Monitoring The Right for an Effective Remedy For Human Rights Violations

- Implementation of Article 2 of ICCPR -

On the Occasion of the 57th Session of the United Nations Commission on Human Rights

ASIAN HUMAN RIGHTS COMMISSION

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CONTENTS

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

- International Covenant on Civil and Political Rights

The Enforcement of Rights

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

- Asian Human Rights Charter - A People's Charter

An Overview of the Police and Rule of Law in Asia (In Light of Article 2 of the ICCPR)*

by Basil Fernando,[1] Executive Director, Asian Human Rights Commission

This paper examines the actual circumstances of the police and rule of law in Asia during recent times. It proceeds from the assumption that people in "traditional" democracies find it extremely difficult to understand what occurs in the name of the rule of law and policing in countries falling outside their paradigm. These difficulties in understanding suggest experiential differences that make misunderstanding inevitable. A worthwhile discourse between people from these different backgrounds can take place only with an appreciation of such difficulties. Classification of "North" and "South" suggests a territorial division. The classification of traditional democracies as against the others suggests much more complex historical, social and political differences, pointing to the development of different institutions for the rule of law and policing in particular.

* A paper presented at the International Workshop on Human Rights and the Police in Transitional Countries, 6 - 10 March, 2001, Copenhagen, Denmark, organised by the Danish Centre for Human Rights

This discussion is limited to present-day reality to avoid entering into historical debates about the extent to which before the rise of what are now known as traditional democracies there prevailed vibrant democratic models in other places (such as during the third century BC when India's Emperor Asoka reigned over a rich democracy contemporaneous to that period). Without in any way undermining the importance of such discussions, this paper will concentrate on the actual realities that the peoples of Asia are now experiencing in terms of the rule of law and policing. It concludes by examining these realities in light of Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

The Importance of Terminology

In different contexts the same terms may have different connotations, hence the need to begin by seeking some clarification.[2] A police officer may be described as a "law-enforcement officer" and to a person from a traditional democracy the two terms are likely to carry no distinction. However in other jurisdictions an explicit reference to the law needs to be part of the description of a policeman. For instance, in post-Pol Pot Cambodia there is little law in existence by way of legal enactment.[3] Thus, the activities of police officers are not guided by what laws people are supposed to observe. Police improvise their role and duties according to circumstances and policy guidance given to them from above. Even in circumstances where comprehensive laws exist, as in Sri Lanka, they can be suspended without much difficulty to allow police officers to engage in massive killings (as, for example, when they were called upon to cause mass disappearances in the late 1980s).[4] Moreover, police officers in all Asian countries are expected to use coercion—including torture—in criminal investigations. Further, legislative definitions and avenues available for law enforcement are often so different that going by legislation only can lead to serious difficulties.

In most instances, the concept of "order" is not understood as order according to the law but as order *with or without* the law.[5] Thus, when Chia Thye Poh was detained without trial by the Singapore authorities for 26 years it was not considered illegal.[6] In Malaysia,

Anwar Ibrahim is now in prison based on his conviction secured at a trial condemned as unfair all over the world. Such acts are justified as "keeping order", and law enforcement officers must carry out these orders irrespective of the legal issues involved. The 1999 military coup in Pakistan was likewise justified, and law enforcement officers there are now expected to act on the basis of this assumption. The justification for torture in many Asian countries is also based on the view that it is necessary for maintaining order. What follows from this situation is that the rule of law is often sacrificed under the pretext of maintaining order. Police officers are thus seen more as "order-enforcement officers" rather than law-enforcement officers.

Thus, the starting point for a meaningful discussion on the rule of law and policing is, I believe, to draw a distinction between order-enforcement officers and law enforcement officers. The main differences are as follows:

(1) The concept of order-enforcement is not derived from that of the rule of law. The concept of law-enforcement, on the other hand, is based on that of the rule of law.

(2) Law enforcement mandates criminal investigations to prove that crimes have been committed, undertaken through the submission of evidence. Order enforcement, however, does not require investigations or proof according to the law. This distinction has huge implications for the understanding of policing functions.

(3) Criminal investigations require training, which requires basic education. Investigations also require facilities, such as forensic labs. These are not required by a police force designed to keep order through whatever means.

(4) Law enforcement makes the elimination of use of torture and degrading punishment a possibility. Among order-enforcers this is not possible, and such officers have even been used to commit extrajudicial killings—sometimes on a large scale.

(5) In law enforcement, policing is a function subordinated and controlled by the judiciary and prosecutors. Officers who are mobilised simply to maintain order, however, are free from such controls.

(6) Law enforcement presupposes equality before the law. Order enforcement has no such prerequisite, and in fact unequal treatment is inherent in the system.

(7) Order enforcement is associated with impunity while law enforcement is not.

(8) Law enforcement can be a transparent process, and transparency can be maintained by procedural means, such as by keeping the required records. Order enforcement does not have such a requirement. Indeed, often an order enforcement officer is discouraged from keeping records.

(9) Communication between the hierarchy and subordinates in a law-enforcement agency is usually based on written codes of ethics and discipline. Order enforcement does not require such codes, either written or unwritten.

The distinctions made above help to clarify some of the contemporary problems for the rule of law and policing in Asia. First of all, there is often resistance to the development of law. For example, more than seven years after the UN-sponsored elections in Cambodia the country has no penal code or criminal procedure code. The reasons for this deficiency are more political than technical. Development of the law is seen as disruptive to the social order maintained in the country (such as the types of property ownership that have developed since the Pol Pot era). Many activities of the newly rich would become impossible if there were an expansion of the law and its enforcement.

Secondly, in some countries, development of the law is permitted in some areas, such as commerce, but restricted in regard to personal liberties—Malaysia and Singapore are good examples of this.

Thirdly, very basic laws are sometimes suspended under the pretext that such laws are detrimental to order. In Sri Lanka, even laws relating the reporting of deaths to the courts were suspended to allow the police to engage in acts of large-scale murder and the disposal of bodies. Moreover, the national and internal security laws of almost all Southeast Asian countries have resulted in the suspension of many laws that give protection to people from illegal arrest, detention, invasions of privacy and so on.

Another factor that militates against the rule of law is globalisation. In Asia, multinational companies want a type of order in which local people cannot protest against the ill-effects of companies policies and actions. They want repressive regimes that protect their interests rather than democracies in which people enjoy the rule of law. The more misery new economic developments bring to people, the less sympathy there is to the rule of law by those who wield political and economic power. Advocacy of the rule of law has often become dangerous, with people working for democracy exposed to death threats and other risks.

All in all, the most fundamental distinctions between police officers maintaining law and security guards keeping order have been lost, even to such an extent that from July to December 2000 police officers in Cambodia's capital handed over at least 10 alleged criminals to be beaten to death by mobs. Similarly, in October 2000 at least 26 inmates of Sri Lanka's Bindunuwewa Rehabilitation Centre were chopped to death while 60 armed policemen looked on. Unfortunately, in most Asian countries such incidents are increasingly commonplace.

Current Actions to Monitor Police Behaviour

Equipped with these clarifications, it is necessary to examine suggestions that have been made to enforce the rule of law in Asia and define policing in its terms. In today's Sri Lanka a popular demand is for the appointment of an independent commission to control police affairs, thereby countering manipulation of the police by politicians.[7] This phenomenon is quite common across both South Asia and Asia as a whole: the police are seen as mere enforcers of order due to political control. The call for an independent police force demands their de-linking from political control; the confinement of their duties to enforcement under the rule of law. However in Singapore (and Malaysia) there is no belief that the police will have any independence from the ruling political party. In this situation, comprehensive political reforms are a precondition for developing a police force that will respect the rule of law.

Others have pointed out that mere independence of the police is insufficient and that the functions of police investigation must be more closely linked with the work of prosecutors. For example, it has been observed that when the police are left do criminal investigations by themselves they often fail to do so, particularly when the police themselves are involved in criminal activity. The police then claim that they do not have sufficient evidence to prosecute the criminals. It has thus been suggested that the police must report all serious crimes to the prosecutors from the time they receive the first complaint and that prosecutors must share responsibility for ensuring the satisfactory conduct of investigations. Thus, the police's practice of neglecting to comply with the law may be negated by the prosecutors' supervision, and the "no evidence excuse" can then be rejected. Control exercised by prosecutors over the police can also help to eliminate torture, degrading punishment and illegal detention. Therefore, the principle to be established is that while the police must be made independent of the politicians they must also be made accountable to other legally established institutions.

In addition to the prosecutors, the other institution most relied upon to ensure that the police act within the rule of law is the judiciary. In this regard, the most positive Asian contribution has been made by the Supreme Court of India, which has in numerous cases intervened to prevent government misuse of the police. Of particular importance is the way in which the Supreme Court broke the authoritarian inroads attempted by the government of the late Indira Gandhi. This government's use of emergency regulations was systematically opposed by the Supreme Court, which thereby established a prestigious place for itself as the guardian of human rights and the rule of law in India. Even on such day-to-day affairs as arrests and detention, it has intervened to ensure police discipline. In one famous case (*D. K. Basu vs. State of West Bengal*) the court issued a concise set of instructions on procedures for arrest and detention. The court also sought media assistance to broadcast these instructions repeatedly throughout India, where they remain exhibited in many public places, as follows:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) The police officer carrying out the arrest shall prepare a memo at the time of arrest, and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed as soon as practicable that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organisation in the district and the police station of the area concerned telegraphically within a period of eight to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officers in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest, and major and minor injuries, if any are present on his/her body, must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting

the arrest, and its copy must be provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody or by a doctor on the panel of approved doctors appointed by the director of health services of the concerned state or union territory. The director of health services should prepare such a panel for all provinces and districts as well.

(9) Copies of all the documents, including the memo of arrest referred to above, should be sent to the magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation.

(11) A police central room should be provided in all districts and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest; and at the police central room, the information should be displayed on a conspicuous notice board.[8]

The Supreme Court of Sri Lanka has also tried to intervene in matters relating to violations of human rights by the police under constitutional provisions allowing complaints against fundamental rights violations to be lodged before the Supreme Court.[9] This has become a popular form of litigation, and thousands of cases have been filed under these provisions, to which the respondents are mostly police. In numerous cases the court has declared citizens' rights violated and has ordered compensation. Despite the many limitations placed on this form of legal redress (such as the time limit allowed for filing cases) this mode of litigation is a useful device that may be introduced elsewhere with suitable modifications. In many countries in Asia (such as Thailand, Cambodia, Singapore and Malaysia) there are no special provisions under which a violation of fundamental rights can be justifiable under local laws.

In addition to the judiciary, many other regional institutions have evolved for dealing with the violation of rights by the police. One example is the Presidential Truth Commission on Suspicious Deaths in South Korea, which has the following major functions:

- To select cases which merit investigation;
- To investigate suspicious deaths;
- To provide information and consultation related to suspicious deaths;
- To receive and process applications related to suspicious deaths;
- To take charge of matters related to restitution and compensation for victims whose death has been acknowledged by the commission as having been due to their involvement in the democratisation movement and having resulted from the abuse of power by the government in its attempt to suppress the movement;
- To take charge of matters related to compensation and necessary assistance to people who testify about a suspicious death or who provide evidence or documentation;
- To take charge of matters related to compilation and the announcement of reports on suspicious deaths at the end of the investigation;
- To take charge of matters related to finding the truth about suspicious deaths.[10]

The Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in Sri Lanka was a similar institution.[11] In fact, three commissions covering separate geographical areas were appointed, and a fourth was later impanelled to deal with the remaining cases. The commission's mandate was to inquire into (a) people who were involuntarily removed, allegedly by agents of the state (police, army, etc.) and paramilitary groups in collaboration with them, or subversives or unknown persons, who subsequently disappeared (the present whereabouts of the person are unknown); and, (b) people allegedly held in detention in unauthorised army camps or police stations who subsequently disappeared.

National human rights commissions also are useful institutions that have become common to many Asian countries.[12] These commissions have the mandate to inquire into and report on human rights violations and so they can become one means of monitoring police observance of the rule of law.

Yet another development is the Advisory Council of Jurists that was established on September 9, 1998, at the third annual meeting of the Asia-Pacific Forum of National Human Rights Institutions (in Jakarta, Indonesia). The council will advise the forum and its member national human rights institutions, at their request, on the interpretation and application of international human rights standards. In addition to developing regional jurisprudence on international human rights norms, the council will further strengthen the effectiveness and capacity of national human rights institutions in the region. The forum's secretariat will support the work of the council.[13]

In addition there exist many initiatives by non-governmental organisations (NGOs)—and other civil society actors—to monitor human rights violations by the police and ensure that the rule of law is respected. In most Asian countries there are NGOs who engage in activities such as making legal representations on behalf of the victims of human rights abuses, collecting documentation, maintaining databases and providing humanitarian assistance. Regionally, there are also support groups. The urgent appeals programme of the Asian Human Rights Commission (AHRC) provides a wide network for sharing information and pursuing joint actions on behalf of those who suffer abuse at the hands of law-enforcement authorities.[14]

There are also education programmes about human rights for law enforcement officers. The Bangalore Law School programme in India is one noteworthy example. Many NGOs have programmes for this purpose. However a criticism levelled against these programmes is that education is no substitute for reforms; at best it can supplement needed reforms.

A Review of Actions to Improve Policing in Light of Article 2 of the ICCPR

What is the impact of the ongoing actions mentioned above, among others? Given the massive deterioration of the rule of law in Asia and the dismal record of its police, it is difficult to reject the

Problems Facing the Rule of Law:
How Uninvestigated Crimes Erode the Rule of Law

Stage 1

A complainant goes to the police.

*** The police do not take down his statements; *or***

*** The police take down his statement but do not investigate; *or***

*** The police do not investigate sufficiently.**

This complainant goes to the prosecutor.

*** The prosecutor says that the police have not brought sufficient evidence to him, and therefore, he cannot prosecute.**

This complainant goes to court.

*** The court says that since the prosecutor has not filed a case there is nothing they can do; *or***

*** Since the prosecutor has brought a case without sufficient evidence, the court is obliged to dismiss it.**

The net result is that the crime is not disposed of within the justice system.

Stage 2

When the justice system is unable to cope with crime, lawlessness spreads.

Stage 3

When lawlessness spreads, extrajudicial punishment spreads.

Stage 4

When extrajudicial punishment spreads, belief in the law and morality declines, resulting in the very foundations on which the rule of law are based being lost.

conclusion that the impact of these positive actions is very limited. While done with great effort and often enormous courage, these undertakings have nonetheless failed to address the problem and have at best had only peripheral effects. It can be said without the slightest hesitation that all Asian states have failed to comply with Article 2 of the ICCPR, which requires an effective remedy for the violation of rights, "notwithstanding that the violation has been committed by persons acting in an official capacity."

In terms of Article 2, the problem of policing in most Asian countries can be summed up as follows. The prosecution of crimes and human rights abuses fails when there is insufficient evidence to proceed. The gathering of evidence presupposes the existence of a functioning criminal investigation agency. The functioning of such an agency presupposes that it has full legal powers to conduct these investigations; that such powers are not suspended arbitrarily by the law or political interference (or any other means that the agency is unable to overcome); that the agency has the human resources and technical capacity to function; and that it has a system of internal controls regarding its professional duties. Most Asian countries do not have a criminal investigation system in which all or most of these requirements for its proper functioning exist to any satisfactory degree. Thus, most Asian countries do not have a functioning criminal investigation agency, which means that they do not have a policing system that meets the criteria for proper functioning. In other words, most Asian countries have a malfunctioning policing system.

A malfunctioning policing system is not just a deficiency of a society but also a threat *to that society*. It encourages crime; weakens and even destroys people's faith in seeking legal redress against criminals; causes people to feel intimidated by criminals as well as by the police; helps to build bridges between big crime and the police; allows political revenge against people holding opposing views; encourages corruption; and endangers free and fair elections, thus making the realisation of the rights enshrined in the ICCPR very difficult, if not impossible, to achieve. Glaring examples of all these instances can be found in most Asian countries, making any expectations about the rule of law unrealistic. In fact, in several Asian countries the police

are treated as a serious threat to the rule of law.

Article 2 makes it obligatory for all state parties to provide an effective remedy for the violation of rights. The absence of a functioning police system indicates a failure to provide an effective remedy as required by Article 2. The question becomes how to address this problem. The human rights model that exists today is not capable of dealing with it because it presumes the existence of a functioning police system—at least to a minimum standard. International bodies established to monitor states' compliance with Article 2—such as the UN Human Rights Committee and UN Human Rights Commission—examine the violations of rights and make recommendations where violations have occurred. When these recommendations are made, it is presumed that the state party to which they are addressed possesses the legal mechanisms, including a functioning policing system, to put them into effect. As outlined above, for most Asian countries such a presumption is baseless.

This presumption is inappropriate for most Asian countries as it is based on the structures and practices of traditional democracies, upon which the existing human rights model was founded. While violations of rights occur in these democracies, a basic structure exists for dealing with these violations, in contrast to most societies in Asia. Thus, the existing human rights model is inadequate to deal with the problems examined above, and therefore needs to be expanded. The following are some suggestions on what ways and by what means the existing human rights model may be expanded:

(1) The jurisprudence relating to Article 2 needs to be explored and developed;

(2) UN bodies for human rights monitoring must scrutinise states' performance regarding Article 2;

(3) Human rights educational institutes must change their curricula to include more comprehensive expositions of the implications of Article 2;

(4) It is more important to encourage the reform of law-enforcement agencies than to provide them with human rights education;

(5) Human rights NGOs and civil society organisations must play an active role in exposing the limitations of the existing human rights model and exploring ways to initiate change. NGOs in traditional democracies must work in partnership with NGOs outside of their countries to achieve this objective;

(6) International agencies should make financial resources available for the achievement of this objective; and

(7) The UN Human Rights High Commissioner's office should initiate activities and studies to promote this aim.

End Notes

[1] Basil Fernando, an attorney at law of the Supreme Court of Sri Lanka, has practised law in Sri Lanka and has been a senior U.N. officer in Cambodia. He is the author of several books and articles and an editor of the monthly publication *Human Rights Solidarity*.

[2] Differences in understanding of common terms because of different backgrounds and experiences are elaborated upon in Basil Fernando, " Judicial and Legal Reform: Preparing the Field," in *Rule of Law, Human Rights and Legal Aid in Southeast Asia and China: Report of the Practitioners Forum* (Hong Kong: International Human Rights Law Group and Asian Human Rights Commission, 2000), pp. 1–5.

[3] Basil Fernando, *Problems Facing the Cambodian Legal System* (Hong Kong: Asian Human Rights Commission, 1998).

[4] Asian Human Rights Commission, *Sri Lanka: Disappearances and the Collapse of the Police System* (Hong Kong: Asian Human Rights Commission, 1999).

[5] Basil Fernando, "Disappearances of Persons and the Disappearances of a System," in *Sri Lanka: Disappearances and the Collapse of the Police System*.

[6] "Singaporeans Demand Repeal of ISA," *Human Rights Solidarity*, Vol. 9, No. 1 (January 1999); Chee Soon Juan, "Looking into the Past and Struggling for the Future: Prospects for Democracy in Asia," *Human Rights Solidarity*, Vol. 9, No. 10 (October 1999).

[7] Asian Human Rights Commission, *Suggestions for Police Reforms in Sri Lanka: Final Statement of the Consultation on Police Reforms in Sri Lanka* (Hong Kong: Asian Human Rights Commission, 1999).

[8] Asian Human Rights Commission, *Suggestions for Police Reforms in Sri Lanka: Final Statement of the Consultation on Police Reforms in Sri Lanka*.

[9] Article 126 of the Sri Lankan Constitution.

[10] For more information, see www.truthfinder.go.kr.

[11] For a lengthy report on disappearances in Sri Lanka, see the Cyberspace Graveyard for Disappeared Persons at www.disapperarances.org.
[12] For details about commissions, see National Human Rights Institutions at www.ahrchk.net.
[13] For more information about the Asia-Pacific Forum, see-www.apf.hreoc.gov.au.
[14] For details, see Urgent Appeals at www.ahrchk.org.

Police abuses in Cambodia*

Basic principles of international law and fair trial are often violated in Cambodia's criminal justice system. Impunity, torture, forced confessions, illegal arrests and detention are frequently reported by the news media and monitoring non-government organisations.

Such practices are in violation of the Cambodian constitution of 1993 and the International Covenant on Civil and Political Rights (ICCPR), which Cambodia has ratified and to a large extent incorporated into its national constitution. The constitution protects the right to life, personal freedom and security and the right to judicial recourse. It also prohibits the death penalty, physical abuse, arbitrary arrest and detention. Accused persons are protected against forced confessions and are presumed innocent until proved guilty.

However these constitutional provisions are often violated, and the Cambodian criminal justice system lacks almost all components for effective operation, including an independent and efficient judiciary. Police activities are devoid of democratic policing and rule of law principles. In fact, the police and military are often involved in crimes and human rights violations, alike ordinary perpetrators. Police or military agents perpetrating gross abuses are

* A written submission to the UN Commission on Human Rights 57th Session by the Asian Legal Resource Centre

not brought to justice. In the eyes of the public, the police constitute a threat to their safety and security; they are mistrusted and regarded as criminals.

Police officers do not behave according to either the Cambodian constitution or article 6 of the ICCPR, protecting the right to life, as the following examples demonstrate.

On November 1, 2000, Don Ran (26) was shot dead by a police officer armed with an AK-47, at his house in Traing Village, Kom Rieng district, Battambang. Border policeman Chhun Touch shot the victim repeatedly in the throat and chest, after becoming angry when Ran criticised him and belittled him over an unpaid debt. According to the police, Touch fled over the border to Thailand. (Phnom Penh Post, November 10-23, 2000).

On November 28, 2000, Buot Dan was shot dead by criminal police after he was freed from prison in the provincial capital of Kratie. According to the police, a moto-taxi driver was severely wounded in the shooting. Buot Dan was allegedly a former member of the Khmer Serey insurgency movement in Sambo district. (Phnom Penh Post, December 8 -21, 2000). This case is an example of police in Cambodia not considering the judiciary and its judgements binding on them or their authority. The motive for this killing was the victim's alleged political persuasion, indicating a lack of respect for other political convictions and so further violating articles 1 (1), 2 (1) and 26 of the ICCPR.

Cambodian legal aid organisations report that approximately twenty percent of all their cases involve forced confessions (Cambodia Defenders Project statistics). Lawyers have major problems proving that they are forced, as police tend to keep the victims in custody until bruises and other signs of violence have disappeared. Victims of forced confessions tend to confess to prosecutors because police threaten the accused with more violence if they do not obey their orders and do so. Police very rarely testify in court, and never stand trial accused of torturing or forcing confessions. That most criminal cases are based on confessions indicates that Cambodia is still employing a socialist evidentiary style. These violations breach article 7 of the ICCPR. The following cases illustrate:

On May 27, 1998, Ngan Kim Srun was charged drug usage, counterfeiting, murder, robbery and kidnapping of two children near the central market in Phnom Penh. The accused was one of ten persons charged in the kidnapping case, of which six persons are being prosecuted. The robbery and murder charges were dropped. Ngan Kum Srun was arrested by a soldier and blindfolded. According to his statement when brought to the police station he was beaten and forced to confess. However, witnesses did not identify him among the kidnappers, and the kidnapped children were not available to give testimony. The defence lawyer argued that the confessions were forced, but the investigating judge maintained that the accused had confessed to both the police and prosecutor, stating that there was no risk of being beaten by the prosecutor and therefore that confession could not be regarded as forced. The investigating judge decided to forward the case to court. The trial date is set for June 6, 2001 (Cambodia Defenders Project, Case No. 424 / 27-05-98).

On November 1, 1999, Kim Van Dy was one of three persons accused of robbery. The two other accused confessed and stated that Kim Van Dy also participated. When the case came before Phnom Penh Court, the two withdrew their statements and said that they had only confessed to Kim Van Dy being part of the crime because the police had beaten them and forced them to do so. The defence lawyer raised the question of forced confession, but the judge did not consider this argument and said that the police knew the three for their previous crimes, however he did not make any specific reference to a crime the accused had allegedly been involved in. No other witnesses were heard. The judge sentenced the accused to three years imprisonment. (Cambodia Defenders Project, Case No. 18/ 03-01-00).

Cambodian police also violate the right to liberty and security, including freedom from arbitrary arrest and detention, as dealt with by article 9 of the ICCPR. For example, in February 2000 a married couple travelling by motorbike in Siem Reap Province were arrested by a military lieutenant for no apparent reason. The husband was threatened with death if he resisted. Both suffered head inquiries from beatings. The wife was pregnant at the time of the incident, and the case went to court, as the couple wanted compensation for the wife

having to spend all her time at the hospital till she gave birth. In November 2000, the judge issued an arrest warrant for the lieutenant, which was sent to the police commissary and headquarters of the provincial military police. By the beginning of December 2000, however, the perpetrator was still not arrested (LICADHO).

In Cambodia, illegal arrest and detention, torture and forced confessions in police custody are common. This situation may have been caused by many factors, such as the heritage of the communist era; the long term use of the Cambodian police as a tool for political power struggles; the militaristic role imposed on policing by past regimes; and the many police officers without training, if any education at all.

No doubt there is a major need for reform of policing in Cambodia. International organisations and donors must push the government to conduct reforms towards creation of a democratic civil police force committed to upholding the national constitution. However, reforms cannot be successful without the commitment and participation of all the key stakeholders, including the government and police organisations. Furthermore, police reform should be linked with reform of the judiciary and rule of law in Cambodian society.

In the short term, the Commission must urge the Government of Cambodia to make an effort to stop human rights violations committed by police and military authorities and to ensure that those violating constitutional provisions be bought to justice. The government should put high priority on creation of an independent organ with a mandate to handle complaints against the police, empowered to make inquiries into specific cases, as well as general areas of concern. It should have the capacity to obtain all documentation on cases that it is investigating and hold powers to subpoena and refer cases to the judiciary. An independent organ handling public complaints would facilitate reduction of the prevailing climate of impunity in Cambodia.

Beatings of alleged criminals to death expose fatal flaws of the criminal justice system in Cambodia*

Group killing of alleged criminals has become frequent practice in Cambodia. Pictures in newspapers publishing details of street executions clearly show policemen standing by while people attack and kill. These incidents are not accidental, but the product of a legal system that has proved itself incapable of dispensing justice objectively and a police force willing to incite violence as a rough substitute for the dispensation of legal justice.

When policing and judicial practices fail, street violence becomes a form of trial delivering an instant remedy to appease the appetites of people made insecure. Without recourse to legitimate remedies and with tacit approval of law enforcement agencies, people take to savage revenge. In Cambodia, none of those engaging in such killings have been arrested or brought to justice, even despite their photos being exhibited by the press.

* A written submission to the UN Commission on Human Rights 57th Session by the Asian Legal Resource Centre

A few cases from July to October 2000 serve to illustrate. On July 21, Song Veasna and Dy Hor were beaten to death and their corpses burned after alleged robbery of a motorcycle. On August 19, Rim Bros was taken from the police station at Sam Pov Loun district, Battambang, while he was under police custody for an alleged rape; his penis chopped off, he was beaten to death by a large mob armed with sticks and rocks. On September 15, Sna of Chankar Morn Section, Phnom Penh, was beaten to death at Dankor Market after attempting to escape from police, having been accused of theft of a gold watch. Alleged thieves of motorcycle taxis beaten to death on October 3-4 were Chea Pha, at Ang Snuol, along Highway 4 of Kandal province; Keng Kosal and Mun Nath at Trapeang Thloeung, Sangkat Chom Chau, Phnom Penh; and an unidentified person at Sangkat Boeng Keng Kong, Phnom Penh. For snatching a necklace, a student named Norng Darn was beaten to death on October 23 in front of You Nam Market, Kampuchea Krom Street, Phnom Penh. On October 27, another unidentified person was beaten to death at Street 219, Sangkat Sangkat Phsar Doeum Kor, Phnom Penh, for alleged theft of a bicycle.

These killings clearly violate article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), which states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." They also violate the right to fair trial enshrined in article 14 of the ICCPR. The Government of Cambodia has ratified the ICCPR and the Constitution explicitly upholds the ICCPR. Thus, these killings violate Cambodia's own fundamental law as well as its international obligations.

The Government of Cambodia is obliged to bring this practice to an end and punish all those who have engaged in it. As it has been legitimised through both the passive participation and instigation of the police, the government should explicitly prohibit gang killing via a pronouncement and a campaign to reinforce the message. The government must also appoint a commission to inquire into these cases and scrutinise actions taken by the police to investigate and punish offenders.

These practices, however, are systemic; not the product of arbitrary mob violence or public outrage. They are rooted in the country's failure to develop a functioning criminal investigation system, without which there can be no fair trial. In the absence of criminal procedure, elements of the public are being encouraged to seek violent alternatives. A permanent solution can come only through legal and judicial reforms designed to make fair trial a possibility in Cambodia. Sadly, during the seven years since the UN sponsored elections progress in this direction has been slow, if at all.

Cambodia lacks a functioning criminal justice system because there is:

a. No penal code. The existing code consists of about forty offences drawn up as a guideline by the UN Transitional Authority on Cambodia (UNTAC). The Cambodian Ministry of Justice has been drafting an adequate code but it has not been produced, despite many claims that it is nearing completion. There seems little likelihood of a penal code being adopted in the near future.

b. No basic criminal procedure code. One new draft has been circulating, but this has been based on the socialist justice model employed from 1984 to 1992, before UNTAC and adoption of the new Constitution. Differences of opinion about the criminal procedure code – whether the former system of socialist justice should continue or whether liberal democratic principles should be used as the norms, on the basis of the 1993 Constitution, which declares Cambodia a liberal democracy – have not been settled. For all practical purposes, the old socialist system continues, as most judges are products of the pre-UNTAC period.

c. No professionally competent judiciary.

Without serious reforms, Cambodia will not be able to honour its obligations under the ICCPR. The situation will continue to degenerate, as more people are encouraged or permitted by law-enforcement agencies to engage in barbaric practices such as killings and other gross human rights abuses.

Dying Without Redress: A Tribute to Manorani Saravanamuttu [Sri Lanka], A Mother Who Fought For Justice

Manorani Saravanamuttu, who was more popularly known as Richard De Soyza's mother, passed away on 14th February 2001. Richard was a poplar figure in Colombo, Sri Lanka a young journalist, film and dramatic actor who was kidnapped by government security personnel. His body was later found by the seashore and identified by Monrani.

Richard was killed on the night of February 17th/18th 1990. The speculation is that his dead body was dropped from a helicopter flying at a certain height with the expectation that the body would sink to the bottom of the sea and never be found. Manorani identified one of the kidnappers as one Ronnie Gunasinha by seeing his picture on a TV broadcast.Gunasinha was a senior security officer of the late president Premadasa.He was among those who died in the explosion that killed the President on 1st of May 1993. (Though some saw this as divine justice, Manorani was much more humane, and even showed sympathy for Gunasinha's children. A commentator who has spoken to her mentioned she preferred justice meted out in a court of law, which would have helped people achieve genuine reconciliation.)

Richard De Soyza's killing was part of huge number of disappearances which took place between 1988 and 1991, the number of which is estimated by the state as around 30,000 and by the civil society organizations as 60,000. Manorani will be remembered as one who symbolized the mothers of the disappeared who rallied to demand justice. She saw her son's death as part of a wider phenomenon: the collapse of the Sri Lankan society, rule of law and morality. Though by family and by profession she was a medical doctor belonging to the elite of the country, as a mother Manorani transcended the class barrier at the moment she lost a son.During the last 11 years of her life she played a very strong part in raising fundamental issues regarding the Sri Lankan society which will remain valid until these problems are finally resolved. In the days of intense terror she courageously and fearlessly worked throughout the country, in solidarity with tens of thousands of mothers who lost children in similar circumstances to her. She became a powerful spokesperson. The following are her words: " Whether they know why they are doing it, I do not know. Whether they have been told today is the night for so and so. They probably do not question why we are doing this. What has this fellow done to us that we should go and take him, and kill him. That I do not know. But they come. They come with their eyes that are empty of everything. They come with their guns. They come with their assurance that they will not fail in their missions.

They come and knock at doors. Ring bells and they look at you, and frighten you, and threaten you..... If I had thought for one moment that they had come to take my son I would have died there at the door.....It's the women who bear the brunt, and its the women who are the strong ones, because, when you lose a child you lose yourself " (quoted from a video interview by Nimal Mendis)

"It is the most devastating experience to have a child pulled out of your arms. My boy 'disappeared' and 48 hours later his mutilated body was found. Since then I have received numerous threats, anonymous letters, telephone terror and I am also certain that my telephone is tapped. I want to pursue my son's case. Many friends and colleagues have asked me to stop: "the one who seeks the battle should not complain about the wounds". But I know there are tens of thousands of relatives who have been affected by the violence. I will

never advise the women I work with to forget, I will tell them that they must speak. 20.000-30.000 did not join, out of fear of reprisals to other relatives". (quoted from Linking Solidarity).

She was persistent in her call for justice. In this she was bitterly betrayed. Even those who made use of the anger and bitterness of the mothers whose children disappeared for electoral purpose betrayed their call for justice. Sri Lanka remains one of those countries where the justice system is too weak to provide a response to such calls for justice.

It is unable even to respond to the extent of Chile or Argentina.This not just a weakness of the justice system but of the society as a whole. Sri Lankan society remains in a primitive state, unable to deal with the fundamental forms of in injustice entrenched in it. It is only the mothers facing such problems who can make the best critique of society, morality and justice systems. The best way to honour them is to face the questions that turn their lives into tragedies. To not do so is to dishonour them as a society and as individuals in the society.

Let us remember Manorani by committing ourselves to work towards the reform of society, morality and the Justice system (comprised of Police, Prosecutions and Judiciary) that have betrayed Manorani and thousands of other like her.

Asian Human Rights Commission
19 February 2001
Hong Kong

Sri Lanka: The Bindunuwewa Massacre*

On October 25, 2000, twenty-six persons (twenty-nine by some estimates), were chopped to death, while about fourteen others were seriously injured, in a rehabilitation detention centre at Bindunuwewa, Badulla, Sri Lanka. According to the National Human Rights Commission, which inquired into the incident, "the police officers, approximately 60 in number, were present at the place of massacre at the time of the massacre" and they "were fully armed". At least two of the detainees were shot by the police while trying to escape their attackers. Clearly these officers were participants in the massacre and have committed an even graver crime than the actual perpetrators. The armed police presence encouraged and enabled the attackers to engage in the massacre; they were assured that their crimes would have no legal consequences.

Initial stories told of a mob attack, however the timing of the event, in early morning, debunks the idea of a mob. Reliable inquiries have since revealed that the attackers were brought to the place by vehicle. In recent decades, there have been many attacks carried out by persons brought to the crime scene by others. The cruelty consistently demonstrated in these cases – hacking people to death, burning people alive, burning buildings – reveals that the attackers

* A written submission to the UN Commission on Human Rights 57th Session by the Asian Legal Resource Centre

have not been amateurs, but persons with previous experience or "professional" training. At Bindunuwewa, they briskly did their job and soon disappeared. What grounds for personal anger or fury have been suggested to explain why someone would engage in such brutal crimes? The implausible proposition that members of a farming community living in the area carried out this massacre contradicts all that is known about the behavior of Sri Lanka's poor rural folk. This atrocity was committed by men with muscle, the will to kill and the know-how to go into hiding fast.

Sri Lankan law clearly states that accessories to murder are equally guilty of murder. What took place during this incident is much more than that. The sixty officers present were part of the arrangements for the carrying out of this massacre. Attempts to treat these police officers as less responsible parties go against the law. Additionally, efforts to diminish their legal responsibility will only result in further degeneration of the police force itself. Among the sixty police present, however, there must have been some with different ranks and some with a duty over others. These higher officers bear greater responsibility than their subordinates for the crimes that happened on this occasion.

Senior officers must also be held responsible for the actions of those present during the crime. The indications of these higher officers' culpability are:

a. These sixty police could not have been present at this particular place and time but for their being assigned there. The documents in which their assignments are recorded will reveal who authorised their movement. On that basis, it should be possible identify and question the superior officers.

b. Immediately after the incident, there were many official versions of what happened that are now known to have been fabrications designed to misdirect inquiries. When senior police officers – normally those who conduct investigations – undertook to fabricate stories and misdirect criminal investigations they must have known the seriousness of their actions. Thus the senior police officers who made false press statements must be considered among the persons responsible for this crime.

c. Two to three hundred innocent villagers were detained in an effort to put the blame for this crime on the local people and cover up the real perpetrators. That senior police officers went this far suggests the extent of their involvement, how vast their fabrications. The pre-crime conspiracy was supplemented by subsequent falsehoods. These innocent persons were released only after sit-down protests by other villagers at the front of the police station.

d. Posters inciting violence were exhibited locally prior to this incident. How could they have been displayed without the knowledge of high law enforcement agents in the area? On previous occasions, for example during 1988-89, law enforcement agencies themselves forged posters and other materials under the name of the insurgents, to mislead the public about attacks they themselves carried out. Even if they were exhibited without their prior knowledge, tacit or express approval, why did they not have these posters removed? With prior knowledge of these incitements why did they not take action to provide greater security to the detainees or move them to a safer place?

Unfortunately, even the National Human Rights Commission has deemed the police officers' actions in this case as nothing more than a "serious dereliction of duty", effectively exonerating them from criminal responsibility and transforming the whole affair into a mere internal disciplinary inquiry. The criminals have been miraculously reduced to a group of fictitious "outsiders". The totality of this event and others like it as an act of mass murder has been undermined and the legal stage set for a few unimportant persons to take the fall in some low-key murder trials, at best. Meanwhile, the victims' families have already been promised compensation, not as an act of compassion by the authorities, but as a pay-off to silence their outrage and confuse the sheer criminality of the massacre by giving it the veneer of a civil case. Thus, this heinous crime is swept under the carpet.

Reports on the investigation into this incident indicate that the burden of proof has now perversely been cast onto the survivors. Having narrowly escaped death, the victims have found themselves required to identify the culprits and prove their allegations, in spite of the state being legally responsible for the investigation and prosecution. With sixty police officers present during the crime there need be no lack of

evidence. These sixty eye-witnesses are those who must be interviewed; their log books and other notes that they are required by law to keep are those that must be examined. According to reports, about thirty of the officers were detained immediately after the incident. They must have been interrogated and their statements too must be available. If there were ever a case with overwhelming evidence, this is the case. Suffice it to say that the Sri Lankan government has in its possession all the information necessary to act.

This incident is not only morally outrageous but of extremely serious nature both under Sri Lankan criminal law and international law.

a. Under Sri Lankan law, the perpetrators of these killings must be charged with murder. The attorney general's department is legally responsible for the prosecution of crimes in Sri Lanka. As prosecutor, the department is obliged to act objectively and without fear or favour. If these prosecutions do not proceed or if the cases are not dealt with in a satisfactory manner, legal responsibility for the breach will fall primarily on this department.

b. Under international law, these killings are a crime against humanity. They clearly fall within the definition of a crime against humanity of murder given by the Preparatory Commission for the International Criminal Court [PCNICC/2000/1/Add.2, article 7 (1) (a)]. Ultimately, the whole episode must be viewed from this standpoint.

Irrespective, states are obliged to protect prisoners in their custody. The Government of Sri Lanka has failed in this duty. As a state party to both the International Covenant on Civil and Political Rights (ICCPR) and the Second Optional Protocol, the Commission is mandated to seek an explanation from the government for its failure to fulfill this positive obligation, and make appropriate recommendations in accordance with the ICCPR and international norms.

Reform Of The Criminal Investigations And Prosecutions Systems Is The Real Key To Reducing Crime In Sri Lanka

- An AHRC Statement -

The recent decision of the Sri Lankan government to re-introduce the death sentence adds to the already very bad human rights record of the country. The argument that the increased crimes rate requires the reintroduction of the death sentence does not stand up to examination. There are fundamental failures in the criminal investigations and prosecution system in Sri Lanka that allow criminals to remain free, however serious their crimes. The Hangman can become a substitute for proper criminal investigators and competent prosecutors.

The present situation of increased crimes must blamed on the criminal investigation authorities and on the prosecuting department which in Sri Lanka is the Attorney General's department. However, the relationship between these two departments themselves are inherently defective. As it exists now, criminal investigation is entirely the function of the police and if they fail to investigate, the prosecutors can wash their hands by saying that there is no evidence with which to prosecute. While this situation remains, all that the hangman can

do is to send a few poor people to the gallows as a deterrent to others. This will only be a further mockery of justice in a country where justice is fast becoming a distant dream.

We instead call upon the government of Sri Lanka to seriously address the defects in the justice system that make the increase in crime possible and the increase in serious crime inevitable. The most vulnerable place in the system is the absolute separation between the criminal investigation function and the prosecuting function that exists. Without ending this separation, crimes will not only increase but more serious crimes will escape prosecution.

The reasons for such separation are as follows.

1. To end the absolute Gap that exists in Sri Lanka between the criminal investigation function and prosecution function:

The system as it stands now is for the police to investigate crimes and, in serious offences, to present the file to the Attorney General's department, which may thereafter prosecute the case. If the police do not investigate a crime or do so very badly, there is hardly anything that the prosecutor can do, except to say that there is no sufficient evidence to prosecute. Thus, the ultimate responsibility to prosecute a crime rests with the police. If the vicious circle that produces the 'no evidence' argument is to be broken, it is necessary to build a link between the prosecutors and the investigators from the very inception of a case. This would mean that from the receipt of the first complaint up to the finalization of investigations the prosecutors would be informed of the investigations and could take suitable steps to guide them.

2. To bring the Sri Lankan law into line with the developments of other common law countries:

The Sri Lankan practice of absolute separation between prosecutors and investigators is based on 19th century British practices. However in all of the major common law countries, including the United Kingdom, United States, Australia and India, no such separation exists. In these countries the prosecutor's departments

have extension offices in all areas and the police departments coordinate their activities from the very inception of such inquiries. It would be useful for Sri Lanka's law drafters, legislators and the legal profession as a whole to study the developments that have taken place in other common law jurisdictions. In Civil law (the French system), the link between prosecution and investigation has always existed through the function of the investigation judge.

3. To create professional prosecutors:

The present practice of conducting prosecutions through the attorney general's department deprives the country of the development of professional prosecutors. Under the present set-up, lawyers in the Attorney General's department spend a few years in prosecution work and then shift into other work. The Attorney General's department has many functions and its lawyers shift from one to another. However, the acquirement of professional prosecuting skills takes a long time, as with any other serious profession. Besides, this allows individuals the option to enter and stay in this profession for a long time. In any profession, personal aptitudes and choice are important. This also has an impact on training. If the prosecutors are going to be in this profession for only a short time, there is no purpose investing in training for them. However, modern day prosecuting involves a high level of training and specialization. The mere fact of being an attorney-at-law is no sufficient qualification to be a competent prosecutor of serious crimes.

4. To create institutional habits within the prosecuting system:

Professional habits are made with difficulty. The credibility of any institution of professionals will depend on the way, these habits are formed and transmitted. The present system as it operates throgh the attorney general's department is not conducive to development of such professional habits and to ensure a continuity to a tradition of proper conduct of prosecutions.

5. To address the problem of increase in crime:

The government admits that there is a vast increase in crime. The only real answer to this is proper criminal investigation and certainty of prosecution for all crimes. The system as it exists now fails to do this. It is an unavoidable fact that the system needs to be corrected.

6. To deal with crimes committed by law enforcement agencies:

It was just few months back that about 26 persons were massacred in the presence of about 60 armed police. Each day bring reports of crimes in which law enforcement officers are involved. Over 30,000 disappearances have put the countries among those with the worst records in the world. It is simply ludicrous to leave these crimes to be investigated by the police alone. The repeated argument that comes up is that there is not enough evidence to prosecute these crimes. The evidence depends on competent investigations, which in turn depend on proper systems of accountability. To allow the present system of separation between prosecutions and investigations to continue is to connive with crimes done by law enforcement agencies.

7. To answer international criticism;

The United Nations' report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999)" (E/CN.4/2000/64/Add.1) issued on 21 December 1999 and presented to the UN Commission on Human Rights Session in April 2000 contains, among other things, the following recommendations:

"(a) The Government should establish an independent body with the task of investigating all cases of disappearance which occurred since 1995 and identifying the perpetrators;

(b) The Government should speed up its efforts to bring the perpetrators of enforced disappearances, whether committed under the former or the present Government, to justice. The Attorney-General or another independent authority should be empowered to

investigate and indict suspected perpetrators of enforced disappearances irrespective of the outcome of investigations by the police;"

In a statement from 2000, AHRC summed up the central problem relating to prosecution of those responsible for the disappearances in Sri Lanka as follows:

"It is an elementary principle of Criminal Law that the investigation into crimes determines the prosecutions. Because of the lack of criminal investigations into cases of disappearance in Sri Lanka, the cases cannot be prosecuted. Thus, the first step towards any real prosecutions of these cases must be to begin criminal investigation.

"As the police were mobilized to cause the disappearances, it is not possible to investigate through this apparatus. Thus, an independent body for conducting criminal investigation must be the first step towards the carrying out of prosecutions."

Thus the failure of the criminal investigation and prosecution system is now a well known fact world-wide. Sri Lanka has even been classified as one of the most dangerous places on earth. There can be no real answer to these criticisms until the defects inherent in the system, particular the absolute separation between criminal investigations and prosecutions, are done away with.

11 January 2001
Hong Kong

Torture in Asia*

Basil Fernando, Executive Director, Asian Human Rights Commission

When Cesare Baccaria (1738-1794), wrote his book *An Essay on Crimes and Punishments* in 1775 arguing against the use of torture he was a lone voice in Europe. At that time all European countries practiced torture for the extraction of confessions. However, the debate that he began led to enormous developments in Europe and elsewhere. In many countries of Asia today torture remains endemic. Those who resolutely oppose torture are still small in number. Though many states have signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and some even have ratified it, actual attempts to take effective action against torture are few. Notwithstanding, the debate that is now taking place on this issue is significant.

This paper begins with a statement from a recent seminar of 25 participants from 10 Asian countries condemning torture and making suggestions for its eradication. It is followed by a selection of writing (most pieces from the seminar participants) on current conditions in several Asian countries, and a conclusion with some recommendations.

* A paper prepared for the Seminar on the Prevention of Torture and Protection of Detainees' Rights in China and Europe, organised by the Danish Centre for Human Rights, 18 - 20 April, 2001, Beijing, People's Republic of China

TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: THE MOTHER OF ALL HUMAN RIGHTS VIOLATIONS

Final Statement of the Consultation on Torture organised by the Asian Human Rights Commission; Bangkok, Thailand, November 2000

1. Twenty-five participants from ten Asian countries gathered in Bangkok from 5-10 November 2000 to discuss the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The participants unanimously agreed that throughout Asia acts of torture and degrading punishment are highly prevalent and pose a threat to the human rights of the people of Asia. So long as law enforcement authorities continue to practice torture, people will perceive them not as guardians of the law but as violators of human rights. Asian communities living under the threat of such grave violations need to take a more active part in influencing the law enforcement authorities of their countries to alter methods of criminal investigation and other dealings with the members of their communities.

2. Violations of all human rights – whether civil and political or economic, social and cultural – begin with the use of torture and degrading treatment or punishment. Promotion and protection of all human rights therefore requires the prevention of torture and degrading punishment. This is especially the case regarding the rights of women. The protection of their rights requires the elimination of violence both in the public and private spheres.

3. In conflict-ridden areas of Asia there is much talk about peace and conflict resolution, however such objectives are unachievable without the elimination of torture and inhuman punishment. Many violent conflicts in Asia have begun due to extreme use of torture and degrading treatment or punishment on sections of the population, particularly upon the young. Acts of torture and inhuman punishment invariably give rise to extra-judicial killings. Study of extra-judicial killings and disappearances in Asia reveals that such atrocities are clearly rooted in hardened practices of torture and inhuman treatment by law enforcement agencies.

4. We, the participants at this seminar, note that the widespread use of torture poses the greatest threat to development of democratic institutions in Asia. So long as the people perceive law enforcement agencies as fearsome places where violent persons exercise their power over civilians with impunity, no trust can be built for cooperation. Such fear exists everywhere in Asia. The use of law enforcement agencies for political ends has aggravated the situation. All aspects of democratic life, such as free and fair elections, fair trial and the participation of people in economic development are vitiated by the use of torture and degrading punishment.

5. In international law, torture is today considered among the highest of crimes, the gravity of which is comparable to crimes against humanity and war crimes. The jurisdiction against torture is not confined to domestic courts, but is extended universally. However an examination of case law in the Asian region does not reveal a reflection of international law on this matter. Often local courts in the region seem to take a less serious approach and thereby condone the wide practice of torture and other inhuman treatment. A change of approach in the local courts, in keeping with international law on torture, is an essential element in altering this age-old practice ingrained in Asian societies. To create an atmosphere of intolerance to torture among the judiciary, education of international law on torture and sharpening of judicial sensitivity by way of social criticism are essential.

6. Community leaders, community organizations and public opinion makers have a paramount role in the formation of social policy to eliminate torture in criminal investigation and all other dealings of law enforcement agencies with society. Sadly, their record of involvement in the elimination of torture is rather negligible. In some instances political leaders exploit law enforcement agencies for personal ends and thus encourage the practice of torture and degrading treatment of their opponents and others. Such short-sighted approaches encourage law enforcement authorities to use the same methods for their own ends. Thus the age-old institutional habits of torture and degrading punishment get further entrenched. Under such circumstances the law enforcement authorities can become a threat to the continuity of democracy itself, as demonstrated by the recent

experiences of several Asian countries. A change in attitudes of community leaders, community organisations and public opinion makers is essential if this grave abuse of human rights is to be eliminated.

7. Leaders of religious organisations and all who advocate the promotion of basic human values need to take a far greater interest in the elimination of torture than they have done in the past. Religious leaders and their organisations have not shown a great resistance to the evil practice of torture and degrading treatment; there is not much in the record of their activities and statements to show that they are actively resisting and morally condemning this practice. A morally tolerant attitude towards torture and degrading treatment has serious impact on the promotion of the human dignity of all persons. This moral apathy against a widely practiced social evil needs to be negated.

8. Civil society organizations, NGOs and all concerned persons need to demonstrate much greater will to eliminate this social evil. An Asia-wide campaign for elimination of torture needs to be undertaken and pursued with determination. So long as such barbaric practices prevail within law enforcement agencies it will not be possible for civil society organizations to make a contribution to their societies. Ultimately the onus is on those advocates of democracy and human rights to see that such practices are applied. In order to create space for people's participation in the democratic process, it is essential that activities to eliminate the practice of torture be undertaken with greater vigour.

COUNTRY REPORTS

NEPAL

Presented by Yubaraj Sangroula, Advocate; Rachana Shrestha, Advocate, and Fr. K Bogati, at the Bangkok Consultation

Background

Nepal has signed and ratified 16 international human rights conventions or treaties concerning protection of human rights, including the Convention on Torture and International Covenant on Civil and Political Rights. Article 14 of the 1990 Constitution has explicitly prohibited torture. Despite these efforts, incidents of torture are

commonplace in Nepal, especially in the preliminary stages of custody during police investigation of crime. In some cases, the incidents are really grave.

A comprehensive study on the criminal justice system released in 1999, "Analysis and Reforms of the Criminal Justice System in Nepal", reports incidents of torture to be widespread: 67% of respondents complained various kinds of torture during the police custody. Verbal abuse, compulsory and random hand-cuffing, hand-cuffing with a long iron chain, unhygienic custodial rooms, and denial of permission to receive visits were among complaints. Many of those tortured are arrested on accusations of being Maoist rebels. Many people are detained even after being given an order for release by the courts.

Nepal also has a serious problem of its girls being sold to Indian, Bangladeshi and Arab brothels. Nepalese society is male-dominated; the women have to put up with lots of discrimination. Most of the country is rural, development is low and people do not send their children to school, especially the girls, whom they think do not need to be educated. Thus girls from rural areas are very vulnerable to trafficking: they are uneducated and unable to stand on their own; they experience abject poverty. As a result, every year 5-6000 girls are taken out of Nepal to be sold into prostitution. Most of the time they are taken without their consent. The Times of India newspaper estimated that around 200,000 Nepali girls are working in Indian brothels.

Problems

1. The Torture Compensation Act (1996) is inadequate. If a claim of torture is sustained in court, the victim may be paid compensation by the State and the perpetrator may be liable to departmental action. However, there is no follow up as to whether departmental action has taken place or not.

2. The Torture Compensation Act has not defined torture as a crime, and thus impunity prevails: owing to the absence of deterrents, repetitions of incidents are commonplace, even in the capital city. No judicial inquiries of alleged incidents are conducted.

3. Trial courts are insensitive to incidents of torture. Many accused complain that they were tortured to force a confession; however trial courts still happily accept the confessions as evidence. Only in very rare cases are the accused sent for medical examinations, but long after the fact.

4. Since courts accept confessions as evidence, police tend to concentrate on obtaining confessions, as this method will ease their obligation to go into a detailed investigation of the offence.

5. The government could do more for trafficked girls than it is now. More girls have to be educated for this problem to be solved. The trafficking problem is linked to issues of education and poverty.

Positive Developments

1. The National Human Rights Commission has finally commenced operations, hence there is now a forum for reporting incidents of torture. The Commission's active and strong intervention in the "Maitri Hospital" case, where the police forcefully snatched suspected Maoists, has created some deterrence for police. However, the Home Minister's open support of the police action has raised suspicion among the people as to the government's commitment to human rights.

2. The Center for Legal Research and Resource Development (CeLRRd), Amnesty International and the Police Headquarters agreed to jointly conduct an awareness scheme at the junior level of police personnel, using a poster describing suspects' rights during detention.

3. With the support of DANIDA, CeLRRd is coordinating a project to draft common criminal procedures' guidelines with the judiciary, government attorneys, police and Nepal Bar Association. The guidelines will give instructions on the human rights of an accused for every step through the justice system. Upon completion of the guidelines, all agencies will be given orientation on their application, and specialized training will follow for concerned officials.

MALAYSIA

Presented by Zaid Kamaruddin and Lim Guan Eng, at the Bangkok Consultation

The Malaysian Government has recognized the Universal Declaration of Human Rights (UDHR) more by breach than compliance. In Malaysia, there is no equality before the law; no right to a fair and public trial; no presumption of innocence; no right to peaceful assembly; no freedom of thought, conscience and religion; and no freedom of opinion and expression.

The Malaysian Government has steadfastly refused to ratify the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights since both came into force in 1976. Although Malaysia has not ratified the principal covenants that have flowed from the UDHR, it is required as a member of the United Nations to uphold the principles of the UDHR.

Under the UN Charter, Malaysia has pledged to take joint and separate action with the UN for the achievement of universal respect for – and observance of – human rights and fundamental freedoms. In addition, it is required to act in accordance with UN resolutions and declarations on human rights. Instead, Malaysia has deemed fit to publicly criticise and question the application of these standards to the country's political, economic and social context, especially in relation to an ill-defined "Asian values" system. In customary international law, all human rights are universal, indivisible, interdependent and interrelated. The only way that States can justify their non-compliance with customary norms on some human rights is on the basis of a public emergency threatening the life of the nation, or similar necessity: a criterion that does not apply to Malaysia.

There is also no freedom from being subjected to cruel, inhuman or degrading treatment or punishment. Instead, government agencies' use of torture – whether consciously or unconsciously – is not only prevalent but is gaining ascendancy in Malaysia. It is not surprising therefore that the government refuses to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Torture has been part of police and government culture since the early decades after independence in 1957, but it has always been hidden from the public eye, never seen as a burning issue that represents a gross violation of basic human rights. Apathy to this silent culture of torture by a large section of the public could be due to a host of factors, among them feudal traditions, an attitude that criminals caught should be tortured as a form of punishment and even a sense of "public order".

Despite growing awareness, there was little positive reaction from the public, as people have tended to believe the government's denials or self-serving explanations for unfortunate events that have led to torture. The public has been moved only when cases of torture and beatings have been caught on camera, completely repudiating the government's lies. Nothing highlighted the government's total loss of credibility more than when former Deputy Prime Minister Anwar Ibrahim was severely beaten up the Inspector-General of Police himself in 1998. The Prime Minister's attempts to avoid responsibility by saying that Anwar Ibrahim's injuries were self-inflicted only aroused anger and hardened sentiments against such torture. Yet, the government has consistently denied that torture exists within the security services.

The fight against torture will only succeed when public support is galvanized to pass laws that not only ban but also provide remedies to victims of torture. Draconian laws that directly or indirectly encourage physical, psychological or mental torture – the Internal Security Act, the Police Act, the Sedition Act, the Printing Presses & Publications Act and the Official Secrets Act – need to be abolished or revised.

Judicial independence must also be established to ensure that no evidence obtained under duress or torture is permitted. Clear guidelines must be established which requires heavy punishment for perpetrators, and compensation must be given to the victims. The Malaysian Government must be pressured to ratify international covenants, and is made subject to the jurisdiction of the United Nations Human Rights Committee.

Finally, we can only succeed with public support. As has been said, "Evil exists because good people do nothing." It is time for good people to act.

KOREA

Presented by Angelica Eun-ah Choi, Human Rights Activist, Sarangbang Group for Human Rights, at the Bangkok Consultation

Although the South Korean government ratified the Convention Against Torture, Inhuman, Degrading Treatment of Punishment in 1995, it reserved the communication procedure that makes articles 21 and 22 possible. At that time human rights NGOs protested this move, but the government announced that Korea's peculiar division mandated the reservation of this procedure.

Paragraphs 2 and 7 of article 12 in the Constitution provide that, "No citizen shall be tortured or compelled to testify against himself in criminal case" and that, "In a case where a confession is deemed to have been made against a defendant's will due to torture, violence intimidation, unduly prolonged arrest, deceit, etc., or in a case where a confession is only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession."

The Criminal Procedure Law also prohibits torture and other cruel inhuman and degrading treatment or punishment, but police have a tendency to treat suspects as inhuman and in practice commit torture. Recent surveys conducted by NGOs indicate that while torture of prisoners of conscience has decreased, torture of non-political prisoners has prevailed. People of low social position, such as foreign labourers and the homeless, are exposed to an environment of torture. However not only such people are subject to abuse. In a recent case, protesting teachers holding a peaceful demonstration to demand enforcement of a collective bargaining agreement and normalization of public education were arrested, detained, strip-searched and forced to endure other humiliations. While strip-searching is technically legal, it is only so in cases where the search is relevant to the crime, which it was not in this instance.

Prevention of human rights violations requires just and fair punishment of perpetrators and compensation of victims. In this regard, Korea has a long and difficult way to go until it solves the problems of impunity.

Many people suffer in the aftermath of torture. They go to mental hospitals and commit suicide. In South Korea there are few doctors and hospitals able to treat people in the aftermath of torture. Medical jurisprudence to decide whether or not people are suffering due to torture has not been developed, so it is hard to win a suit in civil action, although in at least one recent case the plaintiff was successful.

In most cases police accused of torture have been released without charge or for lack of evidence. In 1999 Lee Gun-ahn, a notorious torture specialist, gave himself up. Now he is on trial. Apart from him, it is difficult to find and punish offenders in anonymously committed torture cases, as they are living under the authorities' protection. It is therefore also important to investigate the powers that back torturers and make legal judgements in their regard.

As the government hasn't shown that it will seriously attempt to solve victims' problems, NGOs have felt the need to take initiative in this matter and have established the Korean Center for Human Rights (KCHR). The KCHR's mandate is to investigate and rehabilitate victims of human rights abuse. Until the creation of the KCHR the aim of NGOs had been to reveal the actual human rights situation, resulting in economic and symbolic compensation to victims but leaving many still suffering both psychologically and physically. Particularly in the case of torture, not only the persons concerned but also their families suffer. With the establishment of the KCHR, they too can receive treatment.

To address torture:

1. Police must be educated about human rights and should learn not to force suspects to confess.

2. Offenders should be punished without an arraignment deadline.

3. It is necessary to compensate victims for medical treatment in special hospitals.

4. The government should inform citizens about the Convention through human rights education, whether via TV advertisements, the public education system, or other materials.

BURMA

Report from Burma Issues submitted to the Bangkok Consultation

Presuming an historic role for itself as sole defender of national integrity, the army in Burma (Myanmar) has assumed the mantle of state by consistently perpetrating violence against its own people through a pervasive authoritarian culture imposing military values, discipline and punishment on the entire civilian population. Systemic abuse, torture and inhuman treatment have become mundane; overt and subvert violence is justified in the name of national prestige and unity. The army attacks the population on all fronts: legal, social, economic, cultural and political.

In some Asian states, overcoming widespread use of torture and inhuman treatment is now a matter of building the will to enforce existing statutes for protection of people's rights, or the will to introduce legal mechanisms through political process; in Burma "rule of law" exists, at best, only to the extent it is dictated. The government has not ratified any international covenants that would offer protection against torture and inhuman treatment, nor has it domestic laws to do likewise: the absence of a constitution and civil codes outlining the rights of citizens guarantee nothing but that individual rights are subsumed by those of the State, and are confused with those of the State — such as through media exhortations that the "people's desire" is to "crush all internal and external destructive elements as the common enemy".

While reports from Burma indicate massive human rights abuse, the government policy of blanket denial makes the depth and breadth of violations difficult to gauge. Whereas in many countries NGOs and other agencies are challenging authoritarianism and human rights violations from within their societies, prohibitions on independent civic organisations in Burma mean that the government is able to pursue its

objectives entirely without checks and balances. Nonetheless, ample evidence of widespread torture and inhuman treatment exists particularly in:

1. Military intelligence detention centres and prisons, where physical and psychological abuse and torture are routine during both initial interrogation and throughout periods of confinement.

2. Areas of the country subject to counter-insurgency operations, where civilians are systematically tortured and abused by troops when detained, when conscripted into forced relocation and labour programmes, and when entire populations are perceived as obstacles to military objectives.

The apparent lack of international concern for this grinding tragedy may be due in part to the dim prospects for immediate change; the army's control is both formidable and uncompromising. While it has permitted the International Committee of the Red Cross to resume a limited role in monitoring of prisons, those parts of the country where human life is most readily debased are entirely outside the scope of efforts for monitoring from inside. A recent initiative by the Australian Government to encourage establishment of a national human rights commission has been condemned by outside agencies as nothing more than a public relations exercise for the image-conscious military.

Cessation of torture and inhuman treatment necessitates prior recognition of basic freedoms: when fundamental rights — to life, to food, to work, to freedom of association — are diminished before the State then attempts at reform are crippled. A shift in governance may be an integral step towards change in Burma's culture of chronic abuse, but not an end in itself. Only when violence is no longer accepted as the inherent sanction of authority will torture.

SRI LANKA

Presented by Priyantha Gamage, Attorney-at-Law

Sri Lanka is an ancient civilization where barbarous forms of punishment prevailed alongside acts of justice and fair play by feudal monarchs. After Sri Lanka became a British colony, the Kandyan Convention of 1815 was the first attempt to eradicate torture. Abolition of torture is now policy in Sri Lanka: the constitution guarantees all people freedom, equality, justice, fundamental human rights and independence of the judiciary. Article 11 of the 1978 Constitution states that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. This is an absolute fundamental right: it applies equally to criminals and non-criminals alike. Sri Lanka has also ratified the UN Convention against Torture.

However torture is practiced. Both ongoing civil conflict – which has lasted over 18 years – and the Sinhala youth insurrection have been used by successive governments to introduce draconian laws, namely the Prevention of Terrorism Act (PTA) and "Emergency Regulations" framed under the Public Security Act. Under the PTA, a prescribed police officer may arrest any person connected with, or reasonably suspected of being connected with, any unlawful "terrorist" activity. Such a person may be kept in Police Custody for a period up to 72 hours prior to being produced before a Magistrate. The Magistrate has no discretion but to remand the person until conclusion of the trial. Under normal law the police can keep a suspect for only 24 hours prior to bringing the person before a magistrate.

Draconian measures such as these resulted in the mass disappearances of the period 1989-92. Even though the official number of disappearances is 30,000, unofficially it is believed to be over 60,000. When the present government came to power in 1994, it promised justice for the bereaved families, nevertheless those promises are still unmet: the official number of prosecutions is said to be merely some four hundred cases, and that figure is believed to be exaggerated. And while this government appointed three Presidential Commissions to examine disappearances, the extensive recommendations of these Commissions have so far been ignored.

Role of the Human Rights Commission of Sri Lanka in protection against torture

The Human Rights Commission Act was introduced in 1996. Its provisions are adequate for the Commission to investigate violations of fundamental rights, including acts of torture. Any victim can invoke the Commission's jurisdiction in respect of violations or imminent violations. Unlike other statutes dealing with torture, the Human Rights Commission can, on its own, initiate inquiries into alleged violations of fundamental rights, including freedom from torture. However the Act does not provide an efficient procedure to grant relief to the victim.

How to prevent torture and disappearances

1. Many acts of torture could be prevented if the opportunity to torture were kept to a minimum by informing the Human Rights Commission of all arrests within 24 hours.

2. All personnel who arrest and interrogate must bear clear identification tags with their name and rank.

3. An arrest memo should be kept for each detainee with the time and the date of arrest signed by a witness and the detainee him/herself, and the place of detention. A relative or friend should be informed of the arrest.

4. A diary should be maintained at each and every detention centre.

5. All detainees should be produced for a medical examination at the time of the arrest and ever 48 hours while in custody.

6. Copies of all documents must be sent to the magistrate concerned.

7. All detainees should be allowed to have an attorney present at all interrogations.

8. All provincial councils, the central government and police stations should be informed of these measures. Provincial councils must file an affidavit of compliance.

9. All persons found to be tortured must be paid compensation, in addition to disciplinary action being taken against the perpetrators. Agencies refusing to comply with regulations should be held in contempt of court.

10. There should be a system for civil society, lawyers, judges and representatives of professional groups to visit places of detention.

11. A culture of respect for human rights, especially fundamental rights, should be built into society through education and other methods, from a young age.

12. There should be a hotline to complain about violations of human rights.

13. Organisations need to network with one another.

14. Free legal aid and advice must be made available to detainees.

15. Various kinds of awareness programmes, including training for the police and army personnel, need to be developed.

16. The recommendations of the Human Rights Commission need to be implemented.

The Government of Sri Lanka must:

1. Incorporate the RIGHT TO LIFE into the Constitution.

2. Review Emergency Regulations.

3. Establish a separate organ for the welfare and assistance of bereaved families of the disappeared.

4. Make an official apology for disappearances.

5. Further empower the Human Rights Commission.

6. Use the Torture Act (only 7 cases to date).

7. Increase the time limit of one month in Fundamental Rights Applications at case level.

8. Initiate proper criminal investigations in all cases: conduct prosecutions where there is evidence; and properly, adequately and without delay compensate all families.

9. Have an official continuing human rights programme.

CAMBODIA

Review of a 2000 report by LICADHO, a well-known human rights organization in Cambodia

Unfortunately, torture in Cambodia—and attempts to render pain as power—did not end with the Killing Fields during the Khmer Rouge period of 1975 to 1979. Torture still exists in the country today as an institutionalised device employed by the state security apparatus. In a report entitled "Less than Human: Torture in Cambodia" released on 26 June 2000 (International Day to Recognise the UN Convention against Torture and Other Forms of Inhuman and Degrading Treatment or Punishment) the Cambodian human rights organisation LICADHO outlined the conditions that permit and perpetuate torture in the country and made recommendations to end its routine practice there.

Among the conditions that LICADHO cites as fomenting torture in Cambodia are the decades of war the country has suffered that have perverted the social structures and values of society, creating a national environment in which violence is too easily regarded as a normal characteristic of life. Other factors include long-held notions of power, hierarchy and patronage as well as traditional social attitudes that, for example, view women as second-class members of society—all of which are reinforced by low levels of education. In addition, the low salaries given to police officers and their lack of training contribute to the problem of torture as well. Most importantly, the report notes that the reliance of the police and judiciary on the confessions of prisoners to secure a conviction has made torture an accepted part of the Cambodian legal system.

Although Cambodia is a signatory to CAT and torture is forbidden in Cambodia's 1992 Criminal Code and 1993 Constitution, "Torture continues to exist", says LICADHO in its report, "because the authorities condone it, if not encourage it."

"Torture," the report adds, "impedes the development of the rule of law and contributes to a climate of impunity and exploitation. Law enforcement officials who are permitted, if not encouraged, to commit torture become the criminals whom they are supposed to combat... Prosecutors and judges who turn a blind eye to torture similarly ignore other police abuses and cannot be depended upon to

uphold the rule of law." Moreover, "torture, particularly when used for political motives, impedes the development of democracy, freedom of expression and political and social debate."

LICADHO maintains that torture will continue in the country until the law is enforced. "The government and judiciary are prime accomplices to torture in Cambodia," the report states. "A lack of political will power to strengthen the independence and professionalism of the judiciary, among other necessary reforms, is the biggest barrier to [eliminating the use of torture in Cambodia]."

This creates an environment, says LICADHO, in which "Cambodian torture victims are victimised repeatedly—first by the torturers and then by a government and judicial system which at best ignores the victims and at worst condones the barbaric and illegal treatment of them. They are often further victimised by the economic consequences of torture, as their physical or psychological injuries make it difficult for them to earn a living."

The report notes that the majority of cases of torture in Cambodia are non-political, that it is primarily used in police stations to extract a confession, which is then used to convict the person in court. Torture, the report continues, also takes place in prisons (as well as in military camps and other places of detention), in which it is usually used by prison guards—or inmates recruited by guards—to punish prisoners who attempt to escape.

However torture in Cambodia is not confined to the public sector of society, for the report underlines the fact that physical, emotional and psychological forms of torture are part of the private sphere of life as well: sexual trafficking and domestic violence bring torture and the use of pain to control behaviour into the country's brothels and homes.

"Torture in any form," says LICADHO, "like all human rights violations, flourishes in secrecy and denial. Breaking that silence, exposing its practice and its consequences and giving victims a voice is a vital step toward preventing scores of new torture victims from joining those of the past."

This report is an attempt to illuminate the problem of torture in Cambodia and to offer some remedies. Because the government is currently drafting a new criminal code and a new criminal procedure law, now is an opportune time to transform the country's legal framework that presently condones the use of torture as part of the legal process, says LICADHO. Among the report's specific recommendations, it calls for the new criminal code and criminal procedure law to contain the following provisions:

- Torture cannot be justified because it was ordered by a superior official or any public authority or because of any exceptional circumstances, including political or military instability;
- New criminal offence of torture shall be established that is applicable to civilian and military police officers, prison staff, soldiers and all public officials;
- Criminal charges shall be filed by judicial officers against those who allegedly engage in torture whenever there is evidence that an act of torture has occurred;
- All criminal offences shall result in mandatory higher penalties when committed by a member of the police force or military or a public official or civil servant;
- A medical examination and treatment shall be given immediately to any detainee who bears or complains of injuries when sent to prison or brought before a court, including the issuance of a medical certificate for the court on the nature of the injuries;
- Judges shall drop all criminal charges and the prisoner shall be immediately released on the grounds of procedural errors in any case in which there is reasonable evidence that an accused person has been subjected to torture;
- Confessions allegedly given by detainees in police custody are not admissible as evidence of guilt in criminal trials;
- Any arrested person has a right to decline to answer questions asked by the police, except to provide their name and personal details, and a right to have a legal representative present during any interrogation by the police;

- Immediate access to lawyers and legal organisations must be given to detainees by the police;
- At least one visit by a family member, friend or other person requested by a detainee must be granted by the police during police detention; and
- Access to police stations and prisons must be made available to prosecutors, judges, members of the human rights commissions of the National Assembly and Senate and representatives of legal, human rights and medical non-governmental organisations to inspect prison conditions, to conduct private interviews with prisoners and to provide medical treatment to detainees.

With regards to combating the brutality common in sexual trafficking and domestic violence, the report notes the involvement in sexual trafficking of police and military officers as well as other officials, and underscores the apathy with which laws against domestic violence are enforced. In response, it recommends the following policy changes and law enforcement measures:

- Public officials who participate in or are complicit in any way in sexual trafficking or forced prostitution, including the acceptance of bribes, shall be dismissed and prosecution shall be initiated against them;
- Police and other local officials in areas where prostitution is prevalent shall be regularly rotated;
- A central register of alleged perpetrators of sexual trafficking and their accomplices shall be created and distributed to law enforcement officers nationwide;
- Specially trained police officers, especially women, shall be assigned to all police stations to receive and investigate sexual trafficking and domestic violence cases;
- Victims of domestic violence shall be able to obtain restraining orders against those who abuse them and to receive compensation for their medical costs and rehabilitation; and
- The civil law on divorce shall be amended to make domestic violence valid grounds for divorce.

To assist this process, the report encourages the international community to place its greatest priority in its relations with Cambodia on firmly establishing the rule of law. In this regard, the international community should support long-overdue police reforms, the report says, that include the establishment of a police training school for new recruits and current officers to instil in them proper criminal investigation techniques and respect for the law as well as human rights education. Specialized training in the investigation of sexual trafficking and domestic violence cases should also be made available. In addition, police reforms should include the recruitment and promotion of police officers based on merit rather than nepotism or corruption.

In its attempt to end the use of torture in the country, LICADHO is seeking to restore the value of humanity to Cambodia, for "torture is about treating people as though they are less than human", LICADHO explains. "Torturers invariably de-humanize their victims, labelling them as enemies, criminals or possessions and, therefore, implicitly justifying barbaric treatment of them as though they were animals or objects of lesser or no value." However, "The people who have lost their humanity," LICADHO concludes, "are, of course, the torturers, not the tortured."

INDIA

Extracts from "Words into action", a report by Amnesty International[1]

Despite several positive initiatives in recent years, torture and ill-treatment continues to be endemic throughout India and continues to deny human dignity to thousands of individuals. Amnesty International believes that there is a depressing repetitiveness about statements made by government officials, members of the judiciary, senior police officials and others in official reports and studies during the 1990s and further into the past, many of which are referred to throughout this document, which have all identified and acknowledged a serious problem of torture and ill-treatment within the criminal justice system.

Amnesty International continues to receive numerous complaints of torture and ill-treatment from all states of India which indicate that Supreme Court orders, NHRC [National Human Rights Commission] guidelines and official sanctions have not deterred officials from inflicting torture on individuals in their custody. Methods of torture range from electric shocks to suspension from ceilings to severe beating with *lathis* [long wooden sticks] and kicking. In many areas of India beatings are not reported as torture or ill-treatment because they are so much a part of the arrest and detention process. This is particularly true in areas such as Jammu and Kashmir where detainees are routinely subjected to torture but rarely make complaints for fear of reprisals and because they feel lucky to be alive.

Corruption and extortion, lack of investigative expertise, a confession-oriented approach to interrogation, demands for instant punishment in the context of a crippled criminal justice system, the belief that punitive action will not be taken against torturers, and discriminatory attitudes are all reasons why torture and ill-treatment by law enforcement officials continues throughout the country. Discriminatory attitudes amongst law enforcement officials continue to mean that the most socially and economically vulnerable members of society are particularly vulnerable to torture and ill-treatment. These include women who are not only targeted directly but as a means of punishing their male relatives, *dalits* and *adivasis* who often bear the brunt of social discrimination in the form of physical violence and children who are easy prey.

While constitutional and legal provisions do, as the Government of India regularly argues at international fora, provide an elaborate framework of safeguards for detainees against torture, non-implementation of these safeguards and their absence in special legislation, ensure that torture continues despite these safeguards. Those arrested in areas of armed conflict are particularly vulnerable to torture, often leading to death in custody or extra-judicial execution since they are not offered some of the same basic legal protections as individuals in other areas.

CONCLUSIONS

Torture remains endemic in Asia. There are many causes for its commonality.

(a) Use of torture is a part of defective systems of justice

In considering the ways to eliminate torture, the totality of each justice system needs to be examined. Police, prosecutors and judiciary are important components of the system. The elimination of torture requires an agreement between these three components to eliminate torture. In most Asian countries the commitment of these three units towards this end is very limited. There is a general tendency to tolerate torture as 'a necessary evil'.

(b) Police often are responsible for direct use of torture

Military also engage in torture under some circumstances. Paramilitary groups and other forces also use torture with the consent of law enforcement agencies. Thus reform of police and related agencies is an essential part of elimination of torture. In this regard, the Amnesty International report cited above makes pertinent observations.

Amnesty International believes that the current policing structure encourages discrimination by allowing police to act at the behest of particular powerful groups rather than to act lawfully in the interests of society as a whole and by encouraging arrest on the basis of suspicion rather than on investigation and evidence. In practice also, the failure to prosecute many unlawful activities of police and the problems for victims in accessing justice mean that discriminatory practices are perpetuated.

Powerful sections of society often support police use of torture

A large section of people strongly believe that the police cannot deliver and cannot be effective if it does not use strong-arm methods against the criminals and anti-social elements of society. And these people include India's political class, the bureaucracy, and large sections of the upper and middle class... In their own perception, the policemen feel that they are doing a job. They resort to torture for 'professional

objectives' - to extract information or confession in order to solve a case; in order to recover stolen property or weapons of offence; in order to unearth other crimes that an arrested hardened criminal may have committed; in order to ascertain the whereabouts of other criminals; and in order to locate hide-outs... another 'professional objective' of the police often follows, which is, to terminate the criminality of a professional criminal, who could be a burglar, a robber or a gangster, or even a terrorist... by maiming him, by making him lame, rendering him incapable of further crime....Amnesty International believes that this perception of torture as an effective means of policing or punishment is not only unlawful but is fundamentally flawed. The use of torture or ill-treatment only serves to perpetuate violence and lawlessness rather than combatting it.

This AI report strongly supports police reforms

Amnesty International agrees with a growing body of opinion in India that there is an urgent need for reform of the police system. Demands for reform by police themselves, by the NHRC and by non-governmental organizations, have focussed mainly on the need to modernise a colonial police system which continues to operate under legislation enacted in 1861 and have called for a well-resourced police force free from political influence and operating efficiently and effectively as a professional service within the criminal justice system. Amnesty International believes that police reform is also an essential requirement in systematically tackling the problem of torture and ill-treatment.

Police are by no means the only perpetrators of torture. However, it is clear and has been widely acknowledged in almost all studies of the police carried out by both governmental and non-governmental bodies, that the system under which they operate on a day to day level facilitates torture and other abuses.

Amnesty International does not intend to list here all the problems identified within the current police system nor to rehearse all the arguments in favour of systematic police reform. However, the organization wishes to reinforce the message that many of the problems identified within the police system lead to human rights violations and

that therefore human rights protection must be at the core of any efforts towards police reform. Corrupt political influence over the police ensures that illegal actions by police are routine and sanctioned by vested interest. There is no independent body to monitor police operations which contributes to widespread impunity for illegal actions including torture. The lack of separate professional investigative departments within the police force, lack of scientific and technical resources and political pressure to ''solve'' crime, ensure that thorough and scientific investigation is rare and the use of torture or ill-treatment to produce confessions as a means of pinning blame for crime on individuals is common. Prevailing corruption within the police force encourages the practice of extortion which is often accompanied by threats or force."[2]

(c) Defective prosecution systems perpetuate the use of torture

While role of Police in perpetuating torture has been acknowledged, what is often not clearly recognized is the role of prosecutors for the same. In fact the role of the prosecutors is even more important than that of the police. The prosecutors, who generally are more competent persons (often professionally qualified and experienced lawyers), have a greater capacity to regulate the justice system. They also often have greater power within the justice and systems. As the police have to collaborate with the prosecutors to in dealing with crime, prosecutors can play a vital role in ensuring the proper professional behavior of the police. Prosecutors, for example, can give their instructions on prosecution of crimes to the police in writing and thereby can make the system of criminal investigations more transparent and accountable. They can counteract police negligence by professionally monitoring criminal investigations.

In this regard, the Asian Human Rights Commission has commented on the situation in Sri Lanka.[3]

The present situation of increased crimes must blamed on the criminal investigation authorities and on the prosecuting department that in Sri Lanka is the Attorney General's department. However, the relationship between these two departments themselves is inherently defective. As it exists now, criminal investigation is entirely the function

of the police and if they fail to investigate, the prosecutors can wash their hands by saying that there is no evidence with which to prosecute. While this situation remains, all that the hangman can do is to send a few poor people to the gallows as a deterrent to others. This will only be a further mockery of justice in a country where justice is fast becoming a distant dream.

We instead call upon the government of Sri Lanka to seriously address the defects in the justice system that make the increase in crime possible and the increase in serious crime inevitable. The most vulnerable place in the system is the absolute separation between the criminal investigation function and the prosecuting function that exists. Without ending this separation, crimes will not only increase but more serious crimes will escape prosecution.

The reasons for such separation are as follows.

1. To end the absolute gap that exists in Sri Lanka between the criminal investigation function and prosecution function

The system as it stands now is for the police to investigate crimes and, in serious offences, to present the file to the Attorney General's department, which may thereafter prosecute the case. If the police do not investigate a crime or do so very badly, there is hardly anything that the prosecutor can do, except to say that there is no sufficient evidence to prosecute. Thus, the ultimate responsibility to prosecute a crime rests with the police. If the vicious circle that produces the 'no evidence' argument is to be broken, it is necessary to build a link between the prosecutors and the investigators from the very inception of a case. This would mean that from the receipt of the first complaint up to the finalization of investigations the prosecutors would be informed of the investigations and could take suitable steps to guide them.

2. To bring the Sri Lankan law into line with the developments of other common law countries

The Sri Lankan practice of absolute separation between prosecutors and investigators is based on 19th century British practices. However in all of the major common law countries, including the United Kingdom, United States, Australia and India, no such

separation exists. In these countries the prosecutor's departments have extension offices in all areas and the police departments coordinate their activities from the very inception of such inquiries. It would be useful for Sri Lanka's law drafters, legislators and the legal profession as a whole to study the developments that have taken place in other common law jurisdictions. In Civil law (the French system), the link between prosecution and investigation has always existed through the function of the investigation judge.

3. To create professional prosecutors

The present practice of conducting prosecutions through the attorney general's department deprives the country of the development of professional prosecutors. Under the present set-up, lawyers in the Attorney General's department spend a few years in prosecution work and then shift into other work. The Attorney General's department has many functions and its lawyers shift from one to another. However, the acquirement of professional prosecuting skills takes a long time, as with any other serious profession. Besides, this allows individuals the option to enter and stay in this profession for a long time. In any profession, personal aptitudes and choice are important. This also has an impact on training. If the prosecutors are going to be in this profession for only a short time, there is no purpose investing in training for them. However, modern day prosecuting involves a high level of training and specialization. The mere fact of being an attorney-at-law is no sufficient qualification to be a competent prosecutor of serious crimes.

4. To create institutional habits within the prosecuting system

Professional habits are made with difficulty. The credibility of any institution of professionals will depend on the way, these habits are formed and transmitted. The present system as it operates through the attorney general's department is not conducive to development of such professional habits and to ensure a continuity to a tradition of proper conduct of prosecutions.

5. To address the problem of increased crime

The government admits that there is a vast increase in crime. The only real answer to this is proper criminal investigation and certainty of prosecution for all crimes. The system as it exists now fails to do this. It is an unavoidable fact that the system needs to be corrected.

6. To deal with crimes committed by law enforcement agencies

It was just few months back that about 26 persons were massacred in the presence of about 60 armed-police. Each day bring reports of crimes in which law enforcement officers are involved. Over 30,000 disappearances have put the countries among those with the worst records in the world. It is simply ludicrous to leave these crimes to be investigated by the police alone. The repeated argument that comes up is that there is not enough evidence to prosecute these crimes. The evidence depends on competent investigations, which in turn depend on proper systems of accountability. To allow the present system of separation between prosecutions and investigations to continue is to connive with crimes done by law enforcement agencies.

(d) Weak judicial intervention and supervision

Except in a few instances such for example as Supreme Court of India in some of its interventions to eliminate torture, by and large judicial attitudes in the Asian region are lukewarm on this issue. In some instances the judiciary seems to feel powerless against the tide of powerful forces promoting lawlessness in society. The judiciary can often pass its responsibility on to others by excuses such as "What happens outside court is not within our jurisdiction", or if police and prosecutors fail, "There is nothing we can do". However, the result of such attitudes is that the judiciary will itself be weakened, and this in turn will further weaken the legal defense of peoples' rights. A fundamental change in judicial attitudes is a necessary component of any attempt to eliminate torture.

(e) Some recommendations

For the elimination of torture, fundamental reforms of the police and prosecution systems and the judiciary are needed. Community movements must be involved to push public opinion in favour of eradication of torture

The following are recommendations made by Amnesty International:[4]

1.Condemn and never tolerate torture.

2. Address discrimination.

3. Prohibit torture and ill-treatment in law and amend or repeal legislation which facilitates it.

4. Address institutional problems which facilitate torture.

5. Provide adequate safeguards for detainees during arrest and detention, in law and practice.

6. Provide adequate safeguards for interrogation.

7. Provide effective independent monitoring mechanisms to ensure implementation of safeguards.
8. Ensure investigations into torture.

9. Ensure adequate procedures for medical examination of torture victims.

10. Bring to justice those responsible for torture.

11. Provide reparation to victims of torture.

12. Strengthen and support the National Human Rights Commission and other statutory bodies.

13. Provide effective human rights training to police and security forces.

14. Increase cooperation with national and international bodies in the fight to end torture.

End Notes

1. ASA 20/003/2001, at www.amnesty.org.
2. Same report; ASA 20/003/2001.www.amnesty.org
3. 'Reform of the Criminal Investigations and Prosecutions Systems is the real key to reducing crime in Sri Lanka', Asian Human Rights Commission statement, 11 January 2001, www.arhchk.org.
4. In ASA 20/003/2001.