head of the Criminal Justice Reform Unit of the UN Office on Drugs and Crime, Mark Shaw, in response to

information that the office had offered to assist the Surayud administration in its police reform efforts, explaining that the priority for any work on policing in Thailand must be command responsibility:

“Without command responsibility being enforced within the police hierarchy, superior officers are untouched by allegations that their subordinates have tortured suspects, falsified evidence, doctored records, and otherwise ignored procedure. Without command responsibility, there is no way to combat the intimate relationships between the police and organised crime in Thailand, the line between which has been described as being so fine as to be non-existent. Without command responsibility it will be impossible to introduce the notion of accountability into the police force, and without accountability there can be no reform. The key issue for all police reform must therefore be command responsibility.”

He concluded the letter by asserting that:

“The aim of any police reform in Thailand must be much more than to break the links between the police and politicians. It must be informed by serious understanding of the deep problems in policing there that have developed over the last century—not merely the last few years—and aim to break the links between the police, organised crime and the military that have been forged and multiplied throughout this period. The success or failure of your contribution will be measured in these terms.”

The letter went unanswered.

Kalasin, police, killings, disappearances, torture

The need for effective police reforms, rather than that proposed by the current administration, is borne out by the stories of dozens of victims of the police in Kalasin District, part of the northeastern province by the same name, which the AHRC has documented over the last year.



The Kalasin police appear to have killed repeatedly: at very least 24 times between 2004 and 2006. There is little doubt that there are other victims: bodies have never been found, or have been cremated before proper identification. The intense fear of the police that hangs over the province means that the families of victims and witnesses are terrified to speak out. Their fear is justified. A witness in the case of one teenager later found dead was warned that if she told the truth she would “hang like that kid”.

The “kid” was 17-year-old Kietisak Thitboonkrong, who was found tortured to death and dumped in a field after he had been arrested on 16 July 2004. His grandmother had waited for him after police told her on July 22 that he would be sent home on bail, but he never arrived. At around 6pm, Kietisak called her and in a shaking voice urged her to come back to the police station quickly. “They didn’t tell the truth to you, grandma. It is not as they said,” he told her. “They are going to take me away and kill me. Hurry come and help me, I’m on the second floor.” After that the line was cut. At about 6:30pm, Kietisak also called his uncle and urged him to come and get him immediately. He said that he heard his grandmother’s voice downstairs at the station; but no one was able to meet him. The mobile phone that Kietisak used to call on both occasions was in the possession of a witness at the police station, who has confirmed that he was there and that he called his grandmother and uncle with the phone, but does not know what happened to him after that.

On July 26, after Kietisak’s body was found in part of a neighbouring province, about 30km away, it was sent for autopsy at a regional hospital. The autopsy revealed bruising on his head, chest and legs, cuts on the chest and both wrists, rope tied around the neck and injuries to the elbows. He appeared to have been dragged along the ground and rope tied around the neck. Persons who had been present when the body was recovered said that the boy’s feet and slippers were not dirty, although the surrounding area was muddy due to heavy rain. There were also reportedly many other prints around the area that were clearly not those of farmers. An examination at the Central Institute of Forensic Science (CIFS) in Bangkok confirmed the findings and found many more wounds on the body, including cuts on the wrists that had been caused by the victim being pulled by handcuffs. The victim’s testicles also had been crushed. It concluded that he had died from suffocation caused by the rope being wrapped around his neck several times by someone else, who had then made it to appear that he had committed suicide by hanging.

An investigation team from the National Human Rights Commission (NHRC) of Thailand obtained the telephone records for the mobile phone that was used by Kietisak and confirmed that the phone calls matched the witness testimonies, and that he had still been in the police station at 6:30pm, after which time he disappeared, contrary to the police record, which shows that he was released at 4:35pm. It also found that he was recorded as having been arrested together with another youth, Adul Nathongchai, who later complained that they had been beaten up by the police to obtain forced confessions. Adul had been bailed out and released on July 19. When the NHRC personnel checked the police records of the charges, they found that the photographs submitted in evidence were not clear and that the signatures on the confessions appear to have been forged.

After the NHRC found the gaps in the police version of events, the police changed their story to say that an officer had seen Kietisak outside of the station (after being released) at

about 6pm but thinking that he had absconded brought him back and then re-released him at about 7pm. In September 2006 the NHRC recommended to the government that there be an independent investigation into the case, involving all personnel alleged to have been involved, including senior officers, and that the family of the victim be compensated.



**Kalasin District Police Station
(Police website)**

Meanwhile, in June 2005, the Department of Special Investigation (DSI) took up the case, but like all other human rights cases in its hands under the former administration, failed to make any progress. In October 2006, an officer of the DSI told journalists that it had interrogated and done lie detector tests on 12 police from Kalasin and that so far five of them had been identified as possible perpetrators, but up to now none are known to have been charged. On the contrary, investigating officer Sumitr Nansathit has been promoted.

Here are some of the other cases over which the Kalasin police are suspected, which speak to a pattern of torture, abduction and murder under their watch:

1. Namphoon Dolrasamee (22) was shot from the side by an unknown man on a motorcycle at 1:30pm on 11 February 2004 while herself riding a motorcycle with her sister Narumon past the Prompan Grill meat shop, Kalasin District. After her motorcycle crashed to the ground, the man walked directly to her and shot her head twice, killing her immediately. The police kept Namphon's body for two days without allowing her family to see it, after which an official from the CIFS conducted an autopsy, but the family was apparently not informed of the findings. Namphon had earlier been arrested for drug trafficking but was acquitted. Her family believes that her death was part of the Kalasin District Police operations in the second phase of the "war on drugs" launched by the former government.

2. Wan Yuboonchu, a merchant from Ponggam District, disappeared with his wife Sommai Yuboonchu after visiting a dentist in Kalasin District on 4 May 2005. Two unknown men with caps were video recorded using the couple's ATM card to withdraw money from their account after they disappeared. The family filed a complaint to the Kalasin District Police and Kamalasai District Police,



A victim of alleged extrajudicial killing by the Kalasin police

but there was no progress. A relative, Atthrot Yubonchot, also claimed that the couple had been abducted to Cambodia and asked for ransom from their immediate family for their return. After money was paid but the couple did not return, the family complained to the Crime Suppression Division (CSD) in Bangkok. Atthrot and Somboon, a policeman from Ponggam Police Station, Kamalasai District, were prosecuted and Atthrot was found guilty of blackmail and sentenced to eight years in jail (Penal Code section 338). He was bailed out pending appeal. Somboon was acquitted for lack of evidence. The CSD personnel also searched the house of a Kalasin District Police officer, where they found a cap similar to the one worn by the men who withdrew money from the couple's account. However, they have not obtained enough evidence with which to prosecute him.

3. Suphan Donchompoo, a 49-year-old municipal councilor, disappeared with his 46-year-old wife Lamyong Donchompoo at 1pm on 7 April 2006 while putting up posters for a local candidate for the senate, Chaimai Waramitra, between Baan Nongtae and Baan Nongbua, Huangue Subdistrict, Yangtalad District, Kalasin Province. They were seen being put into a sedan; another vehicle, a pick up, was with the sedan, and someone also drove their own car away. The family lodged a complaint at the Yangtalad Police Station on 9 April 2006 but there has been no progress in the case. Suphan's family believe that the Kalasin District Police were involved as he was indebted and had conflicts with them; also, the couple's youngest daughter was allegedly involved in drug trafficking and normally used the pick up which they had driven that day.

4. In mid-February 2004, Pravit Sattawuth (a.k.a. Pednoi), 22, fought with some people in his house on Thasinca Road in Kalasin district. His neighbors said that a policeman was involved. After, the police came and took him away. When he returned home, he told his mother that they had assaulted him. On February 24, three policemen from Kalasin District Police Station again came to Pravit's house. They were not in uniform. They brought him to the police station. Pravit's girlfriend went to the station to look for him, but he was not there. At that time, the "war on drugs" was in its first month of operation and the police had arrested many teenagers over drug-related crimes. The police had earlier come to Pravit's house and accused him of being an addict and a drug dealer. According to the family, Pravit had earlier used amphetamines, but had quit the habit in early 2003. Around 6-7 pm of the same day, Pravit's body was found in Kudnamkin public park. According to his relatives, the post-mortem examination showed that he had been severely tortured before his death. A boy working in a Caltex gas station owned by a policeman from Kalasin nicknamed Montry later found Pravit's wallet and returned it to his parents. Local people believe that Montry was connected with the young man's death. Nobody now knows about the whereabouts of the boy who worked in the gas station, and Pravit's friends have gone to work in Bangkok.

5. On 19 July 2004, police arrested 15-year-old Krischadol Pancha (a.k.a. Micky) and two friends, Surasak Poonklang (a.k.a. Tam) and Rames Teerathassiripoj (a.k.a. New) for alleged robbery in Chumchon Market. Micky was reportedly arrested while he was paying fines in the police station; Tam and New were arrested at their homes, without any arrest warrants being shown. The police told the three to give up the 2300 Baht (USD 55) and knife that they had allegedly used in the robbery; however, they denied the accusations and were allegedly beaten by the police. The next day Micky obtained bail. His grandmother, Thip Pancha, went to Kalasin District Police Station after lunch to bail him out and pick him up. A policeman told her that the release order had not yet arrived, and asked her to wait at home. In the evening, when Micky had not come home, Thip went back to the station again to ask his whereabouts. This time a policeman told her that he had been released, and asked her to go back home and wait. Thip wondered why the police released her grandson in the absence of his guardian. Micky has never been seen since. According to witnesses, the police told Micky that they would drop him at home; a policeman who was not in uniform allegedly took him out of the police station at around 3pm. At that time the other two friends were still detained in the police station and waited for their relatives to come. The three were later found guilty of robbery; Tam and New were sent to juvenile detention in Khon Kaen. Thip forfeited bail because Micky never came to court.

6. Oynapa Sukprasong, a 34-year-old businesswoman, was a broker for the government lottery who paid “protection” money to the police to run other gambling activities on the side. In 2004, a second group of police sent their representative to demand money, but she refused because she was already paying to another group. The latter group then searched her house twice, and seized her son’s computer. They subsequently detained her and her secretary, Wanthana Thakpama, overnight without filing charges. She then stopped her underground lottery business and also ceased paying the police. One to two weeks before she was taken away, a factory worker of hers who used to be an agent for the illegal lottery was also taken away for interrogation. On 2 December 2004, Oynapa and Wanthana went to the Buddhist ceremony at Buengwichai in Kalasin district. Oynapa’s red van was found abandoned on 227th St in Huay Srithon. That night some of the policemen whom Oynapa used to pay came to her house and talked to her husband, Opas Sukprasong. They asked him if his wife had gone missing, and if he would like them to find her. Opas quarrelled with them and asked, “Why did you take a woman and not me instead?” The police left and said that he could call them if he needed help. Oynapa and Wanthana were never found. Provincial police investigations revealed only that one witness had seen three men putting the women in a car on the day they disappeared. No progress was made in their inquiries.

The characteristic of most of these cases, and most incidents of police torture and abuse in Thailand, is that the victims are ordinary persons accused of small criminal offences: robbery of a motorcycle, theft of some jewellery, gambling with friends. Sometimes torture

is used to extract a confession; whether the victim is a real suspect or not is irrelevant. The torture is often extremely brutal: Kietisak had his genitals crushed; others have had theirs squeezed, burnt and electrocuted.

Routine torture and killing send a message to society that the police are both dangerous and unstoppable. Family members who try to complain, such as Kietisak's grandmother, find themselves up against the entire local police structure, not just individual officers. Superiors of accused police at all levels routinely defend their subordinates against accusations of wrongdoing, rather than investigate or discipline them; a police station commander whose men were accused by a forensic scientist of extrajudicial killing sued her himself. In other cases the alleged perpetrators have sued family members, such as the mother of one torture victim in Ayutthaya. Investigations go on for years without result, and in the meantime the accused remain at their posts. Even in prominent cases, such as the trial of five police in connection with the disappearance of human rights lawyer Somchai Neelaphajit, the accused continue in active service, despite criminal inquiries or charges pending against them.

Little wonder that victims take some cash and disappear, rather than seeking out justice. Ordinary victims, their families and general public understand only that the law-enforcement system cannot stop the police, for the reason that they control it. There are no effective independent channels for receiving complaints and investigating them, despite many calls for their establishment, including from the United Nations. Prosecutors eat from the hands of the police and the courts defer to the side of authority rather than applying the benefit of the doubt as required in principle. The perpetrators have the psychological and institutional reassurances that they are safe; it is everyone else that needs to watch out.

Now that Thailand has, at the start of October, finally acceded to the UN Convention against Torture—after years of work by many persons, among them human rights advocates and personnel in its justice ministry—it must back the move with the legal and institutional changes needed to give it effect. They include:

1. Amending domestic law so as to comply with the convention. At the moment, Thailand's penal code does not cover acts of torture. The offences of bodily harm it describes are limited in scope, and apply to all offenders equally, whereas torture is an offence specific to state agents (in their official capacity) or others acting on their behalf.



Not only is the government required to change the law, but it must also ensure that the penalties it imposes take into account the very serious nature of the offence. For models in the region, drafters can look to Hong Kong, which prescribes life imprisonment for torture under its 1993 ordinance, and Sri Lanka, which set a mandatory minimum seven years in a 1994 act.

2. Establishing a specialised unit to receive and investigate complaints, gather evidence and prosecute the accused. Attempts in recent years to diminish police dominance of criminal investigation—such as by setting up new agencies under the justice ministry and reforming procedure—have at every point been thwarted or compromised by the same entrenched authority that they have been aimed at delimiting.

Any serious efforts to eliminate torture in Thailand will also be strongly opposed, and policymakers and human rights advocates alike will have to consider how a properly trained and well-equipped unit can be established to handle cases and resist the influence of torturers and their bosses. For this, advice and assistance should be sought from relevant United Nations bodies as well as other countries with similar experiences.

3. Making greater efforts to protect, to compensate and rehabilitate victims. Justice depends upon the physical security of complainants and witnesses. At present, it is incredibly easy for police and other state officers in Thailand to threaten or cajole almost anyone. A relatively new witness protection law does not guarantee prompt assistance in cases of imminent danger. And even where given, protection may last only a short time, and be offered by the police themselves.

People who have been tortured in Thailand can at present be compensated under a general law for victims of crime. However, this act does not take into account the many special circumstances that arise in cases of torture, such as the need for fast and sometimes expensive medical treatment, and long-term counseling for psychological trauma.

Money alone will not suffice, least of all when it may not be paid until years later. There has been a great deal of work on rehabilitating and compensating torture victims in recent years, and there are many experienced and interested groups worldwide to whom the authorities in Thailand can go for useful advice and assistance.

How to not complete a trial

Most persons do not associate Thailand with lengthy delays in trials of the sort that are seen in some countries in the region. However, the AHRC in 2007 documented and issued an appeal on a case that has been heard in the Bangkok South Criminal Court since 1993. The four defendants stand accused of having plotted to kill the then-Supreme Court

president. The defence maintains that the police set them up; no material evidence has been brought against them, despite two senior officers having testified from 1995 to 2006. But the case goes on anyhow. So far it has been heard nearly 500 times, by an incredible total of 93 different judges. Two of the four defendants were imprisoned for seven years before receiving bail; if found innocent, they will be entitled to claim compensation from the government for this period of detention.

The court has authority and grounds on which to stop the case. It is obliged by law to see that trials are “speedy, continuous and fair”, and it is entitled to order that no more evidence be given and the proceedings be halted where reason exists to do so. It can also order that the case be closed where the charges have not properly complied with law. The Constitution Court in 2000 made a related ruling that was favourable to the defendants. The defence has since repeatedly applied for the case to be closed, without success.

Careful study of the case gives rise to many serious questions about the state of criminal justice and the judiciary in Thailand. Why didn't the court set down a strict timetable for hearings and ensure that all parties kept to it? Why didn't it admonish the two senior police officers for failing to appear in court on scheduled dates? Why did it allow the prosecution to cover for the apparent lack of evidence by playing for time? Why did it refuse the applications for the case to be closed, despite the ruling of the superior court? And why hasn't it put it to a stop to the trial at any time in the six years since?

The AHRC has documented and reported to the justice ministry of Thailand on various cases where hearings have gone on with no apparent purpose other than to prolong the misery of the defendants, while in other instances the accused have been handed lengthy jail terms after barely having enough time in which to insist that they were tortured by the police investigators. Hearings frequently persist despite a manifest lack of evidence, or where evidence has been completely mutilated by the police and prosecution, either deliberately or negligently.

A senior justice ministry bureaucrat in 2006 acknowledged that some 30 per cent of criminal cases go to Thailand's courts without evidence. The figure is conservative. Cases going to court on the back of police investigations do not require preliminary hearings; they go directly to trial, in contrast to those lodged by private litigants. The police have little incentive to come up with material proof of a crime: in most ordinary criminal cases, coercing or beating a confession out of the accused, whether the real perpetrator or not, is sufficient. In some cases it may be necessary to threaten to implicate other persons in the crime unless they agree to collaborate. The public prosecutor goes along with the police version, knowing full well that when the accused retracts his confession in court the judge will side with the police. Nobody has any incentive to do anything differently, or any better.

One of the main defects in Thailand's judiciary is its lack of leadership. There is no body of well-established standing senior judges working cooperatively to give it marked direction and purpose, as exists in many jurisdictions. Some individual judges are highly regarded within the profession, but few if any could be considered household names, and there is no corpus of such persons upon which the public can place strong expectations.

The case in the Bangkok South Criminal Court is one among many that point to the need for drastic overhaul of Thailand's criminal procedure. The failure to bring the trial to a prompt conclusion amounts to a violation of the defendants' fundamental rights under both national and international law. Ultimately, its 14-year duration has defeated any prospects that the case can be fairly adjudicated, let alone by a succession of 93 judges. This failure is a disservice not only to the defendants but also to the court itself. The reputation and credibility of the judiciary can hardly be improved when the courts are themselves responsible for such protracted abuse.

The ailments suffered by Thailand's courts cannot and will not be addressed by an interim administration under military control, or by any government that comes to power through a fraudulent constitutional process. However, individual judges can set examples, by using the powers vested in them to ensure that they meet their obligation to try cases quickly, continuously and fairly. Among those things that they can do as a matter of course are to

1. Instruct all parties to a case, including witnesses who are state officers, to appear at court on time and according to a fixed schedule, subject to penalties—including dismissal of the charges—for failure to comply;
2. Postpone hearings only in exceptional circumstances;
3. During opening proceedings, and at any point throughout a trial, ascertain that witnesses and evidence do exist upon which to bring the charges, and that they will be brought to the court in a timely and professional manner; and,
4. Review and where necessary dismiss cases at any time that it becomes apparent that no such evidence as promised in fact exists and can be presented to the court.

Conscientious application of the existing legal authority of the courts in Thailand, although not a comprehensive remedy to the judiciary's problems, would go a long way to improving its integrity in the eyes of the public and protecting the basic rights of plaintiffs and defendants alike.

The fondness for authority and Thailand's contradiction

In his classic essay on conservatism, Friedrich Hayek identifies two of its defining characteristics as a fear of uncontrolled social forces and a fondness for authority. "The conservative feels safe and content," Hayek writes, "Only if he is assured that some higher wisdom watches and supervises change, only if he knows that some authority is charged with keeping the change 'orderly'." For a conservative, he continues, who wields power is more important than how:

"In the last resort, the conservative position rests on the belief that in any society there are recognizably superior persons whose inherited standards and values and position ought to be protected and who should have a greater influence on public affairs than others."

Here in a sentence is a synopsis of the thinking that dominated government in Thailand for most of the last century, and which obtained new ground under military rule in 2007. It is a manner of thinking inimical to genuine constitutional rule. It is also hostile to the building of institutions through which notions of legal and social equity may be expressed.

While the interim government has repeatedly mouthed its concern for the rule of law and human rights, it has throughout 2007 proved that in reality it is diametrically opposed to them. The general election set for the end of December will do nothing to change this. The military has already re-cemented its position at the centre of key institutions and regardless of whatever else happens it will use its renewed authority to full effect.

The people of Thailand are now caught in strange and contradictory circumstances. On the one hand, the social and economic life of their country is undeniably in the 21st century. On the other hand, its political and legal life has now been firmly thrown back to the 1980s. As a result, many good persons will likely withdraw from public life completely, while others who may have contributed to them will now be reluctant or unwilling to do so. The parliament, courts and legal profession will likely lose good people, as the former returns to an elite bureaucratic mode of government and the latter become more and more politically compromised and corrupted. Fewer persons also will seek to obtain redress for grievances through these institutions, and will instead turn to outside avenues and feudal remedies in order to gain partial satisfaction, rather than get nothing at all.

The Asian Human Rights Commission (AHRC) is an independent non-governmental organisation that monitors the human rights situations in the region. It works at the local level with partner organisations, as well as at the regional and international levels, to advocate for the greater enjoyment of all rights and the prevention of violations thereof. The strengthening of the institutions of the rule of law, notably the police and judiciary, in Asia's nations is seen as the fundamental means through which the effective respect for human rights can be achieved.

This publication is a compendium of the organisation's reports on its main countries of focus during 2007. The year has been particularly turbulent in many of these, notably Bangladesh, Burma, Pakistan and Sri Lanka, and this report highlights the various human rights issues that the organisation has encountered in these countries in crisis, as well as a range of issues covered in Cambodia, India, Indonesia, Nepal, the Philippines, South Korea and Thailand. It is hoped that the analysis contained within this report will contribute to furthering the discussion on rights in the region, in order to see an end to widespread abuses, including arbitrary arrests and detention, torture, forced disappearances, extra-judicial killings and other grave violations that still plague most of Asia's societies.

