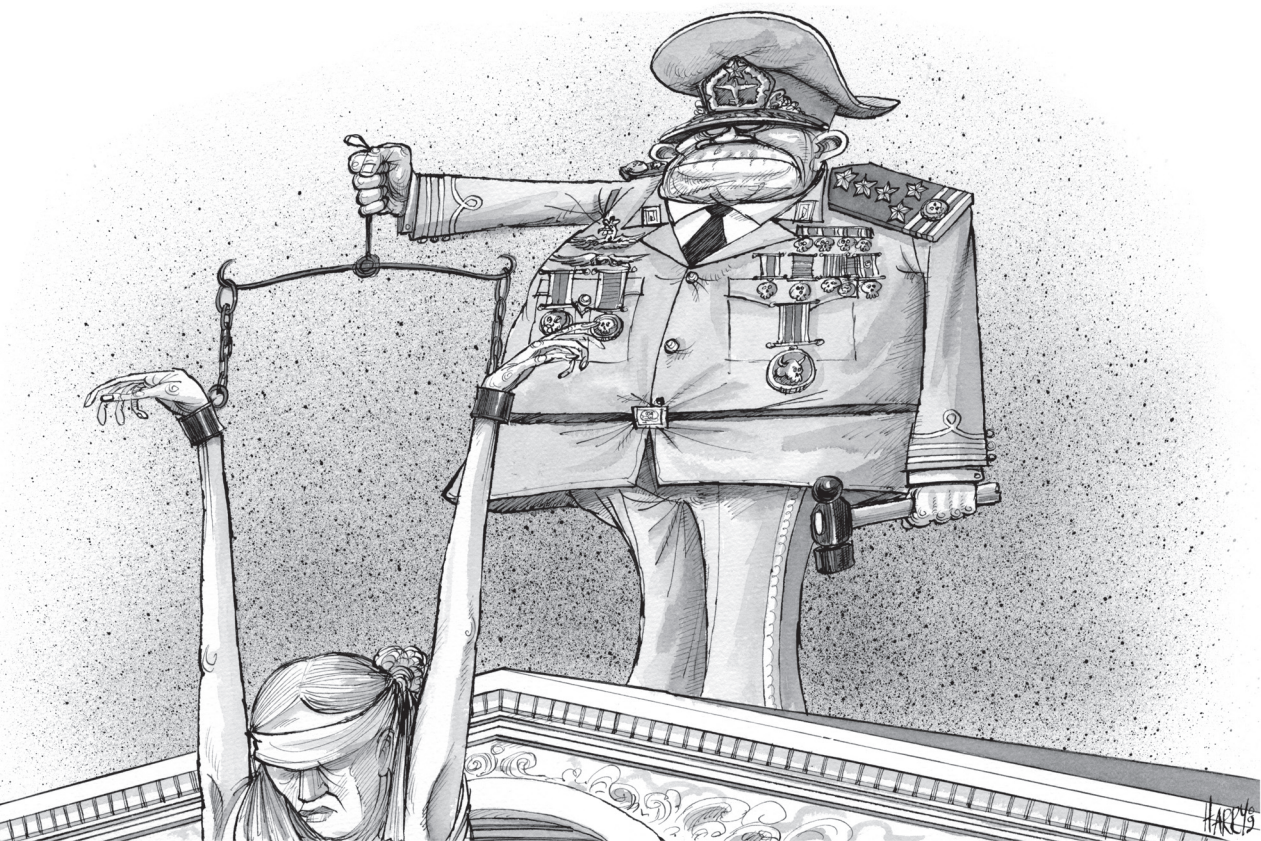


The State of Human Rights in Ten Asian Nations - 2009



Bangladesh • Burma • India
Indonesia • Nepal • Pakistan
Philippines • South Korea
Sri Lanka • Thailand



ASIAN HUMAN RIGHTS COMMISSION

Human Rights Report - 2009

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ASIAN HUMAN RIGHTS COMMISSION (AHRC)

Asian Human Rights Commission 2009

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Foreword

In this following report the Asian Human Rights Commission (AHRC) provides information and analysis about the human rights issues it has documented in 2009. The AHRC is a regional human rights organisation based in Hong Kong. The report contains chapters on each of the following countries: Bangladesh, Burma, India, Indonesia, Nepal, Pakistan, the Philippines, South Korea, Sri Lanka and Thailand.

The AHRC documents a range of grave violations in the countries in which it works. These include such serious violations as arbitrary arrests and detentions, force disappearances, torture, extra-judicial killings, rapes and other forms of violence against women, unfair trials, religious and caste-based discrimination, as well as corruption and violations of the rights to adequate housing and food.

While the types of violation and the manner in which they are perpetrated can vary from country to country, many grave and widespread human rights violations are typically carried out with impunity. While the laws in place to protect human rights may vary, as do the institutions of the rule of law and the governments' levels of ratifications of international legal instruments, the problem of impunity is witnessed throughout the region, often presenting very similar characteristics. Violations committed by State-agents are rarely investigated, and even less frequently lead to any prosecution or repercussions for those responsible. Independent bodies that can launch investigations leading to effective prosecutions are sorely lacking in most of the region's countries, as are effective witness protection systems and judiciaries that are competent and beyond political interference. This is not just the case in countries under the control of brutal military regimes, such as Burma, but is also the case in countries supposed to be governed by democracy, such as India.

2009 witnessed numerous serious flashpoints in the region, including the continuing deterioration of security and human rights in Pakistan and the violent end-game of the conflict in Sri Lanka and the government's subsequent crackdown on independent voices. Even in South Korea, which has in the recent past been considered a positive example of the development of protection of human rights in the region, the AHRC has witnessed several set-backs concerning the key freedoms of expression, association and assembly. In late 2009, the Philippines was the scene of the world's worst single incident of killing of journalists.

While the above are amongst the most noteworthy events, the AHRC has documented many individual cases of abuse that together present a dire picture in all of the countries in this report:

In the chapter on Bangladesh, the situation following the recent state of emergency that critically undermined human rights is analysed. The report looks into numerous issues, including the high number of ongoing extra-judicial killings, impunity, the prevalence of torture, violations of women's rights, as well as an in-depth look at the effect that corruption and political intervention have in perverting the course of justice.

In Burma, the problem of the lack of any form of independent judiciary is highlighted. The report illustrates the fact that the judiciary is not functioning to protect human rights, due to the thorough demolition of its independence, from top to bottom, over a period of decades. This is now the case to the extent that the notion of an independent judge upon which international debate is premised no longer exists in Burma at all. The problem of non-independence was brought out most strongly during the year in the case decided against democracy party leader Daw Aung San Suu Kyi and co-accused in August, but the report also illustrates how such failings are the norm in the country, by presenting several other cases.

The chapter on India illustrates failings in the rule of law that undermine the country's democratic system and values. Violations include extra-judicial killings, torture, caste-based discrimination and violations of the right to food.

In Indonesia, the AHRC documented cases of extra-judicial killings and torture, election-related violence, violations of the right to food, religious discrimination, threats and attacks against human rights defenders and impunity, and was particularly concerned by ongoing violence by the security forces in the province of Papua.

Despite hopes that political developments in Nepal in recent years would bring about a new era of improved human rights, political infighting, delays in creating a new constitution and increased insecurity arising from the proliferation of numerous armed groups, have resulted in 2009 being a year of stasis and frustration. In particular, the serious issues of torture, forced disappearance, violations of women's rights and caste-based discrimination are presented to illustrate the state of rights in Nepal during the year in question. Addressing impunity through institution-building and effective transitional justice that ensures accountability in the near term are required if Nepal is to live up to the promises of a new dawn for the enjoyment of rights.

The deterioration of security in Pakistan during 2009, as the country became increasingly engulfed in armed conflict, and the multitude of grave human rights abuses committed across the country, make this one of the most serious situations in Asia at present. The report includes analysis of the problems of increasing insecurity arising from terrorism and military operations, censorship and attacks on the media during military operations, institutional weaknesses and infighting that is undermining any attempts to protect human rights, institutional corruption, torture, violence against women, religious discrimination and attacks on minorities and on human rights defenders.

The chapter on the Philippines highlights the massacre in Maguindanao province and also shows how victims of a range of human rights violations have limited avenues to seek justice. The lack of accountability concerning hundreds of extra-judicial killings illustrates the country's deep problem of impunity.

The South Korean government's undermining of human rights in favour of public order is the focus of the report on this country for 2009. Efforts to undermine the independence of the judiciary, abuses of powers by the police and prosecution, restrictions on the freedoms of expression and assembly, and attacks on dissenting voices, including those of human rights defenders, were all documented during the year, and represent a worrying trend.

The chapter on Sri Lanka takes an in-depth look at the collapse of the institutions of the rule of law and the resultant lawlessness that blights the country, permitting impunity for the many grave violations of human rights that have been perpetrated there. Post-conflict Sri Lanka remains the scene of grave violations due to the collapse of these institutions, the dominance of the security apparatus and the zero status of citizens. Dissenting voices have faced increased reprisals during 2009, giving rise to serious fears about the direction the country is taking.

Finally, the section on Thailand concentrates on the resurgence in 2009 of regressive anti-human rights forces and their allies within the government and institutions that should be protecting human rights, since the military coup in September 2006.

The AHRC would like to thank all those who contributed to this report, including the AHRC's partners and sources, as well as the AHRC's various country desks and the numerous interns and volunteers who continue to make this work possible.

On December 10th, as 2009 drew to a close, the AHRC marked International Human Rights Day by releasing the following statement as well as initial versions of some of the chapters of this report. The statement, reproduced below, highlights many of the organisations' key concerns at that time:

A Statement by the AHRC on the occasion of International Human Rights Day, December 10, 2009

ASIA: Crisis in Human Rights Protection in Asia -- Bad Policing Systems as a Major Threat to Human Rights

On the 10th of December Human Rights Day is celebrated the world over. It reminds us of the adoption of the Universal Declaration of Human Rights in 1948, which symbolized the start of an era based on a respect for human dignity and on the obligations of states to protect human rights. But what kind of reminder is this day for people living in the Asian region? How many of them have seen improvements that would allow them to participate in such a celebration joyfully?

For the majority of people in Asia human rights remain a promise and a dream; they are not protected to the extent that they are thought worth celebrating. Instead on this day, once again, people will air their grievances louder; they will remember the many who have unnecessarily died because of violence, or because of neglect on the part of their government to provide them with economic, social and cultural development necessary to sustain them.

Threats to the Right to Life

When considering widespread poverty, extreme unemployment and the lack of basic resources available for people to live simply and decently in Asia, these grievances will be largely related to the right to life. It is this right that remains most under threat, in the area of civil and political rights, as well as in economic, social and cultural life across the continent. The more vulnerable sections of society, such as women, children and the elderly, will have the most to say about this. For most of them, Human Rights Day is celebrated under grim conditions.

States are yet to demonstrate that they pay anything beyond lip service to the protection of human rights, and remain preoccupied with the protection of privileges for a particular

minority. They are proving slow and often unwilling to open to the democratisation of their societies in a manner that would give people access to basic rights. Instead the typical Asian state still strongly protects the rights of privileged sections of societies to engage in exploitation. Various ideological justifications and pretexts are made, and often they are overtly nationalist. Nationalism has not yet come to mean the protection of all those living in a particular country, but rather perversely represents certain stronger sections of society.

The Massacre in Maguindanao

One terrible reminder comes from a recent massacre in Maguindanao, in the Philippines, in which over fifty seven innocent persons were executed, including thirty journalists, while on their way to assert their basic democratic rights. It brings to mind many similar killings that have taken place throughout Asia during this year, perpetrated by state actors or other powerful sections, often to suppress more powerless sections of their societies. Besides such mass murders, we receive constant reports of extra-judicial killings, which appear to be used by governments as a way to deal with problematic individuals. Governments in Asia have failed to make a clear legal stand against extra-judicial killings, with punishments rarely resulting from the use of the rule of law mechanism and the operation of due process, both of which continue to be severely undermined continent-wide.

Failures in Criminal Justice Systems

A major reason that violations continue, is the failure of the Asian states to develop their criminal justice systems in terms of universally accepted norms and standards, and on the basis of human rights and criminal justice principles. Instead they rely on underdeveloped systems of policing, which themselves rely heavily on the use of brute force to control populations, rather than the rule of law.

This failure to develop credible systems of policing is the greatest visible sign of states' neglect of civil and political rights. Torture continues to be a common part of the investigation process and its legitimisation paves the way for other violations and the abuse of criminal justice itself, extortion in particular. Police officers enjoy enormous, unchecked powers, and these are often used to illegally enrich themselves.

A police station here is often simply used as a form of domination by the elites and upper caste persons, its staff are symbols of caste and not of law. Internal processes within the

policing system are overly controlled and rarely democratic. A critique of the criminal justice systems from this point of view is essential if societies are to be democratised and entrenched inequality within society is to be handled.

By not reforming bad policing systems, no credible mechanisms for complaint are being developed; complaints cannot easily be filed against anyone in the police force and the problem self perpetuates. Those who are brave enough to complain against the police are often exposed to various abuses, sometimes threatened with death. Witnesses are commonly killed. Thus there is a systemic, sanctioned silencing. This is as helpful for authoritarian governments as it is for powerful individuals looking to exploit the poor; arbitrary forms of power are commonly maintained through the misuse of police both during election times and throughout the year. Opposition political parties across the continent claim to have been suppressed in the localities by police.

Thus in countries such as China, India, Malaysia, Bangladesh, Nepal, Pakistan, Sri Lanka, Philippines, Thailand, Burma and Cambodia, the improvement of human rights must be measured by the extent to which the policing systems are democratised. As long as policing systems remain as they are, the likelihood of any improvement in human rights or democratization will remain scant.

Caste-based Discrimination

Systems of extreme caste-based discrimination are still powerful within the Asian region, particularly in South Asia, where they maintain tight cycles of impoverishment. While some forms of modernisation have made certain inroads, the undermining of this system here is still in its initial stages. Economic power is still very much in the hands of those who control power systems that utilise caste-based discrimination. As a result free expression and free organisation among the lower castes is systematically obstructed by traditional elites. This sector uses national resources for its benefit only. The empowerment of lower caste communities depends upon the unjust practices that have been built into the very criminal justice systems, to the point of being ingrained. Justice is currently very often out of reach of the poor.

Women's Rights

Discrimination against women, particularly those who are underprivileged, remains deeply entrenched in the very processes of criminal justice in Asia. A woman who wants to assert her right to equality finds little protection within the criminal justice

system of her country, where judges remain biased and laws traditionally patriarchal. A woman's access to the rule of law is also often blocked by the police force, where gender sensitisation has yet to take place and where crimes against women are commonly committed.

Traditional forms of community justice also prevail in many parts of the region, which mostly involve the assertion of the will of the wealthy sectors of society. This process controls the rights of women to their property in particular; the roots of most honour killings dealt with by the AHRC lie in land-grabs. This lack of economic empowerment and legal access leaves women with little room to fight social inequality, and the cycle perpetuates.

Starvation, Malnutrition and Hunger

A formidable obstacle for participatory democracy in many Asian states is the prevalence of starvation, malnutrition and hunger. In India, the largest democracy in the world, an estimated 27% of its population lives below the poverty line, unable to earn more than 1USD a day. An equally alarming percentage of people live in similar conditions in Nepal, Bangladesh, Pakistan, Afghanistan, Philippines and Burma. Those worst affected by hunger are women and the children, and in particular the girl child. Malnutrition adversely affects a child's prospects to learn and poverty prevents parents from sending their children to school, thereby ruining a generation's options to participate in whatever democratic process is available in their country.

Nevertheless little is being done by the governments in these states to ameliorate the living conditions of the poorest of the poor. The AHRC has reported many cases of acute malnourishment and hunger this year, particularly from India, where it has most access to this information. Trusted sources from Burma suggest that the condition is even worse there, where acute food shortages are not due to natural disasters, but rather the disastrous failure of the state to manage its resources for the good of its people.

Corruption

Asia harbours many of the world's corruption dens, where the practice hampers the meaningful functioning of justice institutions and demoralises the masses. It affects people's motivation to push for reforms wherever such space is available.

Corruption has contributed to economic polarisation in the region, and adversely affects the majority, yet there have been not active steps to tackle it, except for in a few selected states. Backslides have been observed, as in South Korea, where the state has increasingly resorted to the use of force to crackdown on popular discontent against corruption and highhandedness in the government.

Inadequate Funding for the Administration of Justice

One of the major strategies employed by Asian governments to prevent the improvement of human rights systems and democratisation, is to not adequately fund the institutions that administer justice. Investigating and prosecutorial systems are extremely underfunded across the region. This administratively prevents their independence. Underfunded police often do not have the personal or institutional resources to deal with their tasks, and underfunded prosecution systems do not have the qualified or competent personnel needed for matters of law and justice. By underfunding the judiciary, governments can be sure that judicial functions will be stunted, and this allows the executive to exert easy control. The heavy control of justice institutions is a strong characteristic of the Asian nation.

The Responsibility of the International Human Rights Community

These are the factors that allow human rights violations to flourish in the Asian environment. The international community has still not adequately grasped the nature of the problems of rights implementation in this region. It has instead wasted much of its resources on promoting, for example, national human rights commissions, which are primarily ombudsman institutions for countries that do not yet have the institutional foundations to administer justice. Yet the former cannot function without the latter. The emphasis must lie in improving policing, prosecutorial systems and judicial systems. The challenge for the international community is to review its old strategies for human rights development in countries where the basic rule of law and due process is seriously flawed.

BANGLADESH

HUMAN RIGHTS HOPES AND DISAPPOINTMENTS IN POST-EMERGENCY AND POST-ELECTION BANGLADESH

I. Introduction

After two years suffering under a prolonged state of emergency, which lasted from January 11, 2007 to December 18, 2008, there was hope that the grave and widespread human rights violations that had plagued the country prior to and during the emergency would abate. Bangladesh began 2009 with hope for the “change” that had been trumpeted as an election slogan by the eventual winners of the general election held on December 29, 2008. The slogan emulated that used by now-President Obama in the United States during elections there.

In this report, the AHRC will present its experience of cases and situations it encountered in 2009. This does not claim to be an exhaustive review of the situation of human rights in the country, but will give an opportunity to evaluate whether the early hopes for change and improvements concerning the protection and enjoyment of human rights have been fulfilled.

The Bangladesh Awami League led alliance, formed a government on January 6, 2009, following a landslide election victory, in which it secured 262 seats out of a total of 300 in Parliament. In its election manifest, it had pledged to end corruption and extrajudicial killings and to bring to justice the perpetrators of extrajudicial killings. The AHRC has highlighted the serious problem of extra-judicial killings, typically attributable to the country’s paramilitary Rapid Action Battalion and police forces. Hundreds have been killed with impunity by State-agents over recent years. The alliance also promised to establish human rights and rule of law in the manifesto, which it called its “Charter for Change.”

In this manifesto, it was critical of the corruption that took place during the previous government led by the Bangladesh Nationalist Party (BNP). These two parties have dominated Bangladesh’s political system for years. Typically, in the recent past, the party that finds itself in opposition has championed human rights and decried the abuses by the ruling party. The party in power grossly misuses its powers to harass and even kill

members of the opposition, as well as to engage in all manner of corruption. The military is without doubt the most powerful force in Bangladesh, and successive governments have to come to arrangements with the military that allows all to profit. Human rights and justice are sacrificed as a result, notably where it concerns abuses by the military or the ruling party and its associates. When an opposition party comes to power, it quickly abandons its pro-human rights rhetoric and becomes the abuser. We shall see whether this pattern has been continued under the new government in 2009.

In its manifest, the Awami League-led alliance however praised the military-backed emergency government for its alleged successes without being in any way critical of the gross abuses of human rights that were committed during the emergency. These include mass arrests and arbitrary detentions, torture, extra-judicial killings, the suspension of fundamental rights, as well as efforts to undermine the independence of the judiciary, to name a few. This double standard presaged the continuation of the bitter rivalry with the BNP along with subservience to the military, representing the status quo, not change.

Among the five main pledges in the “Charter for Change,” the second concerned “**Effective Action against Corruption**,” promising that: “*Multi-pronged measures to fight corruption will be put into place. Powerful people will have to submit wealth statements annually. Strict measures will be taken to eliminate bribery, extortion, rent-seeking and corruption. Strong measures will be taken against those having unearned and black money, against loan defaulters, tender manipulators, and users of muscle power in every stage of state and society. State or private monopoly will be broken up. Discretionary power of officials will be curtailed. To establish people’s right, citizens’ charter will be introduced in every department. Opportunities for corruption will be eliminated or minimized through widespread computerization.*”¹

In reality, by the end of 2009, no policy had been drawn up to eliminate bribery and other forms of corruption in the country. Instead, the leaders and activists of the Awami League and its associate organizations, including its student and youth wings, have reportedly been involved in widespread “tender manipulating” and associated acts of violence. This manipulation involves the grabbing of contractual businesses for constructions and supply works using muscle power and political influences. However, the neither the law-enforcement agencies of the government nor the political parties themselves have taken any lawful action against the alleged offenders.

The fifth pledge was of particular importance as it concerned the “**Establishment of Good Governance**.” It declared that: “*Genuine independence and impartiality of the*

1 http://www.albd.org/autoalbd/index.php?option=com_content&task=view&id=367&Itemid=1

judiciary will be ensured. . . Extrajudicial killings will be stopped. The judgment of the Bangabandhu murder case will be made effective and the retrial of jail killings will be held. Trial of real criminals responsible for the grenade attack of the 21st August, 2004 through proper investigation will be arranged. Rule of law will be established, The Human Rights Commission will be strengthened and made effective, and an Ombudsman will be appointed. Human rights will be strictly enforced. . . Wealth statement and source of income of the Prime Minister, members of cabinet, Parliament members and of their family members will be made public every year. Except for some specific subjects related to the security of the state, Parliament members will be allowed to express differing opinions. . . Security and rights of religious and ethnic minorities will be ensured. Courtesy and tolerance will be inculcated in the political culture of the country. . . In order to provide security to every citizen of the country, police and other law and order enforcing agencies will be kept above political influence. These forces will be modernized to meet the demands of the time. Necessary steps will be taken to increase their remuneration and other welfare facilities including accommodation. . . “

Surprisingly, according to Article 70 of the Constitution of Bangladesh, parliamentarians are not allowed to express views different to those of their parties. If they do so, they lose their membership in the parliament.

Concerning steps to increase the remuneration of law-enforcement agencies, following a bloody mutiny within the Bangladesh Rifles, the government increased rationing provided to the lower-ranked members and non-cadre (commissioned) officers of the Bangladesh Police in March, 2009.

The Bangladesh Army formed a special commission headed by a two-star General to review the military's salary and benefit structures. The commission submitted a report to the government in May 2009, proposing increases to salaries, before the national fiscal budget, was announced in parliament in the first ten days of June, which was approved by the government.

Declaring a plan to bring Bangladesh into the digital age, that it hoped would be attractive to young voters who represent over 30% of the electorate, the government made over 60 such pledges. These created public hope for a new era concerning the ways in which the political parties exercise their power, in how justice functions, in how corruption could be combated and in how equal opportunities for citizens could be brought about.

The Judiciary of the country has been ignored in the governmental fiscal budget planning before June as well as in announcing a new pay scale for the public servants in October. The country's National Human Rights Commission (NHRC) has also not been provided

with adequate resources and manpower. The current government followed the path of the emergency government by ensuring this newly created institution remains under-strength and therefore unable to work to its full potential.

Many recommendations and demands have been made by human rights groups, including the Asian Human Rights Commission, notably calls for the government to:

1. Repeal all the ordinances promulgated by the military-controlled government during the state of emergency that contradict international human rights norms and standards, particularly those relating to illegal arrest and arbitrary detention including restriction of bail;
2. Remove all barriers that prevent the independent functioning of the judiciary, in particular by removing the executive control over the judiciary by the state;
3. Strengthen the Judicial Service Commission by ensuring its independency and transparency;
4. Take measures to establish an effective and independent prosecution department, particularly with fixity of tenure. The recently promulgated Public Attorney Service Ordinance, 2008 (Ordinance No. 55 of 2008) must not be ratified by the new parliament;
5. Immediate measures must be taken to ensure the accountability of law enforcement officers, particularly the police, in order to stop arbitrary arrests and detentions as well as torture for the purpose of making money;
6. Disband paramilitary forces, notably the Rapid Action Battalion, which has an appalling record concerning extrajudicial killings;
7. Withdraw draconian laws, such as the Special Power Act, 1974, the Joint Drive Indemnity Act, 2003 and the Armed Police Battalions (Amendment) Act, 2003;
8. Repeal Article 46 of the Constitution, which has continuously been a source of abuses by the Executive;
9. Abolish extra-constitutional bodies, in particular the Truth and Accountability Commission, in compliance with the orders of the Supreme Court of Bangladesh;
10. Establish an effective mechanism to eradicate corruption from public institutions;
11. Strengthen the National Human Rights Commission by expanding its jurisdiction to ensure enforceability of the Commission's rulings;
12. Criminalise the practice of torture, in compliance with Bangladesh's international treaty obligations resulting from its the ratification of the Convention against Torture.

In the sections of the report below, the AHRC will present examples of developments and failures by the government to live up to its pledges and implement the recommendations that have been made to it.

II. Military pull-out begins from the Chittagong Hill Tracts after three decades of deployment and abuses

In a positive move, on July, 29 2009, the military Inter Service Public Relations (ISPR) announced in a media release that the Government of Bangladesh had decided to withdraw 35 temporary camps, three infantry battalions and an army brigade that were deployed in the Chittagong Hill Tracts (CHT), in the south-eastern part of the country.

On August 7, a temporary camp housing some 40 Bangladesh Army soldiers was reportedly closed in Joysenpara under the Mohalchhari upazilla (sub district) of Khagrachhari district. This is a small but welcome beginning to partial military pullouts. However, there have been at least five brigades of the armed forces deployed in the CHT for decades to combat the so-called ethnic and political conflicts that deteriorated in the mid 1970s, so this remains only a small beginning to the withdrawal. Brigades may range from between 1,000 and 10,000 soldiers in this context.

A guerilla group named Shanti Bahini, was formed in order to fulfil the demands of the major ethnic groups in the CHT region. They later turned into the political party known as *Jana Shanghati Samity* (JSS) after the CHT Peace Treaty signed on 2 December in 1997. Around 30 Army Camps out of 500 were withdrawn at the beginning of process, immediately after the peace accord in 1997.

The ethnic groups have accused the armed forces of perpetrating atrocities against civilians in the area, mostly targeting the ethnic population. They have demanded the withdrawal of all forces. Allegations of torture, extrajudicial killings, rape and other gross human rights abuses at the hands of the armed forces had been commonplace since their deployment. For more than three decades the government brought in a large number of non-local and non-ethnic people in order to create a so-called balance of population in the area. There were serious allegations made against the authorities, including the armed forces, concerning the forced appropriation of lands from ethnic minorities during the settlement of other ethnic groups. .

The withdrawal of the military is one of the major demands of the ethnic communities and was recognized by the government as one of the key conditions in the CHT Peace Treaty. The authorities have correctly assessed that, in the long run, the military presence in the CHT area did not bring about the needed changes. Almost 12 years after the signing of the peace treaty, the government has now decided to partially remove the

military camps from the area. The ethnic groups and human rights organizations welcomed the decision to pull the military from the area.

However, the problems affecting the CHT are not merely an ethnic or a security problem and cannot be completely solved by either military action or a decrease in the presence of the armed forces. A people-friendly solution for the problems must be found. The government of Bangladesh should form an independent commission. It should probe and investigate thoroughly the issues involving conflict among the various ethnic groups and ensure the resolution of land disputes as well as taking action concerning allegations of violations by the military. The commission should include in their area of investigation the terms and rights enshrined in the constitution of Bangladesh and the country's international obligations, particularly the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on the Economic, Social and Cultural Rights (ICESCR) and the Convention Against Torture (CAT) to which Bangladesh is a party.

III. Bangladesh's Universal Periodic Review at the UN Human Rights Council

On February 3, 2009, Bangladesh's human rights record was scrutinised as part of the United Nations Human Rights Council's Universal Periodic Review (UPR) mechanism, which conducts reviews of all UN member States in a four-year cycle. The delegation sent to the UN was headed by Foreign Minister Dr. Dipu Moni, in her first abroad after being appointed to the Cabinet. Referring to the electoral pledges of her party, the Foreign Minister declared that the Government of Bangladesh will have "zero tolerance" for extra-judicial killings. She also announced before the international community that all the perpetrators of extra-judicial killings would be brought to justice immediately.

Ironically, Mr. Samsel Islam Robin was killed by the police just hours after Foreign Minister Dipu Moni claimed a policy of zero tolerance for such killings. As of the end of 2009, no complaint had even been registered and no credible inquiry had taken place regarding this killing, making a mockery of the Foreign Minister's promises.

In June, the Human Rights Council adopted the UPR Outcome Report on Bangladesh² and the government accepted a number of recommendations made by the international community. Concerning recommendations 10, 20 and 26, Bangladesh has promised to halt such practices and address the culture of impunity by bringing those responsible to justice.

2 http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/BD/A_HRC_11_18_BGD_E.pdf

The recommendations in question are as follows:

Recommendation number 10: Develop a national human rights programme to give a new impetus to its commitment and determination to tackle national problems, such as a culture of impunity, arbitrary and extrajudicial executions and a practice of torture and degrading treatment (recommended by Mexico).

Recommendation number 20: Address the problems of extrajudicial killings and torture by security forces and improve prison situations (recommended by the Netherlands).

Recommendation number 26: Take steps to address the culture of impunity for human rights violations by law enforcement agencies (recommended by Australia); Adopt further measures to fight impunity for human rights violations, including by law enforcement officials (recommended by the Czech Republic/EU); Fight impunity and hold all officers and persons acting on their behalf accountable for acts of torture and harassment of civilians (recommended by Germany).

AHRC's sister organization ALRC intervened at the time of adoption of the UPR outcome on Bangladesh during the 10th Session of the UN Human Rights Council.³

However, no functioning complaint mechanisms even existed at the time of the adoption of the report regarding the practices of extra-judicial killings, torture and other forms of human rights abuses. The government failed to respond to the ALRC's intervention, which called on the government to produce evidence of even a single case in the period of this review in which a State-agent had been held responsible for torture or extra-judicial killings. The government was also urged to repeal the "Joint Drive Indemnity Act-2003" and Article 46 of the Constitution, which continue to provide blanket impunity to State agents involved in grave violations.

Furthermore, the AHRC regrets that Bangladesh did not accept recommendation number 19 concerning a moratorium on the death penalty.

Concerning recommendations 11 and 25⁴ concerning the independence of the judiciary, Bangladesh claimed that the judiciary was separated from the executive. However, in reality, the government amended its Code of Criminal Procedure-1898 in April 2009,⁵ allowing "Executive Magistrates" to take control of any trial the executive authorities

³ For further details, please see: <http://www.abrchk.net/statements/mainfile.php/2009statements/2092/>

⁴ http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/BD/A_HRC_11_18_BGD_Add_1_E.pdf

⁵ <http://www.abrchk.net/statements/mainfile.php/2009statements/2054/>

deem fit, which completely obstructs judicial independence in practice.

Also of concern is the fact that Bangladesh has failed to accept the UPR's recommendation 12, calling for a standing invitation to be issued to all Special Procedures. As a member of the Human Rights Council, Bangladesh should respect human rights to the highest possible standard and ensure full cooperation with the Council's expert mandates, but is failing to do so and instead is using its membership in the body to protect its reputation, and not human rights. Despite numerous pending requests for visits by the Council's Special Procedures and claims by the government that it is cooperating, there have been few visits and none in the last five years. Bangladesh was urged in recommendation no. 12 (see below) to ensure the visits of the Special Rapporteurs on extra-judicial executions, the independence of judges and lawyers, and the freedom of expression as a priority, and extend invitations to all other mandates, including that concerning torture.

Recommendation number 12: Issue and implement a standing invitation to all special procedures (Czech Republic/EU); Extend a standing invitation to human rights mechanisms to visit the country and to support national efforts in these areas (Mexico); Positively consider the visit requested by the special rapporteur on summary executions (Brazil).

The ALRC also made similar recommendations to the Human Rights Council in a statement.⁶

IV. Lawmakers turn into lawbreakers

Following the formation of the government, the Jatiya Sangsad (National Parliament of Bangladesh) began its first session on January 25, 2009, after a gap of about 27 months, resulting from political turmoil and the state of emergency. The resumption of the Parliament's work led to hope and expectations from professionals and citizens regarding a new direction in governance. However, incidents involving some members of Parliament have cast doubt over such hopes.

Mr. Golam Reza was elected a Member of Parliament from the constituency of south-western Satkhira, some 400 kilometers from Dhaka. Golam Reza, whose party is part of the ruling coalition led by the Bangladesh Awami League, was driving to the capital on the evening of January 24 to attend the inaugural session of the parliament.

Upon arriving at the ferry pier at Daulatdia, on the western banks of the Padma river, Golam Reza did not want to join the queue of vehicles on the ferry. He tried to jump the

6 http://www.alrc.net/doc/mainfile.php/alrc_st2009/554/

queue and in doing so caused a minor collision with a Dhaka-bound bus, breaking one of his jeep's windowpane.

Golam Reza got out of his jeep, rushed inside the bus and beat the bus driver, Alal Sheikh, with a shotgun. It is not known whether the gun was licensed or not. Passengers on the bus and other staff protested against Golam's Reza action, which led to a minor protest by people in the vicinity, who pelted Golam Reza with stones.

Local police reportedly rescued Golam Reza and arranged for his safe exit. The bus driver was taken to a local hospital for medical treatment. Although the officer-in-charge of the Goaland police station, Rajbari district, registered a case against Golam Reza, which was published by the local media, no action has been taken against him.

On January 22, several incidents occurred across Bangladesh in which ruling party lawmakers allegedly rigged votes in the Upzilla Parishad (sub-district council elections). For example, Abdur Rahman Bodi, the Bangladesh Awami League MP in Cox's Bazaar district, assaulted at least three officers at a polling centre for not allowing him to rig votes in the area. Bodi is still enjoying impunity for his actions.

There have been many other instances of physical assaults by lawmakers of various political parties in Bangladesh in the past. However, there are no examples where the government has taken stern action against such persons. Politicians apparently believe they prove their worth by beating people and public servants. Ironically, these lawmakers represent their constituency and its people in Parliament.

After these incidents questions about the quality of representatives elected to the Parliament and other local governing bodies arose. Political parties should ensure that their members anti-social behaviour of this type and illegal actions, if they are to have any credibility.

For example, slogans of various political parties are indicators of their intent. Many political processions in Bangladesh start with slogans such as "Jalo, jalo, agun jalo" - which literally translates as "light the fire," but also incited followers to burn those that oppose them. It is too ambitious to expect such politicians to follow the rule of law. Top leaders of the country's political parties should understand this reality. Those who lead political parties and alliances must be questioned about the concept of the rule of law and the difference in its application between normal citizens and politicians and other officials who disregard the law.

When Prime Minister Sheikh Hasina chose Bodi Abdur Rahman as her party's representative in the parliamentary election, she associated herself with him politically.

His actions therefore tarnish her. The fact that no legal action has been taken against him therefore tarnishes the government. By turning a blind eye to the bad deeds of its own leaders, the government has lost the moral ground to control similar abuses of power by civil bureaucrats and other law-enforcement agents in the country, such as the police, who frequently break laws, abuse their power and indulge in corrupt practices that affect ordinary citizens.

The traditional practice of ignoring lawless actions by public representatives such as Golam Reza transmits the message to ordinary citizens that some are above the law thus undermining the rule of law in Bangladesh.

It is time to rethink the culture of politics in the country. Politicians of the ongoing “Jalo, jalo culture” can only destroy the infrastructure of the country. This cannot contribute to the much-needed advancement development of the country in terms of social cohesions, respect for human rights and economic stability and advancement.

The failure to take legal action against offenders regardless of their political positions and portfolios will only cause the overall situation in the country to continue to deteriorate, especially concerning of human rights, as impunity breeds abuse.

In the first session of the Parliament of Bangladesh, its members spoke out against the former military-controlled emergency government. The parliamentarians demanded the prosecution of members of the military forces responsible for arresting and detaining high-ranking politicians, and subjecting them to ill-treatment and torture in custody.

Abdul Jalil, general secretary of the Awami League during the emergency, has demanded a parliamentary probe into such detentions. He was detained and has cried while describing the torture he underwent in a detention centre operated by the armed forces. He said around eight armed men had come to his office, blindfolded him and taken him away in a waiting car. They identified themselves as members of the Joint Forces, which comprises and is dominated by the army. Jalil was detained and tortured for five consecutive days. He was later paroled to allow him to seek treatment abroad, and after returning to Bangladesh, managed to get bail from the Supreme Court.

Another Member of Parliament, Mahiuddin Khan Alamgir, also described his arrest and torture in a number of articles, interviews and talk shows. He has declared his intention to sue the chairman of the Anti-Corruption Commission, Lt. Gen. Hassan Mashhud Chowdhury, and other members of the armed forces for torturing and treating him inhumanely in detention. He joined the discussion in the parliamentary session.

A former member of Parliament claimed that he was blindfolded when army officers

arrested him and held him incommunicado in a soundproof cell, which he assumed to be at the army garrison where dozens of specialized torture cells have been maintained for years. Medical teams first performed a thorough check-up of detained persons, he said. After they were examined and their medical histories recorded, death certificates were prepared in advance, with physicians' signatures and comments, to elude suspicions of torture.

The torture lasted for days, and victims were moved from one cell to another depending on the choice of the perpetrators and their methods. Threats to circulate false stories of private bank accounts and wealth accumulated through corrupt means were used to intimidate and blackmail the detainees. Most victims were forced to pay huge sums of money, based on their financial wealth, to escape torture.

Bangladeshi media have also claimed – quoting a ruling-party parliamentarian who was a victim of torture and other witnesses – that some of those charged with corruption were tried in a Special Anti-Corruption Tribunal controlled by officers of the Bangladesh Army. The officers and the Anti-Corruption Commission reportedly conducted rehearsals of false depositions by arranging false witnesses to provide testimony in the corruption cases.

These so-called witnesses said they were intimidated and forced to testify before the court. There are allegations of the systematic use of torture on those witnesses who were reluctant to testify. In addition, they said, the military officers dictated the judgments in many cases.

Barrister Moudud Ahmed – who was Minister of Law during the former Bangladesh Nationalist Party (BNP)-led government, who lost his seat in Parliament in the general election but was later elected as member in a by-election, has also tried to convince people through the media that he was a victim of torture and degrading treatment while in the custody of the armed forces. Moudud also announced that he is writing a book on his life in prison.

However, Moudud's claims concerning custodial brutality are considered more aimed at personal or political gain than being truthful, according to the human rights defenders in Bangladesh. In fact, Moudud was Minister of Law when the government validated the actions of the armed forces during Operation Clean Heart, an 86-day crackdown on political dissenters in late 2002, which resulted in 58 deaths in the custody of the armed forces. The government claimed all these deaths were the result of "heart attacks." More than 10,000 ordinary citizens were illegally arrested, arbitrarily detained and tortured under fabricated charges by the military-dominated law-enforcement agencies. Moudud, as the Minister for Law, Justice and Parliamentary Affairs, issued an ordinance in January

2003 that ensured blanket impunity to the perpetrators, which was then enacted by Parliament. Moudud and his government ignored the people's fundamental rights, especially the right to life and liberty.

Talking about human rights, as Jalil, Alamgir and Moudud did, was a rare event in the country. Their stories support the claims made by human rights defenders that the armed forces and law-enforcement agencies operate torture cells. In fact, the real picture of brutality by the armed forces and the police is much more severe than the stories of these three politicians can encapsulate. Ordinary citizens have long suffered at the hands of the military, notably during the state of emergency, and the police during previous regimes.

However, other messages emanating from politicians have continued to attempt to bury the abuses of the past. The incumbent law minister, Barrister Shafique Ahmed, has argued publicly that whatever happened during the emergency government was part of a "doctrine of necessity" thereby justifying the actions of the military-controlled emergency government and promoting impunity. Speaking of the armed forces, he told the media on February 5, 2009 that "You cannot say all their actions or activities were within the bounds of the Constitution ... Whatever they did, they did responding to the necessity of the time. So we are not giving legal cover to all their actions, we're not validating all their ordinances."⁷

The Law Minister's comments attempt to justify illegal arrests, detentions, torture and killings as being a necessity at the time. However, the armed forces' actions violated the Constitution and therefore cannot be justified. The so-called "doctrine of necessity" is merely an excuse to once again grant impunity to the perpetrators of human rights violations, by the present government, allegedly at the demand of the armed forces. Despite several allegations of grave human rights abuses made in Parliament by lawmakers, as well as on television and in national newspapers that require credible investigation and prosecution, the government of Prime Minister Sheikh Hasina remains silent on this issue. The government's silence further damages the country's already impaired rule of law by fostering impunity.

When elected government took over power, there were demands and hopes that an independent and capable commission would be formed to probe abuses by the armed forces. But the government's silence and inaction in this regard has led to frustration and underlines the continuing supremacy of the military in Bangladesh's political system. This supremacy is in evidence in the National Human Rights Commission Act-2009, which placed the armed forces beyond the purview of the rights body. The commission's

7 <http://www.newagebd.com/2009/feb/06/front.html#4>

authority is restricted so that it cannot investigate allegations of human rights abuses committed by the armed forces. In other words, the government has put the armed forces beyond the reach of the law.

The Constitution of Bangladesh states that no one has the authority to grant immunity from prosecution for punishable crimes. Article 31 of the Constitution clearly declares: “To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.”

The country’s highest offices, including the Presidency, are bound by the Constitution and there is a legal framework that protects the supremacy of the law. Actions by the government to place perpetrators of torture are therefore unconstitutional.

Civil society have demanded that measures be taking to ensure that the armed forces cannot take over and abuse power again, as has been the case in the recent past. The current government has the mandate following its election victory and an absolute majority in Parliament that would allow it to criminalize torture and repeal Article 46 of the Constitution, which allows Parliament to grant impunity to state officers for any action, however brutal, if such action was taken in order to “restore order” – a concept that is vague and evidently open to abuse.

The demand for justice by several senior members of Parliament, should be acted upon as a starting point, as the authorities in Bangladesh have yet to begin any process of investigating the crimes committed by State-actors during the emergency government.

V. Mutiny in the Bangladesh Rifles followed by disappearances and killings

Early in 2009, a mutiny within the security forces shed light on underlying tensions and brutality within the establishment, as well as the perennial problem of impunity. A violent 33-hour mutiny took place within the Bangladesh Rifles (BDR) headquarters on February 25 and 26, which saw more than 70 persons killed.

A mutiny occurred on February 25 and 26 at Pilkhana, the headquarters of the Bangladesh Rifles, widely known as the BDR, the country’s border protection force. The paramilitary force is comprised of non-commissioned officers and soldiers, led by commissioned officers of the Bangladesh Army who are deputed to the BDR for a particular period of time, according to the rule and decisions of the Ministry of Home

Affairs, although, the Armed Forces are officially under the Ministry of Defence. The incident took place the day after a visit by Prime Minister Sheikh Hasina to the BDR headquarters to inaugurate “BDR Week.”

During the mutiny, a group of non-commissioned masked soldiers were seen in live televised reports accusing the deputed army officers in the paramilitary of involvement in corruption, depriving the soldiers of their rightful facilities and opportunities, and ignoring their problems over the years or failing to raise the soldiers’ demands to the higher authorities, including the head of the government and concerned ministries. There were allegations of unlawful punishment of soldiers and their being compelled to do personal favours not in their job-description by the army officers. The mutiny spread to other barracks across the country. No casualties occurred other than in the BDR headquarters as a result, and local administrations were able to take control of the barracks’ armouries, disarming the soldiers.

The violence in the BDR headquarters resulted in the deaths of 74 persons, according to the authorities. The deceased reportedly included 58 Bangladesh Army commissioned officers, including the Director General, Major General Shakil Ahmed, and other officers from the ranks of captain to brigadier general. The 16 other victims were civilians and included a child who was a street hawker as well as bystanders, construction workers, the wife of the BDR Director General, and a retired army officer and his wife who were housed at the official apartment of the Director General. As well as the killings, there were also reports of rapes of women and children, mostly the females in the commissioned army officers’ families, and ransacking and looting valuables, including money, from the houses of the officers.

The rebel soldiers demanded a “general amnesty” to be provided to the mutineers by the government and urged the head of the government to facilitate a dialogue. The Prime Minister’s office, instead of using force, sent a team led by a State Minister, who brought a team of 14 mutineers, led by Deputy Assistant Director (DAD) of the BDR, Mr. Touhid Hossain, to hold negotiations with the Prime Minister at her official residence. Later, the responsibility of negotiating with the mutineers was delegated to the Home Affairs Minister, Ms. Sahara Khatun, until the government was able to establish control over the mutiny-affected locations.

Following the mutineers’ surrender, it is reported that members of the army, the Rapid Action Battalion and the police, killed a large number of the mutineers – perhaps as many as 78 - in revenge. As a result of the denial by the authorities that such killings took place and the absolute denial of access of civil society organizations, rights groups and media professionals to the BDR headquarters, the exact number of such killings is not known, although hundreds of soldiers are still missing. The authorities claim that

the missing soldiers have become fugitives in order to escape trials for their crimes, but the AHRC is not convinced of this being the case in reality. The families have allegedly been barred from speaking out on the same issue and face threats of reprisals should they attempt to do so.

After the mutiny, several cases lodged with the Lalbagh police station, which later transferred the cases to the New Market police station. The cases have been investigated by the Criminal Investigation Department (CID), headed by Assistant Superintendent of Police Abdul Kahhar Akand. The investigation report is expected to be submitted to the Chief Metropolitan Judicial Magistrate's Court of Dhaka on December 23, after it missed a couple of previous deadlines in recent months. The CID officers have reportedly recorded statements of 6250 people, including 125 members of the families of the army officers, who were residents of the BDR Headquarters, and 430 civilians from surrounding neighbourhoods. Around 2132 persons, including 27 civilians, were remanded in custody. Around 492 soldiers initially gave confessional statements concerning involvement in the mutiny to the Magistrate, although an estimated 84 soldiers had retracted their confessions by November, claiming that they had been forced by the police to confess to crimes that they did not commit. It is understood that the authorities used severe torture on these soldiers in order to extract confessions, as well as threats to extra-judicially kill their family members.

The Government formed two more probe committees to investigate the carnage at the BDR headquarters. Retired government official Asaduzzaman Khan headed one of official probe commissions that comprised 12 members, and released a report on May 27, 2009, after also having missed a number of deadlines. The Army also formed separate probe body named the Court of Enquiry, comprising 20 officials of the armed forces. Besides, the Government sought help from the Federal Bureau of Investigation of the United States, the United Kingdom's Scotland Yard and the United Nations. Separate teams of FBI and Scotland Yard visited the crime scenes as part of their respective investigations to aid the government of Bangladesh to provide the requested supports. It is interesting to note that Bangladesh was able to carry out investigations and mobilise resources when the situation concerned the killing of members of the military, but has taken no credible steps to investigate the many hundreds of killings that have allegedly been perpetrated by State-agents over recent years, as detailed in the section on extra-judicial killings further on in this report.

The incident raised numerous questions, debates and allegations against the public institutions, agencies and groups, as well as suspicion concerning the role of neighbouring nations. The intelligence agencies – including the Directorate General of the Forces Intelligence (DGFI), National Security Intelligence (NSI), Rifles Security Unit, Army Intelligence, Special Branch and Detective Branch of Police and Intelligence Wing of the

Rapid Action Battalion – were widely condemned for failing to inform the authorities regarding the possibility of the mutiny. The Asaduzzaman Commission reportedly asserts that the mutiny was pre-planned, although it fails to specifically identify the mastermind(s) and behind the incident other than some of the border guards that took part in the carnage.

In its report, the Asaduzzaman Commission states that “[T]he mentality of not accepting authority of the army had been dormant among the BDR members for long. They had been demanding appointment of their own officers under a system as the BCS (Bangladesh Civil Service) cadre, increase of border allowance, 100 per cent ration allowance, sending them to the UN Mission, restructuring of their salary structure in a similar model as that of the army. Besides, the Daal-bhat programme, punishment of sepoys, lack of transparency in running BDR shops, luxurious lifestyle of officials, corruption in running the schools etc gave rise to questions and discontent among the BDR men.”

The same report claims that “[T]he real causes and motive behind the barbaric incident could not be established beyond doubt. The committee feels that further investigation is required to unearth the real cause behind the incident. The negative attitude among the general BDR members towards the army officers, and their discontent over unfulfilled demands may be identified as the primary cause of the mutiny. Analysis of these demands gives the impression that such small demands cannot be the main cause of such a heinous incident. These points have been used to influence the general BDR soldiers. The main conspirators may have used these causes to instigate this incident, they themselves working from behind curtains to destabilise the nation.”

The report went on to criticize the media for playing a “negative role” by broadcasting the mutiny live on satellite television channels, accusing the media of “encouraging the mutineers” and that TV talk-shows “created sentiments against the government and the army among the people.”

Interestingly, the report stated that “[F]rom the first day of the BDR mutiny, mutineers and their family members kept fleeing the Pilkhana premises in different ways. Immediately after the mutiny began at Darbar Hall, many of the BDR members (including officers) had fled Pilkhana. Most of those who participated in the rebellion fled from Pilkhana during the nights of February 25 and 26 (except for around 200 BDR members). The mutineers mainly scaled the boundary walls on the west side and used gate numbers 5 and 2 for their flight. Many abandoned their uniforms, boot etc that were found on the bank of a pond near the boundary wall near Bay Tannery.” However, the report did not include what role the law-enforcement agencies played and why they failed to stop fleeing mutineers.

It also made claims of the existence of “conspirators” by claiming that “[T]hose who do not believe in the independence and sovereignty of the country, those who do not believe in democracy, those who do not want to see Bangladesh as a stable, democratic and developing country, those who do not want Bangladesh to be secure and have a strong armed forces, made an attempt to reach their vile goals by putting the BDR and the army on a collision course through the BDR mutiny.” However, the report did not specifically identify the so called “conspirators”.

It also claimed that the “motive of the mutiny was to destroy the chain of command and render the BDR ineffective, discouraging army officers to work in BDR on deputation in future by brutally killing army officers, putting Bangladesh Army and the BDR on a collision course, destabilizing the newly elected government, destroying internal security and stability of Bangladesh, tarnishing the image of the country abroad, and hampering the participation of Bangladesh in UN peacekeeping missions.”

In its long-term recommendations the report suggested that the authorities should *“update existing laws and rules to ensure proper work environment and facilities in the army, paramilitary and law enforcing agencies; Re-fixing the service tenure of all members of BDR personnel in line with those of the army; Bringing a balance in the benefits, salaries and allowances of the army, paramilitary and law enforcing agency personnel; and avoid the involvement of members of the army, paramilitary and law enforcing agencies in programmes such as Operation Daal-Bhat, and instead engaging them in professional duties as far as possible.”*

Regarding the trial of the accused in cases concerning the mutiny, the army has reportedly been pressurizing the government to allow them to conduct the trials of the mutineers under Army Act-1952. However, the BDR, which was created as paramilitary force under a separate law, is operated under independent command outside of the army’s jurisdiction, under the Bangladesh Rifles Order 1972. Following debates on the issue the country’s President, Md. Zillur Rahman, sent the issue to the Supreme Court for reference. The court, after taking “amicus curie” opinions from jurists, asserted that the trial cannot be conducted under Army Act-1952, as the force was never under the command of the army according to the law.

Later, the authorities decided to hold two types of trials concerning the mutineers – in Speedy Tribunals under the penal laws in open courts concerning charges of murder, rape and robbery, and in BDR Tribunals in six separate Special Courts under the BDR law in the BDR’s six Sector headquarters concerning charges of rebellion or mutiny. The incumbent Director General of the BDR, Major General Mainul Islam, has been made Chairman of all of the BDR Special Courts, which also comprise two further army officers, who are deputed from the Bangladesh Army’s respective administrative jurisdictions.

The BDR authorities started trials in the Special Court in Rangamati Sector for the Chittagong and Hill Tracts region on November 24, 2009, even though the formal investigation of the cases remained unfinished at the time the Law Minister announced the trials on October 30. The trials by the BDR Special Courts comprise officers of the Bangladesh Army, which lost officers at the hands of the soldiers of the mutineers, and there are serious concerns about the likelihood of vindictive outcomes and unfair trials being produced as a result. Around 3,500 soldiers and 80 civilians are facing trial in cases lodged regarding the mutiny. According to Section 10A (3) of the Bangladesh Rifles Order-1972, any person accused of an offence has the right to conduct his own defence or to have the assistance of any officer of the force or of any legal practitioner of his own choice. It is feared that the defence will be biased in favour of the military in many cases and that the prospect for fair trials is unlikely.

Following the tragic and bloody mutiny on February 25 and 26, the government initially announced that it would provide one million takas (US\$14,620) as compensation to each of the families of the army officers that were killed. However, the authorities completely ignored the civilians that died for over a week. It was only after the media reported this fact that the authorities announced that they would give 200,000 takas (US\$2,924) to the families of the civilian victims. Such double-standards again reinforce the notion that civilians are considered as being less valuable than the members of the armed forces to the government.

Following the mutiny, the armed forces and the Rapid Action Battalion paramilitary force (which is a composite force with officers seconded from the armed forces), as well as the police took control of the whole mutiny-affected area in order to rescue persons who were in hiding or being detained, to conduct investigations, to re-establish order within the BDR and its headquarters as well as to search for missing officials. The members of the BDR who left the headquarters during and after the mutiny were ordered to re-join their respective units. In order to arrest missing BDR members, the armed forces and the RAB launched a crackdown named "Operation Rebel Hunt." A large number of soldiers were detained after returning to the barracks and considered suspected mutineers, although the reasons for suspecting soldiers of involvement have been publicly clarified by the authorities. Around 45 of the detained soldiers died in custody, giving rise to serious concerns about the treatment those detained were receiving. Torture remains endemic in Bangladesh even in regular petty criminal cases, and the likelihood of it being used in such emotionally-charged cases was evidently very high.

Relatives of the detained had been reporting the use of torture since the arrest of BDR soldiers began, and each of the 45 deaths was recorded as being an "Unnatural Death" by the relevant authorities at local police stations. The deaths of persons in the custody of Bangladeshi law-enforcement agencies are a well-documented phenomenon. What

made these deaths remarkable was that they were occurring in spite of a promise from the Prime Minister that the suspected mutineers would be kept safe and would receive a fair trial. The families of the detained persons were barred from expressing their views regarding the circumstances of their detained or dead relatives.

VI. The role of the army in Bangladesh in committing violations of human rights

As has been noted above, the military is an extremely powerful institution in Bangladesh and often operates above the law, to the detriment of the country's citizens. The aforementioned mutiny in the BDR came at the end of a long period of political instability in the country in which the military had filled many vacuums in the civilian administration and institutions of the rule of law, notably during the state of emergency. The AHRC has in previous annual reports highlighted the dangerous entrenchment of the military in the country's civilian institutions and the detrimental effect that this was expected to have over the long term in the country. As a result of its position of power, the military plays the role of arbiter in Bangladeshi politics.

Under the state of emergency and in previous years, a large number of extrajudicial killings took place. An estimated 184 took place in 2007 and 149 in 2008 during the state of emergency, for example. It is estimated that an astounding 500,000 persons were arbitrarily arrested for political reasons, and the law of the country and fundamental rights were suspended during the emergency. The administration of justice was effectively brought to a standstill during this period and corruption reached new heights. The average citizen is subjected to corruption at all levels from admissions to hospitals, schools and on the occasions of arrest or detention of any family members. In addition, wealthier businessmen were subjected to various forms of harassments in order to extract large sums of money from them by State-agents during the emergency. In some cases, businessmen and industrialists have been kidnapped by members of the Armed Forces and ransoms have been demanded. Such people were allegedly detained on fabricated corruption charges, intimidated and tortured in custody until ransoms were paid.

The public image of the armed forces has been very mixed throughout the last few decades. Whenever there are floods, cyclones or other devastating natural disasters, the government calls on the army to conduct relief work and engage in disaster management. During such times soldiers and officers are perceived as being diligent and brave, helping to restore calm and hope. The people have applauded the army's humanitarian efforts for decades, because they have helped the common man.

However, many Bangladeshis have also experienced the brutal side of the army. Bangladeshis have witnessed crackdowns on political opponents, social activists and

human rights defenders and read of their arbitrary arrests and detention, torture and extra-judicial killings during previous military dictatorships and civilian governments alike, which have been perpetrated with impunity throughout the country's history.

For example, on Oct. 16, 2002, the government of Prime Minister Khaleda Zia deployed the army across the country in an operation called "Operation Clean Heart," which continued until Jan. 9, 2003, in order to crack down on criminals and illegal arms. During the 86-day crackdown, around 11,200 people were arrested and detained, according to the authorities. The police listed 2,500 people as criminals and about 300 as suspects. Around 2,000 different types of arms and 29,700 rounds of ammunition were recovered. Of particular concern, other than the often arbitrary nature of arrests and the treatment of those detained, were the over 50 deaths in detention of persons being held by the Armed Forces. Their deaths were officially recorded as resulting from "heart attacks." In reality, an additional 8,000 people were arrested and detained, and the majority of those detained are thought to have been subjected to torture.

The members of the Armed Forces that have perpetrated grave human rights violations under "Operation Clean Heart" and similar crackdowns, have been provided with impunity by civilian governments. For example, the then-government passed the Joint Drive Indemnity Act-2003 in parliament in 2003, which provides blanket impunity to all State-actors for any actions they commit while performing actions on behalf of the State. This is still in effect and the government is urged to bring a bill to repeal this Act without delay.

VII. Political intervention perverting the course of justice

As has been the case in the past when a new government takes office, the current government has recruited new sets of Public Prosecutors and Government Pleaders across the country and enlisted politically-chosen lawyers to occupy positions in the Office of the Attorney General in order to defend the government's interests before the Supreme Court. The entirety of the body of public prosecutors across the country have been replaced by a new group of lawyers that have political association with the ruling party. The AHRC has previously termed this Bangladesh's disposable prosecution. It ensures that the judicial process serves the interest of the government as much as possible and perverts the course of justice.

The Government decided on February 17, 2009, to withdraw "politically motivated" criminal cases against their members or allies, that had been pending before the courts of the country. The country's Law, Justice and Parliamentary Affairs Minister Barrister Shafique Ahmed said that the government wished to unburden the courts of politically-motivated cases that were lodged during the previous governments - led by

the Bangladesh Nationalist Party (BNP) and the military-controlled emergency regime. The government formed committees in central and districts levels to receive applications from the aggrieved persons regarding politically-motivated cases. On March 4, 2009, the authorities initially stipulated 45 days to receive applications after a gazette notification is made and another 45 days for scrutinizing the withdrawal-applications by the committees. However, they changed the deadlines afterwards.

By the end of November 2009 the authorities had decided to withdraw 1,348 criminal cases that were filed under the anti corruption laws, penal code and code of criminal procedure. A committee was formed and headed by the State Minister for Law, Justice and Parliamentary Affairs, Mr. Quamrul Islam, who is by profession a lawyer as well as a politician. On the first meeting of the Committee, 12 corruption cases against the incumbent Prime Minister Sheikh Hasina, and several other cases against the senior leaders of the ruling political party, their allies and relatives were dropped.

However, most of the criminal cases lodged against opposition party members and senior leaders were not dropped. Among such cases, the AHRC has noted that two cases against journalist and human rights defender Jahangir Alam Akash's were not withdrawn, even though it is widely known that members of the RAB involved two individuals to fabricate cases against him for his writings against the members of RAB-5 (the RAB's 5th Battalion that is based in Rajshahi).⁸

Under such biased conditions, combating corruption effectively is evidently not possible, as the politicised judicial process leads to impunity for those connected to the ruling party and may also target opposition figures with false cases. In addition to the withdrawal of a large number of cases, the government has also arranged for presidential pardons to be given to convicted persons with political affiliations to the ruling party, some of which were fugitives.

The withdrawal of "politically-motivated cases" is not a new practice in Bangladesh. The BNP led government constituted similar committees after the party was voted to the power in 2001. The then government reportedly withdrew around 5,888 cases to release around 73,541 persons with political affiliations with the BNP and its allies. The names of party supporters who were accused in around 945 criminal cases were also withdrawn.

8 AHRC-UAU-063-2008 : <http://www.ahrchk.net/ua/mainfile.php/2008/3058/>;
 AHRC-UAU-003-2008 : <http://www.ahrchk.net/ua/mainfile.php/2008/2713/>;
 UP-155-2007: <http://www.ahrchk.net/ua/mainfile.php/2007/2668/>;
 UP-142-2007: <http://www.ahrchk.net/ua/mainfile.php/2007/2637/>;
 UP-101-2007: <http://www.ahrchk.net/ua/mainfile.php/2007/2504/>;
 UA-149-2007: <http://www.ahrchk.net/ua/mainfile.php/2007/2371/>.

All those cases were lodged during the previous regime of the Awami League between June 1996 and July 2001.

The withdrawal of such large numbers of cases on the basis that they were fabricated charges for political reasons is a clear admission on the part of the government of Bangladesh that its criminal investigation divisions and prosecution divisions are fundamentally flawed. Since every government engages in the dismissal of such cases as they come to power it is a clear indication that both political parties are aware of the defective nature of the investigations and prosecution branches of their country.

As the new government has declared that it wants to uphold rule of law, one of the primary tasks should be to address the problems of its criminal investigation and prosecution branches. To admit that the functioning of these branches is fundamentally flawed and to do nothing about this issue would be a clear abdication of responsibility. All previous governments have failed to take appropriate action and it is now the opportunity of the Bangladesh Awami League to deal with this entrenched negligence and take appropriate steps to improve the system.

Given the magnitude of the problem and its national importance the government must immediately begin a period of national consultations in order to allow the public to air its views on this problem. Civil society organisations and the human rights community in particular could take an active role in this process.

If the present government proves capable of dealing with this issue it will not be necessary in future for a new government to release a large numbers of accused persons through executive action.

VIII. The ongoing problem of politically-selected attorneys and prosecutors

Bangladesh is reputed for its disposable prosecution system where the whole set of attorneys and prosecutors leave their offices as soon as a new government takes over the power. That tradition remained unchanged and was enhanced with politically chosen recruitments in the prosecutorial service.

The Attorney General of Bangladesh, Mr Salahuddin Ahmed, resigned from his position on January 12, 2009. While submitting resignation he was quoted as saying his resignation was "...in line with the tradition that the attorney general resigns after a new government takes over". Ahmed was appointed as an additional attorney general and promoted to attorney general by the recent military-controlled interim government, during the state of emergency.

His resignation from office was one of the many examples of the politicisation of the attorney service in Bangladesh. Mr Mahbubey Alam, a pro-Awami League lawyer who served as an additional attorney general during the past Awami League regime, was replaced to the position.

Moreover, the *Awami Ainjibi Parishad*, an association of lawyers attached to the current ruling political party, and the leaders of the Bangladesh Awami League, became empowered to select the names of lawyers across the country for appointment as prosecutors.

The stability of attorney and prosecutor positions needs to be taken into serious consideration for the sake of public faith in the country's system of justice, currently at a low. Take the case of the bomb blast that took place at a cultural function of *Udichi* at the Munshi Meherullah Maidan in the southwestern city of Jessore on March 7, 1999; at least 10 persons were killed and several others left with permanent physical disabilities. On June 28, 2006, the judge acquitted all 23 persons accused, observing that "the state and the witnesses failed to prove the charges against the accused beyond doubt".

This whole incident makes one wonder why the system fails so consistently in Bangladesh; what should be done to address these ongoing failures and improve the basic functioning of legal institutions?

In a given situation, the same old use of politically affiliated attorneys and prosecutors will not only question the competence of law officers and the credibility of the prosecutorial service in Bangladesh, but also multiply the problems of the country's people.

Meanwhile the government and concerned members of civil society should begin an open discourse on what the seekers of justice really need. For the sake of understanding and progress, the authorities should initiate debates on whether the country should keep the 'hire and fire' system for attorneys and prosecutors, or whether the prosecutorial service should be under an independent and permanent institution, with competent, committed and experienced professionals who can act without fear or favour. The nation should clarify whether they need law officers as an institution to propel the justice delivery system, or as another political wing of the ruling political alliance.

Political favouritism leads to immunity from prosecution: Mr. Shahdab Akbor Chowdhury, the son of Ms. Sajeda Chowdhury, a senior leader of the ruling Bangladesh Awami League and the Deputy Leader of the Parliament, was convicted in four corruption cases during the emergency government. Shahdab remained a fugitive during the whole period of the trials, including the appeals concerning the four cases. The Special Tribunal against Corruption sentenced him to a total of 18 years of rigorous

imprisonments in the four separate cases. The Courts also fined him around 15 million takas and issued a warrant of arrest against him.

Mr. Shahdab applied to the President of Bangladesh seeking mercy through the Ministry of Home Affairs. Following positive comments from the Ministry of Law, Justice and Parliamentary Affairs the application was forwarded to the Office of the President, who granted mercy. It is known to everyone that the Shadab's mother Sajeda Chowdhury has had a long-standing political relationship with the incumbent President of Bangladesh, Md. Zillur Rahman.

The President of Bangladesh is constitutionally immune and empowered to grant mercy, according to Article 49, which reads: "*The President shall have power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. Prerogative of mercy.*" But the President is not authorized to do anything without the advice of the Prime Minister. According to Article 48(3) of the Constitution, which reads: "*In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister; Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court.*"

Prominent jurists of Bangladesh have explained that the presidential mercy is legally acceptable only when the convicts go through the legal proceedings. Despite this, the Ministry of Home Affairs reiterated its support for the mercy provided to Shahdab after the country's media criticized the decision.

One law to protect one family: The government of Bangladesh adopted an unprecedented law in the country's history in July 2009, when it granted lifetime security protection to family members of the country's founding president Sheikh Mujibur Rahman, which includes his daughter Sheikh Hasina, the current Prime Minister.

Abul Kalam Azad, the Prime Minister's press secretary told the media that the Cabinet had approved in principle the proposed "Father of the Nation's Family Members' Security Act-2009" in its weekly meeting on July 6, 2009. The Act was declared effective from the same date as the Cabinet's approval, even though the parliament had yet to pass it. The Home Minister, Sahara Khatun, tabled it on October 5, as the Father of the Nation Family Members Security Bill 2009, and the parliament passed it on October 13, 2009.

A similar law entitled "Father of the Nation's Family Security Act 2001," was passed by Sheikh Hasina's previous government, 23 days before it completed its previous tenure, but this was scrapped by the following government led by the Bangladesh Nationalist Party.

The 2001 Act had handed over the official house of the country's Prime Minister to Hasina for a symbolic 1-taka (about 1 US cent) and another house to her sister Rehana at the Dhanmondi residential area in the capital, Dhaka, as well as a range of perks and privileges at the expense of the State.

The new Act has similar provisions to allot well-protected safe houses and other facilities, but the government has cited security as the main reason behind drafting it. According to Azad, after the brutal assassination of Rahman and his family members in 1975, which Hasina and her sister Rehana escaped as they were in West Germany at the time, a group has been conspiring to kill other surviving family members, especially Hasina. Azad said the grenade attack on Hasina in 2004 was proof that plotters were attempting to kill her.

However, according to an official in the Law Ministry of Bangladesh, on conditions of anonymity, the definition of "family members" was not defined in the Act at the time it was adopted and put in force but would be advised later. It is thought that "family members" means the families of Hasina and Rehana. Will the children of Hasina and Rehana, who hold foreign residencies and some whom are married to foreign nationals be eligible for State security cover when living abroad? If so, will a contingent of Bangladesh's Special Security Forces permanently stay abroad to protect them? How much expenditure will be incurred? Why should Bangladesh, a nation where 44 million people still live below the poverty line, spend huge sums of money and resources on one family?

The adoption of such a law raises further questions still: Should there be a special law to protect only one family in a country, based on their political position? Why should other families in a population of 150 million be less protected? Does Article 27 of Bangladesh's Constitution, which enshrines people's fundamental rights to equal treatment, allow for such an Act? It is evident that the threat to the life of many of the country's citizens, notably from State-agents themselves, would require the protection of the law, but that this is ineffective at present. The AHRC recalls that officials of the Bangladesh Army killed Bangladesh's founding president Sheikh Muzibur Rahman on 15 August 1975 at his private home in Dhaka along with all the members of his family except two daughters – Sheikh Hasina and Sheikh Rehana. Later, the same force assassinated one of the country's military dictators, Lt. Gen. Ziaur Rahman, who founded the Bangladesh Nationalist Party (BNP) and was assassinated on May 30, 1981, at Chittagong Circuit House. Also, a large number of ordinary citizens die a brutal death at the hands of the same security forces and law-enforcement agencies every year.

Furthermore, while politicians of the ruling Awami League and its allies claim Rahman as the "Father of the Nation," their opponents disagree. So, if Rahman is not officially accepted as the Father of the Nation, will the Act survive?

Last but not the least, if the government claims that the Act was effective from the date when the Cabinet approved it, then what role does Parliament play? How can a proposed Bill, which was not an ordinance and had not completed the legislative process be termed an Act and come into effect? The whole process of making the law has been qualified as being nothing short of insane by members of civil society groups and legal experts.

Under the current government, the prospect for the establishment of the rule of law and the enjoyment of human rights as promised during the election already appears to have been dashed. Gross abuses of human rights, including torture and extra-judicial killings by law-enforcement agencies continue unabated. During a few weeks after the government assumed office various forms of post-election violence occurred, with members of the new ruling party profiting from their new-found power to launch attacks on their political opponents, while the authorities for the most part watched on. 12 Persons were reportedly killed and 998 were injured, according to Odhikar, a human rights organization, although these statistics are only thought to represent the tip of the iceberg as they do not include data from across the whole country.⁹ Access to justice and remedies for victims of abuse remains virtually impossible. No registration of a case of torture by the police as a First Information Report (FIR) is known to have occurred in 2009, except concerning a case that took place in 2006 in which a pregnant woman, Ms. Shahin Sultana Santa, was tortured by police in public. A court has only asked the police to record the case after three and a half years.

IX. Summary of the ALRC's research on politics – Corruption Nexus in Bangladesh: An Empirical Study on Impacts on Judicial Governance

The Asian Legal Resource Centre (ALRC), the sister organization of the Asian Human Rights Commission (AHRC), was preparing to issue a study entitled “Politics – Corruption Nexus in Bangladesh: An Empirical Study on Impacts on Judicial Governance” at the time of writing of this report. The research report will detail aspects of the system of corruption and abuses of political power and systemic failures to control them. It exposes the lack of mechanisms to hold the rule of law institutions accountable for their actions in compliance with existing laws, let alone human rights norms and standards. In addition, the AHRC has documented an account of the numerous bribes that took place in a typical case during its course through the country's lower and higher judiciaries (please see the tables in the section below for details).

⁹ <http://www.odhikar.org/documents/February09.pdf>

The political-corruption nexus, a summary of findings: Over the past thirty-eight years, since the creation of the Bangladeshi nation, its judiciary has been under executive domination. The only notable positive change in this period has been the separation of the magistracy from the executive organ of the State. This occurred in response to a Supreme Court verdict during the recent military-controlled government.

Bangladesh's judiciary is divided into two main components: the higher judiciary comprising the Supreme Court of Bangladesh; and the lower judiciary or subordinate judiciary, comprising the Court of Sessions, the Civil Courts and other Special Courts. The Supreme Court is made up of the Appellate and High Court Divisions. The Supreme Court plays a supervisory role with respect to the control and administration of the subordinate courts and a guardianship role in respect of the protection of the Constitution and fundamental human rights. After the recent separation, now only Judicial Officers control the Magistracy by way of the cognizance and trial of criminal offences. There are different types of criminal and civil cases. Most of the civil cases are related to land disputes and ownership problems. One of the types of punishments that still prevails concerning criminal cases is the death penalty.

Different forms of corruption can be found at most stages of criminal investigations. The police play a key role in corruption in investigative and trial cases. It is difficult to lodge a complaint in a criminal case in a police station. It is also difficult to file a complaint case before the cognizance magistrate courts. Political leaders and other actors with vested interests try to influence the filing or lodging of criminal cases. False cases are often instigated by rival groups. The police often refuse to record cases on political grounds. They tend to distort the circumstantial and physical evidence portion of the First Instance Report (F.I.R.)

Strong persuasion is required to have immediate police action launched after a case is lodged. Bribes for court staff are an inevitable expectation for services rendered at all stages from the filing to the disposal of a criminal case. The Officer-In-Charge of a police station plays a vital role in the investigation and its supervision. Investigative Officers (I.O.) have been found reluctant to arrest the offenders in cognizable cases if not persuaded to do so. The I.O. seldom visits places where crimes have been committed and often threaten to falsely implicate persons unless they are paid off. Witness statements are generally not properly recorded. Vital incriminating and evidentiary elements are purposely omitted. The power of arrest without a warrant is grossly abused by the police. Police remand has become a profitable business, while torture is reported as being endemic during remand. The police are reluctant to conduct identification parades. Allegations abound concerning the manipulation/falsification of laboratory reports, post-mortem reports and other medical information.

Accused persons under arrest are not consistently presented before the nearest magistrate within twenty-four hours. The most corrupt area of judicial matters involves bail, where the majority of stakeholders are either directly or indirectly involved. Strict legal formalities in recording confessions are not properly followed by the magistrates. The police delay submitting reports as long as possible in order to maximise the potential of receiving bribes to speed up the process. In most of the cases the police do not convey the result of their investigations to the persons concerned. Seized articles in the custody of the police are not safe. Supervisory police authorities are not performing their duties professionally. Sensational and political cases are wilfully misdirected during investigation. The government interferes in the process and frequently withdraws criminal cases without giving the court any scope to adjudicate them.

The conduct of arrests by the police has become a lucrative business. Ignoring repeated court orders, the police hold on to unexecuted warrants, thus providing accused persons time to procure money for bribes. Notifications of absconded, accused persons are hidden by publishing them in little-known newspapers. Public prosecutors are appointed on the basis of political affiliation, irrespective of experience and integrity.

The filing of civil cases is complicated and troublesome. The serving of notices and their return is the preliminary impediment in the settling of civil cases. The Najarat (Revenue) section plays a vital role in the serving of notices/summonses to defendants. Even after a proper serving, defendants are found reluctant to appear before the Court. Matters are worse when the government is the defendant. Courts wait unreasonably long periods of time for parties to file their written statements. Parties try to obtain an order of injunction from the courts with a view to frustrating the end result of the case or to drag out the proceedings.

Lawyers are failing to implement the provisions of the law relating to alternative dispute resolution. While examining witnesses or making arguments before the courts, the Government Pleaders are unprepared and indifferent regarding the disputed facts and the law. Judgments are often not written even after the pronouncement of results in open court. This frustrates the appeals process.

Sheristadars (Civil Judiciary office secretary) and staff of Money Loan Courts try to control the auction sale of mortgaged property. The chairmen of the village courts are incompetent to handle legal formalities and are biased in their attitudes. False and fabricated cases are filed in the Nari-O-Shishu Nirjatan Daman Tribunals utilizing loopholes in the Act.

Judges are provided with inadequate salary structures, limited scope for work outside their positions and restrictions on higher education and training abroad. The government

is not willing to give them complete jurisdictional support and instead tries to control them in many ways. Judges have unreasonable workloads while at the same time are most vulnerable to attacks by foes and even terrorists. For example, two judges were killed in bomb attacks in Jhalokahti district, a southern town, in November 2005, reportedly by Islamic militants.

Bangladesh's Police cannot function independently and are being guided by the whims of government. The numbers of members of the police force are very low as compared with the population size. Investigative costs are fixed which affects the quality of investigations. A separate investigative agency needs to be introduced to carry out timely and fruitful investigations.

X. A detailed example of corruption in action

F M Abdur Razzak, 42, is the editor of a fortnightly newspaper, Gonomichhil, and is general secretary of the Human Rights Development Centre. On November 3, 2008 officers from Paikgachha Police Station arrested Abdur Razzak with another human rights defender, Shankar Kumar Dhali, 40. They were both severely assaulted at the time of arrest and during detention. They were falsely accused of having abducted a 13-year-old girl. Please find below a table concerning the bribes that Mr. Razzak was forced to pay to be released on bail. The total of 159,660 Bangladeshi Taka is equivalent to around US\$ 2,300. Similarly, Mr. Shankar was forced to pay a total of 51,650 (equivalent to around US\$ 750). Tables concerning the bribes that both men had to pay, as well as tables that show the results of research performed by the ALRC into typical forms of corruption that are encountered at the various levels in the judiciary, were presented in a special edition of publication Article 2 concerning the use of police powers for profit in March 2009.¹⁰

¹⁰ Asian Legal Resource Centre, Article 2, Vol. 08 - No. 01 March 2009 -- Special Edition: Use of Police Powers for Profit, pages 6-18, <http://www.article2.org/pdf/v08n01.pdf>

Table I. Money that Razzak and his family paid to get him released on bail from fabricated charges

Date	Occasion	Reason	Payer	Recipients	Amount
21 Oct 2008	Petition case of abduction registered with Senior Judicial Magistrate's Court	Providing information about the petition case	Razzak	Court Clerk & office staff	110
28 Oct 2008	Decision of Hamida Khatun, Kahaled's Mother, to lodge affidavit on abduction	Expenditure on affidavit & its registration	Razzak & Shankar	Hamida Khatun & court staff	1200
From date petition was registered to date of arrest	Complaint of abduction	Searching for Khaleda Khatun	Razzak & Shankar	Various social contacts	1600
3 Nov 2008	Arrest & detention at Paikgachha Police Station	Providing food from home to Razzak & Shankar	Razzak's relatives	Police sentries	850
3 Nov 2008	Arrest & Detention	Not to torture in custody & not to fabricate more cases	Razzak's relatives	Officer-in-Charge Ali Hashem Khan	50,000
3 Nov 2008	Arrest & Detention	Not to torture in custody & not to fabricate more cases	Razzak's relatives	Investigating Officer Sub Inspector Mahbubur Rahman	25,000
3 Nov 2008	Arrest & Detention	To cooperate & provide papers when necessary	Razzak's relatives	Prosecution police at court, government record officer, court sub inspector & court clerks	1500
4-8 Nov 2008	Detention under police remand	Providing food from home & meeting with relatives	Razzak's relatives	Police sentries	5000
5 Nov 2008	Inquiry into case by Additional Superintendent of Police, Khulna	Sharing information regarding inquiry	Razzak's relatives	Inhabitants of the area who observed the inquiry	1400

8 Nov 2008	Expiration of police remand	Getting involved with the procedure of the case & providing papers	Razzak's relatives	Court sub inspector, government record officer, court police, lawyer, lawyer's staff	2000
8 Nov 2008	Production before the court after expiration of police remand	Arranging departure to prison instead of returning to Paikgachha police custody	Razzak's relatives	Police officers of the Paikgachha Senior Judicial Magistrate's Court	2000
8 Nov 2008	Court order detaining the two persons in prison	Half of rental cost for car, round trip between Paikgachha Court & the Khulna District Jail	Razzak's relatives	Police assigned to hand detainees over to prison authority	1000
9 Nov 2008	Submission of petition for bail to the Paikgachha Court	Fees, tips & unavoidable bribes	Razzak's relatives	Lawyer, lawyer's staff, bench clerks	6000
10 Nov 2008	Searching Khaleda Khatun	To bring Khaleda Khatun back from unknown place so the detainees could be released	Razzak's relatives	Relatives of Khaleda Khatun	10,000
12 Nov 2008	Hearing on bail petition	Fees, tips & unavoidable bribes	Razzak's relatives	Lawyer, lawyer's staff, bench clerks	500
12 Nov 2008	Rescuing of Khaleda Khatun from Mongla Port by relatives of detainees	Rental of car, food, refreshment, telephone for persons involved	Razzak's relatives	Around nine persons including relatives of Khaleda Khatun	5200
12 Nov 2008	Rescuing of Khaleda Khatun	Developing & processing film, photocopying, sending news to newspapers	Razzak's relatives	Local journalists who took photographs of Khaleda Khatun to publish in papers	1500

12 Nov 2008	Rescuing of Khaleda Khatun	For assigning an officer to record statement of Khaleda Khatun after rescuing from Lal Mia's restaurant, under under section 161, Code of Criminal Procedure	Razzak's relatives	Babul Akther, Officer-in-Charge of the Mongla Police Station	5000
12 Nov 2008	Rescuing of Khaleda Khatun	Recording statement of Khaleda Khatun	Razzak's relatives	Sub Inspector Nazrul Isalm of the Mongla Police Station	3000
12 Nov 2008	Receiving Khaleda Khatun under Paikgachha police custody from the Mongla police	Rental of car for round trip from Paikgachha to Mongla, food & refreshment	Razzak's relatives	Sub Inspector Mahbubur Rahman, Paikgachha Police Station	5000
13 Nov 2008	Medical examination of Khaleda Khatun	Rental of car for round trip from Paikgachha to Mongla, food & refreshment	Razzak's relatives	Sub Inspector Mahbubur Rahman	8000
13 Nov 2008	Statement of Khaleda Khatun before magistrate	Providing a copy of Khaleda's statement to magistrate	Razzak's relatives	Government Record Officer Assistant Sub Inspector Mr. Sultan	1200
17 Nov 2008	Submission of another petition for bail to magistrate's court	Fees, tips, unavoidable bribes	Razzak's relatives	Lawyer, lawyer's staff, bench clerks	500
17 Nov 2008	Police investigation	Submitting investigation report to court	Razzak's relatives	Sub Inspector Mahbubur Rahman	10,000
18 Nov 2008	Seeking bail at the sessions judge's court on rejection of bail petition by magistrate	Providing certified copy of magistrate's orders regarding the case	Razzak's relatives	Government Record Officer Assistant Sub Inspector Mr. Sultan, staff of Paikgachha Senior Judicial Magistrate's Court	2000

19 Nov 2008	Submission of bail petition to the sessions judge's court	Fees, tips, unavoidable bribes	Razzak's relatives	Lawyers, lawyers' staff, bench clerks of the Sessions Judge's Court of Khulna	500
20 Nov 2008	Sessions judge's order to produce case documents from the magistrate's court	Producing papers on time with sessions judge's order & obtaining agreement to do so from staff	Razzak's relatives	Bench clerks of the Session Judge's Court & Government Record Officer Assistant Sub Inspector Mr. Sultan, staff of the Paikgachha Senior Judicial Magistrate's Court	1200
25 Nov 2008	Follow up on session judge's order	Passing case documents to sessions judge's court	Razzak's relatives	Government Record Officer Assistant Sub Inspector Mr. Sultan, police staff of Paikgachha Senior Judicial Magistrate's Court	600
27 Nov 2008	Hearing on bail petition at sessions court	Fees, tips, unavoidable bribes	Razzak's relatives	Lawyers, lawyers' staff, bench clerks of Sessions Judge's Court of Khulna	7000
27 Nov 2008	Ad-interim bail grant by sessions judge	Sending the court's order to the Khulna District Jail	Razzak's relatives	Court staff	500
27 Nov 2008	Release from jail on bail	Transportation home (40 per cent of cost)	Razzak's relatives	Car driver	800
8-27 Nov 2008	Meetings in prison	Food, transportation, telephone & bribes to prison guards	Razzak's relatives	Relatives, friends, staff of Khulna District Jail	3200

15 Dec 2008	Appearing before the magistrate's court	Fees, tips, general expenditure & bribes	Razzak	Lawyers, lawyers' staff & bench clerks	500
12 Jan 2009	Appearing before the sessions judge's court for permanent bail	Fees, tips, general expenditure & bribes	Razzak	Lawyers, lawyers' staff & bench clerks	1200
TOTAL					159,660

XI. Ongoing extra-judicial killings and impunity

The State stands accused of having perpetrated over a thousand extra-judicial killings in the last four years and many more before. On Feb. 11, Prime Minister Sheikh Hasina told the parliament that: "Criminals must be brought to justice according to the law, so there should be no extra-judicial killing in any circumstance. Legal action will be taken against those guilty of such killings."

Article 32 of the Constitution of Bangladesh protects the people's right to life and liberty, as fundamental rights. The provision reads: "*No person shall be deprived of life or personal liberty save in accordance with law.*"

Despite this right being enshrined in the country's supreme law, it is being violated on a scale that requires the attention of the government and the international community, notably the Human Rights Council, which has to date failed to address the situation of rights in Bangladesh in any credible way.

In cases of violations, there are provisions for the lodging of complaints with the police under Section 154 of the Code of Criminal Procedure-1898, which states that:

"Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Government may prescribe in this behalf."

However, when the police themselves, or other branches of law-enforcement, are the alleged perpetrators of abuses, such avenues for complaints are fully obstructed. This is the case in particular with the gravest abuses, notably extra-judicial killings.

Typically, regarding extra-judicial killings, the police at the first hurriedly register a complaint of unnatural death. Such complaints are registered under Section 174 of the Code of Criminal Procedure-1898 as an “accidental or suicidal death” instead of a “homicidal death.” The same provision also empowers an “Executive Magistrate” to inquire into the incident. In all cases, the law-enforcement agents and the magistrates conspire to disguise the extra-judicial killings, notably by branding them as “crossfire” or “encounter” killings.

In the rare case where complainants attempt to lodge complaints of extra-judicial killing by State-actors, the police not only refuse to record the complaint but also intimidate the complainants and even other members of their families. Furthermore, the authorities typically then engage in smear campaigns against the victims, labelling them as being suspects or accused persons in criminal cases, including fabricating charges and/or cases against such persons. Such fabrication is commonplace in Bangladesh, and includes serious crimes like robbery, murder and the possession of illegal weapons.

Extra-judicial killings notably by the police and Rapid Action Battalion, and have resulted in derisory investigations and impunity. Between when the current government took power at the beginning of 2009 and November 30, 2009, 120 new cases of extra-judicial killings had been recorded by the AHRC in cooperation with Odhikar, a local human rights organization of Bangladesh.

Contrary to the indications in Hasina’s speech that extra-judicial killings would not be tolerated, the country’s Minister for Home Affairs, Sahara Khatun, a lawyer by profession, told the media on May 16, 2009, “Incidents of extra-judicial killing occur only when members of the law enforcing agencies come under attack. The law-enforcers should have the right to save their lives when they come under attack.” On 17 November, the Home Minister stated that “no ‘crossfire’ killing [has] occurred since her party has assumed office.”

If the home minister, who is responsible for controlling law-enforcement agencies, endorses their lawless actions instead of reining them in under the laws of the land, things are clearly out of control. Reportedly, after the home minister’s comment, extra-judicial killings increased rapidly.

In January 9 killings by State-agents were recorded, while in February the number reduced to 2 and there were none in March. In April, 4 persons were killed in “crossfire” incidents. However, following the Minister’s intervention, such killings increased in the following months. In May there were 16; 7 in June; 5 in July; 19 in August; 35 in September; and 22 in October, 2009.

The Home Minister's claim on November 17 that "no 'crossfire' killing [has] occurred since her party has assumed office" came two and a half months after the chief of the Rapid Action Battalion (RAB) admitted that his force conducts "crossfire" killings in the country. The Director General of the RAB, Mr. Hassan Mahmud Khandker admitted in a press briefing on September 3, 2009 that 577 persons were killed in "crossfire" in 472 incidents until August 2009, since the inception of the RAB on 26 March 2004. On September 4, 2009, most of the national dailies of Bangladesh published the news. There is a serious inconsistency of messages emanating from the government, which should denounce all such killings and act in concert to eliminate this practice and ensure justice and accountability.

On October 3, shipping minister Shahjahan Khan, while speaking in discussion organized by the BBC in Dhaka, suggested that Bangladeshis should understand that "There are incidents of trials that are not possible under the laws of the land. The government will need to continue with extra-judicial killings, commonly called crossfire, until terrorist activities and extortion are uprooted. Nobody is interested in filing cases against the criminals who carry out one terrorist act after another. Under the circumstances, what other option is left for the government?"

Seeking justice concerning extra-judicial killings remains unthinkable because the police threaten complainants with extra-judicial killings themselves, under the justification of "crossfire" incidents, whenever a relative of a victim goes to the police station to register a complaint. The message is clear to anyone that dares to complain about extra-judicial killings by the authorities in Bangladesh: complain and be killed. This leads to the perpetrators of such grave human rights abuses being able to operate and re-offend in the knowledge that their crimes will be accompanied by total impunity. This situation gives rise to a climate of severe fear in the country, including for journalists, lawyers, doctors and human rights defenders that encounter such cases, as speaking out concerning these killings also results in reprisals.

For example, Mr. Jahangir Alam Akash, a journalist and human rights defender in the northern city of Rajshahi, publicised a number of televised reports highlighting the details of "crossfire" killings along with the inconsistencies of such claims by the Rapid Action Battalion in recent years. On October 23, 2007, officers of the Rapid Action Battalion led by Major Rashidul Hassan Rashed, illegally arrested him from his home. Mr. Akash was arbitrarily detained and tortured in a Rapid Action Battalion camp in Rajshahi. He was implicated in three fabricated charges of extortion under the Emergency Power Rules-2007, and detained in the Rajshahi Central Jail, despite a High Court Bench having granted him bail in the case. Mr. Akash, after having been released on bail, has to regularly appear before the Magistrate's Court, Sessions Court and the High Court

Division to seek extensions to his bail grants and continues to receive regular threats from members of the law-enforcement agencies and their allies. He lost his employment and was being financially crippled by legal costs. Ironically, Major Rashidul Hassan Rashed has been serving in the UN Peacekeeping Mission in the Ivory Coast since July 2008. Such an opportunity is treated as a prize in the Bangladeshi armed forces. As mentioned in the section above concerning political interference in the course of justice, two cases against Mr. Akash were not dropped by the current government despite serious concerns as to their validity.¹¹

Given such experiences, it is not surprising to find that persons have no faith in the justice system in Bangladesh. The authorities, however, claim that the lack of complaints means that there are no problems of illegal actions by the members of the law-enforcement agencies. Such “logic” is also used by the country’s representatives at the Human rights Council to deflect any criticism that may surface there.

The systematic protection of members of the authorities by the State has meant that not a single case of extra-judicial killing has yet been investigated by any competent authority, and therefore no prosecutions or punishments of the alleged perpetrators have taken place. Despite what the Constitution of Bangladesh states, in reality the authorities can and do get away with murder and function as if above the law. The AHRC recalls that Article 31 of the Constitution, reads:

“To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.”

However, the agencies that are responsible for such perpetrating over a thousand extra-judicial killings in the last four years and many more before, have been rewarded in various ways, notably the Rapid Action Battalion, which has received praise and awards, including the country’s Independence Day Award on March 23, 2006, for “outstanding performance in maintaining law and order.” In 2007, the government awarded 28 RAB officers with “Police Medals.” All of these officers have allegedly been involved in grave human rights abuses, including extra-judicial killings.

11 AHRC-UAU-063-2008: <http://www.abrchk.net/ua/mainfile.php/2008/3058/>;
 AHRC-UAU-003-2008 : <http://www.abrchk.net/ua/mainfile.php/2008/2713/>;
 UP-155-2007: <http://www.abrchk.net/ua/mainfile.php/2007/2668/>;
 UP-142-2007: <http://www.abrchk.net/ua/mainfile.php/2007/2637/>;
 UP-101-2007: <http://www.abrchk.net/ua/mainfile.php/2007/2504/>;
 UA-149-2007: <http://www.abrchk.net/ua/mainfile.php/2007/2371/>.

Such extra-judicial killings by the law-enforcement agencies have continued to take place after the current government took office on January 6, 2009, and can therefore not claim innocence concerning this grave problem. The current government must ensure that all such killings cease and that truly impartial and effective investigations are launched into these cases to ensure that the perpetrators are brought to justice and that victims' families receive adequate reparation.

This will require a functioning and effective, independent judiciary at all levels, which remains highly elusive at present. The Supreme Court of Bangladesh, as the guardian and interpreter of the Constitution, must act to address this situation. The Supreme Court's High Court Division has inherent power to deal with issue of fundamental rights, according to Section 561A of the Code of Criminal Procedure-1898, which reads:

“Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

Moreover, Article 102 (1) of the Constitution of Bangladesh authorises the High Court Division to issue certain orders and directions:

“The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution.”

There are three writ petitions pending before the High Court Division of the Supreme Court of Bangladesh where the Division Benches of the High Court issued rule against the government. The first ever Writ Petition was filed on 25 May 2006. The Court – a Division Bench comprising Justice Md. Awalad Ali and Justice Zinat Ara – asked the legality of “crossfire” in its rule against the government. However, no further hearing has so far taken place on this writ petition.

On 6 August 2006, another rule was issued by a High Court Division Bench comprising Justice Seyed Mohammad Dastgir Hossain and Justice Mamnun Rahman following a hearing of a writ petition filed by a local rights organization filed the writ petition.

On 29 June 2009, three human rights organizations together filed another writ petition with the High Court Division. A Division Bench of Justice Syed Mahmud Hossain and Justice Kamrul Islam issued a rule against the relevant departments of the government.

Despite having suo motto powers, the Supreme Court of Bangladesh, has repeatedly

failed to take legal initiatives to stop the practice of extra-judicial killings. Finally, a Division Bench of the High Court Division, Supreme Court of Bangladesh passed a *suo moto* ruling on November 17, 2009, against the government and the Rapid Action Battalion, calling on them to explain within 48 hours that why the shooting and deaths of persons in custody should not be declared illegal. As of early December 2009, no developments had been recorded by the AHRC concerning this, however.

A Division Bench comprising Justice AFM Abdur Rahman and Justice Md. Emdadul Haque Azad passed the *suo moto* rule after reading newspaper articles regarding the deaths of two siblings – Mr. Lutfor Khalashi and Khairul Khalashi – who were killed while in custody of the RAB-8 in Madaripur district. The Court asked the Secretary of the Ministry of Home Affairs, Director General of the RAB, Commander of the RAB-8 and a Major of RAB, who arrested the siblings in person, to respond. This is the first ever *suo moto* rule from any court of Bangladesh regarding extra-judicial killings.

In the case in question, on November 14, Major Wahiduzzaman led a RAB team from Jatrapur area under Narayanganj district to arrest Mr. Lutfor Khalashi and Mr. Khairul Khalashi. On the same day, the siblings' family members held a press conference at the Madaripur press club to express their fear of extra-judicial executions of the two. The family urged the authorities to save the two persons from “crossfire”, which is the officially adopted way of killing suspects while in detention of the RAB and the police.

On the same day, the RAB-8 claimed that Lutfor Khalashi and Khairul Khalashi were killed in an “exchange of gunfire” in Madaripur while a group of ultra-leftists opened fire at the paramilitary force's patrol team early that morning. The RAB personnel arrested the two persons from Narayanganj, adjacent to Dhaka city, and killed them in Madaripur, around 150 kilometres away, after around two days of being in custody of the paramilitary force.

The High Court's long-awaited *suo moto* rule questioning the legality of deaths in the name of crossfire, will hopefully help the nation to establish a system that puts a halt to extra-judicial killings and brings the perpetrators to justice. The government should have accepted the High Court's rule as a window of opportunity to solve the prevailing practice of extra-judicial killings under the various pretexts that are used to justify such killings, including “crossfire”, “encounter”, “exchange of fire”, “gun shots”, “gun battle”, and “shootouts” or “in the line of fire” incidents, all of which are synonymous with illegal executions.

It is evident that such killings are one of the many big problems concerning human rights and the rule of law in the country. Successive governments in Bangladesh have been ensuring impunity for the alleged perpetrators of extra-judicial killings.

In its first ever official report to the President, submitted on December 6, 2008, the National Human Rights Commission of Bangladesh recommended that an Independent Probe Commission should investigate allegations of extrajudicial killings in the country. However, the authorities have not yet made any comment or taken any initiative to respond to the NHRC's recommendation.

Case Study 1:¹²

Mr. Kamruzzaman, who is in the public service, alleged that his son Rakibuzzaman Rakib had been imprisoned for 10 years for possessing an explosive substance. The police allegedly implicated him in four more cases while he was already in detention. However, the court granted him bail five years ago. Hearing rumours that the Rapid Action Battalion might kill Rakib as soon as he was released from prison, Kamruzzaman decided not to allow his son to appear in public, fearing his death.

On 10 May 2009, Rakib's father made arrangements to send the court's bail order to the prison authorities. However, the jail authorities did not release Rakib on that date. Hoping that his son would be released the following day, Kamruzzaman waited outside the Dhaka Central Jail's gate the next morning. At around 9:30 p.m. Kamruzzaman saw two white minibuses arrive at the prison. Seven plainclothes policemen with walky-talky radios and firearms stepped out of the vehicles. Three went inside the prison at around 10:45 p.m.

About an hour later, Kamruzzaman saw the jailor Bazlur Rashid and a deputy jailor coming out with the three men who had entered the prison earlier. They were carrying Rakib and holding his hands and legs. At the gate, when Rakib saw his father he cried for help. The men put Rakib in a car and left the place. The armed men prevented Kamruzzaman from getting close to his son. Later, Kamruzzaman chased them in vain and returned home fearing for his son's life.

That day Kamruzzaman and Rakib's wife Nira visited several police stations, including the offices of the Rapid Action Battalion, to find their son. Every law-enforcement officer they met denied any connection to the incident or any knowledge of Rakib's whereabouts. When Nira wanted to lodge a complaint with the duty officer of the Lalbagh police station, under whose jurisdiction the Dhaka Central Jail is situated, she was denied the right to lodge the complaint. Rather, the police asked her, "Who knows the whereabouts of your husband and who took him where?"

The next morning Rakib's dead body was found on a Dhaka street, with bullet wounds.

12 http://www.upiasia.com/Human_Rights/2009/05/19/still_no_rule_of_law_in_bangladesh/4422/

Forensic medical experts found a bullet in his body, presumably from a small firearm, while conducting an autopsy.

The father of the deceased told the media and rights groups that all relevant offices of the law-enforcement agencies had denied involvement in his son's murder. No investigation or arrests have taken place in this case.

Case Study 2:¹³

Mr. Nirapad Boiragi, a 58-years-old tailor, was a freedom-fighter during the liberation war in 1971. He used to work as a dressmaker in a shop owned by Mr. Peter at Chalna Bazar under the Dakope police station in Khulna district. On 7 October, 2009, the local police called in Nirapad to the police station. He was allegedly tortured by the police while in detention. Nirapad's family members and relatives were denied access to the police to see him. After one night's detention the district police authority took him to the office of the Superintendent of Police (SP) in Khulna city. The family was unable to locate Nirapad's position as the police did not disclose his whereabouts and also did not allow the relatives or any lawyer to meet him. On 9 October early in the morning, Nirapad's relatives were informed that Nirapad was killed in "crossfire" with the Dumuria police under the same district.

The Officer-in-Charge (OC) of the Dumuria police station Mr. Md. Fauzul Kabir claimed that Nirapad Boiragi was a "member of an ultra leftist underground party named New Biplobi (Rebel) Communist Party". Nirapad and around 15 to 20 of his associates were holding a meeting on the bank of the river Bhodra near brickfield. After arrival of the police, who learned about the meeting from their secret source, the operatives fired at the police, who also encountered with gun shots. Nirapad received bullet injury in the incident and succumbed his wounds when he was taken to the Dumuria Hospital.

Nirapad's wife Ms. Kalpana Boiragi told the Asian Human Rights Commission that she along with her son Amit Boiragi went to the Dumuria hospital and saw her husband's dead body left on the floor on thick layer of blood. The body had signs of bullet wounds in chest, throat, lower abdomen and back. The police did not allow any of Nirapad's relatives to touch his dead body or see it more closely. The prepared the Inquest Report of the dead body and arranged post mortem at the Khulna Medical College Hospital. At around 9PM on October 9, the police brought the dead body to Nirapad's house but did not allow any person to see or touch the body. At 10PM the police took the body to the local funeral yard for cremation. In presence of the Upazilla Nirbahi Officer (administrative head of a sub-district) Mr. Sakhawat Hossain and OC of the Dumuria police Mr. Md.

¹³ <http://www.ahrchk.net/ua/mainfile.php/2009/3330/>

Fauzul Kabir and a large number of police Nirapad's body was cremated by the police, not by the family. The authorities paid "state honour" to Nirapad by saluting him at the time of cremation of his body, however, without any bugle, which is a traditional way of paying tribute to the freedom-fighters in Bangladesh.

Nirapad's family claims that Nirapad, as a freedom-fighter, had the spirit of the liberation war throughout his life. He was always an outspoken person in the locality. His firm character earned enemies from his neighbourhoods. Kalpana Boiragi alleged that previously the police arrested Nirapad arbitrarily three times and detained in the custody. On each of those occasions the police fabricated pending cases against her husband, who later proven innocent after investigation and got acquittal of those cases. In one of the recent cases the police brought charge against Nirapad in a fabricated case for failing to pay bribes to the investigation officer. But, the Court granted him bail in that case.

The family alleges that some of the neighbours, who wanted to grab Nirapad's one bigha (0.33 acre) land and a bamboo-fenced house that he possessed from his ancestors, conspired with the police to kill him. Terming the "state honouring" during the cremation of Nirapad's dead body "extremely ridiculous" Nirapad's wife said, *"As a freedom-fighter Nirapad's achievement was his extrajudicial death at the hands of the law-enforcing agencies of the same state for which he fought for four decades ago. The Bangladeshi police have succeeded to put an end to a person's life forever what the Pakistani soldiers were unable to do even during the war. Justice is an unthinkable matter in this country"*.

Nirapad's son Amit Boiragi told the Asian Human Rights Commission that their family used to survive on his father's income from the tailoring job. Amit alleged that the local police and administration have been intimidating their family and insisting to keep silence on the issue of his father's assassination "in the drama of gun fire".

In Bangladesh freedom-fighters are respected by the people and the State for their past contributions and sacrifices. Every government for the last four decades has announced special programmes to honour these persons as national heroes.

XII. The urgent need for the criminalisation of torture

Ill-treatment and torture are endemic in Bangladesh. There is no clear law that criminalizes the practice. Police officers or members of other law enforcement agencies can torture citizens without fear of sanctions, even if they torture people to death. The Penal Code-1860, is very weak in this respect.

Moreover, people are so frightened that they normally don't lodge complaints against members of law enforcement agencies concerning cases of torture. Should they register

such a complaint, it is predictable that either the complainant or members of his or her family may be falsely implicated in a criminal case.

Torture is not defined as a crime in any of the existing laws of Bangladesh. The police, who continue to operate under colonial-era laws and practices, use torture as the easiest tool to extort money and confessional statements from suspected criminal or individuals that they choose to target. They also use torture to fabricate evidence as they wish. The police not only routinely deny victims of torture access to complaint mechanisms but they also fabricate criminal cases against the victims and their relatives, as well as any witnesses, in order to stigmatise the persons socially and perpetuate the climate of impunity.

For example, if an allegation is lodged against a police officer, who killed an accused person illegally, the case will be investigated by a police officer (Section 156 and 157 of the Code of Criminal Procedure-1898). In most cases police officers do not make negative reports against other police officers.

Furthermore, the existing laws in the outdated Penal Code (1860) as well as the Code of Criminal Procedure (1898) have significant loopholes that deny the victims their right to justice regarding cases of torture.

Additionally, criminal complaints are initially dealt with at the Magistrate's Court where the prosecution is handled by the police. This helps the alleged perpetrators instead of providing victims with avenues to seek effective remedies. The public prosecutors, who are politically chosen by successive governments and who appear on behalf of the State in certain cases, prefer to maintain a good relationship with the police and therefore also do not pursue the police.

Magistrates and judges lack adequate knowledge about the consequences of torture, which creates innumerable physical and psycho-social problems, followed by unavoidable financial expenditures to the victims of torture. Judges do not comprehend the systemic problems for victims in proving a case of custodial torture against the police who control the complaints procedure, the investigation and the prosecution.

The leaders of the ruling political parties in Bangladesh treat members of the law-enforcement agencies as their hired henchmen. Many senior politicians make statements minimising the serious nature of torture or justifying the practice.¹⁴ These politicians wrongly argue that torture is useful in fighting crime. They overlook the reality that

14 <http://www.abrcbk.net/statements/mainfile.php/2009/statements/2253/>

the police abuse their legal powers as result of the absence of any functioning system of accountability. Such statements are major obstacles to the eradication of torture in Bangladesh.

There are certain Sections in the Penal Code-1860, in Chapter- IX, Section 161 to 171, regarding offences by or relating to public servants such as:

Public servant receiving gratification other than legal remuneration in respect of an official act (Sec-161)

Public servant disobeying the law with the intent to cause injury (Sec-166)

OR

Public servant filing a corrupt report in a judicial proceeding contrary to the law (Sect- 219)

OR

Commitment for trial or confinement by a person in authority who knows that he is acting contrary to the law, (Sect- 220) as incorporated in Chapter-XI of the Penal Code regarding false evidence and offences against public justice.

These are punishable offences. But such a case initiated against a police officer or a public servant can hardly be found. People do not feel free to take action against a police officer or the Armed Forces because they are afraid of being falsely accused as mentioned above. Secondly, these types of cases are generally investigated by police officers and all garnered information is required to be given to the Police Station as provided in Chapter-XIV, Part-V of the Code of Criminal Procedure. Every recognizable offence is investigated by police officers. If the case is directly filed before a Magistrate, the same information is sent to the police for investigation. In such circumstances it is difficult to bring the wrong doers to justice. These are crimes committed by police officers/ armed forces in discharge of their official duties.

Mechanism of trial and punishment: Decisions taken by the Armed Forces Tribunals and the disciplinary actions by authorities in the Armed Forces are immune from challenge in Writ Jurisdiction, except within the narrow compass of want of jurisdiction, according to the Dhaka Law Report (DLR) 34 (Appellate Division), Page 125.

The Armed Police Battalion Ordinance 1979 has given birth to (i) Armed Police Battalions and (ii) Rapid Action Battalions (RAB). Under Section 6-A of the Ordinance the RAB is empowered to investigate any offence under the direction of the government under the Code of Criminal Procedure-1898 or any other law. The Investigating Officer shall exercise all such powers and perform all such functions and duties as may be exercised or performed by a police officer under the Code of Criminal Procedure-1898;

but if they do anything wrong or illegal they will be tried by their own Tribunal, not by an ordinary court.

Legal Impediments: There are certain legal impediments that are designed to prevent cruel and inhumane acts, although these are proving ineffectual at present. The Code of Criminal Procedure of 1898 has given wide-ranging powers to police officers effecting arrests or investigating cases. Section 46 to Section 67 as incorporated in Chapter-VI, set out the procedures for conducting arrests.

Section 46-

Making arrests: (1) “In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action”.

Resisting arrest: (2) “If such person forcibly resists the endeavor to arrest him, or attempts to evade the arrest such police officer or other persons may use all means necessary to effect the arrest.

(3) Nothing in this Section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life”.

It is clear from sub Section (1) of Section 46 that police officers in arresting a person will not touch the body unless by word or action the police officer informs him that he is arrested or he is in custody. So there is no scope for applying force in arresting a person unless the person required to be arrested applies any force or resists in evading the arrest.

But in Sub-Section (2) of Section 46 the Police Officer may use all means necessary if the person resists or attempts to evade arrest. The police officer may shoot towards the evading person and kill him if he is an accused of an offence punishable with death. This has enabled the police and RAB to cause the death of a person while arresting him by justifying the death as necessary due to the person resisting arrest, however true this may in fact be. To stop extra-judicial killing an important step would be the amendment of sub-Section (2) of Section 46 to prevent further abuses.

The police have an important social responsibility to ensure that innocent persons are not charged with irresponsible or false allegations. In the Dhaka Law Report (DLR) (High Court Division) page 363, Mr. Justice Hamidul Haque and Mr. Justice Salma Masud Chowdhury have made certain recommendations regarding arrest, confessions and police remand. But these recommendations have not been implemented.

The pen of the investigating officer is a mighty weapon, as was experienced in the British colonial period. It can compel an innocent person to stand in the dock to face trial; likewise it can set a veteran criminal free.

In sections 54, 156, 157, 164, 167 and other accompanying sections of the Code of Criminal Procedure-1898, the police have unfettered jurisdiction, resulting in their being able to act as if they are above the law. The time has come to urgently address these problems by amending relevant Sections and enacting the necessary laws. If this is done, there would be ways for members of the law enforcement agencies to be held accountable, while at present this is not possible in reality.

However, the current government does not appear to have the will to take the required action and should therefore be condemned for its failure to take the steps necessary to begin to eliminate abuses during and following arrest, that are the cause of many grave human rights violations in the country, including torture and extra-judicial killings. Incumbent governments have typically been reticent to tackle the law enforcement agencies, and while those in opposition denounce violations for political gain, they become silent on the matter when taking power.

Case Study 3:¹⁵

Police tortured in public Ms. Shahin Sultana Santa, a pregnant woman awaited her son in front of school, on 12 March 2006, at the Dhanmondi area in Dhaka. Deputy Commissioners of the Dhaka Metropolitan Police (DMP) at the time, Mr. Kohinoor Mian and Md. Mazharul Haque, led the torture along with their subordinate police officers on the street when a procession of the then opposition political party, Bangladesh Awami League, which is currently the ruling party in 2009, was passing through the area. The police suspected Santa of being one of the demonstrators. The acts of torture were published in print media as well as in the electronic media, as well as through televised reports on the satellite television channels.

Santa received severe injuries to her thighs, lower abdomen, back, waist, hip and other areas of her body. She suffered two fractures due to the police brutality, one in her right elbow and the other in the small finger on her right hand. She also had to abort her unborn baby as a result of the torture. Santa went to lodge a charge against the alleged perpetrators at the Mohammadpur police station, who refused to record the case. She then filed her case (CR Case number 312/06) with the Chief Metropolitan Magistrate's

¹⁵ *AHRC-UAU-035-2009, UA-105-2006, UP-058-2006, UP-062-2006, UP-083-2006, UP-096-2006, UP-101-2006, UP-112-2006, UP-114-2006, UP-181-2006, UP-207-2006, UP-026-2007 and UP-040-2007*

Court in Dhaka on March 14, 2006, against her alleged perpetrators. On 19 March, 2006, she filed another case (Number: 23/06) under sections 10/30 of the Women and Child Repression Prevention (Special Provision) (Amended) Act - 2003.

On 22 March 2006, the police fabricated two cases against Santa involving two individuals and lodged complaints with the Chief Metropolitan Magistrate's Court of Dhaka for extortion and theft. The Magistrate ordered the police record and investigate the two cases that were lodged as counter case to harass Santa and her husband, a lawyer by profession, who had been pleading her case.

In the first case, following an order by the Chief Metropolitan Magistrate's Court, which was made on 14 April 2006, the Inspector General of Police (IGP) initiated an investigation into the original incident of police brutality against Santa. The Additional Special Superintendent of Police of the Criminal Investigation Department, Mr. Kawsar Ahmed Haidari, sought the help of Santa in recording witness statements, who were in hiding to escape further police brutality and harassment. Santa had arranged to have the witnesses meet with Mr. Kawsar at her residence on April 10, 2006. On that day, however, instead of recording the statements of the two witnesses, Mr. Kawsar proceeded to charge them with involvement with a banned Islamic militant political party, Jama'atul Mujahidin of Bangladesh. The policeman charged the witnesses with having met with Sheikh Abdur Rahman, who is the top leader of the banned militant group and who had been arrested in that period by the Rapid Action Battalion.

For three and a half years the case has remained pending before the Metropolitan Sessions Court of Dhaka for hearing of the Revision Petition since 2006, following Santa's lawyer having challenged the CID investigation report.

Mrs. Santa lodged two cases against the police officers – one under the Penal Code of 1860 for torture, lodged on 14 March, 2006, and the second under the Women and Children Repression Prevention (Amendment 2003) Act-2000, lodged on 19 March, 2006, concerning violence against her as a woman. The violence against women case was investigated by a Magistrate and the Penal law case was investigated by a police officer from the Criminal Investigation Department.

The Judge of the Fourth Special Tribunal for Prevention of Women and Children Repression Ms. Kaniz Akhter Nasrina Khanam dropped Santa second case, after Magistrate Shafique Anwar conducted a shoddy investigation as part of a judicial probe, which ended up leading the tribunal to rule that "sexual harassment and molestation was not proved." The court failed to address the issue of torture, which had been proven in the same investigation report.

The report made by the judicial probe commission contains additional information, which was not provided by the witnesses, and important information that was provided was omitted. For instance, witness Mr. Omar Faruk Keru, reportedly told the judicial probe commission that while he was passing the scene he saw a group of police beating a woman on the street before taking her into a police van. Others, he said, also witnessed this scene. Santa said that Mr. Omar made this statement during her presence. The judicial probe commission added that while passing through the place Omar 'saw around 5000 people gathered there'. Santa asserted that Omar did not say about "5000 people" in his statement. On the other hand, Omar told the judicial probe commission that the Deputy Commissioner (DC) of the Dhaka Metropolitan Police (DMP), Mr. Kahinoor Mian, was being aggressive and was directing his colleagues to beat the lady (Santa), but that information was absent in the report of the judicial probe commission.

Santa also noted changes to the buildings and area where the attack against her took place. Santa alleges that she learned that DC Mr. Kohinoor Mian allegedly paid the owners of the shops and buildings to alter the appearance of the area with a view to change the circumstantial evidence of the place of the incident. She also alleges that the police are continuing to harass the witnesses in her case as of December 2009.

Meanwhile, Mr. Belal Hossain, a medical doctor from the Dhaka Medical College Hospital, who treated Santa at the time of abortion after the incident of torture and subsequently issued a medical certificate in this regard, has since been seriously intimidated by the police officers. The doctor went to Santa's home and requested that they return the medical certificate that was submitted to the Court.

One of her witnesses, Mr. Zakir Hossain, was arrested and detained when he went to give testimony to the office of the Magistrate for the judicial probe, and another witness was allegedly killed by the police and made to look like an electrical accident during electric connection repair works in Barisal district. False witnesses were arranged by the police to provide testimony in the separate criminal cases against Santa.

The lawyers in Santa's cases, including her husband, were repeatedly threatened by unidentified persons, who were believed to be close to the alleged perpetrators of Santa's torture.

The first case, which has remained pending before the court due to objections by Santa's lawyer that the case is based on a falsified police investigation report, has now been registered with the Dhanmondi police station after the Chief Metropolitan Judicial Magistrate of Dhaka on 24 September 2009 ordered the case be registered as a First Information Report (FIR) and issued a warrant of arrest against the police officers.

The Home Ministry, in October 2009, suspended Mr. Mazharul Haque, who was promoted to an Additional Deputy Inspector General of Police after he had tortured Santa, and Mr. Kohinoor Mian, who had been working as a senior Superintendent of Police. The government reportedly deployed additional members of the police at the entry points of the Supreme Court of Bangladesh, assuming that both of the senior police officers would go to file writ petitions with the High Court Division to seek anticipatory bail regarding the case of torture against them. But the police authorities have failed to arrest the accused police officers, who remain in hiding.

The Inspector General of Police of the Bangladesh Police told the media that the two officers – Mazharul Haque and Kohinoor Mian – became fugitives to escape arrest. It is hard to believe that the police authorities do not know the whereabouts of their own officers. As of the date of writing of this report in early December 2009, the police had arrested none of the alleged perpetrators of Santa's torture case.

A senior politician, who is also a Member of Parliament from a north-eastern constituency and holds the portfolio of Chairman of a Parliamentary Standing Committee, argued with a Staff of Asian Human Rights Commission in a meeting that Bangladesh should continue custodial torture. "See, Bangladesh is a third world democracy. If we do not use torture, then how can we combat our political opponents? Even if we want to control Islamic militancy, we need to use torture. Otherwise, how do you manage these problems?" the parliamentarian asked. His arguments are similar to those of the police, who always claim that torture is necessary to control crime.

Case Study 4:

Sub-inspector Abul Hossain began his first day on the job at the Narsingdi Sadar Model Police Station with an arrest and the brutal torture of Shakil Sarkar, a sixth grade student believed to be around 12 years old. On October 2 at about 8 a.m. Shakil had gone to meet his classmate Tanvir, who reportedly had been missing since the previous night.

Hossain took Shakil from Tanvir's house to the police station, although there was no complaint against him. The police officer detained him and then interrogated him about the whereabouts of Tanvir. As Shakil was not aware of Tanvir's whereabouts, Hossain allegedly tied Shakil's legs and hands with rope and hit him with a hammer on his body joints and the soles of his feet.

Shakil's mother, Rozy Begum, heard what was going on and went to rescue her son, but police officers beat her too. At about 7:30 p.m., Tanvir's relatives found him at his maternal grandfather's home in Nelaxa, which falls under the Raipura police station of the Narsingdi district.

Around midnight police released Shakil from custody, but not before warning him and his mother of dire consequences if they disclosed the torture episode to anybody. Due to injuries sustained during police torture, Shakil had to be admitted to the Narsingdi Sadar Hospital for treatment.

When the media asked Mohammad Ali, the police superintendent of the Narsingdi district, about the torture incident and the abduction of Shakil by the police, he simply said, "Sorry for what has happened. If there is any written complaint lodged with the police on the issue, the police will inquire into the matter and will take action, if anybody is found guilty."

However, the Additional Superintendent of Police of the same district, Bijoy Basak, a subordinate to Ali, denied the torture allegation altogether.

The police officers do not want to realize that saying "sorry" for torturing someone does not cure the pain suffered by the victim. Neither does denying that torture took place. With regard to the claim that torture is vital for solving crimes, it is evident from this case that it only perpetuates violence and injustice and does not reduce it. Shakil was not a criminal, a political opponent or an Islamic militant. But his case is not an isolated incident. Hundreds of people have suffered torture at the hands of the police, and some cases have resulted in the death of the victim in custody.

Every case of torture has the same ending: the victim alleges police torture in custody; the police deny it and sometimes apologize as Ali did when questioned by the media. The police refuse to lodge any complaint regarding the torture incident. There is no complaint, no inquiry and no punishment for the perpetrators.

This can only happen in a country where senior parliamentarians argue in favour of using torture. The politicians' arguments are based on miscomprehension and a feudal mindset and their expectations of receiving undeserved political benefits. Such arguments contain no rational reasoning.

Instead of arguing for torture by saying Bangladesh is a so-called third world democracy, Bangladesh's policymakers should check the abuse of power by police who extort money from ordinary people. Without torture and corruption, Bangladesh would have far greater hopes of developing.

The nation must check how many cases the police in each of the country's 631 police stations fabricate every day. They must find out whether the police are efficient in investigating cases and whether they follow the due process of law.

There should be investigations about the number of reports that are politically motivated and manipulated by the police as well as politicians. It is necessary to find out how many criminal offenders get direct and indirect support from the police and go free by paying bribes, and how many innocent individuals are falsely implicated in crimes committed by criminals that enjoy police protection. Parliamentarians should also inquire how much people trust institutions like the police and the judiciary and formulate steps to earn the people's trust in these institutions.

Politicians should also look into sincere and serious efforts to address problems relating to law and order in establishments whose functional systems are weak. There must also be transparency in the allocation of government budgets to law institutions and the law enforcement agencies.

The current government was elected in a landslide due to the evident desire of the Bangladesh's citizens to enjoy the rule of law and human rights, but have turned their backs on their electorate and do not at present deserve the mandate they have been awarded.

New Bill tabled to punish the torturers and providing justice to victims: On September 10, 2009, the Torture and Custodial Death (Prohibition) Bill, 2009, was tabled in parliament. The bill attempts to bring Bangladeshi law in conformity with international law. The bill has come to the parliament by way of a private member's bill proposed by Saber Hossain Chowdhury, one of the members for Dhaka city.

This bill has created the possibility of making torture a crime that is punishable as a serious offence. It will also make custodial deaths punishable with life imprisonment.

The Asian Human Rights Commission worked in close collaboration with the Private Member in the drafting of this law. This draft has incorporated the most developed conceptions of law on this matter and deals with some of the more difficult problems of investigations and prosecutions on torture in the Bangladeshi context.

In the past there had been various objections to treating torture and custodial deaths as serious crimes in Bangladesh. Some have argued that such notions do not apply to developing nations. The development of democracy and rule of law requires that primitive methods of dealing with criminal investigations should be replaced. Experience has clearly demonstrated that allowing the use of torture leads to the abuse of the powers. The police and military often use these powers for unjust enrichment and also to suppress fundamental freedoms, such as those concerning expression and association as well as the course of justice.

The development of a proper criminal investigation system depends on the possibility of proper inquiries being conducted into crimes without the use of brutal methods such as torture and cruel and inhuman treatment, that do not yield reliable results, as those being tortured will agree to anything or say anything that is required to halt the torture.

The presentation of this bill before parliament has provided an opportunity for an enlightened discussion on all matters relating to justice in Bangladesh.

All law makers of Bangladesh were urged to take an active part in the passing of this law as soon as possible. On October 5 1998, the government of Bangladesh, under the leadership of Sheikh Hasina, ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Ratification of this international treaty automatically imposes the obligation to ensure that domestic legislation is in conformity with international law on the matter. Eleven years has now passed since the ratification of CAT, however, Bangladesh has still not yet criminalised torture and is therefore not in compliance with the Convention Against Torture.

Moreover, apart from Bangladesh's international obligation as a party to CAT, the state has a mandatory constitutional obligation to protect the people from torture since the Constitution was adopted by the Parliament after independence. The Constitution of Bangladesh enshrines the citizens' right to be protected from torture as a fundamental right in Article 35 (5).

The government of Bangladesh also has constitutional obligations to ensure the eradication of torture. The country's parliament has an opportunity to take an important step fulfil the government's pledge by beginning to tackle torture in an effective way by enacting the Torture and Custodial Death (Prohibition) Bill (2009).

Torture of journalist also a threat to the freedom of expression: Freedom of expression and opinion remains vulnerable in Bangladesh. Journalists have been beaten by private gangs operated by law-makers and politicians of the ruling political party. There have been fabricated criminal cases lodged by ruling party political activists against a number of journalists. For example, in Mymensing, Patuakhali, Chuadanga, Jessore, Chittagong and Dhaka, journalists have faced fabricated charges for writing concerning abuse of political power. Charges frequently involve extortion or bribery, although in certain cases false charges of violence against women, including rape or molestation, have also been used in such cases.

There are even instances of torture of journalists at the hands of paramilitary forces in the capital, where the Home Minister either has little ability control over these forces or is working in complicity with them.

Examples of attacks on the press are plentiful. On 13 April, journalists were beaten by allies of a Member of Parliament at Gaforgaon in Mymensingh district. The incident happened after the legislator reacted to a media report and warned the journalists by saying “I am the MP . . . nothing can be written against me in the next five years. . .”

A journalist and editor of an English speaking national daily, Mr. Nurul Kabir’s private car was chased by unidentified gunmen on a motorbike in Dhaka on 5 March, 2009. He was able to escape without injury. Mr. Kabir has been critical of illegitimate and extra-constitutional practices by the country’s various governments, especially the emergency government. He also challenged the government’s decisions before the Supreme Court during the military-controlled regimes. However, the government has remained silent and has taken no action to investigate such incidents or to pursue the alleged perpetrators of attacks against members of the press.

Case Study 5:¹⁶

On 22 October 2009 Mr. F. M. Masum, a journalist of an English language national daily newspaper in Bangladesh, was tortured by members of the Rapid Action Battalion (RAB), at his residence as well as in custody of the battalion, in Dhaka.

A team of the RAB-10 raided the house at 167 South Jatrabari where journalist Masum lives as a tenant. The RAB claimed that the landlord was peddling drugs. The paramilitary force members knocked down the door of Masum’s flat. Despite Masum stating that he was a journalist, they beat him severely. Bystanders witnessed this beating. As a result Masum sustained serious wounds, into which the RAB personnel literally rubbed salt.

They then took Masum to the headquarters of the RAB-10, where he was detained for around 10 and a half hours and was again subjected to torture, notably severe beatings with sticks and metal rods. He has stated that: “At the RAB office, they tortured me inhumanly saying: ‘We are taking our anger at Nurul Kabir [New Age editor] out on you’. Only after the intervention of Home Minister Ms. Sahara Khatun and several high officials of the government into this case was Masum released, at 10:30 p.m. Before he was released, his colleagues were forced to sign an undertaking that he had been handed over to them “in good health”¹⁷ despite the fact he had injuries all over the body including swollen feet when he was released. His colleagues, however, refused to sign an undertaking stating that Masum had been involved in trading in drugs for a long time. Masum also said that RAB personnel had forced him to participate in orchestrated video recordings of them seizing drugs from his abode. However, soon after Masum’s detention,

¹⁶ <http://www.abrchk.net/ua/mainfile.php/2009/3303/>

¹⁷ <http://www.newagebd.com/2009/oct/23/img13.html>

different RAB officers came up with different stories as reason for his detention. Some officers claimed Masum was found in possession of Pethedine, some said with Phensidyl (codeine) syrup while others said they found him with prostitutes.

Masum has written reports on extra-judicial killings, notably 'crossfire' or 'encounter' killings, committed by the RAB as well as illicit trading of drugs by police and security officers. Ironically, he has also written several reports on the torture of journalists in the country.

XIII. Violations of women's rights remain endemic

Violence against women is a one of the common forms of human rights abuses in Bangladesh. Women and girls face manifold problems within the domestic setting as well as in their communities. Molestation, abductions followed by rape and forced marriages are widespread. Deaths of wives due to the failure of their families in making dowry payments to the husbands and their in-laws are also numerous.

In many of the incidents regarding violence against women, the perpetrators go unpunished due to the flawed criminal justice system and leniency stemming from the male-dominated social and cultural fabric of the country, as well as due to rampant corruption and abuse of police power at the stage of the complaint making and investigation of the crimes.

Case Study 6:

After having his marriage proposal refused a number of times, Mr. Ayub Mollah (20) reportedly took to teasing and harassing Ms. Reshma (18), whose parents work out of the country. After she complained to the man's family he threatened her with an acid attack which, on 7 May, he carried out. Reshma had already moved away to her maternal uncle's village to escape the threat, but on a trip back to pick up some belongings she reports that Ayub entered the house, sexually propositioned her and, when she said no, threw acid at her face. Neighbours intervened after hearing her cries, and Ayub fled the scene. The acid had burned her face, ear and left shoulder and Reshma was admitted to the Khulna Medical College Hospital (KMCH).

The One-Stop Crisis Centre (OCC) at the KMCH drafted a complaint, which they sent to the Koyra police on the 13 May, to be used in a First Information Report (FIR). Police did not record the complaint due to bribes from the alleged perpetrators. A month of pressure from civilians meant that an FIR was lodged on 12 June (FIR No. 10/09) under Section 5 (B) of the Acid Crime Prevention Act-2002, though officers illegally changed the date of Reshma's original complaint, which she had signed and dated.

Eyewitnesses then report that the Investigating Officer (IO), Sub Inspector (SI) Mr. Md. Abdul Hashem, went to the area of the crime-scene and accepted refreshment from Ayub, along with various other members of the ruling political party, the Bangladesh Awami League. He then visited Reshma's house to insist that she withdraw her case. He reportedly told her that she had no chance of winning the case because she was too poor, and her attacker's supporters too powerful. The SI then suggested that she settle for a cash payment and consider marrying Ayub, for her own safety.

Ayub and his political associates then started to harass Reshma, threatening her life, and other witnesses have also allegedly been warned not to testify. At just 18, Reshma is extremely vulnerable, and is losing her will to fight the case in court. She recently told local human rights defenders: 'I don't trust the police now; I can't be hopeful about the fate of my case because of the role of the IO. The witnesses of my case are also very afraid. Will it be possible to get justice from the court if the police conduct investigations in this way?'

Signs of the acid attacks are evident on Reshma's face and shoulder. The One-Stop Crisis Centre at Khulna Medical College and Chemical Examiners of Dhaka identified the results of acid attack during examinations, but the police investigator's report does not include anything concerning these.

Reshma lodged a General Diary (No. 209) with the Koyra police on 5 July seeking physical and legal protection from the police but has been given none. The Chemical Examiner, Mr. Bimalendu Bhounik, of the Government of Bangladesh, in his report asserted that "sulfuric acid was found after examining the cloths" that were seized by the police as material evidence and sent to the Chemical Examiner for investigating the case – of Reshma. However, SI Hashem produced a Final Report (No. 58, dated 14 August), to the Court discharging Ayub despite the evidence against him. In his report the police officer argued "sulfuric acid was not harmful for person and the case was fabricated by complainant for the purpose of harassing the alleged accused as a result of personal grudge. The police officer also recommended to initiate counter legal proceedings against the complainant and her associates for fabricating charge against "innocent person".

Case Study 7:

Ms. Rupa Mandal, a twelve year old from a single parent family in Paikgachha town, was first abducted by a young Muslim man after the family rejected his marriage proposal. She was kidnapped by a group of Muslim men led by Mr. Zohor Ali Morol on four occasions on 22 July, 27 July, 19



August and 22 August 2009. Each time the police ignored registering a case while on two occasions Rupa's mother Mrs. Suhukkuli Mandal went to the Paikgachha police to file complaint. In one occasion she got recommendation from the local Member of Parliament for registering the case.

On 22 August, on the fourth occasion, Zohor and his associates took Rupa from her home. Rupa's mother and sister, Ms. Krishna Mandal, were beaten by the kidnappers, and the girl was taken away. Despite previous failure to act, Mrs Shukkuli again sought help from the Paikgachha police, and was directed to a Sub Inspector (SI) Delwar Hossain (the second officer, who had previously handled the case). Mrs. Shukkuli's, managed to find SI Delwar at the Paikgachha bus terminal and by bending submissively to embrace his legs, asked for his help. She reports that the Police Officer then kicked her and said: "Do you expect the police to guard your daughter all around the world? Go away and find her yourself". He allegedly told her not to disturb him again. Later, she went straight to the Jewel Fish Product office after that to continue her search. She found SI Delwar there with his motorbike, directing the abduction of her daughter with Zohar in a boat from the adjacent river port. She shouted for help but no one came.

Mrs Shukkuli were able to force the lodging of a First Information Report only after filing a Petition Case (No. 211/09, under Sections 7/30 of the Women and Children Repression Prevention (Amendment) Act-2003) with the Special Tribunal for Women and Children Repression Prevention of Khulna, which sent an official order to the Paikgacha OC to record the petition as an FIR. The court has ordered that the case be given to the Criminal Investigation Department (CID) for investigation, that a draft map of the crime scene be prepared, alams (material evidence) be seized, and the abducted girl be located and rescued. The Special Tribunal has asked the police submit their report on 21 October 2009.

After the court's order the police (including SI Delwar Hossain) and others attached to the Jewel Fish Product have been threatening Shukkuli Mandal, her family and the witnesses in the case, insisting that they either withdraw or negotiate the case through arbitration so that the alleged perpetrators walk free. On 10 September 2009, the Khulna district police authority transferred SI Delwar Hossain, rather than subject him to investigating him for criminal offences. Mrs. Shukkuli said that she has struggled to find the money for court and transport fees – about Taka 3000 – to file the complaint with the Special Tribunal.

After interventions from human rights groups Rupa Mandal was rescued by the police and produced before the Court, which ordered to hand over Rupa to a shelter home operated by an NGO in Bagerhat district following medical examination to check whether she was raped and to determine her age.

XIV. The lack of independence of the judiciary – a major obstacle to the realisation of rights

Bangladesh's government has made public announcements that the judiciary would be separated from the executive and will function independently, including to the international community in pledges made as part of the country's re-election bid for membership in the UN Human Rights Council. However, the same government also amended the Code of Criminal Procedure in 2009 to allow "executive magistrates" to arbitrarily take over trials of any cases they deem fit, greatly undermining any notion of independence of the judiciary, in particular concerning cases of human rights violations allegedly committed by the State.

Moreover, by enacting the Mobile Court Act-2009 the government has attributed judicial powers to executive magistrates, bypassing judicial officers. Under the new law, the executive officers are empowered to punish offenders with imprisonment of up to two years along with monetary penalties during an instant trial without any proper investigation or representation by a lawyer, if the alleged accused confesses to a crime under the laws included in the Mobile Court Act-2009, such as using a fake driving licence and around 80 other such offences. The mobile courts work in the presence of the police and paramilitary forces that intimidate the alleged accused into confess to crimes. The provisions of the Mobile Court Act-2009 are contradictory to the protection of rights enshrined in the country's constitution as well as provisions of the Evidence Act-1872, notably Sections 24 to 30, and any notion of justice.

On November 15, 2009, a Division Bench of the High Court Division of the Supreme Court of Bangladesh asked the government to explain in three weeks why the amendments of the Code of Criminal Procedure-1898, which were made on April 8, 2009, giving executive magistrates judicial power to deal with cases relating to possession of immovable property, should not be declared illegal. The Court issued the rule to the President's Secretariat, Prime Minister's Office, Cabinet Division, Parliament and the Ministry of Law, Justice and Parliamentary Affairs, following a writ petition filed by a human rights organisation.

Senior government officials have also interfered in judicial affairs. Two judges - Mr. Abdul Gafur, the District and Sessions Judge of Dhaka district, and Mr. Md. Shahjahan Shaju, Judge of the Women and Children Repression Prevention Tribunal of Gazipur district - were forced into retirement on 30 July. They were issued with an instant order to meet with the Law Minister and lead a demonstration of judges to the meeting. The sacked two judges were the President and Secretary General of the Bangladesh Judicial Service Association respectively, a professional organisation of judicial officers who are recruited under the Judicial Cadre of the Bangladesh Civil Service. According to Article 116 of

the Constitution of Bangladesh, “*The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the 67[President] 68[and shall be exercised by him in consultation with the Supreme Court].*” It was established that the government’s order of forced retirement was a clear violation of the constitutional provision, as no discussion took place between the government and the Supreme Court of Bangladesh.

Serious criticism by human rights and civil society organizations was aired and published in the media. The two judges declared that they wanted to challenge the government’s decision before the Supreme Court. Fearing a potential loss in the case, Prime Minister Sheikh Hasina held a meeting with the two judges and reversed the government’s order two days later. The Parliamentary Standing Committee of the Ministry of Law, Justice and Parliamentary Affairs inquired into the matter and found that the Adviser to the Prime Minister, Mr. Hossain Toufiq Imam, and the Secretary of the Ministry of Law, Justice and Parliamentary Affairs, Kazi Habibul Awal, were directly responsible for the unlawful decision of forced retirement. On September 13, Kazi Habibul Awal admitted before the Parliamentary Standing Committee that his Ministry had violated the constitution, but no legal action had been initiated as of December 2009, the time of writing of this report.

XV. Conclusion

The incumbent government of Bangladesh made a public commitment to improve the fields of governance, human rights and rule of law of the country during its tenure in office. In reality, after the first year, there have been no credible or effective initiatives taken to address the gross violations of human rights, particularly concerning the right to life and liberty, as per Article 32, and the right to be protected from torture, as per Article 35(5) of the Constitution of Bangladesh. As a State party to a number of key international legal instruments – including International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other forms of inhuman and degrading punishment and treatment (CAT), Bangladesh has obligations to protect the fundamental human rights enshrined therein. The Foreign Minister’s pledge of “zero tolerance for extrajudicial killings” to the UN Human Rights Council during the country’s Universal Periodic Review has been broken. A number of ministers, including the Home Minister and Shipping Minister, have even indicated their support for the use of extra-judicial killings such as the so-called crossfire or encounter killings, which have continued to be perpetrated throughout the year with impunity.

Following the Supreme Court’s suo moto intervention and the NHRC’s recommendation for the formation of an independent probe commission to investigate the extra-judicial

killings, the government should have taken action without failure or delay, but this was sadly lacking as of December 2009.

The criminal justice system of Bangladesh is incapable of holding a fair trial and providing justice to the country's citizens. In order to establish the rule of law, the country immediately requires equal access to be provided to citizens to effective complaint mechanisms without any fear or manipulation. Criminal investigations should be efficient, impartial and independent from the regular police. The prosecution needs to be independent and permanent instead of the current practice of politicised recruitments followed by dismissals depending on which political party is in power. Judges occupying the judiciary's various branches need to exhibit competence and judicial skills and be supported with adequate resources. The deeply-entrenched system of corruption in the policing system must be rooted out as a priority. It is extremely damaging to the maintenance of law and order and requires significant reforms to be carried out.

The importance of ensuring freedom of expression by allowing the media to express their opinions without any intimidation or threats of attacks, including the threat of being subjected to the fabrication of cases against them is a key component in the protection of human rights.

The AHRC calls on the government to take the following specific actions in order to improve the protection and enjoyment of human rights:

1. Criminalise torture as a punishable crime by enacting the "Torture and Custodial Death (Prohibition) Bill-2009", which was tabled in parliament on 10 September 2009, allowing victims of torture to have access to a complaints mechanism and the possibility of reparation;
2. Repeal or amend, as appropriate, the provisions contained in laws that allow for abuses and ensure impunity, such as the Article 46 of the Constitution of Bangladesh; Sections 46, 54, 132, 151, 156, 157, 161, 167, 190, 197 and 247 of the Code of Criminal Procedure-1898; the Joint Drive Indemnity Act-2003, the Mobile Court Act-2009 and the Special Powers Act-1974;
3. Ensure that all incidents of extra-judicial killings, including its many synonyms such as crossfire incidents and the like, are investigated by an independent probe commission headed by and comprising judges of the Supreme Court, in order to expose these violations and ensure that the perpetrators of these actions are held to account and that justice is provided to the families of the victims of these most grave human rights abuses;

4. Adopt a well resources and functioning Witness Protection Mechanism, in compliance with international human rights norms and standards;
5. Issue a standing invitation to all UN Human Rights Council's Special Procedures mandate holders, and ensure that the Special Rapporteurs on torture; extra-judicial and summary executions; and the independence of judges and lawyers are able to conduct country visits to Bangladesh as a priority and without delay or impediment.

B U R M A

JUDICIARY AS BUREAUCRACY

One of the long-term outcomes of military rule in Burma has been the reduction of a once assertive and independent judiciary into an arm of the bureaucracy. Often persons concerned with politics, human rights and other affairs in Burma take for granted that the judiciary is not independent and leave it at that. Because the problem is not explored, the important consequences of the judiciary as bureaucracy are overlooked: these include the consequences of its non independence and non-separateness from other parts of the state, its endemic corruption, the zero public confidence in the work of the courts, and the lack of public space for debate about issues of justice and the rule of law. This year's annual report on Burma of the Asian Human Rights Commission (AHRC) is organized around these themes.

Non independence

The problem of the non-independence of the judiciary in Burma is a 50-year-old problem. It began with the caretaker government of General Ne Win in 1958, and since 1962 there has been no independent judiciary at all. (For details see article 2, vol. 7, no. 3, September 2008.) In the 1960s and 70s the structure and habits of the independent judiciary were completely destroyed. So the problem of a non-independent judiciary in Burma is not just one of a military dictatorship. It is not the sort of problem with which many people are familiar from past experiences of countries in some parts of the world, like the Americas, where judiciaries were variously co-opted and cajoled by military dictators to go along with their agendas, or were marginalized and bypassed if they failed to cooperate. It is a more comprehensive problem of the thorough demolition of the independent judiciary, from top to bottom, over a period of decades, to the extent that the notion of an independent judge upon which international debate is premised no longer exists in Burma at all. Therefore, it is not a problem that will be addressed with some short recommendations for changes in personnel and laws. It is a problem that ultimately will take decades to address, just as it took decades to create.

The problem of non-independence is intimately connected to the non-separation of powers across the whole state apparatus. For the last half-century Burma has been run by

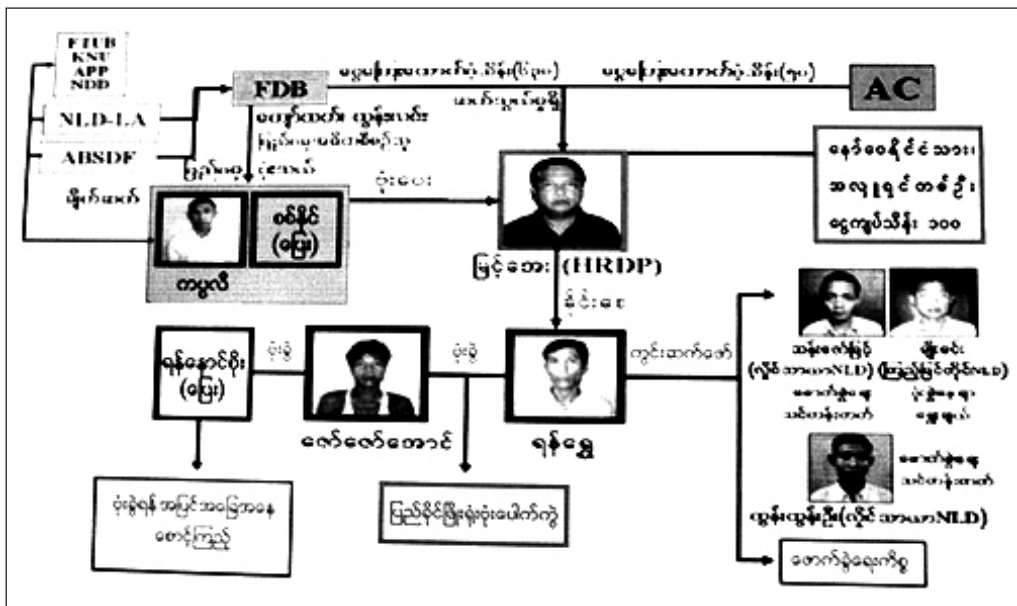
decree or, for about 14 years, by a one-party parliament that was anyhow under executive control. The non-independence of the judiciary is also intimately connected to the non-separation of the executive and legislative functions. Its role has been completely changed from that of a body to interpret and apply statute in individual cases to a body to enforce pronouncements that are described as “laws” but that have never had any legislative backing, nor, for most of the time, any constitutional framework; they are only “laws” insofar as laws can be made without a law-making organ and in the absence of a supreme law to give them coherence.

Therefore, the problem of non-independence cannot be properly addressed until the non-separation of powers is properly addressed. The government is keen to give the impression that this will soon be done through the election for new parliaments at the national and regional levels. However, from the contents of the 2008 Constitution—the drafting of which the chief justice oversaw—it is plain that this is not the case. The constitution has declared that the parts of government will be separated only “to the extent possible”, which speaks to how far Burma is not only from separation of powers in reality but also even from a basic conceptual understanding of separateness.

The problem of non-independence was brought out most strongly during the year in the case decided against democracy party leader Daw Aung San Suu Kyi and co-accused this August. Although global outrage was expressed at the politically contrived manner in which the proceedings reached their inevitable conclusion, the trial was in many respects typical of thousands of others in recent years, because it was a consequence of the institutionalized non-separateness of parts of government, not so much a particular policy response to a prominent person. The features that it shared with other cases that the AHRC has documented included the following:

a. Inapplicability of charges: Leaving aside questions over whether or not the house arrest of the accused in this case was legal at all, the charges against the defendants were inapplicable, as the order against Aung San Suu Kyi did not include anything to prohibit her from communicating with someone already in her house. Many other cases heard against opponents of the government in Burma also rest on inapplicable and baseless charges. The police, who may receive interrogation files from military personnel and be ordered to frame charges without ever having had contact with an accused, often appear at a loss to identify an offence. For instance, in the case of Aung Aung Oo and three others, the accused were charged with an arms offence but during the preliminary trial process the charge was instead changed to intent to cause public fear or alarm: an offence used when the police can find no other. In the case of Aung Aung Oo and three, the so-called crime was having had stickers calling for the release of Aung San Suu Kyi. The police have no evidence that they had stuck them up anywhere in public or had committed a crime as alleged, but they were prosecuted nonetheless.

b. Violations of basic criminal procedure: Judges from two districts heard the case against Aung San Suu Kyi and her co-accused. This is a fundamental breach of criminal procedure, which requires that a judge of a jurisdiction hear a case against an accused in the jurisdiction where the alleged offence occurred. There is no provision of law for mixing judges of different jurisdictions. The case also was heard in a closed court which only select persons were allowed to attend: again, there is no basis in law for trying someone in this manner; however, the trying of opponents to the present government in this way is the norm, not the exception. The AHRC is not aware of any such case in recent years that has been conducted in an open courtroom. In fact, in the case of Aung San Suu Kyi and her co-accused there was more openness than in many such cases. Very often family members and also lawyers are denied access to courtrooms. For instance, in the case of human rights defender U Myint Aye and two co-accused, who were sentenced to life imprisonment for an alleged bombing plot, the first defendant was not represented in court despite his attempts to have a lawyer. His original counsel was also charged and imprisoned in a separate case. Myint Aye and his co-accused claimed that they were tortured to extract confessions but the court ignored these claims.



(Government schema with alleged role of U Myint Aye in bombing plot)

c. Problems with witnesses and lack of evidence: The court in the case of Aung San Suu Kyi initially allowed only one defence witness, and thereafter on request to a higher court allowed a second witness. By contrast, the prosecution presented some 17 witnesses, of whom 11 were police and the others were immigration and council officials. Defendants in trials of this sort in Burma are routinely unable to present witnesses. It is also common to find that the only witnesses for the prosecution are police and other officials; and ordinary civilian witnesses, where present, are not genuinely independent but appear for the police as professional witnesses. For instance, in the case against U Tin Min Htut and another, who were accused of writing a letter to the United Nations Secretary General in which they criticized the government and the manner in which the international community has treated the situation in Burma, a line of police testified for the prosecution but the defendants were unable to present witnesses and were not allowed access to a lawyer, even though Tin Min Htut had signed a power of attorney and his advocate had come to the court premises.

Evidence-less cases are also common. As the verdict against Aung San Suu Kyi was being read, nearby a 36-year-old monk named U Sandadhika was arrested and accused of planning to immolate himself as an act of protest against the conviction. Three men in plain clothes and an unmarked vehicle took him to the Yangon North District Police Headquarters, where he was assaulted with a bamboo rod. The police had him forcibly disrobed and charged in court with insulting religion. They later admitted that they had no material evidence to prove the allegation. They also had no independent witnesses and listed only four police officers to appear against him.

When a system can be manipulated and misused to the extent that it is in Burma, it can be used for practically any purpose in practically any case by practically any government official, large or small. Local forestry department staff in Aungmye, Magway accused human rights defender U Aye Myint of threatening a forest manager in August 2009 after another official, had made a criminal complaint against local villagers, whom he accused of cutting eucalyptus plantations in the Bwegyi Reserve in order to make charcoal. In fact, the officials had allegedly confiscated the “reserve” land from farmer U Nyan Myint and his son, Ko Thura Aung, and had charged them with destroying public property after they had gone to work in the area like before. Although the case against Aye Myint was based on the say-so of some government officials and people whom they had brought to the court as witnesses, Judge Win Myint in the township court sentenced him to prison. In giving his decision, the judge said that the defence witnesses had not been able to show that the accused had not said the things of which he was accused, even though this is a reversal of the presumption of innocence.

Earlier in the year, one of Aye Myint’s associates, 43-year-old Ko Zaw Htay, was imprisoned for ten years under the Official Secrets Act because he had video recorded

confiscated farmland. Ko Zaw Htay had been detained the previous October and together with three farmers was tortured and illegally detained inside an army compound, before being brought before a judge only in December 2008. He was convicted in an evidence-less case on 23 January 2009.

In 2009 the AHRC also issued an appeal on the case of former elected parliamentarian, U Kyaw Min, a.k.a. Md. Shamsul Anwarul Haque, 58, who together with his wife, son and two daughters was imprisoned for allegedly violating the citizenship law. Kyaw Min and his family were all born in Burma and are lifelong residents. He holds a number of degrees from institutions there and worked as a township education officer and a school headmaster. The election commission scrutinized Kyaw Min's personal records before allowing him to stand for election to ensure that both he and his wife were citizens. Yet in 2005, because Kyaw Min was joining with other elected members of parliament to call for the legislature to be allowed to sit, and also apparently because he met with representatives of the International Labour Organisation, his family was targeted out of revenge. Officials accused them of lying about their ethnicity and falsely obtaining citizenship, accusing them of being Bengali.

In court, where he did not have a lawyer to represent him, Kyaw Min explained to the court that his family is Rohingya but because this is not an officially recognized ethnic group that they had gone along with whatever the officials had put down for the purposes of ethnicity in the past. The court rejected this argument and found them guilty of lying about their identity. In order to penalize Kyaw Min and his family far beyond the maximum already set down in the citizenship law, the police also lodged four identical separate cases for different members of the family even though the offence was



U Kyaw Min

the same and under law they should have been lodged as a single case. In total Kyaw Min was sentenced to 47 years and his wife and three children, 17 years each. A lawyer lodged appeals for Kyaw Min, pointing to the factual and procedural flaws in the original case; however, the courts successively dismissed the appeals without considering the substance of the appeals at all and merely restating what had already been decided in the lower court.

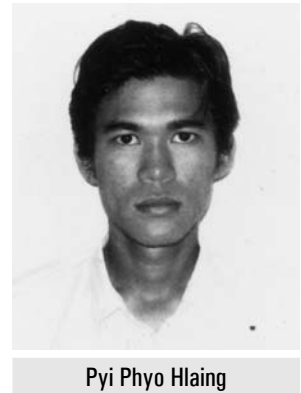
In 2009 many other politically-motivated cases of this type continued against persons accused of various offences for which little if any evidence existed but whom the courts were obliged to convict because of their bureaucratic rather than judicial function. Nyi Nyi Aung, 25, and four others were charged with establishing an illegal organisation called Burma National Integrity to Democracy. In the trial it emerged that the accused were arrested on different days in January 2009 but the police did not bring the matter

to court until April, during which time the defendants were kept in illegal custody and tortured.

The type of “evidence” that the police have presented to court includes a map of refugee camps in Thailand obtained from one of the defendants that is from a government-issued textbook.

Similarly, 53-year-old Sein Hlaing, a trader from Sanchaung, Rangoon and two other persons were detained in March and accused of having contact with unlawful associations from abroad, after they had received money to distribute to the families of prisoners who are facing financial hardships because of the loss of breadwinners. The three were kept illegally without charge until August. They were allegedly tortured to extract confessions and the police submitted evidence from the interrogations of the accused as proof of the alleged crime, even though under the Evidence Act such information does not constitute proof.

Some cases arising from the September 2007 monk-led protests also continued to make their way into the courts into late 2008 and early 2009. Pyi Phy Hlaing and eight others were convicted in the Sanchaung Township Court to periods of eight to 24 years in jail on a gamut of charges. The cases against them were, like others of their type, full of errors in law and procedure, including that the oral and material evidence was obtained from the interrogations and searches of the bureau of military intelligence, in violation of the Evidence Act; that the witnesses were police or government officials; that the hearings were held behind closed doors; and, that multiple charges were lodged for the same offences.



In another case of the same type, Phoe Htoke, a 47-year-old dried fish merchant was sentenced in December 2008 to three years with two others in the Kyimyindaing Township Court for having allegedly distributed unlawful fliers in the lead-up to the protests in September. Despite the many police allegations, they had no firm evidence to back most of the claims. For instance, they could not show proof of Phoe Htoke's and Kan Myint's involvement in a small protest in February, despite having taken photographs of it (the two are not in the photos). They also could not give exact dates that the two accused allegedly went to Thailand. Meanwhile, one of the accused men's defence lawyers, Saw Kyaw Kyaw Min, was forced to flee the country after being charged with obstructing the work of the court.

Three men who had earlier already been given jail terms over the 2007 protests were

among others sentenced to additional periods. Win Maw, 46, Zaw Min, 39 and Aung Zaw Oo, 30, were all tried in a single case—despite not having known one another previously—under the Electronic Transactions Law 2004 in a closed court at the Insein Prison and on 5 March 2009 sentenced to an additional 10 years each. In his most recent report to the UN Human Rights Council, the Special Rapporteur on Myanmar wrote that this law violates a raft of international standards. He has called upon the government to review and revise this and other laws to lower the incidence of systemic rights abuse in Burma, but given that the problem in a case like this arises not merely from the law but also from the nature of a judiciary working as a bureaucracy, even in the unlikely event that the government followed his suggestion, it would not lead to any discernible change in circumstances for defendants like Win Min and the two others.

Ma Mar Mar Aye, 46, of Kyopinkauk, Pegu, was on August 15 arrested for allegedly attempt to provoke monks in her locality to do something to mark the two-year anniversary of the 2007 protests. After a hearing that lasted for only a few hours, on August 28 she was sentenced to two years in jail. During the perfunctory trial, a number of police and government officers appeared as witnesses for the prosecution but none of the monks who were the eyewitnesses to the supposed offensive behaviour of the accused were called. The defendant did not have a lawyer and was also not able to call any witnesses.

Mar Mar Aye is reported to suffer from heart disease and arthritis and has lost weight during the time that she has been detained. However, neither the International Committee of the Red Cross nor any outside agencies are currently able to routinely access Burma's prisons and therefore neither she nor the other detainees mentioned in this report have obtained the support and assistance that they need from third parties to ensure even the minimum standards of their health and well being.

Endemic corruption

The problem of the total loss of habits of an independent judiciary is not only among judges and prosecutors in Burma but also among defence lawyers. Ordinary defence lawyers see their role not as advocates of law but as brokers. This is because ordinary criminal cases are decided through payment of money between the parties, to the police, the prosecutor, the judge and other personnel. The government itself to some extent acknowledges the corruption in the system, but is unable to address it because the corruption extends to all parts of government, because there are no institutional means to make change, and because the cooperation of the judiciary with the official programme depends upon its personnel being able to make money out of their positions. Therefore, the problem of the non-independence of the judiciary is intimately tied to the problem of endemic corruption.

Two 15-year-old girls, Ma Amy Htun and Ma Thuza Khaing, both of Daik-U, Pegu, were tried and imprisoned as adults in August because the police concerned with the case allegedly paid the prosecutor to overlook records that indicated they were children. The girls were arrested with a number of adults in February after a raid on a house to uncover alleged selling of illegal lottery tickets—which in Burma is extremely common. They were held in the police lock up without bail until the case came to court. While there, the families allegedly had to pay the police sentries 500 Kyat (USD 0.50) each time they came to bring food.



April Htun and Thuza Khaing

In court the accused denied the charges and said that the items of evidence were not theirs. They said that they had signed the search warrants out of fear of the police. They also said that they had never seen the two men who the police brought as supposed witnesses for the search and seizure at the house. They did not have lawyers to defend them. The judge was informed that the girls were all aged less than 16 but he failed to verify this fact, instead relying on allegedly falsified documentary evidence from the police on their ages, after the prosecutor had received 30,000 Kyat (USD 30) from the police to try the case against the three girls as adults.

The costs for accused persons are not merely in court. They start from the moment of detention, and prompt payment can be vital not only for liberty but for survival itself, as Ko Aung Khaing Htun learned. On 19 June 2009 local council authorities in the delta detained the 31-year-old fisherman along with another man, Ko Tin Htun Lwin, at the Ngawun River, and took them back to their office. One of the officials told the two that if they paid 3000 Kyat each then they would be released. As the two men did not have the money on them, they agreed to release Tin Htun Lwin for him to go collect the money and come back.



Ko Aung Khaing Htun

The next day, June 20, when the money was delivered, an official told a member of Aung Khaing Htun's family that they had already released him; however, he had not come

home. On June 21, Aung Khaing Htun's family received news in the morning that his body was found in a sentry hut. Around 20 friends and relatives of the victim went to see. His face was bloodied and there was bruising on the left side of his chest. According to them, he had been in good health before he was detained. Witnesses reported that council members allegedly beat Aung Khaing Htun and brought him to the place when he was nearly dead. They asked the cemetery keeper to bury him, but the latter refused because he could see that Aung Khaing Htun was not yet dead. After that, they dumped him in the nearby hut, where he died. The cost of his life was the failure to more quickly pay the equivalent of three US dollars.

Zero public confidence

The problems of non-independence and corruption together mean that people in Burma have zero confidence in the courts. People come before the judiciary because they are brought before it on charges. Most are poor people who are not represented by lawyers; a fact adverted by the Special Rapporteur on Myanmar in his 2009 report. He remarked of his visits to jails on his previous trip that nobody whom he spoke to at random had had legal counsel, and that some did not know the meaning of the word "lawyer". Some businesspeople also use the courts as part of their commercial negotiations, because if they have more resources than their rival then they can buy judges to settle disputes. But ordinary people rarely bring genuine complaints to the courts. This is because there is no perception of the courts as places where someone can find justice. It is also because the courts have less power than other parts of the state apparatus. Instead, a person with a grievance against a state official will take the complaint to a senior person in that part of the administration to which the official belongs, such as the police or the Ministry of Home Affairs. Rather than being able to rely upon the judicial process to consider a complaint, the complainant must hope, in the manner of feudal rule, that someone high up will hear his or her prayer, take sympathy and do something about it.

To illustrate, the AHRC during the year obtained the details of a case of two young male victims who were tortured at a police station in an urban area, over an alleged robbery. According to the first, eight police interrogated him for three days, during which time they covered his face with a sarong and assaulted him. They allegedly hit him with batons over a hundred times on all parts of his body. Then they made him stand on tiptoes and for about two hours hold a pose like he was riding a motorcycle.

He added that his wife paid a total of the equivalent of around USD100, which is more than a couple of month's wages for poor people in Burma, to the police so that they would not torture him. His companion also said that he was detained and interrogated for two days during which time the police hit him and ran a piece of bamboo up and down on his shins.

Before turning to the question of complaint and the consequences of judiciary as bureaucracy, we need to make some observations about the methods of torture in this case, the victims, and the reasons for the use of torture, all of which run contrary to conventional ideas on torture globally.

First, the techniques used were advanced methods of routine torturers. They are the types commonly associated with military intelligence officers or with troops in outlying areas. The motorcycle and rolling bamboo are particularly familiar methods in the documentation in those categories of cases. However, the torturers in this case were police in an ordinary suburban station. Thus the methods of torture ordinarily associated with cases of political prisoners or alleged insurgents are actually in the entire system.

Second, the victims were typical of the overwhelming majority of victims throughout Asia: poor people accused of ordinary crimes, for which the purpose of the torture is both to extract confessions and/or to obtain money. In this case, the accused were freed after making some payments. However, there is no guarantee that they will remain this way. Once they have gone through this type of experience once, it can happen again at any time. In fact, one of them had already been interrogated once over the same alleged crime, and both expressed fear that they might be picked up again any day. Neither was taken before a judge, even though this should have happened within 24 hours of arrest.

Third, the victims claim they were innocent and that the police know this but they tortured them anyway to conduct a fake investigation, as a favour to a local businessperson. This too is a common feature of torture throughout Asia. It is also likely that the police have interrogated, tortured and taken money from other young poor men in the vicinity over the crime for which these two were also accused. One case like this can be very profitable for police. It is common to hear reports of dozens or even hundreds of people rounded up from an area in a general attempt to find some people on which to pin blame and make money at the same time.

Now to come back to the problem of zero public confidence, the distinctive problem for these victims of torture in Burma is not that they were tortured over an ordinary crime in an ordinary police station. This, as noted, is an experience they have in common with victims in India, Thailand, Sri Lanka, the Philippines, Bangladesh and Pakistan, among others. Rather, it is that because of the non-independence of the judiciary and endemic corruption, there is nothing that they can realistically do about it. In those other countries, the obstacles to bringing complaints of torture against the police are enormous, and the risks immense. But in them there at least exist courts that are in some way separate from the administration, rights groups and lawyers who can work on the cases with some effect and media that can report and publicize to generate public opinion.

By contrast, in Burma the only thing that the victims can really do is to lodge a complaint with high-up authorities and hope that someone will believe them and take sympathy. If they try to lodge a complaint in the courts, not only will they risk police reprisals, against which they will have no protection—since there are no groups in the country who can hide them and no media that can report on the case to assist with their safety through some publicity—but they will get no help from the courts anyway because they are not the ones with the power to afford them redress. The courts have no effective authority over other parts of government. As an arm of the executive, they are not capable of hitting back. Unless an army general or someone else in a position of real importance is supporting a court order, the police can easily ignore it or get around it. Since in this case the allegations are against police officers, the police would use many methods to prevent them from being successful, or if in the extremely unlikely event that the court actually made an order against the police, could see that the officers concerned escape punishment by absconding and changing their identities, which has been done in the past.

The lack of public confidence in the work of the courts also derives from the subordinated position of defence attorneys in the system. Although technically defence lawyers hold an equal position to the prosecutors, in fact their status is much less than other officers of the courts and their position much more tenuous. This is evidence by the persistent targetting of defence lawyers as a means of quelling dissent not only outside but also inside the criminal justice system itself.

The law practiced in Burma is supposed to be adversarial, apparently not content with already pre-arranging for the outcomes of many cases through the orders of executive councils at all levels to trial judges, authorities also began taking action against defence lawyers who have been causing them embarrassment simply because they have been trying to do their jobs according to law. Towards the end of 2008, for instance, at least six lawyers in Burma were accused of criminal offences because of their attempts to defend clients whom the government intended to imprison irrespective of the trial process.

Two were Supreme Court advocates U Aung Thein and U Khin Maung Shein, who were imprisoned for four months on a charge of contempt of court in November 2008. After they were released from prison in 2009, the authorities revoked their licences to practice. They were not given any opportunity



U Aung Thein



U Khin Maung Shein

to contest the revocations. Hundreds of other practitioners have similarly faced suspension or loss of licence on various pretexts, without being given a chance to defend themselves.

No public space

All of the above problems are connected to the lack of public space for debate. At present there are no publications in Burma that can report openly and honestly on the work of the courts. The government publications rarely make mention of the courts at all. Private publications do so more but they are tightly censored and very little of the types of problems outlined above ever makes it into print. The absence of public space for debate also means that the types of opportunities for public advocacy on cases that have existed under other regimes, such as those formerly in Latin America, do not exist in Burma. This also greatly hampers opportunities to address the endemic problems of the judiciary, and therefore its non-independence is affected by the lack of open media.

Even attempting to report on mundane affairs or on government-organised events can land journalists in trouble. For instance, during 2009 the AHRC reported that Judge Daw Amar of the Hmawbi Township Court on 27 August 2008 sentenced 30-year-old Aung Htun Myint, a freelance journalist with a local news journal, to three years' imprisonment for video recording proceedings at a polling booth—although the charge against him was that he had supposedly travelled to Thailand for video training. In fact, they had no evidence against him of this charge, which was totally unrelated to his being in Hmawbi. The investigating officer could not say what day he had supposedly gone to Thailand, for how long he had stayed or where he had stayed. But in the system of judiciary as bureaucracy that exists in Burma today this was irrelevant.

Two other news reporters, 24-year-old Ma Eint Khaing Oo and 29-year-old Kyaw Kyaw Thant were freed in a general prisoner release during September after they were imprisoned for taking people left homeless by Cyclone Nargis to request assistance from international organizations. The two were accused of attempting to cause a public disturbance because they took a group of women and children in June 2008 to the offices of the International Committee of the Red Cross and the United Nations Development Programme.



Eint Khaing Oo

The type of society in which natural disaster victims appealing for aid can conceivably be equated with a public disturbance is a type of society in which news can be harmful not only in terms of special security affairs and national interests but even in terms of the most mundane and trivial matters. U Khin Maung Kyi, 45, was put in detention

at the behest of local officials because he had complained about electricity supply in August 2009. The law under which he was imprisoned is intended for restraint of known habitual criminals on whom information has been received that they are likely to commit another offence, not ordinary citizens who make complaints.

Tellingly, among the many things of which the local authorities accused Khin Maung Kyi was that he had spread “unwanted” news. For people fortunate to live in places where government is more or less rational, this is an unfamiliar concept: news is often irrelevant, but there is no objective category of news that can be described as unwanted. In contrast, for an irrational government of the sort that exists in Burma, not only does such a category exist, but also it is essential to the management of society and the control of troublemakers like Khin Maung Kyi.

Under a rational state, communication is encouraged, even though it may inconvenience officials and may sometimes be frivolous or annoying. Measures are put in place to mollify dissatisfied members of the public and to take action to address complaints properly. Measures also exist to take action against people who abuse the system. Among these, criminal sanctions are a last resort. Things don’t always work as they should, but attempts are made to reduce the opportunities for abuse of authority.

Under an irrational government, communication is not only discouraged in practice, but is opposed as a matter of principle. Irrationality does not need or want open exchange. Measures are put in place so that officials can silence those who irritate them by making complaints, and criminal sanctions, or at least the threat of criminal sanctions, are high on the list. Many opportunities are given for abuse of authority, and officials do not hesitate to use their power, or at least to remind citizens of it. This is why the types of problem associated with judiciary as bureaucracy, outlined above, are necessarily tied to the problem of the lack of public space on which to communicate about these very problems.

These are among the features of the system in Burma with which the international community must come to terms if it is going to say or do anything useful about the human rights situation there, rather than simply decry the unfair trials of a few prominent individuals. The judiciary is in its present form an appendage of executive authority. Unless its structurally and functionally subordinate position is addressed, it will continue to act as an instrument for the violation of rights rather than their defence. Under these circumstances, calls for the courts to decide cases fairly and in accordance with international standards are completely meaningless. In such cases, the courts in Burma are not even capable of complying with domestic standards, and nor should they be expected to be, because they are performing an executive function, as a bureaucratic agency, not a judicial one at all.

I N D I A

A DEMOCRACY IN PERIL

Introduction

On 1 June this year, a gang chopped a young man into pieces in broad daylight in full public view in Thiruvananthapuram, the capital city of India's Kerala state. The rival gang, who murdered Binish, the victim, stayed at the scene for about an hour after the incident. Binish is a suspect in more than a dozen criminal cases. The incident happened barely 50 meters from the state police headquarters.

A few days later, the governor of Kerala, R. S. Gavai, gave permission for the Central Bureau of Investigation to prosecute the state secretary of the Communist Party of India (Marxist), Mr. Pinarayi Vijayan, for corruption. The bureau accuses Vijayan of illegally profiting from a government deal with a private contracting company, SNC-Lavalin, in 1998 while Vijayan was a minister. Within hours the CPI(M) organised a protest march against the governor's decision and burned his effigy in front of the governor house. The governor even received death threats. The CPI(M) called for a protest throughout the state.

In some areas, especially Vijayan's home district of Kannur, vehicles stayed off the roads while government and public offices remained closed due to the inability of officers to travel. Even hospitals had to function with minimum support. Instances of violence were reported around the state where the CPI(M) cadres destroyed public and private property.

In India, political parties sponsor mafia gangs and violence. Violence is part of India's political culture as well as its social fabric. Many would dispute this argument. Yet when a Sikh preacher was killed in Austria in May this year, Sikhs in the Indian state of Punjab resorted to violence in their homeland. The entire incident is an irony. Sikhism is a religion that officially denounces caste-based discrimination, which is yet another form of violence that runs through every Indian's veins.

Followers of Sikhism have resorted to violence in the past. The attack on two visiting preachers in Vienna this year, of which one belonged to the Dera Sach Khand sect, was

allegedly by members of a rival sect. When the news reached Punjab, followers of the Dera Sach Khand sect in the state, despised by the so-called upper-class Sikhs, resorted to violence. Thousands of Dalits, or “untouchables,” in Punjab burned and destroyed public and private property on 25 May. A curfew had to be imposed to contain the violence.

It is a cruel twist of Indian society that Dalits, a community of millions that have faced the worst forms of violence, ranging from being labeled untouchables to denial of the right to exist, resorted to violence to vent their feelings.

When Indians protested in Australia against racial attacks on Indian students this year, their friends in India organised rallies and shouted at the Indian government to invade Australia. The Mumbai terror attacks in November 2008 were just one more excuse for some Indian intellectuals, politicians and policy analysts to call for an Indo-Pakistan war. According to these people, it was an opportunity dropped from heaven to test nuclear weapons and also to annihilate “terrorist neighbours” on their soil and solve the “world’s problem” forever.

So behave the descendents of a generation that was able to gain independence from the British through a civil disobedience movement. But within hours of realising that the “external” threat of higher severity was set to go, Indians brought out their inherent affinity for violence by killing each other, in the name of two religions, in the Hindu-Muslim clashes that followed.

Some interpret the philosophical basis of the country’s largest religion, Hinduism, to revolve around violence. The Bhagavad Gita, literally translated as “Song of God,” one of the cornerstones of this religion, tells of the justification offered to a warrior by his counsel for the use of violence. The warrior is told to fight the rival factions, who are brothers, as it is justified as “dharma” or duty.

The overarching effect of this religion and its philosophy upon the people of the country is a catalyst to the primordial Indian nature to resort to violence to settle disputes and disagreements. Many religious groups in the country, whether Muslims, Christians or Parsees, have at times resorted to violence to vent their feelings and views, particularly disagreements.

Mainstream politics in India are merely harvesting the natural crop that violence breeds. All major political parties in India resort to violence. Dissent and discord is silenced with violence and the use of force. Violence is used not only in the literal sense, but also in all its temporal manifestations. In this milieu politics, state practice and the very concept of democracy itself have become the celebration of violence.

The human rights report on India cannot thus say anything other than the violence omnipresent in the country. In its manifest forms, violence haunts Indians and the country's future as extrajudicial executions, torture, crude forms of discrimination and enforced starvation. The following chapter on India thus deals with these subjects and tries to explain how such forms of violence is possible in the largest democracy of the world.

1. Extrajudicial executions

Pattern:

The Manipur Police Commando Unit (MPC) shot dead two persons on 23 July in Imphal town, the capital of Manipur state. One of the victims, Mr. Chongthan Sanjeet, was a young man and the other, Ms. Mayanglambam Thokchom Rabina, a mother in her advanced stage of pregnancy¹. The MPC was checking passenger vehicles in the town when the incident happened. The MPC stopped the vehicle in which Sanjit and Rabina were travelling near a crowded traffic interception and ordered the passengers to step out. When Sanjit came out of the vehicle, the MPC led him to a nearby medical shop. The MPC shot Sanjit inside the shop killing him immediately.

Hearing the gunshot the people ran for cover. The MPC fired at the fleeing crowd, hitting Rabina and five other persons. Rabina died on the spot and the other five persons were seriously injured. A journalist documented the entire incident, including the MPC placing a 9mm pistol on Sanjith's dead body before dragging the body out from the shop veranda.



Sanjit, in black circle, moments before he was shot.

Picture courtesy: Human Rights Alert

The Chief Minister of Manipur, Mr. Okram Ibobi Singh, announced the next day in the state legislative assembly that the two victims are terrorists. The minister also said that the government could deal with terrorists only by resorting to harsh steps. The Director General of Police, Mr. Y. Joykumar Singh, said that the murder was necessary as the victims were armed and posed a threat to his officers as well as other citizens.

¹ AHRC-UAC-098-2009, 14 August 2009

In fact, Sanjit was a villager travelling to the town for some business, whereas Rabina was going to the hospital along with her nine-month-old son for medical check-up. There was no subsequent investigation about the incident, nor any action taken against the officers involved in the firing.

The incident provoked a weeklong state wide protest organised by the civil society. The schools remained closed. Normal life in the state paralysed and the state administration wanted to regain control of affairs. The government launched a crackdown of the protest movement. The police arrested innocent persons whom they suspected of leading the movement. They charged the arrested with provisions under the draconian law, the National Security Act, 1980. Those arrested are yet to be released on bail. The detainees include prominent human rights activists.² Even after five months, the schools in the state are yet to be reopened.

Open murder by security agencies, the administration covering up the incident and then detaining anyone who protest are the regular ingredients of what is popularly known encounter killings in India. Extrajudicial executions have become a daily event in many parts of the country. During the past 14 months, the number of extrajudicial executions has alarmingly increased in the country. Not single state in India is an exception.

Murder for profits:

Fighting terrorists, insurgent groups, Maoists, Naxalites and other armed resistance groups are common excuses the security agencies, including the police, pose after each incident of extrajudicial execution. Out of an estimated 840 incidents of extrajudicial execution reported this year from India by various credible sources, the AHRC is yet to know a case where an officer is punished or an incident investigated after the incident. Instead, it is a common practice for the government to promote officers involved in the incident.³ It is thus not surprising that police officers in the country wrongly believe that illegal detention, torture and killings are legitimate tools to maintain law and order.⁴

This is a controversial issue, not merely due to the wrong belief of police officers resorting to unlawful means, but also since these illegal methods are often used to cover-up criminal activities committed by law enforcement agencies and the political regime that control power to silence opposition. This is what happened in the case of Mr. Jainto Singh Gaur and Mr. Rajesh Bando reported from Assam.⁵

² AHRC-UAC-122-2009, 18 September 2009

³ INDIA: *Encounter killing and custodial torture, a disgrace for the nation*; AHRC-STM-171-2009, 14 August 2009

⁴ India: *Overhaul Abusive, Failing Police System*; Human Rights Watch, 4 August 2009

⁵ AHRC-UAC-163-2009; 27 November 2009

The army officers attached to the Kumaon Regiment stationed at the Tihu camp in Assam encouraged Gaur and Bando to pose as surrendering United Liberation Front of Asom (ULFA) cadres.⁶ Gaur was a student leader and Bando a small businessman from the Baksa district of Assam. The young men were attracted in the deal since a lawyer who worked closely with the corrupt army officers promised them that after the surrender, the government would pay them money from the funds designated by the state government for the rehabilitation of surrendering ULFA cadres.

The men started visiting the army camp and soon the army detained them in an undisclosed location. By the time they realised that the officers will kill them in a fake encounter, it was too late. The army killed Gaur and Bando between 17 and 28 April. The army claimed that they killed the two young men in an encounter. The recovery of hidden notes from the dress of the two men exposed the truth behind the incident. The notes strongly suggest that the officers and the lawyer were scheming to kill the two and share the reward money. The family of the two men are now pursuing a case at the Guwahati High Court, seeking the intervention of the court to direct an investigation in the case.

An enquiring magistrate exposed a similar case in Gujarat this year. The magistrate enquiring into the extrajudicial execution of Ms. Ishrat, Mr. Pranesh Pillai alias Javed Shaikh, Mr. Amjad Ali Rana and Mr. Zeeshan Johar accused the Crime Branch of Ahmadabad Police for murdering the four students in June 2004 for mere promotions. The police case after the murder was that the victims, though college students are associated to the *Lashkar-e-Taiba*, a terrorist outfit.

The police accused that the students were plotting to kill the Chief Minister Mr. Narendra Modi. After five long years, the magisterial inquiry has pointed fingers at the officers, accusing them that they killed the students expecting promotions and cash awards. In fact, after the incident, the government promoted the officers. The case is now pending at the state's High Court. Similar cases are reported from Maharashtra, Punjab and Uttar Pradesh states where police officers are openly engaged in killing innocent persons after accepting money or expecting promotions.⁷

6 ULFA is a proscribed terrorist organisation operating in Assam. Over the past ten years, the political parties ruling Assam have used financial lures as a method to encourage ULFA cadres to surrender. It is also widely known that the political parties sharing power in the state have used 'surrender' of ULFA as a political tool to maintain popular support. The system is widely criticised for being laden with corruption. Blaming opposing politicians as ULFA cadres or sympathisers is a common method used in the state silence opposition. Hundreds have lost their life in this game. For further details please read Justice K.N. Saikia Commission Report, 2007

7 Watch for example: *Passport to Murder*; BBC 28 September 2009

Murder as state policy:

In addition to corruption, the policy of the government is to condone extrajudicial executions. In states like Chhattisgarh, Orissa and Madhya Pradesh, the state government encourages extrajudicial executions for mere social control that favours the political regime in the state. These three states form part of India's red-corridor. In this year alone, the combined actions of the state police and the state-sponsored private militias in the three states account for more than half of the encounter killings documented in India.

The latest of the cold-blooded murder is reported from Orissa. On November 20, the state police shot dead two persons in the compound of Narayanpatna Police Station.⁸ The deceased were part of a 200 strong crowd that had gathered in front of the station demanding the Officer-in-Charge of the police station to accept their mass complaint. The crowd, mostly comprised of members of the tribal community in the state, were complaining that the police officers regularly molest them, particularly the women at home during night, in the excuse of search operations.

The police fired 300 rounds at close range at the crowd, injuring an estimated 60 persons and killing two. Several international organisations have condemned the attack.⁹ Yet, the state government has not initiated any inquiry in the incident.

The myopic and blind urge for development is the reason for the government-sponsored onslaught upon the tribal communities living in central India. The state governments in these states are competing to attract foreign domestic investments. The investments are for exploitation of natural resources including the underground mineral resources in the region. The private corporations investing in excavation operations require the tribal communities that have been residing in these lands for generations to vacate the land. When the state government take sides with private corporations, it leads to conflicts.

Government-sponsored development programs implemented in Chhattisgarh state during the past six years are an example. This has destroyed thousands of hectares of forestland in Chhattisgarh. The National Mining Policy released in April 2008 spells out the government policy on mining. It aims at boosting national development through mining and disregards completely the concerns and welfare of the original inhabitants of the land.

Multinational players like *De Beers* of South Africa and the Anglo-Australian mining company Rio Tinto, which have invested heavily in mining operations in India, have

⁸ AHRC-UAC-162-2009; 26 November 2009

⁹ Among other organisations, the Amnesty International issued a statement on 2 December condemning the incident and calling for investigation

shady human rights records and shoddy environmental practices. Accepting tenders from corporations with deplorable records and supporting their activities using state resources stands proof to the government's lack of commitment to the people.

Left with no means to survive and their original habitats rapidly depleting, the rural populations in the country have increasingly become vulnerable to exploitation by landlords and corrupt politicians. Exploitation often takes the shape of bonded labour, a practice criminalised in laws that are hardly enforced. Police and other state agencies, like the forest department, are easily bought over by landlords owing to the widespread corruption in the system. In frustration, the oppressed populations fall prey to extremist ideologies like those promoted and professed by the Naxalites, finding in them a means of fighting back.

Such fights, of varying intensity, have spread to an alarmingly large area of the country. Unfortunately, the government response has been equally violent, resulting in extrajudicial executions. Lopsided and religiously coloured defence tactics – like the formation of the “*Salwa Judum*” and other village defence forces – have resulted in loss of life on both sides.¹⁰

In these fights, both sides are engaged in committing atrocities, as would be the case in any unregulated war where might and connivance make right. In addition to the policemen and the Naxalites, a large number of innocent persons have lost life in this war. As it was in the case from Manipur, the state governments justify every killing by its agencies by accusing the victims as Naxalites or members of armed resistance movements.

Even the union government in New Delhi supports this. A statement made by the Prime Minister of India proves this point. A few months back, the Prime Minister said in a public meeting “*Naxalites are the worst enemy of India.*” A week later government advertisements appeared in national dailies stating that Naxalites are cold-blooded criminals.¹¹

Trusted sources from Orissa, Chhattisgarh and Madhya Pradesh informs the AHRC that after the advertisement, there has been an increase in number of police raids carried out in the villages each day, resulting in a consequential escalation in the extrajudicial executions. The access of the media and other independent agencies into these ‘unreported

¹⁰ *When state makes war on its own people: Peoples' Union for Civil Liberties Report*

¹¹ INDIA: Advertisement campaign against Naxalites is a call for violence; AHRC-STM-205-2009, September 30, 2009

war zones of India' are extremely restricted and often prevented.¹²

In the Narayanpatna incident, the police rounded up the five member fact-finding team that went into the villages ordered them out from the village at gunpoint. The Deputy Superintendent of Police threatened that he will register fabricated charges against them if they were to be found anywhere near the villages.

The absence of credible data about extrajudicial executions prevents effectively challenging the government and allows it to continue its 'business of killing' with impunity. Often the victims' families, being from the most underprivileged backgrounds, have no means or the courage to approach the courts. The complete absence of a witness protection programme or even a law to that effect, coupled with court delays often makes complaining against the law enforcement agency a suicidal act in the country.

However, there are direct and indirect sources in the country that provides 'sneak previews' into the reality. Often statements by government officers provide limited but shocking insights about extrajudicial executions. The Director General of Police in Manipur state, Mr. Y. Joykumar Singh made one such statement in November. He said that between January and October this year, his officers have murdered more than 260 persons.¹³ Of course, the officer added that all those who are killed are terrorists, murdered in armed encounters. In addition, there are also human rights groups who are actively engaged in documenting cases in the country.¹⁴

Conclusion:

The Indian media often report with contempt the killing and maiming of the citizens by non-state actors. The limited debate in the country upon the issue is centred on the illegitimacy of violence used by the terrorists, insurgents and armed resistance movements, and is highly polarised. Except for the effort of a few publications like the *Tehelka*, the deliberations so far have missed a crucial aspect, the issue of disproportionate use of violence by the state upon its own citizens.

The significance of this subject is on the logic that the state is the custodian of the law and is principally responsible for governing by the rule of law. It implies that the state must ensure equality before the law and must not allow the arbitrary abuse of authority and power by its agencies. Further, it casts a legal obligation upon the state

¹² "It can become too dangerous, because of ongoing fighting, for our partners to access and reach out to the villages," Maria Joao Ralha, European Commission Humanitarian Office, as reported in *India's Forgotten War*, 19 November, 2009

¹³ INDIA: Law-enforcement agencies made accountable to the rule of law is an urgent need; AHRC-STM-236-2009, 2 December 2009

¹⁴ The SAFHR, a human rights group based in India is currently documenting cases of extrajudicial execution in Assam and Manipur. However, owing to fear most victims do not want their cases to be taken up in courts.

that it can resort to force only through legitimate and controlled procedures, that too in extraordinary circumstances where the lives of its citizens are under immediate threat.¹⁵

The constitutional framework in India that guarantees rule of law to its citizens thus restricts the state from unleashing disproportionate violence upon its citizens. Unfortunately, the Indian state is engaged in systematically negating this legal premise for the past several years. A cursory glance at the statistics produced by the National Human Rights Commission of India (NHRC), brings this fact to the fore. From April 2001 to March 2009, the NHRC has recorded 1184 deaths in police custody; which is murder committed by the police, without any sanction or approval of a court of law. Further analysis of this data brings out even more startling facts.

Most of these murders have taken place in relatively calm and problem-free states in the country, with Maharashtra state having the dubious distinction of topping the list with 192 murders. The other states ranked high in the list are Uttar Pradesh (128), Gujarat (113), Andhra Pradesh (85) and West Bengal (83). All these states are within the peaceful and prosperous parts of the country, with no insurgent activities.

It is a fact that these statistics is a gross underestimation of the actual numbers since only very few cases reach the NHRC and/or judiciary. The reason behind this is that often the victims' families, being from the most underprivileged backgrounds, have no means or the courage to approach the courts. The complete absence of a witness protection programme or even a law to that effect, coupled with court delays often makes complaining against the law enforcement agency a suicidal act in the country.

Further, in states like Manipur, the security forces have unlimited and unaccounted power to carryout their operations under the statutory protection of the draconian law, The Armed Forces (Special Powers) Act of 1958. This law allows even a non-commissioned officer to shoot to kill based on mere suspicion in order to "maintain public order".

The euphemism, "to maintain public order" is widely misused by the security forces for unleashing unbridled terror where they operate, thus supporting a trigger-happy culture of governance. The July 23 killing of Mr. Chongkham Sanjit and Ms. Rabina Devi in Manipur, exposes the degree of lawlessness resorted to by the security forces in these areas.

15 Rehnen, Frank. "Matching Traditional and State Authority: Challenges in Cooperation between Different Types of Authority to Build Peace", Paper presented at the annual meeting of the ISA's 49th annual convention, Bridging Multiple Divides, Hilton San Francisco, San Francisco, CA, USA, 26 March 2008

Placed in this context, the recent developments in the country have been highly disturbing. Despite all the evidences pointing to the worthlessness of the idea in delivering peace to the disturbed areas by use of force, the state is increasing its pitch for declaring war on its own people. Even more unsettling is the fact that the union home minister himself leads the campaign.

An example of this is the home ministry's argument for a cohesive, clinical and all out operation against the Maoists named as Operation Green Hunt. What is missing in the aggressive rhetoric for a war on Maoists is the question about the people living in the area -- poor, hapless tribal -- marginalised to the peripheries of the Indian state for long. Caught between two warring parties armed to the teeth, the tribal pay the heaviest price in this battle.

Yet, they are nowhere cited in the public discourse. The only occasion they appeared to be included in the discussion was when the government decided to withdraw more than 100000 cases against the tribal 'to win their hearts and minds'. Cases that were slapped on them for 'stealing' firewood, honey and other minor forest produce and a constant source of their exploitation by the police and the forest department were withdrawn.

The government did not care to answer why these cases were charged against them in the first place! After all, they have been living in these forests for centuries and the forest belonged to them. Why did it take an armed rebellion to force the state to think about their plight, and why the government could not act on its own for this long are two important questions that are yet to be answered.

Similar is the case with the people of Nagaland, Manipur, Assam, the Jammu and Kashmir and other states hit by insurgent activities in the country. The people residing in these states are compelled to resort to war like efforts just to ensure survival. Day after day, they are forced to walk through an alarmingly reducing narrow corridor of neutral space, maintaining equal distance from the state and the non-state actors. In addition, the state does not help its case for garnering their support by the amount of terror it unleashes. After all, the state is the legal guardian of all its citizens, for it is the state who had solemnly promised and which had been bestowed the authority under the constitution to protect and preserve the inalienable human rights of its citizens.

For this reason alone, extrajudicial executions committed by the police and other state agencies deserve not only the strongest condemnation but also concentrated action against them. The deaths in police custody, committed with impunity provided by the uniform and authority, instigates not only public anger and protest but also hatred towards the state. The insurgents, whichever colour they belong to, tap this hatred for mobilising people into an armed rebellion against the state.

Declaring a war on its own people is a humongous error of judgment on the part of the state. What the state needs to do is reengaging those who are up against it, addressing all their concerns. The state also needs to go for a systematic and systemic overhaul of the system and correcting the flaws within the administration at the earliest. For this, it is elementary to conduct a revision of state policies ensuring public participation.

Further, guaranteeing equality before the law and ensuring punishment to the perpetrators of violence including those enjoying political power is required. The country needs to put an immediate end to murder in police custody and fake encounters. Those who are responsible for committing these acts must be prosecuted, with no exception to incidents that have happened in the past. The government needs to put people in command of their life, their habitat and resources and stop the state-sponsored corporate plunder of natural resources. The future, otherwise, does not seem that bright.

The Supreme Court of India has repeatedly warned the government that ‘custodial torture, violence and killing’ as ‘a naked violence of human dignity’ and a ‘calculated assault’ upon the people and their fundamental rights. The judgments delivered in the D.K. Basu and the Bhajan Kaur cases categorically declare that it is the state’s duty to ensure that persons live, behave, and are treated like human beings. The state must neither condone nor tolerate deprivation, oppression and violation of the right to life and liberty.

Yet, custodial killings in India have assumed alarming proportions, that it has adversely affected the belief of the citizens in the rule of law and the administration of justice in the country. Arbitrary misuse of authority with statutory impunity has also demoralised the security agencies in the country. If the functionaries of the state become lawbreakers, it results in a situation where might means right, leading to lawlessness and anarchy.

The Supreme Court has also directed the government that it must undertake innovative measures to deal with terrorism and has said that ‘state terrorism would only provide legitimacy to terrorism which is against the rule of law’. The state must thus ensure that its agents deployed for combating terrorism acts within the bounds of law and do not become law unto themselves.

India cannot afford to kill anymore of its citizens without plummeting into a state of anarchy. The prophetic vision of the court has proved to be true. It is now the duty of the state to undo its wrongs and prevent the ensuing anarchy.

It is time for the government to put an immediate end to the use of arbitrary means in dealing with dissent to safeguard the life and liberty of the citizens. The government cannot reject its constitutional and sacred duty to the citizens by becoming the unlawful arbiter and the executioner of humanity.

2. Torture

Tool for investigation:

Sceptics may argue that it is an irresponsible generalisation to say that Indian police depend on torture to conduct investigations. They may think such incidents are rare. The story of a 15-year-old Dalit, or low-caste, boy named Nitish proves that the sceptics are wrong.

The officers from Kodungaloor Police Station arrested Nitish into custody on 13 January.¹⁶ The police arrested Nitish at the Kodungaloor temple grounds. An officer took Nitish to the police station, where a probationary police sub-inspector and police constables brutally tortured him. The officer wanted Nitish to confess that he was a thief responsible for several unresolved cases that had been registered with the police.

The boy's family soon came to the police station, bringing along a politician for support. The probationary officer summoned Nitish from his cell. The officers had stripped him naked by then and he was bleeding from his wounds. The officer then caned Nitish in front of his parents and the politician. The boy's mother lost consciousness and collapsed inside the station. Later, the officer released Nitish after "advising" his parents that Nitish required "proper grooming," which he had demonstrated. Before letting Nitish go, the officer filed false charges against the boy. When the family approached a superior officer to complain about the incident, the officer said they could not expect the police to buy good food for suspects to get them to confess their crimes.



Nitish

This attitude is not an isolated view. The speaker of the Kerala Legislative Assembly, K. Radhakrishnan, while inaugurating the 2008 Annual State Conference of police officers, said that police would have to use their "tools" while investigating a crime, for which "third degree" methods were essential. The speaker further clarified his position that human rights were an impediment to criminal investigations, a sentiment shared by police officers and many policy makers in the country.

A few months after Radhakrishnan's public statement supporting torture as an investigation tool, on 2 February, India's electronic media aired a short video displaying the shocking brutality practiced by the country's law enforcement agencies. The video showed eight-year-old Komal, a Dalit girl, being publicly tortured in Kailokhar village, Uttar Pradesh. A police officer held Komal up by her hair, twisted her ears and rained blows on her, demanding that she confess to an act of theft.

¹⁶ AHRC-UAC-016-2009, 23 February 2009

Five police officers in New Delhi are now facing accusations of raping a woman slum dweller inside the Inderpuri Police Station. The officers brought the woman to the station, as they wanted to question her about her husband, a proposition unheard of in Indian law.

What do the police have to say about all this? The most repeated rhetoric is that officers suffer from low salaries and a lack of proper investigation facilities. Political interference and public pressure to prove crimes are also quoted as reasons for pushing the police to torture suspects.

The Supreme Court of India in 2007 tried to address this problem. In a 2006 case, *Prakash Singh and Others vs. Union of India and Others*, the court directed the government to take measures to delink politicians from the police. Interestingly, Prakash Singh is a former police officer who believed that the court could end unwarranted political interference in the day-to-day functioning of the police. When the court decided in Singh's favour, the government filed a revision petition seeking a review of the court order on the grounds that the court was interfering with the function of the government. The revision was not allowed, but the court's directives are yet to be implemented, which demonstrates the simple fact that courts cannot resolve all the issues in the country.

Torture undermines democracy:

Torture is an important issue because it neither promotes democracy nor supports the rule of law. On the contrary, the open or clandestine use of torture undermines the fundamentals of democratic governance. India allows law enforcement agencies, particularly the police, to practice torture. As one of the most visible representatives of the state, the police can implement its directives in society through fear. Criminal investigations in India often begin and end with a confession. Fair trials have no place in such an environment.

The tendency to brutally abuse the weak is deep-rooted in the minds of the Indian people. In fact, the subcontinent has been the cradle of this practice. The temporal basis of the superiority of Brahmins, or high-caste elites, forms the foundation of the caste system, which justifies the use of brutal force to suppress weaker sections of society. Ill-conceived notions of divinity, to succeed, require unchallengeable restrictions imposed on those who are expected to remain outside the "divine caucus," which in the caste hierarchy are those lower than Brahmins.

Brutal suppression was the fate of anyone who attempted to break away from this servitude to the elite. Even in Hindu mythology, there is the story of Lord Rama, revered by millions, who kills a low-caste sage named Sambuka to liberate him from worldly sins. Another story tells the tragic fate of *Eklavya*, a low-caste prince who has to sacrifice his

thumb to his teacher *Dronacharya* to perfect the art of archery – an act forbidden him due to his birth in a lower caste. Although one of India's national honours for teachers, the *Dronacharya* Award, is ironically named after this very teacher, whether he or Lord Rama ever existed is still a highly debatable issue.

Even after gaining independence from the British on 15 August 1947, and forming a democratic socialist republic on 26 January 1950, torture continues to be practiced in India by the powerful on the weak. This undermines the very foundation of the country and is the result of its decayed political system. It reflects the dead Indian mind. Torture is nothing but state-sponsored brutality.

The UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment came into existence on 26 June 1987. In the debates during the formalization of the convention, the government of India supported it and was of the opinion that it was “a step forward in realising human rights.” That is the only statement made by the government of India in support of the convention in any international forum.

Unfortunately, 22 years later, torture is still widely practiced in India by the police, paramilitary units and other law enforcement agencies. They perceive the practice as standard operating procedure for criminal investigations, which usually begin and end with a confession obtained through torture or intimidation.

Torture is not viewed as a criminal act, but as a symbol of authority, a means to enforce discipline and for social control. That is why torture is not carried out in the secrecy of a detention centre, but in full public view in India.

A tool for extortion:

Law enforcement officers use torture as a tool for extortion. This behavior has distanced law enforcement officers from the ordinary people. In fact, “law enforcement agency” has become a misnomer in India; public perception sees these agencies as state-sponsored criminals in uniform. It is common practice in India that ordinary individuals, if required to interact with law enforcement agencies, will first seek assistance from politicians to avoid intimidation, abuse or arbitrary detention.

Corrupt politicians use this as an opportunity to demand bribes. In this way, torture facilitates corruption not only among law enforcement agencies, but also among other public servants. Similarly, torture corrupts the country's justice delivery mechanisms. Even though torture and a fair trial cannot coexist, criminal charges based upon evidence gathered by the use of torture continue to be brought to court, and result in acquittals. On the other hand, when there are possibilities for persons to be convicted through such evidence, a fair trial is negated.

Currently, there is no law in India that criminalizes torture. For the past several months, a law to this effect has been under the consideration of the government. However, it would require considerable revision to meet international standards that conceive torture as a crime against humanity.

No legal framework:

The internationally recognised definition of torture as envisaged in the convention is *“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”*

The proposed Indian law, however, limits the definition of torture to *“any act which causes: (i) grievous hurt to any person; or (ii) danger to life or health (whether mental or physical) of any person.”* Limitations like the requirement of “grievous hurt” not only circumscribe the concept of torture from its normative definition, but also put additional burden upon the victim to prove that the injury was grievous in nature. The law is also silent about the burden of proof, which according to existing provisions of the Indian Evidence Act, 1872, is upon the victim.

The introduction of the concepts of “hurt” and “danger” in the law as qualifiers to the convention’s broad definition of torture can only be viewed as an intentional attempt to dilute the state’s responsibility in preventing torture. It is also an attempt to dilute the gravity of torture, the right to be free from which has attained the status of *“ius cogens,”* a peremptory norm in customary international law.

The condemnation of the crime of torture and its expanding horizon was envisaged as early as 1992 by the United Nations in General Comment 20. The legislative process in the proposed law is seeking to keep this away from Indians. The law bypassing key aspects such as the investigation and prosecution of torture further lessens its use for torture victims. Without exception, no one in India would expect the police to impartially and promptly investigate an act of torture allegedly committed by their peers.

The proposed law also prescribes perimeters to its operation by limiting the time within which a complaint has to be filed to six months from the date of incident. The law makes no mention of any complaint filing mechanism however, or provisions for witness protection. Considering the gravity of the crime and possible suspects, a law criminalizing torture must include measures for witness protection.

So far, the government has not initiated any discussion or debate concerning the proposed law. Civil society groups however, made use of the International Day in Support of Victims of Torture, 26 June, as an occasion to discuss the brutal practice of torture in the country. For these discussions to be meaningful, civil society must also analyse the proposed law and devise means to make the necessary revisions for it to meet the standards prescribed in the Convention against Torture, which India signed as early as 1997.

Self-censored media:

The quintessence of democracy is governance through consultation. Torture prevents dialogue and discourages consultation. Complaining against torture is complaining against the state. Discouraging a complaint is demoralizing to the complainant. Complaint is also a form of expression. Freedom of expression and speech cannot coexist with torture.

Yet, the Indian media opted to maintain blissful silence on 26 June this year too, by not devoting enough space to speak against torture on the International Day against Torture.¹⁷ The silence of the media exposes the lack of appreciation and understanding of the Indian media of the importance of torture and the destructive role it plays in undermining free speech and expression. It also illuminates the professional neglect the media entrains against people's concerns.

Such lack of interest has allowed the government of India to succeed in denying to admit that torture as an issue affecting the country's rule of law. This denial challenges the constitutional mandate of any government that assumes office promising to protect democracy, promote the rule of law and fulfil constitutional guarantees.

Torture is the mother of all human rights violations, undermining the concept of justice and democracy. Trying to negate state responsibility for preventing torture is not only a self-defeating exercise for the government, but also an act of deceit played upon the citizens.

Judicial interventions:

India's Supreme Court has attempted to address questions concerning the use of torture. As early as 1978, the Nandini Satpathy case raised the issue of an accused person's right to

¹⁷ *The mainstream media in India did not write against the practice of torture on June 26, instead accolades were showered upon the government for its effort on combating drug abuse, as the same day is observed as international day against drug abuse and illicit trafficking*

remain silent under investigation.¹⁸ A series of judgments in the Charles Shobraj¹⁹ and Sunil Batra²⁰ cases discussed and confirmed the rights of prisoners. The Raghbir Singh²¹ case dealt with the issue of torture, where the court condemned not only its practice, but held the government responsible for the acts of state agents. The Francis Coralie Mullin²² case dealt with the issue of preventive detention and laid down the rights of a detainee in preventive custody. In the Sheela Barse²³ case, the court said that a citizen has a right to know the living conditions of prisoners inside a prison.

The jurisprudence laid down by these cases not only affirmed the fundamental rights of the accused and convicts, but further reiterated that custodial torture is unacceptable in law. It is a settled law that a police officer could be punished for the crime of torture. Later, in the D. K. Basu²⁴ case, the court went one step further by detailing the procedures to be followed during the arrest, detention and questioning of a person. The court did not stop here. It went further, directing the government to publish its directives in every police station and detention centre in the country as a permanent public notice. Yet, day after day, people are tortured, raped or murdered in police custody.

Meanwhile, in the Prakash Singh²⁵ case the court addressed yet another issue, that of unwarranted political control of the police. This time too the judges literally stepped out of the Supreme Court building asking the government to come up with measures to meet the court's directives to replace malicious political control by laws and procedures. The court fixed a time limit for the government to fulfill the directives, which included setting up a Police Complaints' Authority to receive complaints about erring police officers.

Now in many states there are Police Complaints' Authorities. But three years after they came into existence, not many in India, including police officers and judges, are aware of these institutions. This explains why there aren't any cases registered in the country on the basis of a complaint received by these institutions. The government has provided the least possible advertisement to the public about them. Besides, the government has done nothing to comply with the court's directives.

The negation of the court's directives by the government and the police is proof that

18 *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424

19 *Charles Sobraj v The Superintendent, Central Jail, Tihar, New Delhi*, 1978 AIR 1514 1979 SCR (1) 512

20 *Sunil Batra v Delhi Administration*, (1978) 4 SCC 409 AND *Sunil Batra v Delhi Administration* 1980 AIR 1579

21 *Raghbir Singh v State of Haryana*, AIR 1980 SC 1087

22 *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, 1981 AIR 746

23 *Sheela Barse v State of Maharashtra*, JT, 1988 (3) 15

24 *Shri D.K. Basu v State of West Bengal*, 1996 (9) SCALE

25 *Prakash Singh v Union of India*, (2006) 8 SCC 1

India's courts cannot solve deep-rooted problems. The impunity and the utter lack of accountability associated with policing also prove that politicians in the country are not interested in improving the state of policing. A country where one-third of its elected representatives, irrespective of their political allegiances, face charges from murder to rape, cannot expect to have a legislative assembly that would enact and implement laws to curtail the "freedom" of corrupt politicians. A police force that benefits from corruption cannot be expected to press for any change in the status quo.

Yet, torture is not criminalised in law as a separate or special offense. Provisions in the Indian Penal Code, 1860 (sections 330 & 348) penalises acts that can also be considered as torture, with seven and three years of imprisonment respectively if proven guilty. But the offense attracts no particular relevance if the crime is committed by a police officer. The temporal treatment of the law is to deal with a regular offense. The two provisions also falls short of covering all aspects of torture, as defined in the Convention against Torture.

In addition, the reduced possibility of a proper forensic medical examination of a victim and the complete absence of a witness protection mechanism facilitates easy acquittal of the criminal. The Indian Evidence Act, 1872 also does not have any provisions in dealing with the aspect of torture. An act of torture, if proved, does not require the perpetrator to pay compensation to the victim. The right against torture is not a fundamental right. The courts in India, thus far have taken a minimalistic view on compensatory claims concerning acts of torture. A claim for compensation is dealt within the realm of personal injury claims. Awards of compensation vary widely from court to court throughout the country.

Witness protection:

There is no specific law concerning witness protection in India. The only possible measure is for the court to impose a condition at the time of considering a bail application. The usual practice is to impose conditions like the accused shall not interfere with the witness or the evidence in the case. But there is no safe and watertight framework within which compliance to these conditions could be guaranteed. It is a common practice in India for the accused to try to threaten the witnesses and or tamper with the evidence in a case.

Conclusion:

Torture is practiced as a routine and accepted as a means for investigation. Most police officers and other law enforcement officers consider torture as an essential investigative tool, rather than an unscientific and crude method of investigation. Policy makers and bureaucrats believe that there is nothing wrong in punishing a criminal in custody, not realising the fact that a person under investigation is only an accused, not a convict and further, that even a convict cannot be tortured. This is due to the lack of awareness

about the crime, its nature and about its seriousness. All sections of the law enforcement agencies, the paramilitary and military units practice torture. Torture, as a form of violence is used for social control.

Trauma from torture affects an individual's capacity to act prudently and further to respond normally to incidents. Torture -- metal or physical or a combination of both -- is practiced in every police station (12,441 police stations in the country). Given the fact that a victim of torture and a witness -- which includes the perpetrator, since the perpetrator is also a witness -- suffers from mental trauma from an act of torture, arguably, the police stations in the country are manned by individuals suffering from mental trauma associated with torture.

Domestic as well as international experts, particularly the thematic mandate holders under the UN framework have expressed concern regarding the widespread use of torture in India. The National Human Rights Commission of India has repeatedly recommended to the Government of India to ratify the Convention against Torture and to criminalise the act of torture in the country. The Commission said “[d]aily the Commission receives petitions alleging the use of torture, and even of deaths in custody as a result of the acts of those who are sworn to uphold the laws and the Constitution and to ensure the security of its citizens. Such a situation must end, through the united efforts of the Government...”

As early as 1981, the Supreme Court of India has said “[n]othing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights”.²⁶ The UN Human Rights Committee as early as 1997 has expressed its concern about the widespread use of torture by the law enforcement agencies in India.²⁷ The Committee on Elimination of Racial Discrimination²⁸ in 2007 and the Committee on Economic Social and Cultural Rights²⁹ in 2008 have also expressed similar concerns.

Torture and the concept of democracy do not coexist. Torture works against the fundamentals of justice and the rule of law. Torture is not a stale human rights issue that has to be left for the consideration of the courts or that of human rights activists. Torture is the enforced monologue by the state to the people to constantly remind them that the state has the will and the means to enforce its writ whether the people like it or not. Enforced monologue by the state is the character associated with dictatorship.

²⁶ *Kishore Singh V. State of Rajasthan*, AIR 1981 SC 625

²⁷ CCPR/C/79/Add.81

²⁸ CERD/C/IND/CO/19

²⁹ E/C.12/IND/CO/5

India and Indians are not immune to the effects of torture. In fact, thousands of individuals fall prey to torture each year in the country. It is practiced inside police stations and other centres of law-enforcement. Torture is so common in India that it is no more a highly secretive act practiced in hidden locations. Torture is viewed as an acceptable mode for criminal investigation and is condoned by jurists and policymakers alike. Until this attitude is changed, there shall be no change in the status quo, instead India will continue to remain a pseudo democracy.

3. Caste based discrimination - the continuing curse of manual scavenging:³⁰

Manual scavenging in India is officially defined as ‘lifting and removal of human excreta manually’, at private homes and toilets maintained by municipal authorities. The practice consists of gathering human excreta from individual or community dry toilets with bare hands, brooms or metal scrapers into woven baskets or buckets. This the scavengers then carry on their heads, shoulders or against their hips, (and in wheelbarrows if they can afford it) into dumping sites or water bodies. Apart from this, many scavengers are similarly employed to collect, carry and dispose excreta from sewers, septic tanks, drains, and railway tracks.

Manual scavengers are condemned to live and work in most dehumanising conditions. Cleaning public/private latrines, sewer systems, and septic tanks, they work amidst excruciating filth and stench. Carrying the refuse to disposal grounds merely adds to their woes as they are generally compelled to carry it refuse as head load. It is insignificant to point out that these working conditions make them vulnerable to serious health hazards exposing them to viral and bacterial infections.

Apart from the dehumanising and degrading nature of the work, scavengers are employed at highly exploitative wages. Those working for the municipalities seldom earn more than 40-50 Rupees a day. The enactment of the Employment of Manual



Manual scavenging: Picture courtesy- Karuna Trust

³⁰ This chapter is based on the findings of the research and contributions made by Mr. Avinash Pandey, Research Scholar at the JNU, working on the political economy of manual scavenging. His research interest includes the overall political economy of caste and caste based occupations, and he has done projects partially supported by the AHRC, exploring the sources of the entrapment of Balmiki community in manual scavenging and the perpetuation of the violation of their human rights and dignity. The text is the abridged summary of Pandey's article, reproduced with his kind permission.

Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 has effectively worsened their situation. The Act prohibits municipalities to hire scavengers as permanent workers and therefore they take recourse to contracting out all the scavenging work. These private contractors have been seldom found to pay stipulated minimum wages to their workers.³¹ The condition of those employed privately is even worse. All they get for this demeaning job is left over food as well as a meagre 20-30 Rupees per month per house.

In sum, the scavengers have been pushed out of the religious boundaries by virtue of their 'untouchability', are denied rights whether scriptural, religious or social and are placed on the margins of the society, necessary for its survival but unwelcome to be a part of it. The predicament of the *Balmikis* is a classic case of subversion of logic making the manual scavenger who cleans and disposes waste (including human and animal excreta) by others becomes ritual 'polluter' condemned to remain on the fringes of society.

Yet, far more intriguing is the fact that instead of taking corrective measures, India after independence has not made any gains in reinstating the *Balmikis* to the mainstream of the society. For all its lofty ideals of equality, democracy, secularism, and socialism promised in the Indian constitution, *Balmikis* continue to be discriminated because of sheer accident of birth in a marginalised community.

The rise of manual scavenging and fall of manual scavengers:

The scavengers known by different names (*bhangis*, *mehtars*, *thottis*) in different parts of the country stands at the bottom of the caste system. Their basic functions in the villages are to do away with the carcasses of the dead animals, to clean and sweep the village, to beat drums (as drums are made of leather and so were filthy, unfit to be handled by the upper caste Hindus), and to announce deaths, the most unwelcome news. Thus, they are considered to be the heralders of bad omens whose contact and presence can defile the caste-Hindus. To put it in the words of Dr B.R. Ambedkar, they are "the lowest in a system of graded inequality".³²

Even the other Dalit (lower caste) caste groups discriminate the manual scavengers, thus forcing them to face the worst forms of double burden of exploitation. The recent political assertion of the Dalit groups has left this particular community out of its ambit. The reasons behind this are manifold. First, the occupation they are in is considered to be most polluting and filthy. In a system where occupations are ranked not over their

31 See Ramaswamy, Gita (2005) *India Stinking: Manual Scavengers In Andhra Pradesh And Their Work*, Navayana, Chennai; and Thekaekara, Mari Marcel(1999) *Endless Filth: The Saga Of Bhangis*, Books For Change, Bangalore among other for prevalent wage rates

32 Dr. B.R. Ambedkar, the father of the Indian constitution was also a lower caste, born into the Chamar caste

economic value, but on their religious and ritual ranking, heredity profession of manual scavenging predestines the members of the community to be ranked at the dead bottom of the hierarchy and to be despised by everyone.

Contrary to the popular belief, even the British interventions during the pre-independence period did not bring any change to the condition of manual scavengers. The sight of head loading of the shit, and shoddy brooms reminded the dominant castes of the Balmiki's inevitable occupation and of their menial status. Om Prakash Valmiki, a poet who hails from the same caste, comments with anger and disgust simmering within. *"As long as there will be a metal trash can in Rameshwari's hands, the democracy of my nation will be an insult"*.³³

Dr. B.R. Ambedkar was first to spot and oppose the nefarious designs inherent in pre-independence legislations that nailed manual scavengers to the bottom of social hierarchy. Commenting on the criminalisation of refuse to do scavenging work and supporting the sweepers' strike in Bombay, he described the Acts as sanctions for forced labour and a perpetuation of slavery through the legitimacy drawn by state power. A long quote of him on the issue reads:

*"People may be shocked to read that there exists legal provision which sanctions forced labour. Beyond doubt, this is slavery. The difference between free labour and slavery lies in this. Under slavery a breach of contract of service is an offence which is punishable with fine or imprisonment. Under free labour a breach of contract of service is only a civil wrong for which the labourer is liable only for damages. Judged in this light of criterion, scavenging is a legal obligation imposed upon the untouchables which they cannot escape."*³⁴

The miserable conditions of Dalits were not lost upon Gandhi. He did notice their pain, agonies and sufferings. Yet, the contradictions of Gandhi's position on the issue become evident when we analyse his take on the question of scavengers' right to strike. Gandhi was categorically opposed to this and suggested other ways to the scavengers to give voice to their anger. Gandhi said:

*"Just as man cannot live without air, so too he cannot exist for long if his home and surroundings are not clean. One or other epidemic is bound to break out, especially when modern drainage is put out of action. ... A Bhangi may not give up his work even for a day. And there are many ways open to him for securing justice."*³⁵

³³ Valmiki, O P (1991): 'Jharuvali' Sadiyon Ka Santap, Philbal, Dehradun, pp16-17

³⁴ Ambedkar, B. R. (1989) *Essays On Untouchables And Untouchability, writings and speeches, Vol. 5 Government of Maharashtra, Mumbai* p 257

³⁵ Harijan, 21 April, 1946

Faced with this dual assault of native elites (read upper caste Hindus in the main) and the might of colonial empire, the scavengers were doomed to enter the profession for mere survival, and once in the profession had no way out. The legislations, the punitive powers of the state, religious bigotry and economic penury have sealed their fate. They were to remain entrapped in the profession and were also to be blamed themselves for their predicament.

Government inaction and intentional neglect:

Despite official abolishment of all forms of untouchability with the framing of Constitution itself, it took 24 years more for India to introduce Section 7A into the Protection of Civil Rights Act, 1955 which made the compelling any person on grounds of untouchability to scavenge a cognizable offence. The practice was illegalised finally in 1993 with the passage of Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 in Indian parliament making even the supposed “voluntary” employment as scavengers an offence. The political will of the Indian state behind this legislation gets exposed from the fact that the Act got notified in the Gazette of India only in 1997 and no state promulgated it till 2000.

Adoption of the Act by state governments was crucial to achieve the goal of eradicating manual scavenging as sanitation is a state subject as per entry no. 6 of the Seventh Schedule of the Constitution; and the central act remained an ineffective and worthless tool for eliminating the practice in absence of its adoption by state governments. As per rules, the responsibility of enforcing the various provisions of the act was with the state governments and their inaction ensured the failure of it.

Despite repeated attempts and mounting pressure from activists and civil society organisations, both the central and state governments did not budge on the issue. In 1996, Justice Rangnath Mishra, the then Chairperson of the NHRC, sent a letter to various authorities expressed his concern about the continuation of the ‘inhuman and degrading practice of manual handling of night soil’ which was ‘prevalent even today in certain parts of the country’.³⁶ He asserted the need for translating the ‘landmark’ legislation into concrete measures in view of various constitutional provisions and the protection of human rights in view and urged upon the authorities to ‘*set an example on this score by replacing dry latrines, wherever they exist in the buildings owned by your [m]inistry, with pour-plush ones, and fix a date for achieving this target*’.

However, it required another letter, far sterner in tone and tenor, from the NHRC to make the states get their act together. Justice M.N. Venkatachalliah, the then Chairperson of the NHRC communicated his displeasure to chief ministers of all the states and

³⁶ NHRC (1996) D.O.No. 15 (19) / 96- Coord.

requested them to implement the provisions of this Act.³⁷ However, it took another decade for some states to adopt the Act. As of now, only 17 states of the Union of India viz; Andhra Pradesh, Goa, Karnataka, Maharashtra, Tripura, West Bengal, Orissa, Punjab, Assam, Haryana, Bihar, Jharkhand, Chhattisgarh, Madhya Pradesh, Tamil Nadu, Uttar Pradesh, Gujrat and some union territories have adopted the Act. Most of these states have adopted the Act only after 2005, including Uttar Pradesh, the most populous state of the country.

In a clear violation of all the constitutional provisions and the their self-proclaimed commitment to uphold the constitution, eleven states including six major states of Himachal Pradesh, Rajsthan, Uttarakhand, Kerala, Jammu and Kashmir are yet to adopt the act together with the states/union territories which have claimed to be 'manual scavenging free' despite data to the contrary. These states include Arunachal Pradesh, Delhi, Goa, Himachal Pradesh, Meghalaya, Mizoram, Nagaland and Sikkim.

Estimating the numbers: engaging with the perplexing statics:

For all the false claims of success in eradicating the inhuman practice of manual scavenging from India, the ground realities are grim. Even after sixteen years of passage of the Act, the government of India itself unabashedly accepts the continuation of the practice. The Ministry of Social Justice and Empowerment holds that nearly 676000 people are still engaged in manual scavenging, though official figures are definitely an underestimation of the extent of problem.

Based on surveys and fieldworks conducted by them, the activists engaged in campaigns against manual scavenging and other atrocities on Dalits estimate a number three to four times higher than the government data. The reasons behind this underestimation of the number of people engaged in manual scavenging are manifold.

First and foremost, acknowledging unabated persistence of a practice illegalised full sixteen years ago is not only a source of huge embarrassment for the government of India, but is a direct affront on the constitution of India by denying the very basic fundamental rights and freedoms guaranteed by it to Indian citizens. The continuation of this dehumanising practice violates fundamental rights guaranteed under Article 17 (right against untouchability) together with Articles 14, 19 and 21 guaranteeing equality, freedom, and right to life with dignity.

Presented with this situation, the only way of estimating the numbers of people condemned to be engaged in manual scavenging is making an attempt to infer their numbers by triangulating government's own statistical data with the surveys and field

37 NHRC(1997) D.O. No. 11/1/99-PRP 7 P, January 24th

studies conducted by activists, campaigns and independent researchers. For example, National Commission for Safai Karamcharis, a statutory body established by the parliament of India, puts the number of dry latrines in country around 9,600,000.

As against this figure, the 2001 census of India found service latrines (another name for dry latrines) in 13 million households, 6 million in rural and 7 million in the urban areas.³⁸ The staggering difference of around 3,400,000 between these two figures is a telling comment on the reliability of government data on number of manual scavengers employed in cleaning these dry latrines. Compounding the problem are another 122 million households in the country without any kind of toilet facility of which 108 million are in the rural and 14 million are in the urban areas. Even if we assume that there is absolutely no need of cleaning the human excreta generated by these households in the rural areas for the fact that most of the people defecate in open agricultural fields, the question that who cleans the urban streets is never addressed by the government authorities.

Plenty of schemes: poverty of vision:

The question of scavenging has remained in the public discourse since the times of Indian struggle for independence. The issue kept springing up post independence as well. Right from 1949, when the government of Bombay (now Maharashtra) appointed the Scavengers Living Conditions Inquiry Committee, under the Chairmanship of Mr. V.N. Barve, many a committees, commissions and task forces have been appointed by the government of India as well as state governments to tackle the problem. A few prominent ones of these include, the *Scavengers Living Conditions Enquiry Committee* (Barve Committee, 1949) *The Scavenging conditions enquiry Committee* (Malkani Committee) 1957, *The Committee on Customary Rights to Scavenging* (Prof. N R Malkani Committee) 1965, *The Committee to study the working and service conditions of sweepers and scavengers* (National Commission on Labour) 1968.

Interestingly, most of these reports accused the scavengers themselves arguing (seemingly) that they had taken up the job voluntarily without even thinking of the material and conditions that forced them into the profession. The following recommendation of the Barve Committee is a classic example of this misplaced identification of the problem:

*The caste of Bhangi as such was confined only to certain provinces like Gujrat, Maharashtra, Karnataka, etc. it was of a very late origin. Ancestors of these Bhangis were just field labourers of a low caste but never did the work of scavenging. **Some of these people took to the dirty work of cleansing the latrines for the sake of profit. Slowly this developed into a***

³⁸ Census of India 2001

*monopoly. The stage was reached when the Bhangis wanted to exploit this monopoly and a sort of customary right was thus developed. By force of habit the Bhangi lost his self-respect to such an extent that he did not consider the dirty work of cleansing latrines as a curse from which he should Endeavour to extricate himself.*³⁹ [Emphasis added]

In blaming the Bhangis for taking the dirty job 'for the sake of profit' and by losing their self-respect 'by the force of habit' the committee made a mockery of its own stated goal as well as that of the very basic belief in the rationality of individuals, the cornerstone of modernity. Fascinatingly, nowhere the committee talks of the material conditions which might have forced the Bhangis into the profession or, cite any data in support of its laughable claim that Bhangis took to the job willingly!

Just to give an idea of the enormity of the issue, the Indian Railways has more than 8000 stations of which, only six per cent or some 500 stations are currently marked for concrete platform tracks which allow a washable apron system (in other words use of mechanical water jets to remove human excreta). Again, only 60 of these 500 stations figure in the short term up-gradation plans of the railways and the Railways is tight lipped about when it would upgrade remaining 94 per cent stations. Furthermore, the annual allocation in the Railway budget under passenger amenities, a section of which is used for such up-gradation is a meagre two billion rupees as against the estimated budget of 11 billion rupees for upgrading just 500 top stations.

Many of the defence establishments flatly deny any dry latrines even while employing manual scavengers. Municipalities, on the other hand, have been found to threaten the scavengers and others who brought the existence of dry latrines to public knowledge and achieved silencing of these voices in most cases.

Government of India, on its part has failed singularly to bring the offenders to book. Multiplicity of departments, institutions and agencies for tackling the problem has done anything but helping the scavengers. Armed with the confusing jurisdictions of different government agencies of competing departments, officials have treated the issue with absolute abandon and have seldom tried to fix responsibilities. Further, these agencies keep passing the buck to other departments when confronted with concrete data regarding absolute failure of the schemes for liberation and rehabilitation of the scavengers. For example, in 2005 an official of the Ministry of Social Justice and Empowerment (hereafter MoSJW) lamented the inaction of Railways in containing the

39 Barve, V. N. (1958) *Report of the Scavengers Living Conditions Enquiry Committee, State of Bombay ; Government Printing Statistical , Bombay.*

practice by inadequate allocation of funds in railway budget for doing away with manual scavenging.⁴⁰

Situation now:

Unfortunately, despite scathing critiques, the ministries and implementing agencies did not change their ways. Even after 2002, the implementation of the Scheme was as appalling as earlier. The audit report of 2006 gives a fair idea of the underperformance by demonstrating the allocated budget and actual expenditure. The data shows the taxpayers' money meant for manual scavengers remained underutilised in government coffers year after year.

Similarly, the auditors' report of 2007 indicted the Railways for violating the directives of government of India and the Supreme Court by failing to eradicate manual scavenging from railway tracks. It found that washable aprons were either not provided at all or were not provided on tracks between all platforms in 69 per cent of the A category stations reviewed. The report further observed that:

- *Existing washable aprons were not maintained properly and were found in broken condition in 15 stations including important stations such as Mumbai Central, Bandra Terminus, Sealdah, Kharagpur, Ranchi, Bilaspur, Lokmanya Tilak Terminus, Pune, Surat, Ballarshah etc.*
- *Non-availability of washable aprons and poor maintenance of existing washable aprons compounded by the inadequate water supply restricted the use of machines for cleaning. Consequently, the night soil and waste collected near the tracks had to be disposed off manually, even though manual scavenging was banned by Government of India through the 'Employment of Manual Scavengers and Construction of dry latrines (Prohibition) Act 1993' and Supreme Court had also issued directions regarding the same.*⁴¹

Very recently, The Safai Karamchari Andolan, an organisation working towards the implementation of the 1993 law banning manual scavenging, submitted a report before the Supreme Court on 9 May this year pointing out it had identified 15 dry latrines and five manual scavengers in North East Delhi, the capital city of the country.⁴² Only after drawing the opposition of the Supreme Court, the Delhi Cabinet decided to implement the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition)

⁴⁰ Mazoomdar, Jay (2005) *Railways say Manual Scavenging to Stay*, Indian Express (New Delhi Ed), Sept 10

⁴¹ CAG (2007) *Union Report, Performance, Ministry of Railways, Cleanliness and Sanitation on Indian Railways*, para 2.10.3

⁴² Dhananjay Mahapatra (2009) *A Capital Shame: SC Gets Details Of Manual Scavenging In Delhi*, Times Of India (Delhi Ed.) May 10th

Act, 1993 in all areas covered under the National Capital Territory of Delhi.

Conclusion:

Though there have been many studies which dealt with the perennial subordination and subjugation of the Dalits in general, far less attention has been paid to the scavengers. Their plight was believed to be explicable by the structure of Hinduism through the perpetuation of caste hierarchy over millennia.

Undoubtedly, Hinduism and the caste structure did produce and shape the fate of the scavengers, yet their plight cannot be explained by it alone. The exploitation they suffered with the onset of colonialism was significantly different from what they underwent in their rural settings. As it has been argued earlier, though exploited, subordinated and dehumanised, yet manual scavengers did not carry human excreta as head load.

Manual scavenging was never a hereditary specialised caste based occupation till the onset of the colonial rulers. The nineteenth century entrapment of the scavengers did not emanate from the structured inequalities of Hinduism, it derived rather from the massive urbanisation and the consequent needs of urban government, though the existing social divisions along the lines of caste hierarchy did help the process.

As of today manual scavenging continues to haunt the prospects of the 'developed country within 2020' projection of India. Caste based discrimination, corruption and government neglect have contributed a large share to continue the 'status' of manual scavengers unchanged in India. India has a long way to go to clear its image as one of the societies practicing the worst forms of discrimination conceived by the human race. Yet, the urge required to bring about that change is not yet visible in the Indian polity.

4. Right to food and child malnutrition

Indicators of democracy:

*The formulation and implementation of national strategies for the right to food requires full compliance with the principles of **accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary.** Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.*

– ICESCR General Comment 12-

Child malnutrition is one of the indicators explaining food insecurity as well as social and economic inequality in a society. The world reports on food insecurity and child malnutrition published by international agencies including International Food Policy Research Institute (IFPRI), United Nation Child Fund, Food and Agriculture Organisation (FAO) and World Bank all show that Bangladesh, India, Nepal and Pakistan are on top five among the countries in Asia⁴³. To compare these four countries merely by child mortality rate, the number of underweight children or the number of malnourished children is neither possible nor appropriate.



Photo courtesy of the Spandan, Madhya Pradesh

Compared with other three countries, India has been producing sufficient food to all citizens, even exports food and has a high economic growth rate⁴⁴. Politically, it is a democratic country. Despite this, the fact that India is at the same level as the other three countries in terms of child malnutrition explains that discrimination and inequality against the vulnerable groups exposed to food insecurity and deprived of food accessibility are more serious than the in other three countries⁴⁵. In other words, the economic growth has not been reaching those groups who are excluded from participatory democracy.

The AHRC, since the launch of its Hunger Alert programme in 2004, has been reporting cases of child malnutrition, in particular to disclose the fundamental causes promoting food insecurity. In 2009, the cases from four states including Madhya Pradesh, Uttar Pradesh, Bihar and Orissa documented that all victims belong to either the lower castes including Scheduled Castes (SC, mostly known as 'Dalits') and Other Backward Class (OBCs) or Scheduled Tribes (ST) who are the most marginalised. They are usually either landless agriculture labourers or small-scale farmers with no proper facilities living in rural area. Under this lack of adequate livelihood, they are often forced to migrate to the city, seeking jobs or depend on government schemes aiming to guarantee right to food for the poor. However, the vulnerable groups in rural area living under the condition framed

⁴³ In the report published by FAO explains that Bangladesh, Nepal, and Pakistan are classified as counties who need international assistance for natural disasters, drought, and conflict threatening food security whereas it is observed that food production in India has increased.

⁴⁴ See the AHRC statement for World Food Day titled "Do not give food, give the right to food".

⁴⁵ Gini Index shows that economic inequality in India is higher than the countries such as Pakistan and Bangladesh (UNDP 2009 report).

by long lasting caste system are again deprived of their right to food by corrupt public servants who are engaged in government schemes for the poor at different level.

Apart from these two root-causes discrimination and corruption depriving of right to food that the AHRC has been highlighting, there are two more significant issues emerged this year. One is a climate change and drought seriously affecting on food security in some area and another is a public discourse on the National Food Security Act drafted by the government and currently under the discussion.



Photo courtesy of the Spandan, Madhya Pradesh

Killing the tribal children:

Two-month-old Reena died on 17 June.⁴⁶ She was malnourished with the symptoms of high fever, diarrhoea and respiratory difficulty. Her parents took her to the private hospital nearby where her condition did not improve. Reena's family lives in Saledhana village, Khalwa Block, Khandwa district, Madhya Pradesh. They are from the Kol tribal community.

Villagers like Reena's family, living in a remote and rural India finds it difficult to access the public health institution such as the Primary Health Centre (PHC) or the Nutrition Rehabilitation Centre (NRC). These institutions are often located away from rural villages, closer to towns. In addition, the doctors who are trained to treat a malnourished child are not attached to the NRC. As it was in Reena's case, a malnourished child often suffers from a variety of ailments due to the child's poor physical state and requires specialised medical care, which a PHC or NRC cannot provide.

Reena's father Kishore is a landless agricultural labourer. He is one of the millions of small-scale, marginalised or landless farmers amounting to 60 percent of the total population of farmers in the country. Despite the majority of the population - approximately 70 percent - are engaged in agricultural sector, the agricultural industry merely contributes 17 percent of the GDP. One of the causes for low proportion is low wage of the agricultural labourer, which is actually, less than the statutory minimum wage.⁴⁷ In share crops, the

⁴⁶ AHRC-HAC-004-2009, 23 July 2009

⁴⁷ Minimum wage in agricultural sector is lower than other sector. Please refer to the AHRC-HAU-006-2009

farmer has to pay more than 50 percent of the total output to the landlord.

Thanks to the soaring food price since 2008, Kishore will have to pay 12 Rupees per kilogram of wheat and 20 Rupees per kilogram of rice. Even though he is entitled to get wheat at five rupees per kilogram and rice at 6.5 Rupees per kilogram from the ration shop (officially called as 'fair price shop'), the grains are neither available in the shops and most shops do not open. This pattern is not unique to one state or district in the country, but is a common complaint across rural India.⁴⁸ In addition, the ration sold at the ration shop is much less than 35 kilograms earmarked by the Supreme Court Order on the right to food.⁴⁹ 20 kilograms of rations last merely a week for Kishore's family members. Since his family depends on the rations provided from the Public Food Distribution System (PDS) and landless labour cannot manage food for a year, his family is forced to migrate to other districts or states twice a year.

Given the above facts, it is no surprise that the Infant Mortality Rate is the worst among the Scheduled Tribes in the country. 96 percent of child deaths in India happen within tribal communities.⁵⁰ The infant mortality rate in India is one of the highest in Asia.⁵¹

Seasonal migration is an invisible element violating the right to food. The most vulnerable group in rural area are landless labourers who usually belong to tribal or Dalits communities and have no other choice but to migrate seeking employment. The government neither have an official record of migration nor exclude them in the process of Below the Poverty Line (BPL) identification. BPL survey 2002 includes the reason of migration as one of the dimensions; however, it is not viewed as a serious deprivation of right to food reflecting life insecurity. All the cases from Madhya Pradesh documented by the AHRC shows that the migrant labour is the main income of the tribal in rural India.

The BPL identification excludes not only migrant families but also other villagers forced to leave their villages due to corrupt administration and the oppression of village head and upper castes⁵². The case documented by Spread in Orissa explains that how the village

48 According to the report circulated by Ministry of Consumer Affairs and Food & Public Distribution on June 4, 2009, the price of the ration shop in Madhya Pradesh is relatively higher than the one in other states.

49 It is one of the loopholes of the Targeted Public Food Distribution System (PDS). The state government who is in fact responsible for the food distribution to the ration card holders has to decide how to distribute the rations since there is a gap between the BPL identification from the government and the actual BPL families. The civil society calling for right to food to all in India demands universalisation of the PDS identifying that the BPL family is more than 70% while the BPL survey 2002 identified around 35%

50 UNICEF report, published November 2009

51 UNICEF the State of the World's Children Report 2009 states that India has a high rate of infant mortality in Asia; 72 deaths for every 1000 children below the age of five. Cambodia and Pakistan perform even worse.

52 AHRC-HAC-004-2009. After the AHRC reported the case, the Orissa state government sent a letter dated on November 21, 2009 to the District administration asking for the investigation of the case.

head manipulated the data and the official in charge of a government survey cooperated with the village head. In other cases documented so far, the victims are deprived of benefits from the government schemes or programmes for the poor as not identified as a BPL family. This is the first step of corruption by the officials and depriving rights of the poor.

The media pressure on the government increased after the AHRC started reporting cases. In response the government increased the AWCs in the villages and paediatricians are dispatched to the NRCs. However, NRC refuses treating moderately malnourished children identified as suffering from grade II and I malnourishment. In many villages, the NRC officials refuse to admit even severely malnourished children due to lack of facilities⁵³. Further, there is no food security and health care for the malnourished children at home owing to the lack of follow up by the health officials.

Government's denial and absence of monitoring body

The government continues to deny that an alarmingly high number of children die out of malnutrition in the villages. If the children had any other symptoms or sicknesses such as fever, diarrhoea, malaria or respiratory difficulty before they died, the government tends to highlight the diseases as main causes ignoring the element of malnourishment.

The state and its agencies do not have a clear picture of hunger and malnutrition. On the other hand, to avoid the criticism and responsibility the state officers accuse human rights groups for manipulation of data.⁵⁴ Government views human rights groups as their foe instead of encouraging them in participating in policy framing and implementations.

The government's record on child malnutrition and mortality fails to reflect the reality. A fact-finding team composing of several civil society groups in Madhya Pradesh has exposed the incompatibility between the state's record and the reality.⁵⁵

It is a pattern observed in many cases documented by the AHRC, that the tribal and Dalit children are not registered at the Angawadi Centres (AC - child care centre). It is in these centres records of the children with clinical data including that of vaccination and immunisation are maintained. Caste based discrimination plays a vital role in this.

The workers from the upper caste are neither concerned of the tribal and Dalit children,

⁵³ Only ten out of 36 malnourished children visiting the NRC in Java Block, Rewa district were admitted in September 2009 due to lack of basic facilities such as beds. See the details in AHRC-HAC-008-2009

⁵⁴ The open letter by the Spandan, a human right group working on right to food based in Madhya Pradesh explains that the relevant authority in fact made an irresponsible and groundless statement. See the AHRC-FOL-005-2009

⁵⁵ See AHRC-HAC-009-2009

nor visit their families, since they consider a tribal or Dalit child as source for pollution. Due to the denial of education to the lower caste communities, often employment at ACs is priority opportunity for the members of the upper caste.⁵⁶ Given the fact that most of the malnourished children belong to the SC and the STs, this is a significant impediment in the villagers' participation in running primary health centres and Anganwadis.

When the *Spandan* started running AWCs with the help of volunteers from the community, the local administration did not allow the volunteers to work for the children at the AWCs. Participation is one of the national policies in ensuring the right to food. Yet, it is negated due to caste discrimination.

The negligence and discrimination practiced by the public servants in charge of the right to food or health care of the children in the village create a gap in policy and practice. Further, the government tries to intentionally play down the gravity of the issue.

According to the report, World Hunger Index 2009 and India Hunger Index 2008, despite the big gap, Madhya Pradesh has officially highest number of undernourished children and child mortality rate in the country. It does not really mean that other states have better status regarding the right to food and health care as there is always question as to accountability and accuracy of the official data. Government ignorance is illuminated from the fact that there has been little improvement in government programme and the budget⁵⁷. The lack of budgetary allocation is an additional obstacle in eradicating malnutrition and poverty.

Concealment of the facts and the failure to implement policies reflect the absence of substantial monitoring system and a deterrence mechanism for those violating the right to food. Suspension of low profile public servants such as workers of AWCs sometimes happens to the hunger deaths. Officers up in the bureaucratic ladder who are equally responsible for the deaths are neither made accountable for the deaths nor punished.

When cases are reported to the NHRC, it does not conduct an independent and objective investigation into the complaints on right to food and child malnutrition. Investigation, a primary role of this monitoring body is intentionally negated. The letters sent by the NHRC to the AHRC proves this point. The NHRC merely depends on the report from the governments to decide the case. Absence of independent investigation and long delay

56 Recently the qualification was downgraded to eight grade from 12 grade however it is still difficult for low caste or tribal women to get educated at that level.

57 According to the right to food group in Madhya Pradesh, the budget for health service accounts for merely 2.4% out of total state budget. Although the child malnutrition has been increasing for last five years, not even a single PHC has been built up. 1,659 out of 4,708 posts of medical officers are vacant and 1,098 posts of Auxiliary Nursing Midwife (ANM) are yet to be filled.

of investigation make a question about its role and existence.⁵⁸

Collusion:

The proposed law on national food security brought out a national level campaign in November this year. It demanded the universalisation of the public food distribution system and food sovereignty protecting domestic food product as well as natural resources including land and forest against the draft by the government that merely discuss the PDS.⁵⁹ The law will be one of the main issues of debate and discussion in the coming year. It is important how the civil society participates in the process and succeeds to achieve their demands.

The denial of the right to food, a fundamental guarantee under the constitution and an inalienable right is a wilful, systematic and systemic practice of violence upon the people of the country. It is a state policy to ignore the plight of a few million Indians, fated to be born in India and left to starve to death. The fact that the highest number of victims of malnutrition and hunger are from the tribal and Dalit communities in the country and that nothing much has been done to improve their condition proves the point.

From Jawaharlal Nehru to Manmohan Singh, Indians have been served by 17 prime ministers. All of them voiced concern for the nation's children; every year the country observes 14 November as Children's Day. Yet, India is worse than sub-Saharan Africa when it comes to child welfare, dealing with infant mortality in particular.

There has been only a marginal drop in the number of underweight children from seven years ago, when it was 47 percent. At the same time levels of anaemia in women and children have worsened compared to seven years ago. About 56 percent of women and 79 percent of children below three years are anaemic. The survey confirms that India has done little for its children.

India is rich in food stocks; in fact there has been a food surplus for the past several years. There have been no serious natural calamities that have affected the country as a whole in recent years. There has been no civil war in the country. India has had a democratically elected government since independence. There is a reasonable logistical infrastructure, and the country is not really poor.

Then why are the children in such a pitiable state? The answer is not simple, and several causes are apparent. Of the millions of children who suffer from malnourishment in

⁵⁸ AHRC-STM-182-2009. *The independence of the NHRC is debated in the 2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia.*

⁵⁹ AHRC-STM-224-2009

India, more than 80 percent are from the lower-caste communities. Their parents are discriminated against and forced to work as bonded labourers. Corruption being rampant in the public food distribution system in India, the food grain that the government distributes through welfare shops does not reach the targeted population. It is sold on the black market.

Bonded labor, caste-based discrimination and illegal dealing in grains are prohibited in India. Yet corruption in the food distribution system is one of the worst systemic failures affecting the poor in India. Caste-based discrimination in its most inhuman forms continues in India. It is obvious that the children who are born into this environment would suffer the most.

Responsibility for this pitiable state of affairs does not rest solely on the government. Caste based discrimination is not practiced by the government, in fact, but by the people who make up the government. However, both the government and many well-placed Indians deny this practice with all their might. Even the NHRC jumps on the bandwagon by augmenting the government's stand on caste issues, which is shameless denial.

India as of today is leading the region with its trump-card diplomacy of democracy and projected growth-rate statistics. But what is in store for millions of children in the country is death or permanent disability from acute starvation.

This is a curse that could have been warded off, had the democratic institutions remained truly democratic and the benefits of growth been shared proportionately among the people. But for this, Indians would need two vital virtues -- openness and generosity. What the people lack cannot be expected from their government.

INDONESIA

VIOLENCE BY SECURITY FORCES IN PAPUA AND SILENCING OF ACTIVISTS DURING AN ELECTION YEAR

1. Introduction

The 2009 parliamentary and presidential elections gave rise to both hopes and concerns for human rights groups. The elections were dominated by persons with strong military backgrounds and several of the presidential and vice-presidential candidates face serious allegations of human rights violations committed by the military. Indonesia also saw increasing demands for the islamisation of the state and public life, notably with the introduction of the Sharia law bill in Aceh, which aims to legalize punishments identified internationally as torture. Since being re-elected, the comparatively moderate President Yudhoyono, faces demands to fulfil the promises he did not fulfill in his last presidential term, such as bringing the murder of human rights defender Munir to justice. The main suspect in this case, retired Maj. Gen. Muchdi PR, was acquitted of all charges, with the verdict facing criticism based on the fact that the trial included irregularities and did not meet international standards for fair trials.

The ongoing power play of the military elites in government parallels the expanding activities of the military in the crisis-ridden province of Papua. 2009 saw an increase of political arrests and prison sentences for peaceful political activists. While mining in, and transmigration to, the Papuan provinces continued, no substantive improvement of the living conditions for indigenous Papuans was visible. Arrests, torture and killings are reported to have continued, and access to the well-funded health care and education systems remained poor for indigenous people. And this while the Special Autonomy Law in Papua was declared by many local groups as being a failure.

The police underwent reforms to its internal guidelines and regulations with a substantive human rights element brought into police practices. However, the cases received by the Asian Human Rights Commission (AHRC) show that torture continues to be used as a viable means to obtain information or cover up cases of abuse in the police force. Torture has even resulted in the deaths of the victims in some cases. Attempts by the country's

lauded Anti-Corruption Commission (KPK), to investigate allegations of corruption in the police and the office of the attorney general (AGO) were countered with a power play from the police. The stand-off between the KPK and the National Police became known as the “Gecko vs. Crocodile” case in which Commissioners of the KPK had to face charges of abuse of power. The public widely supported the struggle of the KPK.

Allegations of criminal defamation against human rights activists, police violence against protesters and criminal charges of “disobedience” are examples of increased attacks on the freedoms of expression, opinion, and assembly in 2009. The recent ban of a movie - which depicts past military activities in Timor and ongoing impunity related to gross violations of human rights committed by the military - by the state censorship body is evidence of the power that military interests still hold in Indonesia, despite progress and reforms that have been taking place.

2. Torture and extra-judicial killings ongoing

Over the last 12 months the AHRC has documented four cases of unlawful killing, three of which were committed by the police and resulted from torture. The cases reported continue to be of a severe nature despite campaigns for police reform and calls for the criminalization of torture by local groups. The UN Special Rapporteur on Torture, Dr. Manfred Nowak, visited Indonesia in 2007 and issued a series of recommendations following his visit. The UN Committee Against Torture, in its 40th session in May 2008, also issued several important recommendations, in particular concerning the need for the criminalisation of torture. In 2009, Indonesia has still not included the act of torture, as defined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), in its Penal Code as a crime. Indonesia has been under this obligation since it ratified the Convention in October 1998.

Police conduct in Indonesia is governed by police regulations as well as the criminal procedure code and the criminal code (penal code). The enactment of Indonesia’s new police regulations in 2009 is an important development. The Regulation of the Chief of the Indonesian National Police no. 8/2009 regarding Implementation of Human Rights Principles and Standards in the Discharge of Duties of the Indonesian National Police¹ entered into force in the summer of 2009. The document refers extensively to the prohibition of torture and sets high standards for police conduct. The AHRC welcomes this reform. The implementation of these regulations would signify a major improvement. However,



Indonesia's new police regulations

the document lacks provisions for enforcement, in particular by failing to provide disciplinary measures in cases of violations of the code.

Torture in Indonesia is not only a phenomenon confined to rural police branches but also extends to Jakarta, the capital, whose infrastructure and development stands in stark contrast to most other regions in the country. In Indonesia, torture is not so much a problem that can be blamed on a lack of resources, as is a lack of proper police practices based on law. An amendment to the Criminal Code is immediately required to provide a solution to this problem.

Extra-judicial killings by the police were reported in 2009 as well as several reports of killings by the military in remote provinces such as the conflict-stricken West Papuan region. It is thought that much of the violence by the military is conducted to intimidate suspected independence activists.

Killings by the police are often the result of severe torture and serve to stop the victim from making a complaint. Such killings are then covered up by falsifying the post-mortem report to clear the perpetrators of wrong doing. Meanwhile the military continues to enjoy immunity from civil courts and their members are only subject to military trials, which are reported to be flawed and do not hold up to international human rights norms. As a result the military remains largely immune and above the law, despite being in de-facto control of several areas of remote provinces in Indonesia. This is especially the case with respect to incidents involving the excessive and/or lethal use of military force in relation to protecting mining and other such activities.

Examples of cases that illustrate the issues cited above include the following:

A person suspected of stealing a tire is tortured to death by the police in Aceh

Mr. Susanto was arrested on July 9, 2009, after the owner of an auto workshop in Aceh filed a report against him for stealing a tire. Without waiting for an arrest warrant to be issued, officers from the Krueng Raya Police Station arrested him in Lampoh Raya, during which time they reportedly fired three shots. 15 officers and three police cars were involved in this operation. He was taken to the Krueng Raya Police Station. After three hours of detention and torture he was taken straight to the nearest health clinic by the police in a critical condition as the result of injuries sustained during his ordeal. He was then immediately transferred to the Zainal Abidin Hospital where he was pronounced dead at 10 p.m. When his body was delivered to his family, they saw evidence of violent abuse: they report that his right leg bore deep wounds, there was a stab wound to his left toe, a roughly stitched wound to the back of his head and bruises around his eyes. At the time of writing, no legal action had been initiated against those thought to be responsible.

Police officers torture a man to death and falsify his autopsy report

On April 14, 2009, the police from Tegal station police, in Central Java, reportedly arrested and tortured Mr. Carmadi. He was later transferred to Slawi police station where he was again tortured and finally succumbed to his injuries on April 17, 2009. The victim was reportedly forced to confess to a crime that he did not commit. The content of the post-mortem report was reportedly fabricated by officials in order to clear those responsible of his torture and subsequent death of blame.

Police officers severely torture a man and shoot him, making dubious claims that he had been trying to escape at the time of the shooting

Mr. Bayu Putra Pradana was arrested on April 2, 2009 by police officers in North Jakarta and reportedly severely tortured, resulting in numerous injuries including at least ten stab wounds to his legs. The victim was pronounced dead on April 4, 2009, after having been shot by the police, who claim that he was trying to escape at the time. The wounds to his legs, however, suggest that it is highly unlikely that he could have run away. At the end of 2009 no action had reportedly been taken against those responsible for the torture or subsequent extra-judicial execution of Mr. Bayu Putra Pradana.

Police torture a man after illegally arresting and detaining him on two occasions

On April 29, 2009, Mr. Zaenal M. Latif was falsely accused of being a drug dealer by police, and was arrested and detained twice in the same day. The policemen burned his hand with a lit cigarette and repeatedly assaulted him inside the police station in Cilegon City in order to force him to confess.

No investigation into the torture of an indigenous Papuan

A 23-year-old indigenous Papuan, Mr. Kiten Tabuni, was arrested on 23 July, 2009, and tortured in detention. He was taken into custody by the airport security unit of the police in Wamena town. The police officers allegedly beat Tabuni using their fists, weapons and helmets, and kicked his face, head, and legs, in order to get him to confess to the killing of five Javanese Indonesians. However, his arrest was later acknowledged to have been a mistake and he was released after three days. The victim was hospitalised for his injuries, yet no investigation had been carried out in order to bring those responsible to book and no reparation had been offered to the victim, as of the end of 2009.

3. Papua**3.a Failure of the Autonomy Law**

The Indonesian law on autonomy rights for the provinces of Papua has not fully been implemented, several years after the autonomy law in Aceh was implemented under the close monitoring of the international community, in the aftermath of the 2006 tsunami.

The Special Autonomy Law for Papua (Law No. 21/2001²) was enacted in 2001 after political bargaining between the national government and indigenous people in West Papua³ to respond to calls for increased self-determination. The law was expected to solve many of the issues of concern, based on peace and dialogue. However, since its enactment the situation has deteriorated in many ways, contributing to tensions and suffering.

While the contributions from indigenous Papuans to local political processes are used by the central and local government as indicators of success, the picture needs to be contrasted with the silencing of protesters and political activists by means of arrests, intimidation, torture and killings. Peaceful activists who criticise the failed implementation of the autonomy law or the law itself are being branded as being sympathizers with allegedly armed independence movements. This is blocking necessary dialogue and a review of the implementation's status.

Importantly, the Autonomy Law is also criticised for failing to address the core problem of military plundering of the region, including through illegal logging and other forms of exploitation of its natural resources. At present, military raids into Papua to protect or partake

The continuing calls for autonomy by indigenous groups are based on:

1. The questionable and flawed process of UN consent to Indonesian domination of the territory after the former Dutch colonial power tried to give West Papua (West New Guinea) its own independence as a nation state without success. Indigenous Papuans excoriate their exclusion as key stakeholders in the drafting of the New York Agreement (1962) that administered the handover process to Indonesia. *The Act of Free Choice* (1969) in which 1025 Papuan representatives, selected by Indonesian General Sarwo Edhi Wibowo, consented to the earlier Indonesian integration was proved to be manipulated and violating of the rights of indigenous Papuans.^{4 5}

2. Past human rights atrocities: While under Indonesian military control, in particular during Suharto's *New Order* regime human rights atrocities occurred including massacres, killings, torture, arrests with thousands of victims left dead. Many of these events were based on remote military operations without any judicial investigations, compensation or other remedies for the victims. The scars left on the indigenous Papuan society are deep.

3. Present day human rights violations: Killings, torture, unlawful arrests, intimidation and various forms of discrimination against indigenous Papuans continue, along with the violent silencing of activists.

4. Indonesian and international exploitation of Papuan natural resources without any development such as access to public services negatively impact on the living conditions of indigenous Papuans.

5. Efforts for the preservation of indigenous Papuan traditional culture and languages to end violations of these and other cultural right.

in illegal commercial activities are a significant problem for the indigenous people, that have not been stopped by the local government. This is one of the main concerns of indigenous Papuans, concerning which the Autonomy Law has not provided protection.

The killing of Yustinus Murib and nine other civilians on November 5, 2003

As part of a joint sweeping operation the military and its Special Command Forces together with the police surrounded a local village house in Yalenga, Bolakme district, where they suspected an alleged leader of the Free Papua Movement (OPM) was located. After the villagers came out of the house and tried to escape, the security forces killed nine of them and arrested Mr. Yustinus Murib without any charges. Mr. Murib and the bodies of the nine other villagers were put into a vehicle and taken to the Wamena General Hospital. On arrival Mr. Murib was dead. His body and that of the other nine villagers were covered with stab wounds. Further investigations by local human rights organizations into the killing were blocked by the local Police and Military.

Transmigration and Economic exploitation

The government's transmigration programme, which provides incentives for poor and often landless Indonesians from densely populated areas, such as Java, to re-settle West Papua, continues. Thousands of economically disadvantaged migrants arrive in Papua each month seeking to improve their economic status and living conditions. They are supported by the government which subsidises their food production for the first few months and provides them with money, housing and land. The government claims that this is a program based on the right of freedom of movement and is aimed at improving the quality of life for many poor people that live in densely populated areas, as well as providing a workforce to better utilise the natural resources of Papua. However, this constructed, incentivised re-location program has significantly changed the demographics of Papua.

The demographic imbalance created by this process aggravates the situation for indigenous people and has not resulted in an improvement of their living conditions. In fact, this program has been seen to increase the economic gap between transmigrants and indigenous Papuans. Moreover, a significant consequence of transmigration has been the continued exploitation of natural resources through activities such as deforestation, which has a serious impact on traditional living conditions.

In some towns and cities⁶ the demographic proportions are reported to be approximately 30% indigenous Papuans to 70% transmigrants compared to a formerly predominantly indigenous Papuan population. However, a clear and regulated census is lacking.



Logging in Papua, source: Fokker

The increasing economic activity in West Papua remains strongly in the hands of transmigrants and is in practice mostly non-inclusive to indigenous people. Many Papuans feel that their traditional culture and language is threatened by transmigration. Despite provisions in the Autonomy Law to respect, foster and develop indigenous culture and customs,⁷ no substantive programs or activities for the protection or promotion of indigenous culture and languages have been successfully initiated until 2009.

Right to health and education

Along with increasing economic and cultural separation and disadvantage, in recent years the education system in West Papua has also continued to suffer. In 2009, this was largely due to the loss of teachers who are often recruited into higher administrative and political offices - becoming heads of districts or regional offices - under the creation of new administrative regencies. Teachers often leave their office for prolonged periods for personal reasons without replacements being provided by the education department. This absence of a functioning and inclusive education system for indigenous Papuans is a considerable obstacle for development and widens the social gap between transmigrants and indigenous people. Under the Autonomy Law the responsibility for all areas of education in Papua is given to the Provincial Government. However, by not providing teachers that are willing to work in Papua and by not instilling work discipline and respect for indigenous culture, the Provincial Government has reneged on its duty to provide "high quality education and teaching" (article 56 (3) of the Special Autonomy Law) to which every inhabitant of Papua is entitled up to high school level.

However, while some local political offices such as that of the Mayor and the Governor are filled by indigenous Papuans, no efforts are made to professionally prepare indigenous Papuans for strategic positions in government departments and other institutions, as well as industry. After 44 years of Indonesian control over West Papua, access to such jobs is far from being equal for native Papuans.

According to the Autonomy Law the abundance of natural resources in West Papua is supposed to benefit the citizens of West Papua, through a Special Autonomy Fund, which gives access to free medication in public hospitals, amongst other things. For 2009, the Indonesian central government allocated the equivalent of US\$ 390 million to both administrative provinces in West Papua. However, patients are often refused medication and are instead referred to commercial pharmacies. Corruption in the healthcare system and at the local government level has also been reported. In addition, many health workers refuse to work in remote villages where most indigenous Papuans are living, leaving them without access to required healthcare. In the last decade, HIV/AIDS infection rates have increased sharply in West Papua, with migrant prostitution workers from other provinces in Indonesia reported to be a significant factor contributing to

this. This should be recognised by the health ministry and combated with the necessary facilities.

The Special Autonomy Law for the two West Papuan provinces has provided the Papuan local government and local parliament with many privileges and an increased budget. However, local corruption, continuing military dominance and the lack of effective implementation of many of the Autonomy Law's provisions remain after eight years. A majority of indigenous Papuans see this as a clear failure of the Autonomy Law to address one of their key concerns and thus reject it as a failed attempt to settle the demand for the right to self-determination. Meaningful dialogue between West Papua and the central government is required to address these significant and on-going problems.

3.b Police and Military in Papua

The heavy military presence in West Papua is reminiscent of the pre-1998 era under President Suharto, when the military de-facto ruled and controlled public life. While Police and Military are now separated, both still play a leading role in West Papua and both bodies are involved in economic activities such as logging. In addition the military is frequently reported to be involved in taking bribes for protecting commercial mining activities in different parts of the two West Papuan provinces. While trying to maintain its supportive role for international mining companies the military has a strong self-interest in maintaining and extending its presence in Papua.

An exaggerated armed independence conflict would support the military's argument for the importance of their presence in the region. The Free Papua Movement (OPM) is one of the main threats according to the security forces. Lieutenant-General George Toisutta was appointed Army Chief of Staff in 2009 and requested to establish a new military command in West Papua thus extending military presence and control of the region. It has to be noted that such additional inland military command is in contradiction to the defence mandate of the army.

While the existence of some poorly armed independence movement groups cannot be denied, their actual capability is in no proportion to the military presence. Military bases are located in transmigration areas as well as along access roads to them. Intimidation tactics applied by the police and the military include arbitrary arrests, torture and sweeping operations with the destruction of property. While almost all of the related victims were alleged to have links with separatist movements, almost none of them were based on any evidence. This makes the intimidation and pressure tactics by the security forces an untargeted, arbitrary operation against indigenous Papuans. As a result, large parts of the indigenous population are routinely terrorized, as the cases received by the AHRC show.

After international pressure, such as the visit of the United Nations Special Representative of the Secretary-General on Human Rights Defenders Ms. Hina Jilani (at that time) in June 2007, the security forces started to apply more caution. However, the reported increased security maintained by the military and police is not a natural security situation. Human rights activists are silenced and most of the atrocities are not being documented and reported, in particular events in the remote highland regions. Indonesia's past was marked by victories through violence -the government's approach to mitigate in indigenous West Papuan issues has not fundamentally changed this and there is a lack of serious engagement and dialogue between West Papuans and the Jakarta administration.

The National Intelligence Agency (BIN) and the intelligence service of the army play an important role in public life. Often operating as bicycle riders, street traders, sales persons, mobile phone traders, waiters in hotels and restaurants, hotel drivers, airport taxi drivers, students and civil servants, these intelligence staff support a heavy surveillance machinery in West Papua, creating an environment of fear among the indigenous population and exacerbating distrust and ethnic division.

Case: Police and soldiers burn houses and destroy resources in Papua's Bolakme district

October 27, 2009 AHRC-UAC-143-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3299/>

In October the AHRC received reports of violence being wrought by soldiers and police against civilians in remote West Papuan villages. In a recent case a joint operation responded to an illegal flag-raising by the banned Free Papua Movement with indiscriminate violence against civilians. Soldiers reportedly burned down 30 houses, killed livestock and fired live rounds threateningly around local residents, many of whom took refuge in the forest for several weeks out of fear. Also a man was shot in the stomach and died before reaching the hospital. Complaints to the local and central offices of the national human rights commission were not taken up.

Case: Police allegedly kill villagers and destroy their property in Papua

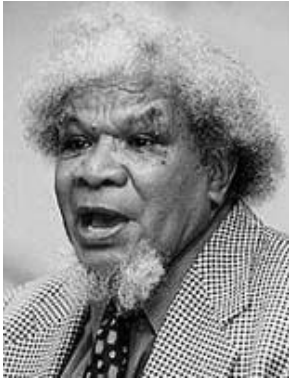
January 21, 2009 AHRC-UAC-006-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3098/>

At the start of this year we received information that a man was shot dead by police constables, thought to be under the influence of liquor, in Teminabuan, south Sorong Regency of West Papua Province, at midnight of 31 December 2008. Angry villagers protested against the killing and in the ensuing violence a police officer was left dead. However, it was reported that the police- unable to control the situation-destroyed houses; more villagers were injured and an 8-year-old boy was killed.

Case: Investigation needed into the two week detainment and ill-treatment of a Papuan man

September 17, 2009 AHRC-UAC-121-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3263/>

A Papuan man was ill-treated during a two-week detention, where he was interrogated about a fire that destroyed property owned by former Indonesian President Suharto. The incident is similar to past cases of abduction by army personnel. The AHRC is concerned that the matter will not be thoroughly investigated by local officials.

Key Case:

Papua's most prominent human rights victim Theys Hiyo Eluay was heading the highest indigenous political body at that time - the Papuan Tribal Presidium (PDP), which after the fall of Suharto, was able to be more outspoken about the concerns of indigenous Papuans. Theys Eluay was seen by many as a symbol of Papuan indigenous emancipation. After Theys Eluay attended the Indonesian "Hero Day" at the invitation of the Special Force Command (Kopassus) of the military, he was killed by members of the military on his way back home on November 10, 2001.

After substantive pressure, President Megawati set-up a special national investigation team in February 2002. The central office of the military police and the national police also prepared special investigation teams and finally Kopassus members from Tribuana of the Hamadi district of Jayapura, Papua were convicted and sentenced to 2-5 years imprisonment and dismissal by the High Military Court III in Surabaya. However, Commander in Chief of the Indonesian army at that time, General Endriartono Sutarto disagreed with the judgement and called for the soldiers to be seen as "heroes who fought in the name of national unity".

While some henchmen in the Special Force Command of the army were convicted, the main instigators of the murder of Papuan leader Theys Eluay have not been found. The murder of Theys Eluay remains one of the biggest scars in the history of the Papuan struggle against human rights violations.

3.c Political Prisoners and the Freedom of Expression

2009 has seen an influx in political arrests based on charges of subversion or treason. While decades ago, activists talking about the question of self-determination of the indigenous Papuan people, were invited to discussions with political decision-makers, such voices are now silenced with criminal charges, political trials and years of imprisonment. Buchtar Tabuni, Sebby Sambom, Musa Mako Tabuni, Yance Amoye Motte and Seravin Diaz are just some of the victims who had to face trial in 2009 while many were already sentenced to up to 20 years imprisonment.



Abepura Prison, detention centre for most political prisoners in Papua; source: AHRC

Some activists were arrested following peaceful protests. Arrests are often carried out arbitrarily without formal charges or a warrant. If issued, such arrest warrants are put out days after the actual arrest. Following the arrest, abuse and torture, including beating, punching, kicking and slapping are common. Most of the victims are detained or imprisoned in the Abepura Prison. Several of the detainees were reported to have unsuccessfully tried making complaints regarding their illegal treatment in prison.



Trial against political prisoner Buchtar Tabuni in Jayapura, Papua; source: local human rights group

While the treason law has in the past been applied more rarely, its current use exposes its incompatible character with international norms such as the right to freedom of expression, including political expression.

Case: Torture and maltreatment of political prisoners in Papua

February 16, 2009 AHRC-UAC-014-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3111/>

The AHRC received information of detainees being tortured and ill-treated by prison officials in Abepura Prison, Papua province. It was reported that seven persons were tortured from 1-5 February 2009. They were reportedly beaten and put

Article 106 of the Indonesian Penal Code⁸ reads:

The attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part thereof shall be punished by life imprisonment or a maximum imprisonment of twenty years.

into solitary confinement where they were deprived of food and water for four days.

Case: Rights activist Buktar Tabuni arrested after peaceful protests

December 10, 2008 AHRC-UAC-262-2008 <http://www.ahrchk.net/ua/mainfile.php/2008/3082/>

The subversion charges laid against rights activist Buchtar Tabuni were not dropped, and he is currently facing trial at Jayapura District Court. The main charge against him is under article no. 106 of the Indonesian Penal Code, which in effect, criminalizes the expression of certain political opinions.

- Update: Another activist arrested for holding a peaceful protest
December 20, 2008 AHRC-UAU-071-2009 <http://www.ahrchk.net/ua/mainfile.php/2008/3088/>
- Update: Rights activist Buchtar Tabuni in trial on charges of subversion
February 24, 2009 AHRC-UAU-004-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3117/>

Case: Killing of an activist

December 5, 2008, AHRC-UAC-261-2009 <http://www.ahrchk.net/ua/mainfile.php/2008/3081/>

Yosias Syet was found dead in his home on 17 October 2008. The autopsy confirmed that he had been murdered. It is alleged that the murder was designed to threaten the Head of the Papuan Customary Council, Fokorus Yaboisembut, since Yosias Syet was in charge of his security.

3.d Election Violence

While the parliamentary and presidential elections were seen as an important step in the further democratization of Indonesia, the events were marked with violence and killings in the West Papuan provinces. At least 14 incidents, related to the legislative and presidential election from April to July 2009, were reported.

Many of the incidents appeared to be set up by unknown interest groups to create an image of violent resistance against the election by indigenous Papuans and a security situation that would call for increased presence and activities of the armed forces. An office burning at the University of Cendrawasih, clashes between the police and indigenous Papuans in Abepura (April 9, 2009), the mysterious killing of Pdt. Zeth Kiryoma, S.Th, and false reports of bomb attacks and are just some examples that seemed more likely to be set up by the security forces themselves than by resistance groups. Searches, arbitrary arrests and violence during the legislative and presidential election

were common in various cities in West Papua. On another occasion the military allowed a poorly armed group of protesters to allegedly take hostage of a local airport for days. Most of these incidents stigmatize indigenous Papuans as violent resistance fighters, while indigenous Papuans are often themselves victimized by arbitrary arrests, detentions and violent abuse. Cases of electoral counting fraud in areas with strong military dominance support the view that the military, who benefits most from the alleged indigenous violence, might be behind the incidents. A police investigation of alleged OPM bombs showed that their composition and sophistication makes the military are more likely perpetrator.

Case: Indigenous Papuans are shot by police and denied proper medical treatment

May 13, 2009 AHRC-UAC-047-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3154/>

On 13 May 2009 two indigenous Papuans died and three others were injured after the unrestrained use of lethal fire arms by the Mobile Brigadier (Brimob) Unit of Papua Regional Police on 9 April 2009 in Abepura, Papua, Indonesia. The wounded were arrested and taken to a hospital, but reports allege that they did not receive proper medical treatment, resulting in the death of one of the arrested persons.

3.e Right to Food

No improvement on food security for past four years in Papua province

In 2005, 55 villagers died of starvation and others suffered from lack of food in Yahukimo district, Papua province. In September 2009, the casualties went up to 113 in same area, Yahukimo.⁹ The cause for both cases was reportedly harvest failure. In this region however, it was disclosed that the government had neither properly invested to increase the food produce nor constructed basic infrastructure for accessibility to the area. As a result there was food insecurity in 2005 and there was still food insecurity in 2009.

The constant reports on starvation deaths in Yahukimo demonstrates that the government continues to fail to respect the right to food. Indonesia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2006 and the right to food is a fundamental right enshrined in the Act of the Republic of Indonesia Number 7 of 1996 on Food.¹⁰

When the deaths were reported by the AHRC as well as the media, the relevant government authorities initially stated that the villagers died not of starvation but of diseases and failure of harvest¹¹. The government did not allow anyone, including local human rights groups in affected areas, to report the details of the deaths. Subsequently,

the Chief of Papua Regency, Ones Pahabol, admitted that the villagers suffered from starvation. The failure of harvest can never be a cause of death nor a justification for deaths.

In 2006, after the starvation deaths of 2005, the government constructed food storage units in several areas around the town of Yahukimo aimed at storing food and grain for longer terms as well as for emergency situations. The affected areas, this year, were excluded from the provision of food storage and the villagers who are supposed to use the storage units were not taught how to use them- the government merely set up the facilities but did not train the villagers to make use of them.

Three hundred tons of rice were distributed to villagers starting from Walma district on September 18 2009, when the government gave temporary food aid of rice, sweet potato and fruits, however lack of roads and infrastructure continues to aggravate food insecurity in villages. The affected areas are remote and there is no road or transportation accessibility but for helicopter or plane. However, only 16 tons of rice were reportedly distributed to 11 districts and others have not yet received the food aid.

The majority of villagers in Yahukimo eat sweet potato as their main food. The villagers also cultivate coffee, pineapple, banana, peanut, bean, mango and red fruit. However, it is difficult to cultivate rice in highland areas and villagers have not learned how to harvest rice or other crops to meet a nutritious diet and obtain micro-nutrients. The villagers in affected areas cannot afford to buy rice from the market located in town. As of 2009, the price of rice per kilograms in those areas is 20.000 IDR (10.000 Indonesian Rupiah = 1 US Dollar) whereas the transportation fee is 30.000 IDR and takes approximately 90 minutes. However, the villagers find it difficult to manage cash to buy rice and to organise transportation. Furthermore, the quality of rice is not good. Of particular concern are the children who are easily exposed to malnutrition as well as lack of micro-nutrients. This is the hidden hunger.¹²

The government should take substantial and sustainable measures to ensure the right to food through providing long-term food security structures. At present they are failing to prevent hunger deaths and even failing to provide food aid to the affected villages. Next year, more villagers will suffer from lack of food and die of hunger associated with other relevant diseases.

Case: 113 villagers' hunger deaths caused by government neglect as well as harvest failure in Yahukimo, Papua [Hunger Alert]

September 16, 2009 AHRC-HAC-006-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3260/>

The number of people that have died of starvation in Yahukimo regency has reached 113 since January 2009; more than 31 people had died in Langda, 34 in Bomela, nearly 20 in Seredala and 10 in Suntamon. According to Yuliat Iksomon, the head of the Yahukimo disaster response team, deaths caused by starvation also happened in another three districts of Yahukimo; Walma, Pronggoli, and Heryakpini. In Walma district itself, it is reported that as many as 60 people have died of starvation associated with diseases.

4. Religion and Human Rights

4.a Sharia Law in Aceh

The Aceh Autonomy Law entitles the Aceh Legislative Council, a local parliament, to make its own legislation. This provision was used 14 September 2009 when the Aceh parliament passed a local sharia penal law that would provide for penalties including flogging and stoning to death for crimes against islamic traditional law such as adultery.¹³ The legislation has at the time of writing not yet been signed by the governor of Aceh, Yusuf Irwandi, which would make the law active and fully adopted. In the meantime the law should be completely reviewed since its provisions-including the application of torture- violate human rights norms and in particular Indonesia's international obligations and applicable international law such as the International Covenant on Civil and Political Rights and the Convention against Torture.



Aceh Governor Yusuf Irwandi,
source: Aceh.Net

The proposed provincial legislation (Law No. 11/2006) dictates that a raped women find four witnesses to her attack or face death by stoning for adultery. Its provisions for the protection of women are very weak and ignore issues such as domestic violence. The law makes children from the age of 12 subject to harsh punishments, thus violating the Convention on the Rights of the Child which Indonesia ratified, with reservations, in 1990. The right to health, as supported by sex education, is threatened by the document since such education is prohibited.

The law would apply to all Indonesian's in Aceh, including non-Acehnese residents and non-muslims. Journalists and rights activists who criticize the law are easily stigmatized as anti-islamic. Since this law is not a national law but a provincial law, it cannot be challenged in the Constitutional Court. Such a piece of legislation can only be reviewed by the Supreme Court which is reported to have made political decisions in the past. While local groups are preparing a challenge to this law, worries remain that this attempt

will not succeed. This law would replace existing local islamic regulations that already provides for islamic vice squads and other sharia related practices.

The fact that the constitutionality of such local legislation cannot be challenged in the Constitutional Court remains a loophole through which the protection of the constitutional and human rights in Indonesia can spiral.

4.b Pornography Law

After demands, particularly from non-representative islamic groups, to ban pornographic material in Indonesia, an Anti-Pornography law was prepared. Opponents pointed at the incompatibility with traditional culture. The draft bill of this law was submitted by the government to the House of Representatives in 1999, after that there was no progress until the new government followed up this bill in 2004. The plenary session of the House of Representatives on September 27, 2007 established a special committee for the bill of anti-pornography and pornographic actions. Finally, on October 30, 2008 Law No 44 of 2008 regarding pornography became law to divided public opinion.

The law is vague in its definition and violates several constitutional rights as well as national laws. These include Law No 39 of 1999 regarding Human Rights, Law No 9 of 1998 regarding freedom of expression and opinion and also the Indonesian government has obligations under international human rights instruments which should be respected¹⁴.

While supporters point to the moral protection this law would provide against western influences and the degrading of women, opponents of the law argue that it will criminalize acts that any citizen might arbitrarily deem inappropriate and pornographic. This law does not only open up the possibility of arbitrary denunciation of "pornographic actions" but also restricts the cultural freedoms of some of the ethnic groups in Indonesia. On April 6, 2009 several civil society groups such as human rights NGOs, community, religious organizations and community leaders submitted a judicial review of this law to the Constitutional Court (MK) requesting the Court to repeal all content of the Law. The decision of the court is still pending.

4.c Freedom of Religion - Pluralism and Secularism

Eleven years after political reform (*reformasi*) that occurred in 1998, freedom of religion in Indonesia faces serious obstacles because of increasing fundamentalism in several sections of Indonesian society. This presents a serious challenge to Indonesia's acclaimed principles of ethnic and cultural pluralism. At present the government only formally recognizes six religions in Indonesia: Islam, Roman Catholicism, Protestant Christianity,

Buddhism, Hinduism and Confucianism (Khong Hu Cu).¹⁵ Each person's religion is registered on his/her identity documents which s/he is required to carry with them.

Religious groups outside the six state-recognised religions such as the Ahmadiyah do not enjoy state protection.¹⁶ As a consequence of discrimination and alleged crimes committed against the Ahmadiyah the National Commission for Human Rights (Komnas HAM) established a monitoring team based on Law No 39 of 1999 regarding human rights. This law was aimed at monitoring and inquiring in to several alleged violations of human rights against members of the Ahmadiyah. To date there is no significant progress.¹⁷

The current situation for members of the Ahmadiyah is that they are under pressure and monitoring and intimidation from several Muslim fundamentalist organizations who try to prohibit them from praying and promulgating their religion.

The AHRC has in the past received cases of attacks against religious communities; further, a person identified as belonging to one religion cannot marry a person from another religion and religion can also be a barrier to work due to discriminatory employers. In such cases insufficient protection was given by the Indonesian government.

On June 5, 2008 when the National Alliance for Freedom of Religion (AKKBB) marked the anniversary of Pancasila in Square of the National Monument of Jakarta they were attacked by Muslim fundamentalist organizations such the Islamic Defender Front (FPI) and The Hizbut Tahrir Indonesia (HTI)¹⁸. Two leaders of those Islamic organizations, namely Mr. Habib Rizik and Mr. Munarman, were prosecuted by the public prosecutor under article 170 and article 55 of the Indonesian penal code in the Central Jakarta district court and on October 30, 2008 the judges convicted each of them to one year and six months imprisonment.



AKKBB, a coalition of civil society groups supporting freedom of religion in Indonesia demonstrates in front of the Attorney General's Office, source: KontraS

Currently several civilian organisations (human Rights NGOs, organizations of religious and human rights lawyers) have submitted a judicial review to the Constitutional Court against law No. 1/PNPS/ 1965 regarding the prevention of abuse and discrimination of religion claiming that the content of this law is contrary to the Indonesian Constitution and other national human rights laws. This process is on-going and at the time of writing there have been two appearances before the court.¹⁹

5. Human Rights Defenders

5.a The Trial of Munir's case

After Indonesia's leading human rights defender, Munir Said Thalib, was poisoned onboard a Garuda Airlines flight in September 2004, his family and supporters have been fighting to bring his murderers to justice, but the process is long and politicised. While some henchmen have been imprisoned, no instigators have been successfully convicted. See the brief chronology of events in the table.²⁰



ret. Maj. Gen. Muchdi PR in court for the murder of human rights defender Munir. He was acquitted of all charges, source: KontraS

In 2009, trials were held in the South Jakarta District Court against the former National Intelligence Agency (BIN) deputy director and retired Major General, Muchdi Purwopranjono, also known as Muchdi PR. During the process twenty trials took place and more than 25 witnesses were called in during the 5 months from August 2008 until the District court verdict in December 2008. The trials were marked by the presence of numerous support groups for Munir including NGOs and victims groups. Maj. Gen. Muchdi PR also had proclaimed 'supporters' mobilized in his support.²¹ The Court acquitted Maj. Gen. Muchdi PR amid strong criticism for having ignored crucial evidence submitted by the prosecution. The prosecution was also criticised by court monitors for their poor job in preparing the case and the lack of commitment their work.

The prosecution filed an appeal to the Supreme Court- it being the court of last instance for this case. On June 15, 2009 this appeal was rejected and Maj. Gen. Muchdi PR was acquitted of all charges. The outcome of this trial only serves to foster the record of impunity in Indonesia with many questions unanswered.

The Solidarity Action Committee for Munir (KASUM) subsequently urged the Attorney General (AG) to submit a case review to the Supreme Court as the last option to resolve Munir's case. According to a meeting between members of KASUM and Mr. Jasman Pandjaitan, spokesperson of the Attorney General's Office on September 7, 2009, the AG plans to submit a case review only based on *the negligence of the judges*. KASUM commented that the AG's strategy shows a lack of commitment since such a submission to the AG can be expected to be rejected unless it is accompanied with new evidence. Instead, the AG should request the submission of missing evidence from the police. According to the National Human Rights Commission (Komnas HAM) retired Maj. Gen. Muchdi PR should have been sentenced by the court to a maximum penalty based on the sufficient evidence against him.



Defendant Muchdi organized allegedly hired supporters to influence public opinion in the court room, source: KontraS

Commitment of the new government

The re-election of President Susilo Bambang Yudhoyono through the Presidential election on June 8, 2009 heightened expectations, but also doubts, about his commitment to resolve Indonesia's most important human rights case. While he ranked Munir's case at the top of his agenda during his first election in 2004, his failure to bring about a fair and successful trial against all perpetrators of Munir's murder raises concerns about his commitment to human rights in his coming presidential term.²²

For example, President Yudhoyono refused to publish the report by the fact finding team he had set up to start inquiries into Munir's murder during his first presidential term. He also refused requests to strengthen the fact-finding team by extending its mandate. The team was thus not in a position to support the police investigations. President Yudhoyono is now under pressure to take action. The AHRC welcomes President Yudhoyono's decision to replace the head of the National Intelligence Agency (BIN) with Mr. Sutanto (retired General) as the new chief of BIN. Mr. Sutanto's record and past stance on Munir's case gives hope for an opening up of BIN files that could support the case.

5.b Freedom of Expression

Freedom of expression and opinion in Indonesia is increasingly being restricted due to the use of several articles of the Penal Code which prescribe for criminal defamation against civilians. Contrary to the spirit of the political reform that occurred in 1998 and the ratification of international human rights instruments, such as the ICCPR, protesters in Papua and activists in Jakarta and Aceh have faced criminal defamation proceedings. The extensive use of the criminal defamation law against critical discussion and opponents of established political elites and impunity activists is a new phenomenon. The Indonesian

government must review the law on criminal defamation and ensure that it cannot be applied to limit the activities of civilians and human rights defenders.

The government is still implementing some of the articles in the Indonesian Penal Code regarding criminal defamation in particular articles 311, 316, 314. The defamation law is a colonial hangover, and the government's reluctance to revise it has allowed its continual abuse by officials who wish to restrict freedom of expression. Over the last two years, civil society groups have made several attempts to submit a judicial review regarding the law based on their potential threat to human rights workers.

Case: A human rights defender is accused of criminal defamation for seeking to investigate Munir's murder

September 11, 2009 AHRC-UAC-118-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3258/>

The Asian Human Rights Commission received information that a leading rights activist and partner of the AHRC has been accused of criminal defamation by the former deputy chief of Indonesia's State Intelligence Agency, after he testified against the latter for his involvement in the murder of Munir Said Thalib.

Mr. Usman Hamid, a coordinator of the Commission for disappeared and victims of violence. Mr. Hamid was a witness in the trial of Mr. Muchdi Purwopranjono- an alleged perpetrator in the murder of Munir Said Thalib. On 3 September 2009 Mr. Hamid received a summons letter from the police headquarters stating that Mr. Muchdi's lawyer has filed a complaint that accused Mr. Hamid of committing criminal defamation during the process of Muchdi's trial. Mr. Hamid is charged under article 310 and 314 of the Indonesian penal code.

This incident once again emphasises the unresolved status of the case and reveals the persecution facing the few still trying to get justice five years on. The AHRC is alarmed by the increasing frequency with which the laws of the country are being manipulated to obstruct the work of human rights defenders.

Case: Two activists are accused of criminal defamation by the Attorney General after questioning gaps in his annual budget

November 4, 2009 AHRC-UAC-148-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3305/>

In early November we received information that two anti-corruption activists had been accused of defamation by the Attorney General's Office, after their group publicly pointed out a multi-trillion rupiah gap in the AGO's annual budget and called for an

investigation. The case raises questions about the use of the defamation law to stop public criticism of institutions and calling for reforms. Since the suspect data was taken from the State Audit Board report, the responsibility for bringing the information to light belonged to that institution. However it failed to do its job. Governmental support and protection must be given to those willing to expose corruption.



Emerson Yuntho and Illian Deta Arta Sari were summoned to the police on charges of criminal defamation after questioning the annual budget of the Attorney General's Office.

5.c Arrests and Violence against Protesters

2009 saw continuing police violence committed against protesters and demonstrators in Indonesia. People that seek to protest about issues such as land rights, corruption or human rights issues are required to inform the police of their intention to hold a peaceful demonstration. The police are then obliged to attend the protest to maintain public order and to ensure the people's right to freedom of expression through peaceful protest under national Law No. 9 of 1998.

However, the Indonesian police often use excessive force and police brutality against peaceful protesters is a frequent occurrence; with kicking, punching and beating with batons, by armed police being commonplace in such instances. This is often followed by arbitrary arrests and detention, with cases of protesters being further beaten in the police vehicle while being taken to the police station. The abuse often continues once the protesters are detained. Such egregious treatment, in the face of peaceful protests, further violates the individual's right to freedom of expression under national and international law.

Such police violence are contrary to the Law of national police No. 2 of 2002 governing the conduct of police, as well as the new Regulation of the Chief of Indonesian National Police Number 8 of 2009 which details the Implementation of Human Rights Principles and Standards in the Discharge of Duties of The Indonesian National Police. Article 10 of the Regulation states that:

'Every Indonesian National Police personnel must [...] refrain from instigating or tolerating any act of torture or other cruel, inhuman or degrading treatment or punishment.'

Case: Tortured student activists who protested against a hotel's fictitious facilities convicted for nine months

October 13, 2009 AHRC-UAC-135-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3287/>

The AHRC was informed that three protestors, whom the police had brutally assaulted, arbitrarily arrested and tortured while in custody in May 2009, had been convicted for nine months on false charges of attacks and violence. The protestors were, together with several villagers, holding a peaceful demonstration to protest against the fictitious facilities a local hotel had advertised it was offering.

Case: Police violence and arrest of protesters and denial of their legal representatives

February 16, 2009 AHRC-UAC-013-2009 <http://www.ahrchk.net/ua/mainfile.php/2009/3110/>

The Mobile Brigadier Unit (Brimob) of Central Java Regional Police attacked Sukolilo villagers in Kedumulyo, Pati, Central Java with disproportional and indiscriminate use of force in order to disperse a protest demonstration on January 22, 2009. The attacks injured several villagers and damaged their houses. The attacks were followed by arrests and the victims were denied legal representation.

6. Impunity and the Human Rights Court System

6.a The willful dereliction of responsibility by the Attorney General

As with previous years the most serious obstacle to bringing gross violations of human rights to the human rights court is the unwillingness of the Attorney General (AG) to conduct investigations on the recommendation of the National Commission for Human Rights (Komnas HAM). Although several efforts have been made to initiate an investigation this problem still continues and all of the cases concluded by Komnas HAM were rejected by the AG.²³

Between 2003 and 2007 several cases were concluded by Komnas HAM and have been sent to the Attorney General.²⁴ However, these cases were not followed up by the AG. Nevertheless, there is a precedent for such investigations which can be seen in the cases concerning violations in East Timor and Tanjung Priok where ad hoc Human Rights Courts were established after the AG had conducted investigations. An evaluation of these cases acts as evidence that the AG is inconsistent in interpreting Law No 26 of 2000 regarding the responsibility for initiating the process to establish an ad hoc Human Rights Court.

After an investigation is carried out by the AG he is charged with delivering the case into the political process by presenting his investigation to the House of Representatives (known as the DPR) which is then responsible for resolving the case by determining whether a human rights court should be established, and then making an appropriate recommendation to the President to establish such a court.

However, in relation to a case concerning disappeared students during 1997/8, rather than making a recommendation to the President the DPR established a Special Committee to determine its response. The Special Committee of 2008 has since held meetings with victims and their family members, human rights NGOs and the Attorney General in order to determine what recommendations are to be made to the President. However, neither a member of the government nor the former Commander of the Special Armed Forces, Mr. Prabowo Subianto, accepted the invitation to take part in the hearings.

On 15 September 2009, the Special Committee issued recommendations to the plenary session of the House of Representatives. The Committee recommended that; the President establish an ad hoc Human Rights Court in relation to the disappeared students; the President and all government institutions and other relevant parties take appropriate steps to immediately locate the whereabouts of the 13 people cited as still missing by Komnas HAM; the President facilitate the rehabilitation and satisfactory compensation to victims and/or the families of the disappeared; and that the Government immediately ratify the International Convention for the Protection of All Person from Enforced Disappearances.

On September 28 2009, the plenary session of the House of Representatives agreed with the Special Committee's recommendation and decided to recommend that the President establish an ad hoc Human Rights Court concerning the case of the student disappearances. To help ensure the recommendation will be implemented by the President, the AHRC sent an open letter to the United Nation Working Group on Enforced Disappeared.²⁵

See Annex 1 for a complete list of the gross violations of human rights and their current status in the justice process.

6.b Political Blockade and Shadows of the New Order Regime

Various efforts to resolve gross violations of human rights in Indonesia still face serious obstacles. More than 11 years after the reformation in 1998 none of the perpetrators have been prosecuted and there is also no fulfillment of victim's rights to compensation, restitution and rehabilitation which is the responsibility of the state.

The Indonesian government wants to be seen to be protecting and respecting human rights as is evidenced by its ratification of various international human right instruments. However, these cases demonstrate otherwise and suggest a stark failure on the part of the government to live up to its international commitments.

Remnants of the new order regime are still dominant in national politics. Players from the previous Suharto regime in particular military office holders continue to play a role in the House of Representatives through political parties that still issue political recommendations to reject past human right abuses being brought before an ad hoc human rights court.²⁶

Furthermore, the rejection by the Attorney General to follow up recommendations from Komnas HAM has shown that there is no reformation in this institution and as a result perpetrators of the gross violations of human rights are protected by impunity. Some of them ran as candidates for the President's and Vice President's office in the general election of 2009 such as retired General Prabowo Subianto and Wiranto.

6.c Transitional Justice and the Truth and Reconciliation Draft Bill

In 2009 the Minister of Law and Human Rights issued a new draft bill on the truth and reconciliation commission to replace Law No. 27 of 2004 which was repealed by the Constitutional Court in a judicial review process initiated by civil society groups in 2006. However, the repealing of Law No 27 of 2004 has delayed the truth and reconciliation process that will be implemented in Aceh and Papua. Law No. 21 of 2001 regarding the special autonomy status of Papua establishes provisions for reconciliation and truth-seeking. Furthermore, in Aceh, Law No 11 of 2006 also allows for reconciliation and truth-seeking after a peace process. Both these laws were linked to Law No. 27 of 2004. However, because the Constitutional Court repealed all of the content of Law No. 27 this will have a negative impact on the process of reconciliation in those areas as people will have to wait for the new national law to be issued by the government.

As is usual in the process of debating a new bill public hearings and discussions were held. However, victims and their families were only involved at the end of the drafting process and as a result there was not enough time for victims to analyse and provide input for this bill.

The new bill has been published by the Law and Human Rights Department in consultation with several civilians such as academics, a human rights activists and a commissioner from the National Commission for Human Rights and law experts. However on the final draft there are still many substantive problems that may potentially reduce the victim's rights under the previous act.

Problems with the draft bill of the truth and reconciliation commission

- 1) The purpose of the commission is to disclose the truth for reconciliation purposes only. There is no provision for prosecution (article 3 and article 4). The TRC threatens the justice process of the Human Rights Court Law by appearing as a replacement. Truth and reconciliation measures should follow after an effective remedy for the victims has been ensured.
- 2) The Commission is not mandated to deal with cases that occurred before November 25, 2000 (Article 1 paragraph 4).
- 3) There is no article regarding victim's rights for the cases that occurred after November 25, 2000.
- 4) The content of this bill only mentions crimes against humanity and genocide. There is no article on violations of economic, social and cultural rights.
- 5) There is no article regarding the definition of perpetrators.²⁷
- 6) There is no guarantee that the recommendations of the commission will be used for the disclosure of information or to achieve justice as it is not certain that the commission report will be made public and the possibility of perpetrators being given immunity, in exchange for testimony before the commission, has not been ruled out (Article 7 (d)).
- 7) There is no article on restitution for the fulfillment of victims rights. Article 7 (d) only prescribes compensation and rehabilitation as forms of relief despite restitution being a fundamental right for victims.

7. Human Rights Protection - Challenges for Reforms

7.a The Corruption Court System

2009 has been a hard year for the anti-corruption movement in Indonesia generally, and more specifically for the Corruption Eradication Commission (KPK). The police and the attorney general's office responded to KPK investigations in their institutions with criminal charges against KPK Commissioners.

The first issue was the unreasonable delay on drafting the Corruption Court Law. The existence of the Corruption Court was regulated by article 53 of KPK Law but later deemed unconstitutional by the Constitutional Court on 19 December 2006. It was said that article 53 of the old law caused legal uncertainty as corruption cases could be brought before two different institutions - the Corruption Court and the District Court. The Constitutional Court then mandated the President and the House of Representatives (DPR) to create a specific law on the Corruption Court which exclusively gives authority for such a court to adjudicate corruption cases. Unfortunately, the ruling

was intentionally ignored and discussions began only 30 days before the expiration of the imposed deadline. As a result, the law that was finally enacted lacks crucial elements to ensure the effective functioning of the Corruption Court.

After the KPK had issued a travel ban for two corruption suspects in the police, Djoko Tjandra and Anggoro Widjojo, the national police responded with criminal charges against KPK members. Chandra M. Hamzah and Bibit Samad Riyanto, two of the KPK commissioners were detained under charges of abuse of authority by the police. Because of the weak evidence, many understand the detention as an intimidation tactic by the police. In the trial against the Commissioners, telephone recordings exposed the staged attempt by the police to stop investigative activities by the KPK. This evidence allegedly also involved officers in the Attorney General's Office (AGO), National Police of Indonesia (Polri), and the Witness and Victim Protection Institution (LPSK).

The campaign against the KPK was met with a wide public outcry in support of the commission and its fight against corruption. Following the urge by the public, the President established a fact-finding team, which in its final recommendation, concluded that there was not enough evidence to continue the legal process against Chandra and Bibit, and that the national police and the AGO should discontinue any legal actions against them.

Before Chandra Hamzah and Bibit Samad Riyanto were named suspects, Chairman of the KPK, Antasari Azhar, was earlier named also as a suspect in a premeditated murder case. This has created three vacant commissioner positions on KPK and left two active commissioners in charge. As a result the President decided to issue the government regulation (in-lieu-of-law) No. 4, 2009 enabling him to select interim commissioners of the KPK.

The issuance of this regulation has sparked wide criticism from lawyers and corruption watchdogs as it is deemed an intervention from the President to the KPK as an independent body, sidelining the role of the parliament. Despite all the controversy and discourse, on October 6 the President inaugurated three persons recommended by the fact-finding team earlier.

Criminal charges were also filed against two anti-corruption activists from the civil society organisation Indonesia Corruption Watch (ICW), Emerson Yuntho and Illian Deta Sari. The case against them is also seen as part of the systematic effort to weaken the anti-corruption movement in Indonesia (see AHRC-UAC-148-2009). Emerson and Illian were charged with defamation for questioning the attorney general's annual budget.

7.b The Witness Protection Agency

Under the mandate of Law No. 13 of 2006 the Indonesian government established the Commission for Witness and Victim Protection (LPSK). Commission III of the House of Representatives then selected seven commissioners who were eventually inaugurated by the President on August 8, 2008.²⁸

The commission is charged with providing: protection to witnesses and victims; providing assistance to victims with medical and psychological treatment; facilitating victims and witnesses by way of compensation or restitution through the courts, and coordinating with other law enforcement officials and institutions²⁹.

In 2009, after three years, the Commission for Witness and Victim Protection is struggling with operational costs due the government's woefully late allocation of it's budget. As a result the LPSK is still pre-occupied with providing provisions for the secretariat and staff recruitment.³⁰ Currently the LPSK is completing several consultations with interested parties to determine it's operational procedure with regard to protection and assistance programs.

Significantly, the ability to provide assistance to victims or witnesses of a specific human rights violation is dependent on a guilty verdict being given by the human rights court. This is an incredibly arduous requirement³¹ that does not provide immediate assistance to those most in need. Furthermore, public awareness of the existence of the LPSK is low due it's lack of outreach³².

7.c Military Court System

The Military Tribunal in Indonesia

The military tribunal was established under Law No. 31 of 1997 and so far has proved unable to bring justice to victims of military violence. There are several problems that plague this court and allow it to perpetuate impunity.

The military court has the authority to prosecute anyone deemed to have committed a crime within a military area or an area hosting military operations, including civilians.³³ This is deeply concerning and is against established norms of criminal justice relating to fair trial.

Moreover, the existence of a commander, who has authority to punish (*Atasan yang berhak menghukum / Ankum*), as well as the officer, who delivers the case (*perwira penyerah perkara / pepera*), opens the gap for a high degree of subjectivity and discretion,

as both of them have the authority to determine whether to proceed the case to court. They can also decide whether to stop an inquiry or investigation, instead favoring non-legal mechanisms.³⁴

The military tribunal, under the previous law, could also prosecute officers involved in cases of gross violations of human rights, such as cases of Trisakti and Semanggi II in 1998 - 1999 and the kidnapping of activists from 1997 to 1998 (see section 5). The tribunal acts to do this as part of a strategic measure to prosecute its military officers before another court can indict them. This prevents the accused being tried again at a later time by any other court or being investigated by the Attorney General (which would violate the fundamental law of *ne bis in idem* preventing a person being tried twice for the same crime) In addition, the punishments given to defendants, by the tribunal, are often not proportionate to the crime (see Theys Eluay case above).

The military tribunal lacks transparency and independence and it is difficult for civil society to access information about the military tribunal.

New Bill of the Military Tribunal

At present there is a draft bill on reform of the military tribunal being debated by parliament, after it agreed to amend Law No. 31/1997, which is no longer considered able to fulfill the demands of security sector reform. It was recognised that reform of the military justice system must be done through the civilian process, giving supremacy to those given power through democratic elections.

This challenge was answered by the House of Representatives through the establishment of a special committee on June 28, 2005. The main debates centre around jurisdiction of the military tribunal toward members of the military who commit general crimes. The government has rejected suggestions of some factions in the House that recommended involving the police as investigators of general crimes committed by the TNI. However, the government insists that the military police (PM) should conduct such investigations. As the previous administration failed to successfully carry through the reform bill, the current administration has the duty to conclude this, taking seriously its obligations under international law and the Indonesian constitution.

8. Recommendations

1. Torture has to be criminalised according to the definition in the Convention against Torture by amending the Indonesian Penal Code.
2. President Soesilo Bambang Yudhoyono should honor his promise to resolve the

murder of human rights defender Munir within the first 100 days of his second presidential period. Munir's case need to be reviewed under consideration of all available evidence and with the full commitment of the Attorney General's Office to its role in the criminal investigation and prosecution.

3. Any obstructions of the work of the Anti-corruption Commission especially from the Police has to stop. The KPK needs the full support and compliance from all government institutions and should be strengthened in its work to fight corruption within the institutions of justice.
4. The Sharia Law in Aceh has to be repealed since its provisions include the application of the death penalty and torture as a form of punishment and violate fundamental freedoms.
5. The military presence in Papua needs to be reduced and not extended as currently planned to avoid an escalation of the conflict and to strengthen civil rule. The autonomy law needs to be given full implementation. A special investigation team of the National Anti-corruption Commission should be mandated to address local corruption in the civil administration.
6. All economic activities by the Indonesian military forces (TNI) and the police need to be inhibited strictly and special investigations for corruption in these bodies under control of the Indonesian National Commission against Corruption (KPK) need to be ensured.
7. The trans-migration has to stop until sustainable ways are found to protect the rights of indigenous people in trans-migration target areas.
8. All prisoners in Papua who have been convicted for the expression of their political opinion in a peaceful manner need to be released.
9. The Attorney General's Office needs to be reformed without delay to ensure thorough investigations and independent prosecutions to end the ongoing impunity.
10. The House of Representative (DPR) should amend the military law (National Law 31/1997) regarding military courts in particular to ensure that members of the Indonesian military who committed crimes against civilians will be brought to a civil court jurisdiction
11. To end impunity and acknowledge the suffering of numerous victims under the Suharto Regime and thereafter, all government institutions and in particular President Yudhoyono should support the struggle of victims for justice and redress. In this regard the Human Rights Court law has to be fully applied.
12. The government should start the truth seeking and reconciliation process in particular in Aceh referring to law no 11 of 2006 regarding the Aceh government and Papua referring to law no 21 of 2001 regarding special autonomy.
13. The government should give full support including a large operational budget to support the work of the Commission for Witness and Victim Protection.
14. The government should ratify the International covenant against involuntary disappeared to strengthen national law of human right

15. Military Courts: Members of the Indonesian military who conduct general crimes should be under the jurisdiction of the civil courts based on an investigation conducted by the police using the Penal Code. Civilians should not be prosecuted by the military tribunal. The Military tribunal should only prosecute members of TNI who commit military crimes such as desertion, insubordination or leaking of the military secrets. The military tribunal should not be able to investigate and prosecute cases of human rights violations and gross human rights violations- this is the mandate of Komnas HAM and the jurisdiction of the human rights court (for offences after 2000) and an ad hoc human rights court (for offences prior to 2000).
16. The government should establish a national commission for legal institutional reform to ensure that human rights principles such as the right to remedy will be made effective.
17. The police needs further training and has to stop the extensive use of firearms during civilian protests.

9. Annex 1 - Cases of gross violations of human rights and their development in the judicial process

65 Massacre (1965)

After Soeharto's coup millions of communist suspects and party members were killed or detained for decades. Many continue to be stigmatized and suffer from discrimination.

1. Komnas HAM: Inquiry started in 2008 and is still waiting for budget allocation from the Ministry of Finance.
2. AGO investigations have not started, Human Rights Court was not set-up due to lack of investigation by the AGO
3. Other developments: In 2006 The Supreme Court has issued a recommendation to the President to issue a presidential decree for rehabilitating political prisoners of 1965 massacre but until now the president has still not acted.

Mysterious Shooting cases (1981 -1984)

Between 1981-1984 the New Order regime of President Soeharto conducted military operations to increase security and public order. Mysterious shootings occurred in some provinces of Indonesia and, based on a monitoring report by Komnas HAM, around 5000 people were killed during this military operation.

1. Komnas HAM: Inquiry started in 2008 and is not yet finished.
2. AGO investigations have not started, Human Rights Court was not set-up due to lack of investigation by the AGO

Tanjung Priok (1984, September 12)

The Armed forces raided and shot Muslims who moved to the District Military command 0502 of North Jakarta. In the fallout several human rights violations occurred including Summary Killings (14), Extrajudicial killing (1), Enforced Disappearances (15), torture (15), unfair trial (58) and arbitrary arrest and detention (96).³⁵

1. Komnas HAM: Inquiry finished in 2000.
2. The prosecution by the AGO was finished after a decision by parliament to establish an ad hoc court. The Human Rights Court trials finished at the last instance (Supreme Court level) with all perpetrators acquitted. This case requires a review.
3. Other developments: In 2007 a lawsuit was submitted to the Central Jakarta District Court to demand victim's right but was rejected by the judges.

Talangsari case (February 7, 1989)

Soldiers from Garuda Hitam Military Resort Command in Lampung Province of Indonesia attacked village Talangsari in Lampung Province. 246 people were killed.

1. Komnas HAM: Inquiry finished in October 2008 and submitted to the AGO
2. The AGO rejected and did not conduct an investigation, a Human Rights Court was not set-up due to lack of investigation by the AGO

Abduction and Enforced Disappeared students activist between 1997 / 1998

Between 1997 and 1998, 24 students and other activists were been abducted by the Army Special Forces Command because of their activism in the struggle for change and democracy in the New Order government.

1. Komnas HAM: Inquiry finished in 2006.
2. The AGO rejected and did not conduct an investigation, a Human Rights Court was not set-up due to lack of investigation by the AGO

Trisakti and Semanggi I+II incidents (1998)

On 12 May 1998, four students were shot dead by armed forces at the University of Trisakti in Jakarta during a demonstration to urge political reform. On November 8 – 14, 1998 the armed forces committed violence against students and civilians during a demonstration to reject the Special Session of the House of Representatives (DPR). The armed forces opened fire and as a result more than 14 students died and 109 people were

injured. On September 1999, the armed forces shot students who voiced their rejection of the National Security and Safety Bill.

1. Komnas HAM: Inquiry finished in 2003 and submitted to the AGO.
2. AGO: still rejects to conduct investigation. The plenary session of the House of Representatives rejected a recommendation to establish an ad hoc human right court.

May Riots (13 - 15 May 1998)

These riots occurred in several places in Indonesia. Armed forces were not deployed to keep the peace and maintain order. Widespread looting took place and the mall and shopping center were set on fire. Several of local NGOs note that large-scale rape occurred as well as attacks on ethnic Tionghoa (Indonesian-Chinese) in several cities.

1. Komnas HAM: Inquiry finished in 2003.
2. AGO action: The Attorney General still rejects to conduct an investigation. The plenary session of the House of Representative refused to establish an ad hoc human right court.

East Timor (1999)

Before and after the referendum, various human rights violations in East Timor were committed by Indonesian armed forces and militias supported by the military. It is reported that abuses such as enforced disappearances, torture, summary killing, detention and arbitrary arrests, burning and rapes occurred.

1. Komnas HAM: Inquiry finished in 2000.
2. AGO action: Prosecution finished after a political decision by parliament to establish an ad-hoc court. Human Right Court trials finished at the Supreme Court level. All perpetrators were acquitted.
3. Other developments: Held Truth and Friendship Commission (CTF) between Indonesia and East Timor and as a result impunity for all of perpetrator (2006).

Abepura case (December 7, 2000)

The police conducted an operation against local residents and university students in the Abepura regency of the Papua province to find the perpetrators of an attack the Abepura police station earlier. This reportedly lead to torture, police violence, extra-judicial killing, forced eviction, arbitrary arrests and detentions and unfair trials.

1. Komnas HAM: Inquiry Finished 2003.
2. AGO: Investigation finished and conducted prosecution in 2004. Since the case occurred after 2000, no parliamentary decision was required to initiate Human Right Court trials. The permanent Human Rights Courts finished at the Supreme Court level. All perpetrators were acquitted and no reparation for victims and families of victims was provided.

Wasior (June 13, 2001)

This case occurred in Wondiboi village of Wasior district, Papua. Five members of Mobil Brigade of the Police (Brimob) and one civilian were killed in base camp of the commercial company *CV Vatika Papuana Perkasa*. Subsequently a police operation was conducted by Manokwari district police during which human rights violations were committed against local residents.

1. Komnas HAM: Inquiry finished in 2005.
2. AGO action: The Attorney General rejects to conduct investigation. As a result no trials of the permanent Human Rights Court were initiated.

Wamena (April 4, 2003)

This incident was triggered by the stealing of armory of the Military District Command 1702 (Kodim) of Jaya Wijaya Regency in Papua. The thieves got away with 29 guns and 3500 bullets. After this incident, the Kodim conducted a military operation during which torture, shooting, persecution, summary killing and the burning of the school and clinic took place.

1. Komnas HAM: Inquiry finished in 2005.
2. AGO action: The Attorney General refused to conduct investigation. As a result no trials of the permanent Human Rights Court were initiated.

10. Annex 2 - Abbreviations

AGO - Attorney General Office
 Brimob - Mobile Brigades of the Police
 CTF – Truth and Friendship Commission
 DPR - House of Representatives
 ICW - Indonesian Corruption Watch
 IDR - Indonesian Rupiah
 KASUM - Solidarity Action Committee for Munir

Kodim - District Military Command
 Komnas HAM - National Commission for Human Rights
 Kopassus - Special Force Command
 KPK - Commission against Corruption / Corruption Eradication Commission
 LPSK - Commission for witness and victim protection
 OPM - Free Papua Movement
 PDP - Papuan Tribal Presidium
 POLRI - National Police of Indonesia
 TNI - National Army of Indonesia
 TRC - Truth and Reconciliation Commission

Notes

- 1 An english translation of the document can be downloaded at http://indonesia.abrchk.net/docs/PoliceRegulationNo.8-2009_PERKAP_HAM_english.pdf
- 2 <http://www.papuaweb.org/goi/otsus/files/otsus-en.html>
- 3 The term West Papua used in this report applies to the entire western half of the New Guinea island, which is part of Indonesia and consists of two administrative provinces: Papua and West Papua.
- 4 Drooglever, Pieter J.: *Een Daad van Vrije Keuze: De Papoea's van Westelijke Nieuw-Guinea en de grenzen van het zelfbeschikkingsrecht*. Verlag Boom, Amsterdam, 2005. ISBN 90-8506-178-4
- 5 *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: Anatomy of a Betrayal* by John Saltford (2002) ISBN 0-415-40625-0
- 6 such as Jayapura, Sorong, Timika, Kerom, Biak, Serui, Wamena, Merauke and Puncak Jaya district
- 7 art. 5, 23, 57 of the Autonomy Law put obligations on the local government and local parliament to protect and respect traditional culture.
- 8 Indonesian Penal Code, p.32, <http://indonesia.abrchk.net/docs/IndonesianPenalCode.pdf>
- 9 See HA-28-2008 and AHRC-HAC-006-2009
- 10 To see the contents of the Act, visit www.foodjustice.org
- 11 This denial of the government was also seen in 2005
- 12 According to the report by FAO 2009, the proportion of undernourished in total population is 16%. However, given that the exact data does not provide by the government, and in particular, food security and malnutrition in Papua is not clearly disclosed, the proportion is estimated more than 16%.
- 13 See some articles of the Aceh Syaria Law such as article 13 and 17 (whip punishment), article 24 (regarding whip punishment and stoning)
- 14 Content of law No 44 of 2008 regarding Anti Pornographic and porno action has serious problem such as terminology of pornography (article 1 paragraph 1), terminology of produce (article 4 paragraph 1) and the explanation, requirement of the production (article 13, article 14, article 17, article 18, article 19 (a, b, c) and article 20. And also terminology of naked (article 4 .p 1 of d and the explanation) and paragraph 2 (a) neglect pluralism of Indonesia, prohibition and limitation (article 4 to article 14) and also protection of pornography (article 17 until article 21). Those articles if implement will increase human right violation that have been guaranteed by several of the national law regarding human right.
- 15 The Majority of Indonesians are Muslims but the Indonesian Constitution does not refer to Islam as a state religion. Indonesia 's five founding principles are supposed to act as the state ideology called 'Pancasila' to accommodate differences. The five principles are first, belief in the one and only God, second, Just and civilized humanity, third, the unity of Indonesia, Fourth, Democracy guided by the inner wisdom in the unanimity aris-

- ing out of deliberation amongst representatives, and five, Social justice for the whole of the people of Indonesia.
- 16 The Ahmadiyah is an Islamic group that has practiced its beliefs for about 100 years under various regimes without any incidents in the past.
 - 17 Two of places that occurred violence against members of Ahmadiyah such Manislor in Kuningan of West Java Province and Lombok of the NTB Province. Hundreds members of Ahmadiyah still become refugees in Lombok without enough sufficient protection
 - 18 Dozens of members of the AKKBB got seriously injured after being attacked by bamboo, stones and sticks.
 - 19 The Law No 1 /PNPS/ 1965 was issued when Indonesia in the emergency situation
 - 20 See Brief Chronology of Events. On 14 April, 2007 former Director of Garuda Airways, Indra Setiawan and former Secretary to the Chief Pilot Airbus, Rohainil Aini, were arrested for the murder of Munir. On January 25, 2008, The Supreme Court sentenced Polycarpus to 20 years imprisonment for murder.
 - 21 Supporters of both parties attended every trial of this process and marked their presence with campaign T-shirts. While victims groups and NGOs supporting Munir's case wore the slogan "Killed because of Truth", the bogus supporters of Maj. Gen. Muchdi PR used T-Shirts with the slogan "Reject foreign intervention" and "free Muchdi PR"
 - 22 In his inauguration speech, President Yudhoyono said "we also want to build a civilized democratic system, a democracy that provides room for freedom and political rights for the people but without dismissing stability and political order. We also want to create justice which is marked by a respect for non-discrimination and equal opportunities while continuing to maintain social solidarity and protection for the weak"
 - 23 According to the Commission for Disappeared and Victims of Violence several such efforts to initiate investigations by the AG were made in 2009 where a public hearing was held by Commission III of House Representatives and the Attorney General and also a limited meeting between special committee of the house representative regarding enforced disappeared of students activist 1997 – 1998.
 - 24 Cases which have been finished by Komnas HAM are Talangsari (1989); Trisakti and Semanggi (1998 – 1999); Wasior Wamena (2001 – 2003); Abduction and Enforced Disappeared students activist (1997 – 1998); May riot (1998)
 - 25 AHRC-OLT-030-2009, INDONESIA: UN Working Group urged to intervene into disappearances from 1997-98, as impunity continues. <http://www.abrchk.net/statements/mainfile.php/2009statements/2274/>
 - 26 In 2001, the plenary session of the House of Representatives (DPR) issued political recommendations that rejected the Trisakti and Semanggi's cases being brought to an ad hoc human right court.
 - 27 It should also be noted that the old TRC law No. 27 of 2004 also does not contain a definition of perpetrators.
 - 28 The commissioners of the LPSK are Mr. Abdul Haris Semendawai (chairperson), Mr. H Teguh Soedarsono (members of commissioner), Mrs. Myra Diarsi (members of commissioner), Mrs. Lies Sulistiani (members of commissioner), Mrs. Lili Pintauly (members of commissioner), Mr. I Ketut Sudiharsa (members of commissioner), and Mr. RM Sindhu Krishno (members of commissioner).
 - 29 Under Law No. 13 of 2006
 - 30 Office of the LPSK is in the Jalan Proklamasi No. 56 Gedung Perintis Kemerdekaan No. 56 Jakarta of Indonesia
 - 31 It specifies that the person must exhaust all national legal processes before proceeding to the human rights court and then it depends on a guilty verdict being given
 - 32 See the government regulation No 44 of 2008 regarding compensation, restitution and victim assistance .
 - 33 This is as mentioned in the provisions of article 9, paragraph 1 letter d, which mentions that a person outside of the military who committed acts within the military crime by permit of the minister of justice can be brought to the military tribunal.
 - 34 As mentioned on the article 122 and article 78 of Law No 31/ 1997
 - 35 Monitoring report of the KontraS

N E P A L

HUMAN RIGHTS ON HOLD AS POLITICAL INFIGHTING CONTINUES

1. Political turmoil and degrading security conditions

2009 was a year of political stalemate and mistrust in Nepal, which has inhibited the peace process and progress on the drafting of a new constitution for the country to guide it into the post-conflict era. Even coalition partners that form the government are sharply polarized along political lines and interests, and this seriously hampers the functioning of democratic politics of consensus and compromise. Brinkmanship politics has in this climate become increasingly common, further alienating the political actors from one another. Within this political impasse, impunity for past human rights violations has remained and the prevention of further violations has been difficult.

a. Symbolic events fuelling tensions and mistrust among the political actors

The signature of the peace agreement and the relatively quiet climate which surrounded the 2008 elections did not appease strong tensions among the political actors. This was made particularly clear in early May of 2009 when the former Maoist Prime Minister Pushpa Kumar Dahal (also known as Prachanda) resigned after President Dr. Ram Bharan Yadav annulled a cabinet decision to sack the Commander of the Army, General Katuwal whom Prachanda accused of defying the government's orders by reinstating eight Generals retired by the Maoist administration.

It remains unclear under the interim constitution whether the President actually has the power to annul such a decision.

This naturally developed into a hot issue, as the Maoists claimed that the President's annulment was made as a result of corrupt foreign influence, and that this constituted a distinct step away from establishing civilian supremacy of the Nepal Army (NA).

In the aftermath of this event, a movie clip of Prachanda recorded in January 2008 was circulated in the local media where he spoke of how the Maoist party had increased the number of its army personnel presented for registration and verification. He further

insinuated that some of the money allocated for the cantonments would be used for preparing a new armed struggle. Unsurprisingly, this exacerbated political mistrust even further.

During the remainder of 2009, the Maoists organised hundreds of strikes calling for civilian supremacy of the NA. These protests have effectively disrupted daily life, and have also frequently turned violent, resulting in clashes between protestors and security forces. On December 20 in Kathmandu, at the onset of a nationwide general strike, a violent clash between Maoist protestors and security forces led to 75 people being injured.

Those different events have cast doubts about the willingness of the political parties to effectively establish a long-term peace and respect the rules of the democratic game. The persisting tensions directly impacted the constitution drafting process.

b. The drafting of the constitution

The absence of good will and cooperation between the political parties had a negative impact on the work of the Constituent Assembly (CA). Parties from across the political spectrum on several occasions boycotted CA sessions, delaying the work on the drafting of the new constitution further.

The deadline for the promulgation of the constitution was set to May 28, 2010, however due to the various delays and interferences during 2009, most commentators are doubtful as to whether this deadline will be kept.

Speculations abound in the media about what could happen should the CA not manage to finish the draft for the new constitution by the given date, with a new Maoist uprising being portrayed as the most prominent threat.

The federalist structure

One of the toughest political challenges in contemporary Nepal is reaching a consensus on the sensitive issue of federalism. Since the amendment of the interim constitution in 2008, the term “federalism” has been constitutionally enshrined in the road map of Nepal’s future. However, most political parties have remained vague and undecided when it comes to actually deciding how such a federalist state should be structured. The Communist Party of Nepal – Maoist (CPN-M) has been the only political party with a clear-cut model for a federal republic of Nepal; one which they have argued should be based mainly on ethnicity.

In the midst of the frustration over the uncertainty of the federal structure, the Maoists

began a series of declarations of “autonomous federal states” on December 11. This was strongly criticized by the President and Prime Minister, along with several party leaders and the national media. The CPN-M dismissed the critique, arguing that the declarations had merely been “symbolic”.

As 2009 drew to an end the Committee on State Restructuring and Redistribution of Resources had yet to submit a concept paper on the federal structure of Nepal to the CA. However, a multitude of commentators are arguing that the likely outcome is a federation drawn along ethnic lines.

Should an ethnic federation become reality, the AHRC has serious concerns as this has proven a dangerous path for many post conflict societies elsewhere; risking national disintegration and increasing ethnic antagonism.

c. Discharging and rehabilitating Maoist army personnel

The Special Committee to Supervise, Integrate and Rehabilitate Maoist Army Personnel has not made significant progress during 2009, as there are still approximately 19'000 Maoist combatants being kept in cantonments at various sites around Nepal. This is an issue that has an extremely high political standing in the country, and hence one that is imperative to solve in order for the peace process to move forward.

Significant progress has however been made with regard to the discharge of the Disqualified Maoist Combatants (DMCs). The DCMs were verified as ineligible to be integrated into the Nepali security forces by the United Nations Mission in Nepal (UNMIN) in 2007. Some 4'008 DMCs were disqualified due to either being minors, or otherwise having been recruited to the Maoist forces after the signing of the Comprehensive Peace Agreement (CPA).

In November 2009, the CPN-M (Maoist) finally announced that they would proceed with the discharge of these DMCs from their cantonments. On December 16 this announcement was confirmed by the signing of an action plan by the Government, the CPN-M and the UN Country Team for the discharge of the DMCs.

The actual discharge began on January 7, 2010 and was subsequently finished on February 8, 2010. By then, approximately 40 per cent of the 4'008 DMCs had already left the cantonments on their own accord, mainly due to disappointment and frustration with the discharge process. For many of the DMCs, the disappointment stems from being deemed “disqualified” combatants, even though they have fought for the Maoists just like the other “qualified” combatants.

Upon discharge the DMCs are vulnerable to recruitment by paramilitary or criminal groups. In order to prevent this, various UN agencies have developed a rehabilitation package that DMCs are eligible to claim within a year following their discharge from the cantonments. The rehabilitation package includes the options of vocational training; formal education; health education training, or support for a small business initiative.

However, not all DMCs are positive with regard to the rehabilitation packages. Many of them have argued that this is a humiliating option for them, as they joined the People's Liberation Army (PLA) in order to liberate their country from oppression, not to end up making handicraft items supported by UN money.

d. The deterioration of security and proliferation of armed groups

The proliferation of criminal armed groups has increased steadily in Nepal's southern plains region, known as the Terai, during recent years. The main *raison d'être* of these groups is the smuggling of various commodities and arms, feeding on political and ethnic discontent in the districts, as well as on the lack of security in the villages.

The proliferation of such groups has led to a steep increase in criminal activities in the districts, resulting in daily reports of abductions, rapes, killings, explosions of improvised explosive devices (IEDs), et cetera. Naturally, this has had a highly disruptive effect on everyday life in the Terai.

On July 31, 2009 the Nepal Home Minister Bhim Raval announced publicly that there are currently 109 armed groups in Nepal, and further stated that most of those are purely criminal elements. He claimed that this constitutes a "security nightmare" which should be dealt with sternly, by the introduction of a Special Security Plan (SSP).

The announcement by the Home Minister was based on a report produced by the Home Ministry in April 2009, entitled "Categorization of armed groups and suggestion on talks" in which the armed groups are categorised as political, religious, political criminal, religious criminal and purely criminal. The conclusion of the report is that the vast majority of the armed groups, 70 out of 109, are purely criminal.

Following the mapping of these criminal groups, the government commenced the implementation of the SSP, which increased the strength of the Nepal Police (NP) and the Armed Police Force (APF) by a total of 16'000 new recruits in the Terai and the mid-western hills, with the aim of curbing crime and disruptive activities, such as highway blockades.

2. The absence of a system successfully protecting human rights

In this report, several types of human rights violations will be presented. In only a few cases did the police actually fulfil its duties to receive a complaint, investigate a case, gave protection to the victims and prosecuted the perpetrators. When the victims do not possess enough resources to convince police officers to defend their cases they are unlikely to be allowed even to file their complaint.

a. Governmental inability and unwillingness to pass appropriate legislation

The government's weakness and instability has led to its failure to adopt proper legislation and fill the gaps in the legal system that allow many grave human rights violations to go unpunished. Several laws such as the State Cases Act, Army Act, Police Act, Evidence Act, Commission of Inquiry Act or the Public Security Act prevent the effective investigation of past human rights violations and have not been amended despite the commitment expressed during the signature of the Comprehensive Peace Agreement to bring perpetrators of human rights violations to justice.

The Comprehensive Peace Agreement also made provisions for the formation of a high level Truth and Reconciliation Commission 'to conduct investigations into those who were involved in gross violation of human rights at the time of the conflict and those who committed crimes against humanity'. Nevertheless, at the time of writing, some three years after the peace agreement, this commission still had to be established and provisions made for it in the agreement were used as an excuse for the police to refuse to file cases of conflict-related human rights violations on the basis that it fell under the jurisdiction of the TRC.

At the time of writing, the stalemate regarding a bill on enforced disappearances reflects how the mistrust between the political forces in the country, further aggravated by the lack of strong institutions to frame policy, have hampered the implementation of measures necessary for the establishment of the peace process and the realisation of human rights in the country, especially those included in the Comprehensive Peace Agreement. The Interim Constitution of Nepal mandates the government to 'provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of disappearances made during the course of the conflict.' In October 2008, a bill on Enforced Disappearances (Charge and Punishment) Act 2008 was drafted,¹ and it was welcomed as a positive step toward accountability for the crime of enforced disappearance, but it also received criticism

¹ Major work of Advocacy Forum on the issue of disappearance, Advocacy Forum website, URL: <http://www.advocacy-forum.org/departments/human-rights-documentation-and-monitoring-department/index.php>

concerning the reparations or punishments included within it were falling short of international standards and as it failed to qualify systematic disappearances as a crime against humanity.² To ensure the adoption of the bill, the Maoist-led government pushed it through in an ordinance in an attempt to short-circuit the democratic process, since it avoided public and legislative debate as well as consultations with the National Human Rights Commission and national human rights NGOs³.

The Person Disappearance (Crime and Punishment) Ordinance – 2009 was eventually promulgated on February 10, 2009. Following international and internal criticism regarding both the content of the ordinance and the way it was adopted, in April 2009 the government submitted to the parliament a substitute bill in which the maximum penalty applicable for crimes of enforced disappearances was increased.⁴ Nevertheless, even with those changes, the bill is still not up to the international standards and it was denounced in a joint memorandum submitted by major international and national human rights NGOs at the end of August,⁵ which aimed at drawing the government's attention to the adjustments which would be necessary. These included the definition of systematic disappearances as a crime against humanity, the clear definition of the chain of responsibility in the crime of disappearances, measures to protect the rights of the victims and the witnesses, etc. An upgraded version of the bill was finally approved by the council of minister and sent to the Parliament in November, nevertheless the OHCHR in its latest report⁶ regrets that the definition of disappearances as a crime against humanity was still not included in the bill and that the bill kept a restrictive 6-month limitation to file a case of enforced disappearances. At the time of writing, the first ordinance had never been implemented and it remained uncertain whether the latest draft would be adopted and the Commission on Enforced Disappearances be effectively adopted.

Similarly, the government has failed to adopt legislation criminalizing acts of torture or of

2 Major work of Advocacy Forum on the issue of disappearance, Advocacy Forum website, URL: <http://www.advocacyforum.org/departments/human-rights-documentation-and-monitoring-department/index.php> and Nepal rights groups raise issue of 'enforced disappearances, One World South Asia, 11 December 2008, URL: <http://southasia.oneworld.net/todaysheadlines/rights-groups-raise-issue-of-enforced-disappearances>

3 Nepal issues controversial forced disappearance ordinance, Deutsche Presse-Agentur, 6 February 2009

4 OHCHR-Nepal encourages disappearance law consistent with international standards, United Nations Office of the High Commissioner for Human Rights, 25 April 2009, available at: http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202009/April%202009/2009_04_25_Disappearance_Bill_E.pdf

5 Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill by Accountability Watch Committee, Advocacy Forum, INSEC, Amnesty International, the Asian Federation against Involuntary Disappearances, Human Rights Watch, International Center for Transitional Justice, International Commission of Jurists, 30 August 2009. Available at: http://www.amnestynepal.org/content/download/20090823/Nepal_DisCom_joint_memo%5BFINAL%5D.pdf

6 Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal, A/HRC/13/73, 5 February 2010, available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/HC/2010_HRC_Report_E.pdf

caste-based violence. In this context, the difficulties faced by the Constituent Assembly to draft a new constitution are likely to further compound this problem, as these will further delay the process of creating such legislation.

b. General weakness of the state institutions

The weaknesses of state institutions are further aggravated by the incapacity of the institutions to implement already existing laws, in particular, the inability of the justice delivery institutions to provide justice to ordinary Nepali citizens. The 10-year-long conflict has inflicted long-term damage on the justice institutions, which are now plagued by corruption and unable to have effective jurisdiction over large parts of the country. This results in a situation in which human rights violations can be perpetrated with impunity.

Those living in the remote rural and mountainous areas of the country face significant difficulties in accessing the justice-delivery institutions - as only 75 District Courts are operating in the country they may be required to travel for 2-3 days to file a case and to come back for the hearings, at their own expense. Village Development Committees also have limited judicial powers to settle petty disputes. Nevertheless, following threats from the Maoists and other armed groups during and after the conflict, most of the VDCs' secretaries have fled the villages and settled in urban areas. Moreover, state institutions at the local level were also under physical attack during the conflict with destruction of infrastructure post-conflict redevelopment of the judicial system difficult.

Therefore, a majority of Nepali citizens only have limited access to justice institutions very limited hope of their case being successfully handled, due to rampant corruption and high inefficiency in the system, which results in tens of thousands of cases being backlogged at one level or another of the judicial system and in obstacles to the enjoyment of the right to due process.

Judicial institutions have seen their independence limited further since the peace agreement through frequent political interference. This prevents lawyers, judges and police officers from conducting their working properly. In April 2009, for example, Young Communist Leagues cadres in Surkhet district physically interrupted a court hearing to demand a rigorous sentence for the accused and locked his lawyer, Mr. Nanda Ram Bhandari, in his chamber. Worryingly, the police refused to file any case against those who had hampered the trial.

Such practices have degraded the system to such an extent that it is now the general public who interfere within the process of justice. In 2009, the lawyer defending a person accused of having murdered a young girl - Khyati Shrestha - saw his house surrounded by

crowds of ordinary citizens pressuring him not to take up the case.

A crippled police system further adds to the difficulties faced by victims of human rights violations who are seeking redress and protection. Inadequate financial and human resources allocated to this system and a lack of checks and balances, which would allow police officers to be held accountable for human rights violations and abuses of power and authority, have prevented the police system from ensuring the protection of the rights of citizens, as will be seen in particular in the section on torture below.

The malfunctioning criminal justice system creates several levels of discrimination and inequality. Those from the poorest and most vulnerable sections of society, including women, Dalits and indigenous people, are less likely to achieve justice, while those with resources and connections are likely to see their case successfully handled. Furthermore, among the perpetrators, those who have enough money or receive enough support from influential individuals or organisations and institutions, such as the army, the Maoists or the political parties are likely to not be prosecuted, while those without such support are likely to be severely sanctioned and are vulnerable to ill-treatment or worse by the police during interrogation and detention.

c. Continuing impunity of human rights violations

In the context of weak institutions and improper legislation, impunity for both conflict-related and post-conflict human rights violations remain a major problem. At the time of writing, not a single perpetrator of grave human rights violations committed during the conflict had been brought to justice.

In its annual report to the Human Rights Council, the head of the OHCHR-Nepal stated that 'Despite the public and private made commitments by the Government, including those made by the Prime Minister before the General Assembly in September 2009, there has been no substantial progress in addressing impunity for conflict or post-conflict human rights violations and abuses. Both the Nepalese Army and UCPN-M continue to resist attempts to hold their personnel accountable for human rights violations and abuses and to withhold cooperation from civilian authorities responsible for investigating these cases.'⁷

The lack of progress in the prosecution of those responsible for the death of Maina Sunuwar is a telling example of the obstacles encountered in the fight for the

⁷ Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal, A/HRC/13/73, 5 February 2010, available at: http://nepal.obchcr.org/en/resources/Documents/English/reports/HRC/2010_HRC_Report_E.pdf

accountability of conflict-related violations. Four military officers are accused of having illegally arrested, raped and tortured this 15-year-old girl to death on 17 February 2004. Maina's mother, with support from local NGO Advocacy Forum, has been constantly fighting for a legitimate and impartial investigation, to determine the exact circumstances of her daughter's death and see the perpetrators properly prosecuted. This case has been presented in detail in several recent AHRC annual reports.

They have faced frequent obstacles and opposition from army officers and the police who first refused to file the case because it concerned the military. The attitude of the military extended beyond a simple lack of cooperation, involving the obstruction of the inquiry and denial of Maina's initial arrest, the threatening of witnesses and the fabrication of allegations about how she had been killed, among other ploys. On 8 September 2005, following the recommendations of a Military Court of Inquiry, a Martial Court held that three military personnel were guilty of not having observed the proper procedures in a non-transparent trial which was challenged by Maina's mother supported by human rights NGOs.

Due to mounting national and international pressure – including the direct involvement of the head of the OHCHR office in Kathmandu – on September 18, 2007 the Supreme Court ordered the authorities to carry out the investigations within three months and prosecute the offenders. A case was subsequently filed against four military officers, Major Niranjan Basnet, Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun on January 31, 2008.

Nevertheless by that time, all of them had been promoted. In a statement on September 13, 2009 the District Court of Kavre ordered the Nepal Army Headquarters to immediately proceed with the suspension of Major Basnet and to submit all the files containing the statement of the people interviewed by the Military Court of Inquiry. Major Basnet was eventually repatriated from Chad on 12 December 2009, giving rise to hopes that he would be prosecuted, which would symbolically mark the end of the area of impunity for human rights violators in Nepal.

However, at the time of writing at the end of 2009, no further progress has been made in the prosecution of the perpetrators. Upon his arrival at the Tribhuvan International Airport the military police arrested Major Niranjan Basnet, committing to his presentation before the court the next day. This has not happened and Major Basnet, though under house custody, has not been prosecuted yet. More worryingly, the Defense Minister at that time Bidya Devi Bhandari publicly said that she would not allow the prosecution of Major Basnet arguing that he had already been brought before a Military Court, and that the constitution guarantees against double jeopardy.

Similarly, the file held by the Military Court which contains evidence that military officers tried to cover up this case, has not been presented before the court yet, raising concerns that the army might interfere again with the judicial process to prevent their personnel from being prosecuted by a civilian court.

Through this infamous case, it is possible to observe how impunity persists in Nepal. State institutions have shown that they are unable to prosecute members of certain organised groups and members of institutions. The police in this case considered that filing a case against army personnel did not fall under its jurisdiction. Furthermore, impunity prevails as the justice delivery institutions are unable to have the army respect district court orders. The country counts a number of organised groups that at present remain above and beyond the reach of the law and justice: the Nepal Army, the Maoists, and the political parties. These are resisting any attempts to hold their members accountable for their acts and are willing to resort to all means to ensure cases of human rights violations by their personnel do not result in prosecutions or convictions. The political turmoil in Nepal further strengthens divisions and the perception that attempts to prosecute human rights violators committed by the various groups is a direct attack on them which is being made by their adversaries.

The continuing impunity has seriously hampered the credibility of the state institutions and fosters resentments that threaten the peace process. It also sends the message that rights violations will go unpunished, which encourages further abuses.

3. Ongoing violations of civil and political rights

a. The worrying pattern of extra-judicial killings in the Terai.

While the security forces have been engaged in curbing crime and disruptive activities in the Terai region of Nepal, this has been accompanied by a worrying number of documented cases of extra-judicial killings by security forces in 2009.

Between February and October 2009, Nepali NGO Advocacy Forum (AF) documented 12 cases of extra-judicial killings in the Terai by the Nepal Police and the Armed Police Forces. The killings occurred in Banke, Dhanusha, Siraha, Saptari and Rupandehi districts. In total 15 people were killed and another eight were injured in these incidents.

The incidents were presented to the public and the media as being “encounters”, which implies mutual violence, such as for example, an exchange of fire between State agents and armed criminals. However, not a single member of the security forces were injured or killed during these supposed “encounters”.

Witnesses to the incidents have instead claimed that they resembled outright executions, frequently describing victims being taken away with their hands tied and subsequently shot. Evidence suggests that these cases should be categorized as extra-judicial killings, rather than “encounters”. Such justifications are witnessed in many countries in Asia to attempt to cover up extra-judicial killings by the authorities.

b. The ongoing fight against torture

Despite the signing of the Comprehensive Peace Agreement (CPA) in 2006, the use of torture remains endemic in Nepal. Since 2006, the Nepal Army and the Armed Police Forces have stopped taking people into custody, which accounts for a decrease in the use of torture. However, the use of torture by the police remains high: approximately 20 per cent of the nation’s detainees still report that they have been subjected to torture at some point during their period of detention. In some districts of the Terai, notably Dhanusha, Bardiya and Banke, in which armed groups are becoming more active, approximately 30 per cent of detainees reported that they had been subjected to torture, as of October 2009. The most radical increase with regards to torture in these districts was between July and October 2009, taking place after the implementation of the Special Security Plan (SSP).

The widespread use of torture by the police across the whole country reveals how the criminal justice system has become so flawed that it is now in the incapacity to provide protection to citizens and on the contrary may even increase their vulnerability.

The case of Sushan Limbu and Bhakta Rai who were arrested, publicly humiliated and badly beaten in front of a crowd by the police in Morang District on 12 July 2009 illustrates this point. The police then tried to arrange a cover-up by writing the medical report of the victims themselves and having the doctor sign it, by forcing the witnesses to delete video footage of the public beating and by threatening the human rights defenders who took on the case. Both victims were produced before a Chief District Officer on July 28. Bhakta Rai was released on bail while Sushan Limbu was charged under the Arms and Ammunition Act under which the CDO has the power to sentence people to up to seven years’ imprisonment after hearings. The CDO’s decision appeared to have been prepared in advance and did not take into account the lawyers’ arguments or objections. At the time of writing Sushan Limbu was still awaiting trial.

The police also denied Limbu’s right to medical treatment by delaying his admission to hospital to receive surgery to a finger, overlooking the doctor’s advice.

The victims were intimidated into not seeking legal remedies. After Baktha Rai was released on bail, Sushan Limbu allegedly received threatening calls claiming that he

would not be released on bail because he had told human rights activists about the police abuse. Local civilians have reportedly threatened Limbu's elder brother in relation to the case. On 2 August 2009 Baktha Rai managed to overcome police refusals to register his complaint and to file a case under the Torture Compensation Act. However he cut contact with human rights organizations shortly after, raising concerns that he may have received similar threats. He did not attend the court hearing regarding his case and the Morang District Court dismissed his application on 13 September.

This case reveals that, despite claims by politicians that they are combating torture, real political will necessary to address this issue and to hold the police accountable is still lacking. After the case was disclosed to the public the Home Ministry agreed to form an investigation committee whose only outcome was the issuance of an administrative warning to four police officers. Inspector Chakra Basnet - who is said to have ordered the beatings – has not been removed from his duties and at the time of writing at the end of 2009 was still serving in the same police station.

Article 26 of the Interim Constitution of Nepal states that torture should be punishable by law. Nevertheless, there was still no law criminalizing torture in Nepal as of the end of 2009. The emphasis is put on compensation for acts of torture, in order to elude the need for criminal sanctions against the perpetrators. Nevertheless, since the implementation of the Torture Compensation Act, 1996, 200 compensation cases were filed by victims of torture and their families. In only seven cases has the money actually been paid to the victims.⁸ Moreover the act has instituted a 35 days limitation for victims to seek compensation which has prevented many victims from accessing this remedy.

In its 2009 follow-up report, the UN Special Rapporteur on torture expressed 'concern regarding reports that suggest that torture allegations continue to frequently not be properly investigated and that perpetrators are not prosecuted or punished.'⁹ Since no mechanisms have been designed to provide assistance and protection to the victims of torture and other human rights abuses who are seeking redress, the victims are often unable to effectively seek remedies and vulnerable to threats and pressure.

8 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak- Addendum Follow-up to the recommendations made by the special Rapporteur, A/HRC/10/44/Add.5*, 17 February 2009 available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/10/44/Add.5&Lang=E>

9 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak- Addendum Follow-up to the recommendations made by the special Rapporteur, A/HRC/10/44/Add.5*, 17 February 2009 available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/10/44/Add.5&Lang=E>

2009 also showed that some dispositions incorporated in the Constitution providing guarantees against illegal arrest and detention, such as the obligation to be presented before a judge within 24 hours after arrest, are not respected. Richard Bennett, head of the Office of the High Commissioner for Human Rights in Kathmandu stated that 'The lack of proper registration and production before a court has resulted in persons being kept in illegal detention for periods from several days up to several weeks.'¹⁰

Police investigations rely mostly on extracting confessions from suspects or witnesses. Since judges do not systematically test the voluntary nature of a confession, confessions extracted under torture may be admitted as evidence, which reinforces the use of torture as a routine way of conducting investigations.

Recommendations concerning torture in Nepal:

1. The adoption of a law criminalizing torture is required to provide a legal framework under which perpetrators of torture can be prosecuted. Torture should be defined according to accepted international standards and be prohibited in all circumstances. Complicity of torture should also be made punishable. The law should also make provisions for the establishment of an independent and impartial body in charge of conducting investigations into allegations of torture. It has been seen that the investigation of police torture was taken care of by police officers belonging to the police station in which the act of torture had been alleged: such a situation must be avoided by all means since it creates a direct conflict of interest.
2. Measures should be taken to ensure the protection of victims of torture and their witnesses, including the systematic transfer of detainees complaining of ill-treatment or torture to another place of detention within a limited period of time.
3. Judges and doctors should be reminded of their crucial role in the prevention of torture and of their duty to systematically ask the detainees about any torture and ill-treatment to which they may have been subjected.
4. Human and financial resources need to be invested in the criminal justice system to encourage police officers to use other methods of investigation than confessions.
5. Article 116 of the Interim Constitution mandates that court orders are to be binding to all, therefore, measures must be taken to ensure the sanctioning of those who do not abide by court orders, including for financial compensation or medical treatment to torture victims.

¹⁰ Interview of Richard Bennett by Pratibedan Baidya, INSEC, 2 July 2009, URL: <http://www.inseconline.org/index.php?type=interviews&id=3&lang=en>

c. Attacks against journalist endangered freedom of expression

Reports by international and national organisations of journalists suggest that frequent attacks and threats against journalists by Nepalese armed groups and political parties continued to curtail freedom of expression and the freedom of the press in Nepal in 2009. News reports critical of any of these groups were often followed by threats. While the government has claimed to be upholding the freedom of expression and freedom of the press, it has shown itself to be unable and unwilling to protect these fundamental freedoms that underpin a healthy democracy. The attacks have concerned both national and local media as well as individual journalists and have been conducted by members of political parties, of armed groups and sometimes by police officers themselves.

One of the cases which attracted the most attention concerned the murder of Uma Singh, a 22 year old journalist, after she had published an article in the monthly magazine *Nepali Sarokar* regarding war-time Maoist land seizures in the Terai. On January 11, 2009, it is reported that 15 men with knives entered her apartment and stabbed her to death. During the course of the investigation the police are said to have overlooked her profession as a possible motive for her murder and five persons were arrested and accused of killing her over a property issue. At the end of 2009, the circumstances surrounding her death remained unresolved. International Media Freedom concluded that her work was a major cause in her death and reported that the victim's colleagues had mentioned that two Maoist cadres linked to the abuses Singh had denounced fled the country after her murder. Moreover, one of the ethnic-Madhesi armed groups operating in the Terai region claimed to have killed the journalist. The Committee to protect journalists argued that the murder seriously affected the work of the press in the region and that in the following months several journalists left the region out of fear.¹¹

Politicians are also involved in cases of reprisals against journalist after the undesired publishing of information. Reporters Sans Frontieres has mentioned the case of Baidyanath Yadav who was attacked by supporters of the Education Minister after he had revealed information that embarrassed the minister.¹²

Often, media were attacked not only to prevent the publishing of information but also to serve a political goal of the concerned organisation.

¹¹ *Attacks on the Press 2009: Nepal, Committee to Protect Journalists*, 16 February 2010, URL: <http://www.cpj.org/2010/02/attacks-on-the-press-2009-nepal.php>

¹² *Are political activists, especially Maoists, disregarding press freedom pledges?*, Reporters Sans Frontieres, 12 June 2009, URL: <http://en.rsf.org/nepal-are-political-activists-especially-12-06-2009,33392.html>

On August 23, in Saptari District, members of the Madhes Tarai Forum intercepted a vehicle belonging to Kantipur Publications and seized 15,000 copies of three Nepali-language newspapers and subsequently burned them. The head of the Madhes Tarai Forum who had fought to make Hindi adopted as the official language in the Terai claimed responsibility for this burning.¹³

Generally speaking, the authorities' inaction allows the persistence of this harassment, the fact that some of the main political forces in the country have been behind attacks against the press casts doubts about their real ability and will to promote the freedom of expression.

The impeded justice system has failed to provide protection to the journalists that have become the victims of attacks. When those behind the attacks belong to powerful forces, the police are afraid of potential retaliation and do little to investigate the case, as was shown in Uma Singh's murder. In some cases it has been reported that the police themselves threatened journalists who were reporting cases of corruption or police torture. CPJ reports that Sanjaya Saha, the editor of daily newspaper Janapratibimba, was threatened by the police after he had published information regarding a case of bribe-taking in the country.¹⁴

Cases of murders and attacks against journalists are not being investigated. In February an International Media Mission¹⁵ conducted a field visit to Nepal to assess the situation of press freedom in the country and concluded that 'the authorities are failing in their duty to prevent, punish and redress the harm caused by such attacks' since 'not one person has been convicted for a criminal act against journalists and media houses'¹⁶. Unsurprisingly the Committee to Protect Journalists ranks Nepal 8th in its Impunity Index which lists 14 nations in which murders of journalists go un-investigated and unpunished.

Instead of making the protection of freedom of the press a priority for the future of Nepalese democracy, the government has instead adopted measures which would further hamper the work of the media. In October 2009, news reports revealed that the

13 *Increase in physical attacks on journalists and news media in August*, Reporters Sans Frontieres, 27 August 2009, URL: <http://en.rsf.org/nepal-increase-in-physical-attacks-on-27-08-2009,34316.html>

14 *Attacks on the Press 2009: Nepal*, Committee to Protect Journalists, 16 February 2010, URL: <http://www.cpj.org/2010/02/attacks-on-the-press-2009-nepal.php>

15 *The International Mission comprised representatives of ARTICLE 19, the International Federation of Journalists (IFJ), International Media Support (IMS), the International Press Institute (IPI), Reporters Without Borders (RSF), UNESCO and the World Press Freedom Committee (WPFC).*

16 *Joint Statement, International Press Freedom and Freedom of Expression Mission: Rapid Response Assessment Mission to Nepal*, 8 February 2009, URL: http://www.i-m-s.dk/files/publications/Nepal%20Mission%20Statement%20_8%20Feb%2009_%20Final%20ENG.pdf

government was planning to use journalists as informants as part of the SSP. The plan was that the journalists would be paid by the government to share information on their news sources and to gather information about the activities of the opposition.¹⁷ Local and international federations of journalists immediately condemned the plan and asked for its non-implementation on the ground that it would put the journalists at even further risks of attacks and be a clear infringement of their independence.¹⁸

Article 12-3 of the 2007 Interim Constitution of Nepal guarantees the right to freedom of opinion and expression and its article 15 specifically aims at preventing any censorship of the media. The Committee to Protect Journalists recalls that in December 2008, Maoist leaders signed a 10-point agreement to address the lawless situation in which they included a clause to create a governmental bureau to investigate press freedom violations.¹⁹ A year later, this bureau has still not been established and as the repeated attacks on journalists show, the Maoists have not taken steps to suppress violations of press freedom.

Although legislative provisions are necessary to guarantee freedom of the press and freedom of expression, their implementation in reality will make this effective in practice. The protection of the freedom of the press in Nepal is therefore tightly linked to the reestablishment of the rule of law and to the strengthening of the criminal justice institutions to guarantee accountability for attacks against journalists.

4. Economic, Social and Cultural Rights

a. The right to be free from discrimination: the prevalence of caste-based discrimination in every sphere of life in Nepal

Discrimination against Dalits was outlawed in the 1960s in Nepal, but the tradition of caste-based discrimination and “untouchability” survives, particularly in rural areas. According to official estimates, Dalits comprise 13 percent of the population, but other estimates put this figure closer to 20 percent. Although Nepali laws clearly say that caste discrimination and racist behaviour are punishable, few measures have been taken to guarantee the effective implementation of this. Often, the police refuse to file cases of

17 *Nepal's journalists to double as informants?*, By Bhumika Ghimire in UPI Asia, 2 November 2009, URL: http://www.associatedcontent.com/article/2383240/nepals_journalists_to_double_as_informants.html?cat=9

18 *Nepal: Government Putting Journalists at Risk*, Press Release by Freedom Forum, Article 19 and Federation of Nepali Journalists, 12 October 2009, URL: <http://www.article19.org/pdfs/press/nepal-government-putting-journalists-at-risk.pdf>

19 *Attacks on the Press 2009: Nepal*, Committee to Protect Journalists, 16 February 2010, URL: <http://www.cpj.org/2010/02/attacks-on-the-press-2009-nepal.php>

discrimination or violence against Dalits and to offer protection to the victims.

Society's reaction to inter-caste marriages reveals how the deeply entrenched the concept of caste remains in the mindset of the rural society. Marrying outside of peoples' caste challenges the orthodox concept of untouchability. In 95% of the inter-caste marriage cases, the couple and the family members of the Dalit partner had to flee from their places of domicile.

Four types of repercussions have been witnessed concerning cases of inter-caste marriage:

- ❖ *Harassment*: Inter-caste couples face violence and harassment from their community including social ostracism, economic hardship, exclusion from religious and cultural events, and often end up living in isolation from friends and neighbours;
- ❖ *Forced separation*: Parents of the non-Dalit often try to intervene to prevent inter-caste relationships. Some even go as far as to forcibly separate their child from a Dalit partner;
- ❖ *Institutional discrimination*: Inter-caste couples face discrimination from the authorities and officials. Dalits, inter-caste couples, and their children are regularly denied citizenship, even though they were born in Nepal. Without citizenship, they are unable to vote or move to another village and the children will not be able to register for school.
- ❖ *Displacement*: Inter-caste couples are also often forced to leave their villages and even flee the country;

The Asian Human Rights Commission has been informed throughout 2009 by Nepali NGO, the Jagaran Media Center, which works specifically on cases of discrimination against Dalits. It reported 21 cases of inter-caste marriage in 2009 in which violent action was taken against the couple. After the insurgency, numerous mixed couples got married, but in most of the cases the marriage did not resist pressures arising from the impossibility to be accepted by the society. Those who suffer the most from this situation are Dalit women because the break up deprives them of any means of subsistence.

In Dailekh District, Amir B.K. who had married a non-Dalit woman, Sabita Shahi, was forced to pay a fine of NRs. 60.000 (USD 820), and beaten up by neighbours and relatives of his bride. They forcibly removed Sabita and tried to murder the groom, who is now reported missing following his attempt to escape the attack by running down a cliff. Unsurprisingly, there is no report of any police rescue team reaching the village.

The local government and police can do much to encourage inter-caste marriage by protecting inter-caste couples, providing education allowances, and guaranteeing

employment. Right to inter-caste marriage should be explicitly protected in Nepal's new constitution. To encourage inter-caste marriage, the Nepalese government announced on 13 July 2009 that it will provide a grant of 100,000 rupees (approx. USD 1300) to the newly married couple within 30 days of marriage registration. Though this issue has been highly debated in the Dalit community and it has its own drawbacks, it could be hoped that this benefit would help couples who are isolated within their community and who suffer from economic hardship or forceful displacements.

Inter-caste marriage is used as a pretext to evict Dalits. In several cases, Dalits have had to leave their village because they are seen as having challenged the traditional law of society by marrying a non-Dalit, touching water and pots in local taps or not helping non-Dalits in their land and at their home.

The AHRC has been informed of seven cases of displacement in 2009. In most of the cases, negligence by the local authorities worsened the situation of the victims.

Dalits are also being denied access to Hindu temples. In 2009, JMC received 10 cases of discrimination in temples in which they were beaten whenever they tried to enter local temples, notably during Hindu festivals.

Dalit women in Bhimdutta Municipality-8 of Kanchanpur district who entered a local temple to celebrate the Teej festival (a festival where women wear red dresses and fast in order to get good husbands, if unmarried, or long lives of their husbands when married) were reportedly beaten by the non-Dalits. The women said that a group of non-Dalits including Karan Bhatta and Surendra Kunawar verbally abused and beat them, saying that Dalits were not allowed to enter the temple.

Schools remain places in which caste-based discrimination is the strongest. Dalit students are commonly being discriminated against by their classmates, other non-Dalit students and even by their non-Dalit teachers. Dalit students are asked to sit separately and are denied access and participation in the social events organized at the schools.

A non-Dalit school teacher, Pushpa Karki, lost her job when she objected to the discriminatory practices in the Shree Saraswati Lower Secondary School which counts 90% Dalit students. According to Jagaran Media Center, Dalit students had to use separate equipment and facilities, including taps for drinking water. Teachers allegedly avoid touching the papers of Dalit students and low grades tend to be assigned without much regard for the content of the work. Dalit students there have also been banned from the cooking classes, which are needed for the home science course.

Pushpa Karki's protests were allegedly rejected by the school's mostly non-Dalit management as 'popularity seeking' among an 'undeserving' class. She was also told that like her Dalit students, she would be prohibited from touching the statue of Saraswati, the Hindu goddess of knowledge due to her close association with them.

Pushpa eventually told the local media about the discrimination at the school in August. Summoned to a school meeting, she was then allegedly threatened and physically pushed around in the meeting hall. She was accused of having sought cheap publicity at the expense of the school, of becoming a spokesperson for an undeserving class, and was threatened with dire consequences unless she changed her tone. It should be noted that Ganesh Parki, the chairman of the school's management is a Dalit, however this has not helped Pushpa's case.

The teacher was transferred to Narayan Secondary School in the same district, but says that she was dismissed soon after, having been prevented from signing the attendance register. She filed a complaint with the National Information Commission (a national body that overlooks the rights and responsibilities of public institutions and servants concerning the right to information). The Commission issued a temporary stay of Pushpa's dismissal at the school, directing staff to allow her to mark her attendance and to pay her salary, and seeking written explanations from them for their actions. She also reportedly received death threats and was planning to file a complaint at the local police station at the end of 2009.

This case illustrates how those who challenge the idea of caste-based discrimination and take the defence of the victims put themselves at risk of retaliation and social stigma. Victims of caste based discrimination rarely get justice. They even often consider being discriminated against as normal. There is a need to rid Nepalese society of this deep-rooted problem.

The drafting of the new constitution is an opportunity to build a legal framework that better protects Dalit's rights. At the time of writing, the Constituent Assembly's Thematic Committees had already submitted their proposed constitutional language. These concept papers take promising steps toward crafting a constitution that protects fundamental rights that are of particular significance to Dalits and other marginalized groups in Nepal. The Fundamental Rights Committee has, for example, proposed a right against exploitation in the name of religion, which has often been a primary justification for the practice of "untouchability." The Committee has also proposed a protection of individuals' choice of spouse, to address social prohibitions on inter-caste marriages. However, much more comprehensive action and consultation with Dalit groups is needed. Dalit civil society in Nepal has expressed particular support for the proposal to include a right for the Dalit community to have inclusive and proportional participation in all state organs—a right that is essential to empowering the Dalit community in Nepal.

To ensure the effective implementation of the law, the Asian Human Rights Commission recommends that the government of Nepal must:

1. Place emphasis on the economic development of the Dalit community. The government of Nepal should formulate and implement positive discrimination and affirmative action for the Dalits.
2. Establish specific departments in the ministries of women, education, health, and agriculture and forestry, to make sure the Dalits' specific needs are taken into account in the formulation of national policies.
3. Ensure effective mechanisms for the monitoring of Nepal's justice delivery systems. Those who practice discrimination should be brought to justice and given adequate and punishment.
4. Establish a complaints mechanism, to be promoted all over the country, so that the victims of caste-based discrimination can register their complaints effectively and without obstacle or reprisals. Punishments should be clearly defined by law for those who practice discrimination. Such provisions must be publicised widely in order to ensure the prevention of further abuses. Separate courts at the regional and national levels should be established to deal cases of caste based discrimination.

b. Gender-based violence

2009 marked a year of legislative progress regarding gender-based violence in Nepal, since in May, the Domestic Violence and Punishment Act 2065 made domestic violence punishable by law.

Nevertheless, religious and cultural traditions and superstitions, the lack of education and economic empowerment, and ignorance of the law are still strong obstacles to the realization of women's rights and allow the persistence of a highly patriarchal society.

Reports of gender-based violence and discriminatory practices persisted throughout 2009 and were in general accompanied by impunity despite concerted efforts by the country's human rights activists. Dhana Kumari Sunar, a member of the National Women's Commission, reports that every year tens of thousands of women in Nepal experience violence, 80 percent of which is domestic violence. In previous annual reports on Nepal, the Asian Human Rights Commission has pointed to numerous cases of rape, torture and killings of women, in particular, which continued to be committed in high numbers despite drops in the levels of some other human rights violations following the end of the conflict. Women's rights remain under threat regardless of political developments in Nepal over recent years that have seen some positive developments, such as a significant fall in forced disappearances, for example.

Because of a lack of education and social stigma, women often remain unaware of their rights and are forced to accept the patriarchal organization of the society and other forms of gender-based discrimination and violence. A 2006 survey²⁰ found that 23% of women and 22% of the men thought that 'there are at least some situations in which the husband is justified in beating his wife'.

Documented cases of rape and accusations of witchcraft against women in Nepal reveal how the traditional, gender-biased mindset of society and the inability of public institutions to provide protection to victims allow for ongoing gender-based violence.

Data suggests that more women dared to report cases of rape in 2009. According to the annual criminal reports of the Nepal Police, the recording of rape cases increased by 48% between 2008 and 2009, with 348 women reporting that they had been victims of rape in 2009. The number of actual cases of rape is likely to be far higher, as only a low percentage of cases are thought to be reported, despite this rise. Police officers are reportedly still reluctant to file cases of rape, especially when the victim belongs to an isolated and poor community and the alleged perpetrator comes from a more powerful sector of society. As a result, Dalit women and women from indigenous communities are particularly vulnerable to rape, since such crimes against them can be committed in all impunity.

The case of 11-year old Dalit girl Runchi Mahara, who was found raped and murdered, shows how the criminal justice system of Nepal fails to address cases of violence against women, especially when the victim's family does not have the power or standing to ensure that the police investigate the case. She was found raped and murdered on 1 September 2009 in a mango orchard; her clothes were near her naked body and there was a belt around her neck. The police were reluctant to file a First Information Report (FIR), but did so and arrested one of the suspects, Mr. Dharmesh Yadav, under mounting pressure. They had reportedly found semen and blood stains in Yadav's clothing, and his mother identified the belt that was found around Runchi's neck as belonging to him. Despite this, he was released, no case was filed in court and the police have shown no signs of investigating further. Local activists have reported that local ruling political party members have been supporting the families of the accused, and that Runchi's family are being pressured to settle the case.

According to the AHRC's source, the JMC, even though these incidences of violence, notably against Dalit women, are extreme, none of the cases of rape reported to the police have been successfully dealt with in favour of the victims. More generally speaking, the

20 *Demographic and Health survey, Ministry of Health and population and USAID, 2006, Available at: <http://www.measuredhs.com/pubs/pdf/FR191/FR191.pdf>*

2009 human rights annual reports of the United States Department of State states that ‘of [rape] victims who reported the crime to the authorities, 25 percent said the government arrested and convicted the perpetrator.’²¹

The impact of superstition on the condition of women in Nepal is observable in a particularly archaic and horrific form in the cases of accusation of witchcraft. Women who are accused of being witches are in most cases stripped naked and severely beaten. Instances where women are force-fed their own excrement have also been reported. These attacks often results in severe injuries as well as strong psychological damage for the victims. To save their lives the women have to admit to being a witch and are then usually forced to flee from their villages.

The Women’s Rehabilitation Centre (WOREC) has documented 82 cases between July 2007 and September 2009 in which women were beaten by neighbours, having been accused witchcraft. Among them, Janjati and Dalit women (respectively 33% and 30% of the cases) are the most vulnerable to accusations of witchcraft.

On March 2009, 45 year old Dalit woman, Kalli Kumari BK, was accused of practicing witchcraft and was beaten and forcefully fed her own excreta by Bimala Lama, a member of the indigenous community and headmistress of the Gadhibhanjyang Primary School, in presence of other villagers. Prior to the incident, Kumari and her husband had been confined in a room in one of Bimala’s relatives’ homes for two days. There, the villagers beat Kumari and forced her to accept that she was a witch. Kumari was kicked, punched and hit with a stone by Bimala Lama, her sister and others who shouted, “*a witch should be killed like this.*” The villagers also threatened Kumari’s husband with the same treatment if he assisted his wife. Kumari filed a case at the Area Police Office - Ashrang on March 23, but the police have failed to arrest the alleged perpetrators.

The lack of concern the police has shown so far in investigating cases of gender-based violence reveals that, in spite of the implementation of women’s cells in most of Nepal’s districts, the issue is still not seen as a matter of priority.

As a result, victims are not encouraged to raise their issues because they know they will have to face social stigma, with a limited chance of actually seeing their case registered and investigated and their aggressors prosecuted.

In this context, those who fight for the realization of women’s rights and go against deeply-entrenched social taboos face many difficulties and risks, including physical

21 2009 Human Rights Report: Nepal, Bureau of Democracy, Human Rights, and Labor, US Department of State, URL: www.state.gov/g/drl/rls/brrpt/2009/sca/136091.htm

attacks and becoming social outcasts.²² Unsurprisingly, the police usually fail to provide protection and support to such human rights defenders, which further weakens their already fragile position.

In response to the many problems facing women in Nepal, the government must as a priority, ensure the rule of law is established paying particular attention to violence against women. It should ensure the education of girls and women; not only should girls be given incentives to go to school and be encouraged to carry on further studies, but awareness-raising campaigns should also be launched to help the women become aware of their rights and of the possibilities they have to defend them. Programmes fostering their economic empowerment should also be designed. Police officers and legal practitioners must also receive training regarding women's rights.

c. The problem of Bonded Labour

Traditionally, at least two types of bonded labour coexist in Nepal, known as Haliyas and Kamayias.

In 2000, the King of Nepal abolished the Kamayia system, which existed in Western Nepal and affected mostly the Tharu and Dalit communities, and 'freed' 20'000 to 30'000 people from bonded labour.²³ Unfortunately, this abolition was not accompanied by any form of rehabilitation programs and resulted in the expulsion of Kamayias from their former places of residence by landlords. This left the Kamayias with no livelihood options.²⁴ Reports of starvation of former Kamayias families have made the headlines and some NGOs have also documented cases of families who had to send their children to work for their former landlords in exchange for one or two hundred kilos of rice.²⁵ According to news reports, 10 years after the abolition of the system, 6000 ex-Kamayias are still homeless,²⁶ and more than 1,000 others are still working in bonded labour in the

22 See Nepal's government fails to protect women human rights activists, *Amnesty International*, 10 April 2009, URL: <http://www.amnesty.org/en/news-and-updates/news/nepal-government-fails-protect-women-human-rights-activists-20090410>

23 Policy spoke in Haliya rehab wheel, *The Kathmandu Post*, 25 April 2009, URL: <http://www.ekantipur.com/the-kathmandu-post/2010/04/25/top-stories/Policy-spoke-in-Haliya-rehab-wheel/207593/>

24 *The plight of the Tharu Kamayias in Nepal: a review of the social, economic and political facets*, Ram B. Chhetri, *Occasional Papers in Sociology and Anthropology Vol.9* 2005 p.22-46, Available at: http://himalaya.socanth.cam.ac.uk/collections/journals/opsa/pdf/OPS.A_09_02.pdf

25 *The plight of the Tharu Kamayias in Nepal: a review of the social, economic and political facets*, Ram B. Chhetri, *Occasional Papers in Sociology and Anthropology Vol.9* 2005 p.22-46, Available at: http://himalaya.socanth.cam.ac.uk/collections/journals/opsa/pdf/OPS.A_09_02.pdf

26 Policy spoke in Haliya rehab wheel, *The Kathmandu Post*, 25 April 2009, URL: <http://www.ekantipur.com/the-kathmandu-post/2010/04/25/top-stories/Policy-spoke-in-Haliya-rehab-wheel/207593/>

mid and far-western regions of Nepal.²⁷

Unfortunately, the government does not seem to have learned the lessons from the mismanagement of the abolition of the Kamayia system when it undertook a similar process to free the victims of the Haliya system. Under this system, a person is made to do agricultural and domestic work for years in order to pay debts, often working on a small piece of land for the purpose of reconciling debts accumulated over the years by his or her forefathers. Such bonded labour is not limited to agricultural work. Haliyas fulfil a range of duties, including making tools (such as spades, knives, and sickles) out of iron, grazing animals, sewing clothes, making utensils and pots, and so forth. The labourers are not paid a wage for their extensive work duties; often they are only provided with a small amount of food. Extreme poverty and debt in the western and far western regions of Nepal has relegated many Dalits to Haliya status.

Although the government of Nepal declared the liberation of Haliyas on 6 September 2008, a lack of proper legal mechanisms and of specifically designed rehabilitation policies has rendered the process far from effective.

The OHCHR office in Nepal reports that ‘While the steps taken by the Government are important, many Haliyas are facing new problems with their landlords, with some under threat to repay loans or to continue working in debt-bonded labour. “We have freedom of choice, a sense of dignity and pride after emancipation by the government; however, our living standard has become worse as our landlords have stopped providing work and additional support such as food, health, and construction materials, which we used to get before,” said former Haliya Dan Singh Talle of Gujallek Village, Amargadhi Municipality, Dadeldhura District.’²⁸

Indeed, most Haliyas labourers do not have formal education or technical skills which hamper their integration into the labour market.²⁹ NGO reports indicate that around 97% of Haliyas do not possess land which they could cultivate for their own benefit. The liberation of this workforce without adequate training or financial assistance to help them make a new start is likely to undermine the implementation of the government’s emancipation policy. One year after their formal liberation, most Haliyas are still working

27 About 1,128 Kamalaris yet to be rescued in mid, far-western, *The Rising Nepal*, 16 May 2009, URL: http://www.gorkhapatra.org.np/detail.php?article_id=34505&cat_id=8

28 *Emancipation of Bonded Labour in Nepal*, OHCHR-Nepal Website, URL: <http://www.ohchr.org/EN/NEWS-EVENTS/Pages/BondedLabourNepal.aspx>

29 *Labour Pain*, *The Kathmandu Post*, 26 April 2010, URL: <http://www.ekantipur.com/the-kathmandu-post/2010/04/26/Editorial/Labour-pain/207651/>

for their landlords.³⁰

According to data provided by the National Haliya Liberation Federation (NHLF), Dadeldhura, there are 150'000 Haliyas in the far western region of Nepal alone, but the government's District Administration Office (DAO) has only been able to ensure that 450 of the 150'000 Haliyas have actually been freed in reality.

In 2008 the government established a working committee on the Haliya situation which gave the following recommendations: the annulment of loans, the formation of a Haliya Commission, the distribution of land, the drafting of a Haliya Labour Prohibition Act, a national survey to design rehabilitation measures, free secondary education, and the elimination of discrimination against Haliya.³¹

The AHRC also recommends that any measures taken to train and support the Haliyas also be provided to the former Kamayias. In particular, land that had been promised to such persons following their liberation should be granted without delay. Ethical micro-credit programmes could be useful to get persons on their feet economically.

Conclusion

At the end of 2009, Nepal remained beset by political instability and infighting between the political parties, with the process of creating a new Constitution and establishing a post-conflict democratic Nepal in which human rights are respected, far from being realised. The longer the political turmoil prevails, the longer impunity will be enjoyed by the many perpetrators of the multitude of grave abuses that took place in the country's recent conflict-affected past. The lack of development of institutions and a normative framework to ensure the rule of law and the primacy of rights, has ensured that further violations of rights, including torture, extra-judicial killings, discrimination and widespread abuses against women and members of vulnerable sectors of society, have continued, with impunity.

There is an evident requirement for all political forces in the country to make public proclamations of renewed commitment to the strengthening of democracy and the rule of law and right, which guarantees the equal participation of all the citizens and the equal protection of their rights.

30 *Policy spoke in Haliya rehab wheel*, *The Kathmandu Post*, 25 April 2009, URL: <http://www.ekantipur.com/the-kathmandu-post/2010/04/25/top-stories/Policy-spoke-in-Haliya-rehab-wheel/207593/>

31 *Emancipation of Bonded Labour in Nepal*, OHCHR-Nepal website, URL: <http://www.ohchr.org/EN/NEWSEVENTS/Pages/BondedLabourNepal.aspx>

The key to long term stability and the enjoyment and protection of rights can only come through the strengthening of the state institutions that are to protect the democratic system and human rights. The justice-delivery systems and institutions have been shown in this report to be ineffective and dysfunctional. They must be strengthened to ensure access to justice for all and for the country to be able to engage in a meaningful attempt to curb impunity, without which progress and evolution beyond the conflicted past cannot occur.

This involves fighting against the corruption that is rampant in the judiciary, effectively guaranteeing its independence from external interference, and ensuring that the military and Maoist forces and actors do not remain above the law. The jurisdiction of civilian courts must cover all of the country, both geographically and in terms of the various powerful groups that operate within it. The police system needs to be deeply transformed into a service that democratically ensures law enforcement and guarantees the protection of rights for all, independently of their caste, ethnicity, political connections, financial resources or gender. At present, the police in many ways contributes to human rights violations and impunity rather than the protection of rights.

The human rights situation in Nepal has clearly not evolved much in 2009, mainly due to the fact that political stasis is blocking and meaningful developments within the country's police, judiciary and other institutions. It is therefore imperative that the Office of the High Commissioner for Human Rights continue to have a well-resourced office in the country and that the government invite key mandates of the UN Human Rights Council's Special Procedures to visit the country in order to assist the development of its laws and institutions in line with the country's obligations under international law. Events over recent years in Nepal have given rise to much hope for a better future, but this has yet to be seen in concrete terms. It is hoped that a successful conclusion to the process of constitutional reform in 2010 will pave the way to a brighter future and all political parties are reminded that they have a key role to play in this and that history will judge them for their actions at this crucial period in the country's development.

PAKISTAN

DETERIORATION OF HUMAN RIGHTS AND SECURITY ACCOMPANIES INCREASE IN TERRORISM AND CONFLICT

Introduction

In this report, the state of human rights in Pakistan in 2009 will be scrutinized. This scrutiny does not claim to be comprehensive, but is based on the cases and situations that the Asian Human Right Commission (AHRC) has encountered during the year. The actual situation of human rights is potentially graver still than the account below relays, as monitoring of many of Pakistan's lawless and/or conflict-affected areas remains problematic for access and security reasons.

In previous years, the AHRC and its sister-organization, the Asian Legal Resource Centre (ALRC), have repeatedly pointed to the worsening situation of human rights in the country. Of concern had been the scale of violations, including grave violations such as forced disappearances, torture, extra-judicial killings and rape and other violations of women's rights, as well as the impunity that accompanied these acts. The weakness of the institutions of the rule of law, such as the police and the judiciary, and their inability to protect human rights has ensured this widespread impunity.

Furthermore, the unbridled power of the military over the civilian establishment has been a key feature enabling the lack of effective challenges to the status quo and the continuing prevalence without redress of brutality in Pakistani society and politics. The suspension of the Chief Justice, Iftikhar Mohammad Chaudhry, on March 9, 2007, by the country's previous President, General Pervez Musharraf, and the latter's declaration of a state of emergency on November 3, 2007, in which many Supreme Court judges were removed, with hand-picked replacements selected in their stead, speak to this military dominance.

Asif Ali Zardari, the widower of former Pakistani Prime Minister Benazir Bhutto, won the presidential election on September 6, 2008. Benazir Bhutto, who was standing for election, was assassinated on December 27, 2007, after departing a Pakistan Peoples Aprty (PPP) rally in Rawalpindi. No progress has been made in the Pakistani investigation into the assassination for many months, while a UN probe committee has again requested three further months for its inquiry.

Following a lengthy protest campaign by lawyers, known as the Lawyers Movement, the Zardari government reinstated Chaudhry Iftikhar and other deposed Judges on March 16, 2009, through a presidential executive order.

There had been hopes that following the ouster of Pervez Musharraf, democratic elections and the re-instatement of the judiciary, the human rights situation in the country would improve. As we shall see in the following report, the serious escalation of conflict between the State and militant Islamic forces, resulting in increased violence and terrorism in the country, accompanied by political wrangling and the continuing weakness of Pakistan's civilian institutions and mechanisms of the rule of law, have given rise to one of the region and world's most dangerous security and human rights situations. Added to this is the lack of effective leadership, as embattled President Zardari has been hanging on to power in the face of growing opposition, and the country has found itself facing dire economic circumstances.

It must be recalled that despite the fact that Pakistan has been the scene of several thousand forced disappearances in recent years, according to estimates, as well as widespread torture and of a range of other grave abuses, the country has been a member of the United Nations' Human Rights Council. As the chair of the Islamic Conference of Foreign Ministers and of the OIC Working Group on Human Rights in Geneva, Pakistan has played a vocal role in the Council, although often to the detriment of human rights and the Council's ability to act effectively.

One step forward, one step back – an overview

While the situation in Pakistan has evidently been plagued by further insecurity in 2009, the government has taken certain steps designed to signal its commitment to human rights and improve the situation in the country, and these are to be commended, even if much more is required.

Ratification of international legal instruments: The government of Pakistan had signed International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) and ratified International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2008. Pakistan claimed in its pledges to the international community as part of its election bids to the Human Rights Council in 2006¹ and 2008² that the creation of a National Human Rights Commission was in process, although no

1 Pakistan's 2006 pledges to the Human Rights Council can be found here: <http://www.un.org/ga/60/elect/hrc/pakistan.pdf>

2 Pakistan's 2008 pledges to the Human Rights Council can be found here: http://www.un.org/ga/search/view_doc.asp?symbol=A/62/808&Lang=E

developments have been seen concerning this in 2009.

Women's rights: The government is also taking certain steps to improve women's enjoyment of their rights in 2009. The National Assembly has adopted bills on violence against women and sexual harassment in the workplace, but these have yet to be passed in the Senate. In another example, concerning land distribution in Lower Sindh, plots started being registered in March 2009 in the name of the women in each family unit. The government has also spoken of creating more employment opportunities and creating financial loan programs for women, but has not yet acted in this respect. When we consider the scale of human rights violations faced by women in Pakistan, these steps, while welcome in their own right, are clearly insufficient. A section later in this report is dedicated to violations of women's rights.

Reinstatement of the Chief Justice: Following a historic protest movement by lawyers, known as the Lawyers Movement, that began in 2007 and has been at the centre of the human rights and political struggle in the country since then, the Zardari government reinstated Chaudhry Iftikhar and other deposed Judges on March 16, 2009. This important culmination gave rise to hopes that the re-instated judiciary would build on momentum and begin seriously tackling cases of grave human rights violations, such as forced disappearances.

However, as 2009 came to a close, such action was still to be witnessed on a convincing scale. The country's powerful groups, including the armed forces, legislators, landed aristocracy have sought to involve the now-high profile judiciary in political issues, hampering its ability to function. For example, while before being removed in 2007, the Chief Justice and supreme judiciary were taking an interest in cases of disappearances, there has been little progress in dealing with these cases since the judiciary has been reinstated. It is alleged that, as the Chief Justice was restored following the intervention of the Army Chief of Staff, the former is under some obligations to the military and progress on cases of disappearances is now virtually non-existent. In 2006 and 2007, before the judiciary was removed, the Supreme Court was becoming vocal concerning the intelligence agencies about forced disappearances. Now, the Supreme Court is calling on the government to produce the disappeared persons.

Increasing insecurity arising from terrorism and military operations

Perhaps the most significant development in 2009 that has a bearing on human rights is the intensification of violence, conflict and terrorism within Pakistan. In previous years, the AHRC has pointed to widespread human rights violations and a system of injustice, the weakness of civilian institutions, the strength of the military and ISI intelligence

agency and the impunity with which they operate, the problems arising out the country's parallel judicial systems, as well as the lawlessness and armed conflicts operating in several provinces. These have all contributed to a situation that was vulnerable to overspill from the conflict in neighbouring Afghanistan. Pakistan has become another front in violent conflict that is affecting the region, from Iraq, through Afghanistan, to the country in question. While Islamic fundamentalists have been training and operating in Pakistan for a number of years, the number of attacks on Pakistani soil has increased dramatically as 2009 has progressed.

As of early December 2009, bomb blasts and suicide attacks on crowded areas, such as market places, and security forces installations had killed over 700 civilians during the year. The military, in response has been conducting operations in different parts of Northern Pakistan, including the Swat Valley, the Malakand Agency, and North and South Waziristan (which border Afghanistan). The military and government have claimed successes in their operations, but while some operations may have been able to curb Taliban militants in an area or for some time, in general, militancy is spread all over the country and the increasing frequency of terror attacks indicates that much remains to be done. It is very difficult to demarcate clear lines between the military and the militants in Pakistan, as militants have infiltrated the military on the one hand, while the military comprises many that are sympathetic to the militants on the other. Given that Pakistan operates nuclear weapons, the instability in the country and the complexity of allegiances is a concern of global proportions.

The military has been conducting a number of operations against the Taliban and local and foreign Islamic militants in different parts of the country's North West province, particularly in Bajour agency and Malakand agency (including Swat Valley), as well as North and South Waziristan. The Taliban and foreign militants have been operating in these regions, training suicide bombers and producing bombs. In the areas in which they operate, these forces have taken control of governance. They have held Islamic courts that fail to protect internationally accepted norms and standards of fair trials and human rights. This has led to punishments that amount to human rights violations, notably of women. They have also burned down schools, particularly those teaching girls, closed barber and video shops. They have also carried out targeted abductions and killings notably of secular persons and security forces personnel.



A plain-clothed police officer firing live rounds directly at persons demonstrating against disappearances in Karachi (photo courtesy of Dawn).

It is impossible to precisely determine the number of people who have died in extra-judicial killings. Security forces are able to kill with impunity in the name of the elimination of terrorism. Foreign forces also indiscriminately kill innocent people through aerial attacks by remotely-controlled Predator drones, US-made unmanned air vehicles, sent in search of Al-Qaeda linked terrorists. In 2009, more than 120 people were killed by these drones, and it is estimated that only 30 to 40 of those killed were militants. Investigative reporter Jane Mayer of *The New Yorker* magazine has revealed that the number of US drone strikes in Pakistan has risen dramatically under President Obama. During his first nine-and-a-half months in office, Obama authorized at least forty-one CIA missile strikes in Pakistan, a rate of approximately one bombing a week.

One of the most high-profile critics of the US drone program has been the United Nations Special Rapporteur on extra-judicial killings, Professor Philip Alston. HE has said that the US government's use of Predator drones may violate international law and raised the issue in a report to the UN General Assembly, calling for the US to explain the legal basis for using unmanned drones for targeted killings. Alston also presented a critical report on the drone program in June to the UN Human Rights Council, but, he says, US representatives ignored his concerns.³

The military operations in Balochistan and North West Frontier Province have been responsible for the extra-judicial killings of several hundred persons, including women and children.

Militants and terrorists have reportedly developed cells throughout the country, from where they have been carrying out attacks with the security agencies providing little obstacle. It is claimed that the Taliban and militants were supported by the State and security agencies during the previous government under General Musharraf.

Militants and terrorists have reportedly developed cells throughout the country, from where they have been carrying out attacks with the security agencies providing little obstacle. It is claimed that the Taliban and militants



Islamabad under the siege as security forces suffer attacks by the Taliban
(Photo courtesy of www.dawn.com)

3 http://www.un.org/News/briefings/docs//2009/091027_Alston.doc.htm

were supported by the State and security agencies during the previous government under General Musharraf.

As we shall see below, the military have continued to fail to convincingly tackle the militants.

North West Frontier Province (NWFP)

The AHRC intervened on April 7, 2009 concerning the apparent State authorities complicity in the flogging of a teenage woman. The AHRC expressed its grave concern about the internet-broadcasted public flogging of the young woman by Taliban members in the NWFP in mid-March, 2009.⁴

17-year-old Chand Bibi was reportedly found out of her home, buying groceries while unaccompanied. Weeks before, the Taliban and an extremist group led by Soofi Mohammad had brokered an agreement with the government that enforced religious rules, including a law that obliges women to stay inside the house unless accompanied by close male relatives.

The religious authorities made Chand Bibi their first example of Taliban justice, suggesting that spectators record the punishment on their mobile phones. Video footage shows the teenager pinned face-down on the ground, clothed, with two men on her upper body and one holding down her legs, while a fourth flogs her buttocks with a stick in front of a large crowd, thirty-five times. Afterwards positive, proud statements were issued by Taliban spokesmen and journalists for religious news publications. In the days following the beating, she and her family were stifled from making any complaints.

After the failure of peace initiatives with the Taliban and Tehreek-e-Nifaz-e-Shariah Mohammadi (TNSM), the government of Pakistan launched an operation in April 2009, called Rah-e-Rast, carried out by the Pakistan army in the northern parts of country bordering Afghanistan, on the request of provincial government of North West Frontier Province (NWFP) in order to defeat the militants.

The military operation against the militants was carried out by gunship helicopters, mortar and jet aircraft. The militants were reportedly armed with rocket launchers and other sophisticated arms allegedly captured from allied forces in Afghanistan as well as from the Pakistan army during the siege of three districts over six years. Some media reports claim that arms were also allegedly supplied by the ISI – the intelligence agency of Pakistan.

⁴ For more information on the case of a flogging of a teenage woman, please see: <http://www.ahrchk.net/statements/mainfile.php/2009statements/1977/>

The army's performance in terms of effectively combating the militants has been criticised. In the first weeks of the operation, the Inter Service Public Relation (ISPR) of the armed forces claimed that more than 90 Taliban fighters had been killed in the military operation, but local media sources claim that the ISPR was providing false information as the most killings were from the civilian population. More than two hundred security personnel including, army persons, were reportedly captured by the militants and about half a dozen were killed during the same period.

Later, the Federal Interior Minister claimed that 1,000 militants were killed during the operation that began on May 5, but could not provide substantial evidence in support of his claim. Collateral damage resulting from aerial bombardment was high as were the numbers of casualties and internally displaced civilians that resulted. Reports from the media and independent sources suggested that there were comparatively more civilian losses than that of militants. There was no independent information as to how many militants and Taliban were killed.

The operation, however, did result in the killings of hundreds of innocent civilians and the internal displacement of an estimated three million persons, notably in the Swat Valley, Malakand agency. The AHRC intervened on May 19, 2009, calling on the government to address the issue of IDP as a top priority.⁵ As the end of 2009, one million IDPs remained and were living with host communities in the North West Frontier Province (NWFP) and other parts of the country.

The exact number of alleged killings is difficult to calculate because the presence of human rights monitors has been limited by the authorities. The International Committee of the Red Cross, which investigates illegal killings, was ordered by the military to leave Swat over matters unrelated to the killings, a senior Pakistani government official and the Red Cross have said.

A fact-finding mission⁶ conducted by a national NGO, the Human Rights Commission of Pakistan (HRCP), to Swat Valley documented accounts of extra-judicial killings by the security forces, the discovery of mass graves in the conflict-hit region, and the continued suffering of the civilian population.

A number of Swat residents have reported sighting mass graves in the area, including at least one in Kookarai village in Babozai tehsil of Swat district and another in an area between Dewlai and Shah Dheri in Kabal tehsil, the three-day mission's report said in

⁵ For more, please see: <http://www.abrchk.net/statements/mainfile.php/2009statements/2033/>

⁶ AHRC's statement concerning the HRCP's mission: <http://www.abrchk.net/statements/mainfile.php/2009statements/2170/>

August 2009. Witnesses who have seen mass burials said that at least in some cases the bodies appeared to be those of Taliban militants, it added.

The mission expressed HRCP's grave concern over the "worrying development" and also over credible reports of numerous extrajudicial killings and reprisals carried out by security forces. The mission said: *"It is vital for the success of the military operation against terrorists that the security forces' actions are distinguishable from the atrocities committed by the Taliban. 'Taliban justice' has been rightly condemned for its brutal and arbitrary nature and was crucial in helping turn the public opinion against the extremists. Treatment of individuals by government must aspire to a higher standard."*

Human rights violations by security forces can only be discouraged if the State puts in place a transparent mechanism to monitor violations both during and post-conflict and fulfills its obligation of providing justice through due process."

The HRCP mission also noted serious difficulties faced by the local population and internally displaced persons (IDPs) returning to Swat. *"The IDPs have returned to find a number of houses in the area damaged in the military operation. Shops in most areas were yet to reopen in August, 2009, and the ones that are open have scarce supplies. The local people demand that the government ensure the supply of essentials to the returning population, including subsidised edibles for the families that cannot afford to buy them on account of financial losses suffered during and prior to the military operation. Restoration of the devastated infrastructure and provision of safe drinking water must be given top priority to prevent the spread of disease."*

Following the operation, a lack of safety and security remained for the people being sent back to the valley from IDP camps, the mission report added. The beheading of a police official in Sangota, Mingora, on July 28 triggered fear among local residents, who had returned to their homes after being assured that the militants had been flushed out of the area.

At year's end, the government and military authorities were still not able to make a clear assessment of the situation arising out of displacement of the millions of the people from the Swat Valley operation, the Rah-e-Rast. A lack of effective rehabilitation processes combined with the continuing threat posed by the Taliban there, has ensured that over one million people remain scattered around the country, particularly in the different cities around Peshawar, the province's capital, with hosts, relatives or friends.

South Waziristan

On October 17, the Pakistan army launched an operation against militants in South

Waziristan, called Rah-e-Nijat (the path of salvation). As was also the practice in the operations in Swat previously, the military announced that it would be launching the operation one month before it began. This strategy on the one hand allows civilians to flee, but also provides plenty of advance knowledge to the militants. The militants have been able to dig in, but also had time to carry out numerous terrorist attacks prior to the operation's commencement.

Some media sources claim that the Taliban and militants have supporters within the military and state agencies such as the ISI and that Muslim fundamentalists in the armed forces support militancy as they share the desire to see Islamic Shariah law imposed throughout the country. The Taliban and Muslim militants are generally illiterate, extremely conservative and poor people. However they also appear to have detailed information about the movement of the army and its officers, sensitive installations, security arrangements inside the General Head Quarter (GHQ) of the army, how to use dangerous ammunition and satellite technologies, leading to understandable suspicion that they are getting their information from inside the military establishment. Seven militants linked with the Taliban in the Punjab province, attacked the army's GHQ on October 9 and remained there until late October 10, 2009, taking 44 officials hostage. Despite the low number of militants involved, they managed to take control of the GHQ and disrupt its operations for hours. This attack embarrassed the army and forced it to attack militant safe-havens with greater vigour than had been seen during operations in Swat, although the effectiveness even here remained questionable.

After the military operation in South Waziristan, which was started on October 17, more than 350,000 persons were displaced and had not been re-settled properly by the authorities. Reports suggest that between 79,000 and 100,000 remained displaced as of early December 2009. Most of them took temporary refuge in the nearby district of D. I. Khan where they face food shortages and ill-treatment by members of the law-enforcement agencies.

Balochistan

Military operations have been ongoing in the south western province of Balochistan since 2002. The then-government of General Musharraf decided to construct several military cantonment areas at strategic points in the province - particularly the locations with an abundance of natural resources and minerals. The military is a major land-owner in the country and has wide-ranging investments and business interests. Due to its physical might and its wealth, the military is a major political force and remains above the law in many respects. As with most conflicts, that in Balochistan can be reduced to a struggle for resources. In order to cover what is a blatant resource-grab, the then-government allegedly launched a military operation in the province – the fifth major operation in 60 years.

At the time of the creation of Pakistan in 1947, Balochistan, which was then known as Qalat state, was not the part of the country. However the founder of Pakistan, Mr. Jinnah, annexed this part through military action. Since 1959, the country's armed forces have been vying to control the province's natural resources. These resources include natural gas, plutonium, cobalt, copper, gold and silver.

During the military operations more than 3500 people have reportedly been killed in the province. Pakistan Air Force jets have been used to bombard those areas where there was resistance. Disappearances after arrest by members of the security forces were a new phenomenon in Pakistan after 9/11 and the beginning of the "war on terror." Disappearances have, however, become a widespread practice since then, and the military refuses to respect the orders of the judiciary to locate and produce the disappeared.

Since the beginning of the War on Terror, the province had become the main target of continuous military operations. The Pakistan Air Force had conducted numerous aerial bombings and deployed gunship helicopters on unarmed people. According to nationalist groups, more than 4000 persons are missing from the province alone.

According to information from local groups, Balochistan continues to be ruled as a colony. It provides resources to the federal government and dominant provinces. Severe poverty and deprivation defines much of the province. 88% of the population of Balochistan is under the poverty line. Balochistan has the lowest literacy rate, the lowest school enrolment ratio, educational attainment index and health index compared to the other provinces. 78% of the population has no access to electricity and 79% has no access to natural gas. The federal government's presence is made apparent not through public welfare activities but through violence and aggression. A large number of military and paramilitary troops (above 37,000) have been stationed in different parts of the province. State-perpetrated violence has become a common feature of the political landscape of Balochistan. Disappearance of political activists and extra-judicial killings has also become very common.⁷ Obviously this situation has given rise to extreme resentment.

The Frontier Constabulary (FC), a paramilitary force working under army, has been mandated to enforce law and order, giving rise to widespread abuses.

Extra-judicial killings in Balochistan: There are many cases of extra-judicial killings, one of the worst possible human rights violations, in Balochistan.

For example, soldiers attached to the Frontier Constabulary of the Pakistan Army attacked a wedding party on the night of February 3, 2009, killing 13 people including

7 <http://www.abrchk.net/statements/mainfile.php/2009statements/2280/>

the bride, the groom, 6 other members of the family and the wedding officiator.⁸ 21 people were injured – the majority of them were women. It has been reported that the attack was in retaliation to an incident on February 2, in which unknown assailants had killed three soldiers of the same constabulary.

The incident occurred at a place called Dashte Goran, 18 kilometers from the town of Dera Buti. This town has remained under military occupation since 2002 and had also been bombed repeatedly by the Pakistani Air Force. The According to some media reports, when the FC soldiers saw the large crowd gathered outside the wedding house, they were scared and attacked the house. They indiscriminately fired into the wedding party on the pretext that they had been shot from inside the premises. Apparently the FC officers had not even bothered to ask people outside the house what was going on inside. After the massacre, the FC members were seen taking away the dead with them in three military trucks.

The identities of the victims killed by the FC have now been revealed. They are: Maulana Qazi Gul Din son of Paher Din, Mandoz son of Muhammad Bijar (the groom), Ali Baig, Pir Bux, Ullo, Todhoo, Kakar, Behram, Bahar Khan, Baran Baloch, Thalu Khan, Kakeer, the bride and the wedding officiator, Nikah Khawn. Among them, Ali Baig, Pir Bux, Ullo, Todhoo, Kakar, Behram and Bahar Khan belonged to one family.

Due to the ongoing military operations in Balochistan, members of the FC have been given the authority to shoot on sight any person they suspect of a crime.

In another unrelated incident, a young unarmed man was shot dead during his cousin's wedding party by a police officer in Panjgore district, Balochistan province. At around noon on May 31, 2009, a police chased a car of armed men into a village, where the men disbanded after a shoot out. The village was Mohalla Gharibabad, UC Chitkan, Panjgore, and a wedding party was taking place nearby. At the first sign of shooting the wedding guests took shelter in nearby houses. Spectators have noted that although the armed men ran off in the opposite direction, police continued to shoot indiscriminately in the area, resulting in the shooting of the young man. The Assistant Sub Inspector accused of the shooting has defended his own authority regarding who he does and does not choose to shoot. Despite protests, no case against him has been lodged by police.⁹

Separately, the targeted killing of non-ethnic Baloch teachers began in summer 2008. It is believed by many to be part of a government ploy to divert attention away from the military operations that have resulted in numerous civilian casualties and disappearances

8 <http://www.abrchk.net/statements/mainfile.php/2009statements/1865/>

9 <http://www.abrchk.net/ua/mainfile.php/2009/3167/>

there, and to fuel ethnic tension. Law enforcement agencies have blamed Baloch nationalists and separatist groups for the killings. Since they began, at least six college principals and three school teachers have been murdered. There are around 4000 non-Balochi speaking teachers working in the province (most ethnic Punjabis) and many are now leaving out of fear for their lives.

An incident in August put a temporary halt to the year-long targeted killings of non-ethnic Baloch teachers in the province. It also clearly exposed the hand of State agencies in the deaths and the resulting province-wide unrest.

On August 22, 2009, two men were captured by residents of Mastung (near Quetta) as they were trying to kill Mr. Haji Saleh Mohammad, a teacher from the area -- they shot at him from a motorbike and were promptly pulled off, and apprehended by the crowd. Employment cards found on the men identified them as Mr. Asghar Ali and Mr. Amir Hamza, officers of the Intelligence Bureau (IB). Their capture confirmed what many had suspected – that the authorities were behind the killings in order to fuel discontent and provide a diversion from the unpopular military operations in the province.

The Mastung city police fuelled this conclusion further, with an open reluctance to file reports against the officers. However they finally arrested them, following protests by locals. Outrageously, officials of the Frontier Constabulary (FC) and the Pakistani Army even tried to rescue them from the station in official vehicles, but the locals physically prevented it. Immediately after the incident the ongoing waves of attacks against teachers in Balochistan saw a temporary lull.

The provincial government and state agencies have tried to prevent the news of the IB officers' arrest from going public. Some newspapers have reported pressure from the military and paramilitary forces to remain silent.

Police threaten indiscriminate revenge killings in Balochistan: In response to an increase in violence committed by nationalist militants, a high-ranking police official threatened in a press conference on August 21 to begin killing people indiscriminately in the province in retaliation.

Mr. Ghulam Shabbir Shiekh, the deputy inspector of police, Naseerabad range, announced that the police would kill 40 local persons in revenge for the militants' alleged abduction and murder of 20 policemen in July and August. No targets, however, were specified. Mr. Shiekh also threatened that if any bullet was fired at the police, the police would fire 100 bullets indiscriminately back at the locality from where the bullet was fired. If any rocket was fired at police stations, the police would fire 10 rockets back.

The announcement by Mr. Shiekh was the most recent attempt by Pakistani state agencies to instil fear among Baloch nationalists. Earlier, in January, 2009, journalists received threats from the Director of the Inter-Services Public Relations (ISPR) for writing editorials demanding investigations into allegations that the army is running torture cells and detaining female prisoners. The Director, who also holds the rank of Major General, threatened to withhold official advertisements and payments from the newspapers if they continued their “malicious” campaign against the army. Some television channels disclosed the threats publicly, but the Federal Minister for Information denied that the ISPR Director has made any such announcement.

Forced disappearances: Forced disappearances by the State are a serious problem in Pakistan. The AHRC has in previous annual reports and statements, expressed grave concern about the number of forced disappearances being perpetrated in Pakistan, which places it amongst the worst violators in the world, with thousands of cases thought to have taken place in the country’s various conflict-affected areas in particular. The AHRC’s sister-organisation, the Asian Legal Resource Centre (ALRC), has also intervened in the UN Human Rights Council concerning this pattern of grave abuse.

Pakistan’s military and intelligence agencies, which include the Intelligence Bureau (IB), Federal Investigation Agency (FIA) and Inter Service Intelligence (ISI) and military Intelligence (MI) are allegedly involved in perpetrating these abuses and only when Pakistan’s civilian government finds a way to effectively control these, will such abuses be preventable.

The military operates cantonments that include torture camps, in major cities including Karachi, the main commercial and industrial city, Rawalpindi, Quetta, Lahore and Peshawar, where people are taken, disappeared and severely tortured. This has been described in detail by the persons who were released after lengthy detention there.

There were approximately 100 cases of disappearance in Pakistan between April 2008 and March 2009. During 2009, more than 40 persons were disappeared after their arrest by the state intelligence agencies, ten political workers were killed and dozens were arrested and some of them, who were wanted in Iran, were handed over to Iranian authorities when among them three persons were executed in the Seestan, Iran. The police typically claim they know nothing about the illegal arrests and subsequent disappearances.

Under the state of emergency declared by General Musharraf on November 3, 2007, a Constitution (Amendment) Order, dated 20 November 2007, was issued. Under this amendment’s section 6, the addition of Article 270AAA to the Constitution ensures that no acts performed by any State authorities or members thereof can at present be challenged in any court in Pakistan, including the Anti-Terrorism Court or the High

Court. This amendment continues to grant total de facto impunity to all State-actors in Pakistan. In order to undo this amendment to the Constitution, the Parliament (the Senate and the National Assembly), is required to vote to do so with a two-thirds majority. However, the new government has failed to undo the amendment, which remains an obstacle in preventing the violations of human rights regarding on disappearance and arbitrary arrest.

Concerning Balochistan in particular, victims are usually arrested by personnel of the Frontier Constabulary during the day and are taken away to unknown places in jeeps without number plates. They are then transferred to isolated military-run torture cells and are kept until confessional statements have been forcefully extracted. Among the number of disappeared cited above, as many as 18 students and young activists allegedly affiliated with the Baloch nationalist movement are thought to have been arrested and then disappeared in between June and mid-July, 2009, in the run up to a meeting was held between the Prime Ministers of India and Pakistan at Sharm-el-Sheikh. The meeting in Egypt resulted in a joint statement being issued on July 16, 2009, in which India accepted its involvement in subversive activities with the nationalist movement in Balochistan.

Students and young people alleged to be sympathetic to the movement were disappeared by law enforcement agencies such as the FC. They were reportedly been detained and tortured in order to extract statements that implicate India in Balochistan's insurgency.

Three Baloch nationalist leaders were killed after their abduction by plain clothes men in unmarked vehicles that bore no registration plates on April 3, 2009. They were taken from the chambers of a prominent lawyer and their deaths have raised several questions on the role of state spy agencies, particularly about military intelligence (MI). All three murdered persons, Ghulam Mohammad Baloch, Sher Mohammad Baloch and Lala Muneer Jan Baloch, were earlier kidnapped by the military intelligence agencies during 2006 and 2007 and each of them were disappeared for several months. After their release it was revealed that they had been kept in the different military torture cells and severely tortured. They all were interrogated by the military officers about the Balochistan Liberation Army (BLA) and funding for nationalist movements in the province against military operations.

The MI are suspected of involvement as the three leaders were witnesses as they all previously disappeared by the army and kept in different military torture cells and could prove dangerous in any probe about disappearances.

As of mid-October, no progress has been made in the investigation into their killing. It is reported that the army and FC are creating obstacles for the civilian administration

hindering progress in the case. Eye witnesses have been threatened by the officials of intelligence agencies and most of them have left their places of residence due to the lack of protection from the civilian government.¹⁰

The Human Rights Commission of Pakistan (HRCP), a local NGO, arranged a fact finding mission to investigate the case. The results so far include the observation that as per the eyewitness statements, previous abduction cases of the Baloch leaders show that the secret security forces of Pakistan were behind the disappearance of the three Baloch nationalist leaders. A first information report (FIR), a police case, was registered against the Inspector General of the frontier corps, a colonel of Military Intelligence (MI) and a major of the Inter Services Intelligence Agency (ISI) based in District Kech. It was further reported that the bodies of the three men were found in the Sadar police area, district Kech, which is 200 km away from the Iranian Border, which strongly contradicts the statement of the Inspector General (IG) frontier corps that they were found near the Iranian border.¹¹

In another case, Zakir Maheed, an active student leader, was allegedly abducted by an intelligence agent on 8th June, 2009 near Quetta. Majeed was the vice chairperson of the Baloch Student Organization-Azad (BSO). The Baloch Students' Organization-Azad lobbies for the basic rights of the Baloch people in Pakistan, and is thought to be the largest platform for students critical of military action there. Some men in casual clothes from two Toyota cars without number plates said they were intelligence agents working for the Pakistan army and took Majeed away.¹²

Separately, postgraduate student Miss Karima Baloch, 23, has just been sentenced to three years in prison and fined Rs 150,000 (US\$ 1,875) after she and several other women demonstrated in August 2006 against disappearances. The charges were made in her absence since she has yet to be found and arrested, and they were based mainly upon the removal of a flag from a government building without authorisation (under section 123 B of Pakistan penal code). She has been charged with defiling the flag and with sedition, which under section 124 A of PPC means 'whoever by words or by sign or by visible representation excite(s) disaffection towards the federal or provincial government.' The sentence was given by the Anti Terrorist Court (ATC) in Turbat, Balochistan province on June 2, 2009.¹³

10 <http://www.abrchk.net/ua/mainfile.php/2009/3145/> and <http://www.abrchk.net/statements/mainfile.php/2009statements/1984/>

11 <http://material.abrchk.net/pakistan/AHRC-STM-212-2009-HRCPTurbatFactFindingRpt.pdf>

12 <http://www.abrchk.net/ua/mainfile.php/2009/3175/>

13 <http://www.abrchk.net/ua/mainfile.php/2009/3175>

Beside student leaders, politicians and those who actively involved in political social movements also have a high chance of being arrested and going missing. On 23rd August, 2009, Rassol Bux Mengal, joint secretary of Baloch Nationalist Movement (BNM), was abducted. On 31st August Mengal's body was found hanging from a tree. There were wounds from serious cigarette burns and torture over the body, as well as words carved by sharp weapons saying, 'down with BLA (Balochistan Liberation Army)'.¹⁴

Furthermore, Ehsan Arjumandi, an Iranian political activist who holds Norwegian citizenship, was forcefully abducted by armed men from a bus between Balochistan province and the capital of Sindh province, Karachi on 7th August, 2009. Arjumandi was actively involved in campaigning for the rights of Balochistan. He also worked as a translator for the Foreign Ministry of Norway Police Department.¹⁵

Women are being disappeared and used as sex-slaves by the army. NGO, Anjuman-e-Ittehad-Marri has collected statistics about the disappearance of women from Balochistan, according to which 179 women are missing after their arrest or during migration from one place to another.

Ms. Zarina Marri, a 23-year-old schoolteacher from Balochistan province, was arrested in late 2005 and was held incommunicado in an army torture cell at Karachi, the capital of Sindh province. She was repeatedly raped by the military officers and is being used as a sex slave to induce arrested nationalist activists to sign state-concocted confessions.

Mr. Munir Mengal, the managing director of a Balochi-language television channel, was arrested on April 4, 2006 from Karachi International airport by the state intelligence agencies. Mengal was transferred to a military torture cell in Karachi for nine months.¹⁶ He narrated the story of the forced sex slavery of the young teacher, Zarina Marri, whom he encountered in a military cell. According to the Reporters Without Borders (RSF), Mr. Munir Mengal witnessed many human rights violations in this military prison. Mengal says that, "a young Balochi woman, Ms. Zarina Marri, was used as a sexual slave by the officers. They even once threw her naked into my cell. I did not know what had happened to this mother of a family who was arrested by the army in our province."

Another Balochi nationalist (name omitted by request) was arrested by the military intelligence agency twice and was kept in military cells in different cities. The person has confirmed to the AHRC that there were young Balochi females seen in those two torture cells naked and in distress. Prominent Balochi nationalist leaders say they are aware that

¹⁴ <http://www.abrchk.net/statements/mainfile.php/2009statements/2203/>

¹⁵ <http://www.abrchk.net/ua/mainfile.php/2009/3235/>

¹⁶ <http://www.abrchk.net/ua/mainfile.php/2006/1666/>

young Balochi women are being arrested and disappeared either during or after protest demonstrations concerning the disappearances. They are also aware that those women are sexually abused in military custody. Even so, the prominent Balochi nationalist leaders cannot talk about these issues publicly due to fear for the security of their families.

Faced with no other recourse, family members of the missing have taken to camping outside the Supreme Court complex in protest in November 2009. The Supreme Court recently relented to one group, stationed there from 2 to 17 November, and assured them that the fate of their loved ones would be examined and their cases tried. But the judges involved have since done little - suspected perpetrators from the state agencies have not been faced questioning or held to account. Given this impunity, it is likely that we will see more victims being arrested and disappeared in future, unless serious steps are taken.

The end of conflict in sight in Balochistan? The examples mentioned above reflect the serious situation of human rights in Balochistan, which continues to be a grave concern despite the government's promise to revive law and order. After the removal of General Musharraf, the newly elected government of Asif Zardari announced in 2008 that military operations in Balochistan would be halted. Prime Minister Syed Yousuf Raza Gilani and government parties apologized before the parliament for military excesses committed during the operations there. However, Prime Minister Gilani has also accused nationalist groups of being run by Indian agents. It is important for the authorities to send a clear and predictable message that they are committed to bringing conflict and rights abuses to an end in Balochistan.

Illegal arrests, extra-judicial killings and cases of disappearances have continued to take place as they did during the military regime of Musharraf. Personnel of the Frontier Constabulary (FC) have arrested victims during the daytime and taken them away in jeeps without registration plates. Victims are reportedly being transferred to military-run torture cells and kept in incommunicado detention until confessional statements have been forcefully extracted.

However, on November 24, 2009, the government of Pakistan introduced in a joint session of the National Assembly and Senate a withdrawal plan that will bring to an end nearly eight years of military operations and abuses. The five-tier package, which includes components on constitutional, political, administrative, economic and monitoring mechanisms, envisages the withdrawal of the military, which would be replaced by the Frontier Corps, a paramilitary force.

The package also includes the release of all political workers and the withdrawal of cases against those persons that have not been charged. Missing persons with charges against them would be brought in front of a court for trial within seven days. They would be

provided with legal counsel of their choice and the government would assist them in this regard. Family members would be informed accordingly and have visiting rights. The AHRC has repeatedly highlighted the severity of the numerous, human rights violations that have been taking place in Balochistan and welcomes the proposed plan to tackle forced disappearances in particular. Balochistan is the scene of allegations of thousands of disappearances in recent years, making it one of the worst places for this grave abuse in the world. The AHRC sincerely hopes that this plan will be implemented in full, as this will be a significant step in the right direction and a start for the political solution to the crisis of the province.

Censorship and attacks on the media during military operations

During military operations in the NWFP and South Waziristan, the military and State agencies have sought to silence any voices critical of their actions in the media. Such actions have also been seen in the context of military operations in the South Western province of Balochistan, where the army has been conducting operations since 2002 against nationalist and secular forces.

During the military operation in the Swat Valley, journalists' access was prevented and movement controlled by military officials. Members of the media were pressured by the authorities not to publish any independent reporting, with only information emanating from the military's public relations office, the Inter Services Public Relations (ISPR), being allowed to be published or broadcasted.

On November 9, the AHRC issued a statement concerning restrictions on the media in military operations in South Waziristan.¹⁷ In the statement, the AHRC noted that ISPR officers have been calling media officials to their offices and telling them to stop covering the news independently and to use only the ISPR press notes or information from the daily briefings of the ISPR.

Journalists were only allowed to remain in Dera Ismail Khan, a city of the North West Frontier Province (NWFP) close to South Waziristan, where persons displaced by the military operations were arriving for aid. Journalists were prevented from entering South Waziristan. Only when the military was successful in some phase of the operation did they allow media personnel to cover the specific situation. Since the operation started, the military had taken selected journalists on helicopter tours to the affected areas on only two occasions. The journalists have been taken from Islamabad, the capital, and from Peshawar, the capital of NWFP, respectively. However, they were not allowed to move

¹⁷ *Restrictions on the media in military operations in South Waziristan*: <http://www.abrchk.net/statements/main-file.php/2009statements/2285/>

about freely or without supervision.

While journalists' security must be an important consideration for the military when they conduct operations, and while this may entail some restriction of journalists' movement in circumstances of particular danger, blanket restrictions of the type in operation in Pakistan serve mainly to ensure that there is no independent scrutiny concerning the actions of the military during their operations. Given the reports of numerous civilian deaths and a wide range of abuses attributable to the military in Pakistan, these restrictions are a major concern.

An example of the pressure being placed on the media can be seen in the case of the BBC's Urdu service, which is known to be disliked by the army as it broadcasts interviews through telephone calls directly from military operation zones. In an effort to stop the BBC Urdu programmes, particularly its Sairbeen programme, the Pakistan Electronic Media Regulatory Authority (PEMRA) was used to block the many FM radio stations that broadcast the BBC's Urdu news on the hour, for 16 hours a day. Those stations are: FM 103, FM106.2, FM 107, FM Apna, FM Ninety-One, FM Okara, FM Highway and FM Gujrat and Islamabad. However, the BBC Urdu broadcast was not stopped in Pakistani held Kashmir.

Reporters Without Borders (RSF) has been monitoring media censorship during the military operation in South Waziristan. RSF says that PEMRA has ordered some radio stations not to broadcast BBC Urdu-language news programmes, while Parliament is preparing to ratify drastic censorship legislation dating from the era of General Pervez Musharraf. "We thought that Pakistan had rid itself of the censorship impulse, but PEMRA and the political parties are once again making decisions that go against the interests of the Pakistani people", the worldwide press freedom organisation said.¹⁸

The BBC Urdu Service officials based In Islamabad claim that on at least two occasions the ISPR's offices in Islamabad and in Peshawar city, have called on them not to report independently from the military affected areas, on the pretence that it would help the militants.

Pressure on the media can take a far more brutal form, however. Killings and attacks on journalists in the military operation zones have been perpetrated with impunity, as no proper investigations have been conducted. In many cases, the militants have been blamed by the authorities for any attacks on or killings of journalists, but these accusations have been made without credible investigations having taken place. Pakistan ranks 10th in the world among countries concerning the killing of journalists. Eleven

18 <http://www.abrchk.net/statements/mainfile.php/2009statements/2282/>

journalists have been killed in Pakistan since 2000, according to the US-based Committee to Protect Journalists.

In one example, 28-year-old local journalist and television correspondent, Mr. Musa Khankhel, was forcibly disappeared on February 18, while covering a procession led by Maulana Sufi Mohammad, a religious leader in Swat, in the NWFP.¹⁹ The procession was to celebrate a peace agreement with the government which would see Islamic Sharia laws implemented in the valley. He had been threatened several times by government security forces for his independent reporting. He had also been kidnapped and tortured twice before by security forces. As a journalist, he was not popular among militant groups either, including the Taliban and the group lead by Maulana Soofi Mohammad, Tehrik Nifa-1 Shariat Mohammadi (TNSM).



On the day he was disappeared, friends and relatives say that Khankhel mentioned hearing that 'today one journalist may be killed,' through sources in the security agencies stationed in the war zone. Because of this he told prominent senior journalist and anchor person, Mr. Hamid Mir, to be extremely careful, should he choose to visit the area.

After Musa Khankhel's body had turned up in the Matta sub district, the government, TNSM and the Pakistan Federal Union of Journalists (PFUJ) announced the formation of separate probe committees into his death. No one laid claim to the murder. The government assigned the Inspector General of Police in the province to investigate the incident, but neither he nor TNSM's committee had reported any findings as of early December 2009. Only the probe committee of PFUJ appears to have started a concrete investigation, and Mr. Mohammad Riaz, the chief of the PFUJ committee, has visited the area in question. He reports that the atmosphere there is tense and few civilians are willing to discuss Khankhel's death; they are scared of harassment from both sides, the militants and the security forces, should they talk. The latter are known to brutally and often arbitrarily mete out punishment in the more remote parts of the country, and disappearances here are not uncommon. There are also no police in the area. Without committed government intervention - a high judicial commission - to probe the killings, Riaz says, it will not be possible to unearth the 'truth'. Information gathered by the AHRC points, increasingly, at Pakistan's wayward security forces for the murder.

19 <http://www.abrchk.net/statements/mainfile.php/2009statements/1913/>

In another case, veteran journalist Raja Assad Hameed was gunned down on March 25, outside his home in Rawalpindi, Punjab province. Mr. Hameed worked for Waqt TV and The Nation, an English-language newspaper. The incident casts further serious doubts on the commitment of Pakistan's authorities to ensure that journalists are safe, notably those that are critical of its actions. Mr. Hameed was also critical of security agencies for not tackling properly the militants. In such cases, the authorities are suspected of carrying out killings of journalists.

On August 24, 2009, Afghan journalist Janullah Hashimzada was killed by unknown attackers. According to the committee for protection of journalists (CPJ), a white car intercepted a public minibus carrying Hashimzada and a colleague, Ali Khan, in Khyber Agency near the border with Afghanistan. The journalists, who worked for Afghan Shamshad TV, were returning from Afghanistan to Peshawar, the reports said. Three gunmen from the car fired on the journalists, killing Hashimzada and injuring Khan in the neck, according to the Associated Press.²⁰ Hashimzada also provided reports for the AP, Pajhwok Afghan News agency and other news outlets.

Unidentified gunmen in Pakistan's North West Frontier Province shot and killed news correspondent for the independent Aaj TV channel Siddique Bacha Khan²¹ on August 14, in the city of Mardan Bacha Khan, before fleeing the scene, the channel reported.

In two separate incidents in July, two journalists²² working in the border area with Afghanistan said militants ransacked and destroyed their homes in retaliation to their reporting.

According to the KhUJ and the English-language daily The News, the home of Behroz Khan was looted and ransacked several times before being burned in Balo Khan village, Buner district, North West Frontier Province.²³ Khan is a senior journalist who works for Geo TV and has assisted CPJ investigations in the Federally Administered Tribal Areas in the past.

In the night of July 8, 2009, around 60 persons claiming to be Taliban, attacked the house of journalist Mr. Rahman Bunaireeri, in Poland, Buner district, NWFP.²⁴ The Pakistan army had been conducting operations against the Taliban in the area during the



20 <http://www.rsf.org/Afghan-journalist-shot-dead-in.html>

21 <http://cpj.org/2009/08/pakistani-tv-reporter-shot-dead.php>

22 <http://cpj.org/2009/07/fear-growing-as-another-pakistani-journalists-hous.php>

23 http://www.thenews.com.pk/daily_detail.asp?id=187607

24 <http://www.abrchk.net/statements/mainfile.php/2009statements/2127/>

previous two months. The members of the Taliban planted dynamite around the house and blew it up in the presence of his family. They informed Brunairee's family that they had followed orders from the leadership of the Taliban movement. Furthermore, they made threats that if Mr. Rahman Bunairee, who works for Voice of America, Pushto bulletin, and is also the bureau chief of Khyber television channel at Karachi, does not stop the "malicious propaganda" against the Taliban then his entire family would be assassinated and used as a lesson for the entire journalistic community. At the time, Mr. Rahman Bunerri was in Karachi city. His three sisters in law, his father and eight children were held at gun point, although no one was injured.

Conflict between institutions crippling efforts to protect human rights

Although parliament and all the provincial assemblies are working, the devolution of power remains the main obstacle for the creation of the democratic institutions in the country. The 17th amendment to the Constitution of Pakistan, introduced by the Musharraf government in 2004 provides all power of governance to the president. Pakistan operates a parliamentary system in which the Prime Minister holds power, with the President acting as head of state, with the role of signing recommendation from the parliament. The 17th amendment changed this in order to give the bulk of powers to the President, notably by making the President the Commander in Chief of the military, which has caused imbalance in the political structure and led to abuses of power and related rights abuses under Musharraf. This has still not been removed.

Under these conditions, the parliament is effectively under the control of the President. Under article 58(2)B of the Constitution, which was amended by a previous military ruler, General Zia Ul Haq, the President can dismiss the government, if the President feels that the parliament is not working properly – or in line with the President's interests. The current President Zardari is allegedly hindering efforts to remove this amendment, as her reportedly wants to keep it to ensure 'that other forces can not interfere in the smooth running of parliament.' This amendment can only be removed by a two- thirds majority in the joint session of the National Assembly and Senate.

The central conflict that is preventing Pakistan from developing democratic institutions that are capable of safeguarding human rights, is that between the civilian government and the military. The military establishment is very powerful, and has been previously stated, does not just fulfil the role of defending the country, but is also a large-scale land-owner and has wide-ranging commercial interests and therefore political interests. Furthermore, the military's grim human rights record over the years in terms of grave and widespread violations against the people of Pakistan, means that it actively seeks to ensure that the country's institutions of the rule of law do not strengthen to the point

that they are able to challenge the military's impunity. The struggle between President Pervez Musharraf, who was a General heading the military and the Chief Justice who he removed, leading to the lengthy and often bloody Lawyer's Movement, is a clear symptom of the tensions between the civilian and military establishments. While Musharraf was ultimately ousted, it has become clear in 2009 that the army remains powerful and that the civilian government has not been able to strengthen its role or institutions. The legislature remains weak and unable to remove residual legislation and amendments left by the previous military-government, thus ensuring the continuing supremacy of the military and continuing impunity concerning human rights abuses.

The army has sought to keep the upper hand concerning several key issues, such as foreign affairs, finance and law and order. The military enjoys strong support from right-wing political parties – such as the PML-Q (General Musharraf's party), Jamat-e-Islami, MQM, and Imran Khan's Tehreek-e-Insaf - that greatly strengthen its hand in the political processes.

The army is believed to be holding grudges against the current government for taking independent decisions on foreign policy or the country's relationship with the USA without involving the army. This has irritated the military establishment and its allies in the bureaucracy, landed aristocracy, major media houses and banks. Since 1990, Zardari has had the reputation of being among the most corrupt persons in the country, and now the army and other groups have to salute him, which irks them. According to the 17th amendment the President is the commander of the armed forces and appoints chiefs of the armed forces. The President and the military have other bones of contention.

For example, Zardari made an offer to India in early 2009, to enter into a non-proliferation agreement concerning nuclear technology, which has irritated the army. The President has allowed cross border trade with India through the Line of Control (LoC), a disputed border line between both sides of Kashmir. On the issue of Balochistan, Zardari made an apology to the people there for the conduct of the military operations. Furthermore, the Prime Minister announced in August 2008 that the ISI, the country's notorious intelligence agency, would work under the Ministry of the Interior. This created a strong reaction from the army and the government had to abandon this proposal. Finally, the military appears to be irked by the fact that the Zardai government holds closer ties with the government of the USA, whereas previously the military held stronger relations. Under the Kerry Lugar Bill passed by the US Congress, 7.5 billion dollars of aid are provided to Pakistan. This bill requires assurances be given concerning the non-proliferation of Pakistani nuclear technology; that most of the aid will go to the social sector and not the armed forces of Pakistan; that terrorist training camps running in Pakistan should be closed down and that the military will remain under the civilian rule.

On October 9, the AHRC issued a statement calling for the parliament and government of Pakistan to constitute a high powered judicial commission to probe the interference of the army generals in the politics of the country and take the generals to task for using extra constitutional methods to undermine the democratic functioning of civilian rule concerning the Kerry Lugar Bill.



The government of President Asif Zardari also does not have the political strength to push for reforms and undo the illegal actions of the previous military government. The PPP government does not have absolutely majority in the parliament and therefore requires the alliance of parties that were part of the Musharraf government.

In addition, and to complicate things, the mainstream media in Pakistan have in the past gained financially from keeping on the military's good side, as the military provides them with funds through advertising. A significant portion of media houses are therefore antagonistic to the civilian government, and have imposed self-censorship concerning many issues, notably those pertaining to human rights violations by the security forces.

The judiciary is also at loggerheads with the parliament concerning the modification of laws and ordinances put in place by the previous government. In its decision to declare the country's recent state of emergency that was imposed by President Musharraf as illegal and unconstitutional, the Supreme Court referred the matter to parliament to decide upon the removal of ordinances.

The role of the judiciary in improving the respect for human rights:



As has been mentioned previously in this report, the judiciary has been at the heart of political developments in Pakistan since the Chief Justice, Iftekhhar Mohammad Choudhry, was removed for his position by then-President Musharraf on March 9, 2007, on the grounds of misconduct. The Chief Justice fought back and was reinstated July 20, 2007.

The judiciary was deposed on November 3, 2007, by the imposition of a state of emergency by President Musharraf in his capacity as Chief of Army Staff (COAS) which was

supra-constitutional. Around 60 senior judges were placed under house arrest. Because of the state of emergency the constitution was put in abeyance and fundamental rights were suspended. A parallel, stooge judiciary was established to approve as legal the executive's illegal and unconstitutional steps. Cases concerning disappeared persons, and corruption were suspended in the courts.



Along with numerous demonstrations and other civil actions, the Lawyer's Movement launched a long march that is credited with exerting sufficient pressure on the Zardari government to reinstate the judiciary. The Zardari government had made repeated promises to do so, but it was only March 16 the deposed judiciary was restored by the intervention of the Chief of the Army Staff (COAS) and the civilian government accepted

the orders of the COAS, following lengthy stalling by President Zardari on this matter. This stalling was further evidence of the Zardari government's weakness and inability to take concrete action due to political paralysis stemming from a need to placate too many divergent political forces in order to survive in power.

On May 4, 2009, following the restoration of the judiciary, the Supreme Court announced the new National Judicial Policy. The policy aims to ensure speedy justice, eliminate corruption and ensure the independence of the judiciary.

The new policy will ensure disposal of criminal cases within a period of three months while murder cases would be decided preferably in a period of six months. Likewise, priority would be given to quick disposal of cases concerning women and juveniles as well as matter relating to bail. The policy also bars Supreme Court and high court judges from officiating as provincial governors and tightens the procedures to curb corruption.

In each high court, a cell would be established under the registrar for eradicating corruption from the judiciary. Similarly district and sessions judges would also report about corruption and misconduct of their subordinate judges.

As of June 09, in total around 140,000 cases were pending in the Supreme Court and high courts of Pakistan. 19,055 cases were pending in the Supreme Court, 2,092 in the Federal Shariat Court, 84,704 in the Lahore High Court, 18,571 in the Sindh High Court, 10,363 in the Peshawar High Court and 4,160 in the Balochistan High Court. Apart from this there were 1,565,926 cases pending before the subordinate judiciary in

the four provinces, including in session courts and magistrate and civil courts, banking courts, anti-corruption courts and anti-terrorist courts.

After the restoration of the judiciary, Chief Justice Iftekhhar Choudhry, visited several prisons, resulting in a number of detainees that were under trial being released. These persons had almost completed the length of their possible sentences while being detained while under trial. More than 5000 prisoners were released. The government has also begun acting on prison reforms introduced by the Chief Justice.

On December 5, the Law and Justice Commission, under the chairmanship of the Chief Justice, banned the traditional feudal and tribal practice used by Jirga courts, in which men accused of having illicit relationships have to prove their innocence by walking on burning coals.

The national judicial policy could prove to be a key step for the speedy conduct of trials and the quick disposal of the cases, if it is implemented. This ambitious plan has still not started, and lawyers are showing resentment and resistance to being rushed. Without the consent of the lawyers courts cannot setearly dates of the hearings. The shortage of judges and staff in the higher courts is proving to be another hindrance to the implementation of the policy. In Supreme Court there are 17 judges and to deal with 19,055 cases, that means that every judge has to deal more than one thousand cases in a year which is evidently impossible. While the policy is welcome in terms of aims, it requires the significant input of resources and is unrealistic as it stands at present in terms of the capacity of the limited numbers of qualified judges.

Another problem remains political interference in the country's courts, which has continued throughout 2009, leading to the higher courts continuing to avoid dealing with controversial cases, such as the many cases of disappearances in the country. On November 20, 2009, the AHRC released a statement concerning this that read:

"It may have a recently-restored judiciary and an elected government that claims a strong interest in the rule of law, but Pakistan is seeing little progress in the hundreds of missing person's cases still pending. Pakistanis continue to be regularly 'disappeared' after arrest.

With the police force exposed as increasingly negligent and corrupt, the responsibility of identifying such cases and intervening has long fallen to the judiciary. Judges taking suo moto action have secured the rescue of numerous persons from illegal military detention in the recent past, and this is widely believed to have been a major motive behind the sacking of the Supreme Court judges in 2007 by then-President and Army Chief, Pervez Musharraf. Yet despite the restoration of the Judiciary with its Chief Justice Iftikhar Chaudhry in March after a long civil struggle and with the support of current Chief of Army Staff General Kiyani,

there has been a marked decline in the response from the courts to appeals from the family of the missing. Leading figureheads in the lawyers' movement, such as Mr. Ali Ahmed Kurd, former president of Supreme Court Bar Association, have been renewing their criticism of its performance. The change has been raising questions about the court's allegiance to civil society versus its sense of obligation to his supporters in the army.

In response to this institutional indifference, family members of the missing have taken to camping outside the Supreme Court complex in protest. The court recently relented to one group, stationed there from 2 to 17 November, and assured them that the fate of their loved ones would be examined and their cases tried. But the judges involved have since done little more than make clichéd remarks about the ultimate good of the Supreme Court, while showing no willingness to flex the judicial muscle; suspected perpetrators from the state agencies have not been called or held to account. The proceedings are, in fact, starting to resemble a publicity stunt.”²⁵

The national judicial policies often do not trickle down to lower judiciary system, specifically, session courts, judicial magistrates and civil courts, who mostly rely on reports from the prosecution and the police for their work as well as the political influence of the powerful elements of society in deciding cases.

In rural areas, where landed aristocracy has significant social and political influence, the lower judiciary has proven ineffective in protecting the rights of the poor and powerless, and women. In the rural and far flung areas the courts remain under threat from powerful land lords or tribal leaders, who control local political bodies and assemblies and also have private armies of thugs at their behest. In spite of the restoration of the judiciary, the corruption in the judiciary has increased. From lower judiciary to the top echelons of the judicial system, paying bribes is the only way to have cases dealt with any priority.

There is a big flaw in the laws of the government, with regard to both Islamic and secular laws, and the judiciary appears to be avoiding discussion of the question due to the stranglehold of Muslim fundamentalists on public opinion. The Constitution declares Islam to be the religion of the state, and notes that sovereignty belongs to Allah alone.

Effectively, this grants the Muslim clergy, that claims that it alone knows the will of Allah, exclusive political and judicial authority in legislating and interpreting laws. Islamic provisions of the Constitution, including Articles 227, 228, 229, require all laws to be interpreted in the light of the Quran and state that “all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Quran and Sunnah.”

25 <http://www.abrchk.net/statements/mainfile.php/2009statements/2307/>

These provisions greatly enhance the authority of the Muslim clergy and are easily exploited by radicals to justify the perpetuation of religious hate and intolerance. More information concerning this will be presented in the section on religious minorities further on in this report.

Institutional corruption in Pakistan

Rampant corruption in Pakistan continues to undermine any possibility of effective governance and the enjoyment of human rights. Corruption always favours the strong over the weak and perpetuates a system of inequality and brutality. Corruption pervades every aspect of life and every strata of society; from taxation to vehicle ownership to basic medicines. President Asif Zardari and several other high-ranking ministers have been accused of corrupt practices, further undermining the civilian government and fuelling political instability and hindering progress. Current president Asif Zardari enjoys indemnity under Article 248 of the Constitution and no new or old cases could be opened against him as long as he holds the Presidency.

Transparency International's (TI) Corruption Perception Index 2009 saw Pakistan drop five places. Not only does this reinforce the sentiment that corruption has become an institutional pandemic, but also weakens the already-wavering confidence of the public in governmental institutions. The report notes that: "at all levels in all manner of public-sector departments, from land records and tax to customs and motor vehicle ownership or licensing, corrupt practices have become disturbingly common. Sections of the law-enforcement apparatus, such as the police and the lower judiciary, are notorious for taking or demanding bribes. In public-sector health units, where services and basic medicines are supposed to be provided either free of cost or at heavily subsidised rates, citizens find themselves forced to pay through the nose or forego treatment."²⁶

Pakistan is now number 42 in the annual list of the world's most corrupt countries. Explaining the link between corruption and other ills, TI Pakistan Chairman Syed Adil Gilani said TI Pakistan was of the view that terrorism was the direct result of poverty, which had resulted due to corruption, and especially the illegal direct, or indirect, rule of armed forces in Pakistan since 1951 to 2007. The endorsements provided to military regimes by a corrupt judiciary were also to be blamed.

Pakistan's water sector, like many in the region and around the world, is fraught with large and small-scale corruption. According to a 2003 survey by Transparency International, Pakistan's Water and Power Development Agency is perceived to be the second most

26 http://www.transparency.org/publications/gcr/gcr_2009

corrupt institution in the country.²⁷ Close to half of the more than 31,000 complaints received by Pakistan's anti-corruption ombudsman in 2002 were related to this one institution. As the World Bank's 2005 Pakistan water strategy admits, top positions in the country's water bureaucracy are sold at a high price.

Adil said positive impact of the few good governance steps taken by the government would be visible by the next year. He mentioned the reinstatement of sacked judges by the Prime Minister through an executive order on March 16, declaration by the Supreme Court chief justice of zero tolerance for corruption and the withdrawal of the National Reconciliation Ordinance from the National Assembly as positive steps.

The National Reconciliation Ordinance (NRO) was promulgated by former president Musharraf in 2007. It allows for the withdrawal of 3,478 cases registered against notable politicians and other high-ranking officials on charges of corruption, financial bungling, misuse of authority and criminal charges.

While the reinstatements of sacked judges and withdrawal of the NRO are commendable steps, the AHRC calls for concrete action to wipe out corruption at every level, with systemic overhauls of institutions and practices to be performed where corruption is detected. As the year draws to a close, there has been significant discussion in the international media about the problem of corruption in neighbouring Afghanistan. There is no doubt that Pakistan also requires this problem to be tackled as a priority. In order to prevent further demoralization of the public in not just Zardari's government, but the democratic system as a whole, a sustained, long-term plan must be drawn up to root out corruption at all levels.

Torture widespread and ongoing:

No serious effort has been initiated towards the elimination of torture which has become endemic in the country. Civil society organisations in Pakistan have reported an estimated 1300 cases of torture in the last year, and new cases continue to be added to this number. Although Pakistan has signed the Convention against Torture (CAT) on April 17, 2008, no discussions concerning the instrument's ratification or implementation in law have been conducted in the country, notably by the Parliament.

Pakistan does not have any specific law relating to torture, although Article 14 (2) of the Constitution expressly prohibits the use of torture for extracting evidence. Domestic jurisprudence concerning the use of torture is minimal. Victims have the burden of proof, and there are no independent investigating agencies that are empowered to inquire

²⁷ <http://loatay.com/index.php/archives/796>

into complaints of torture. Furthermore, claims for compensation for an act of torture are to be settled under Shari'ah law, which can be counter-productive and lead to further legal and rights abuses.

The AHRC has identified 52 such detention centres which are run by the military, where people that have been arrested and disappeared are typically detained incommunicado and tortured for several months to extract confession statements.

The police are the main perpetrators of torture against ordinary citizens. The lack of police reform mechanisms has perpetuated the cycle of torture in Pakistan. Anyone who is arrested is likely to endure ill-treatment or torture. No police officer has ever been sufficiently punished for the act of torture, although in rare cases some have been suspended or transferred for committing torture in the rare cases that it has been proven. The absence of criminalisation of torture provides impunity to the police and engenders further abuse.

Since the establishment of the current government last year under President Zardari, no effective investigations of allegations torture have been conducted in spite of the government's assertion that they will remedy the matter. Article 4.1 of the 1984 UN convention against torture says that every signatory state must ensure that all acts of torture are offences under its criminal law yet there is no prohibition against torture in Pakistan's domestic law. Due to the lack of mechanisms put in place to address acts of torture, arbitrary arrests and grave human rights violations continue to be carried out. As of now there are no independent investigation procedures in Pakistan to investigate cases of torture. In addition, there is an alarming level of insensitivity among the legal professionals including the judiciary regarding torture in Pakistan.

The AHRC has documented numerous cases of horrific torture in Pakistan. For example, in one case, Mr. Fazal Abbas, his young sisters, his mother and his brother in law, Mr. Shafiq Dogar, were all tortured in April at the Airport Police Station Rawalpindi. Their ordeal was allegedly arranged and aided by family members of Fazal's new wife Khulsoom, including member of Punjab Assembly (MPA) Mr. Iftekhhar Baloch, in revenge for a marriage that they hadn't approved.²⁸

Mr. Shafiq Dogar was subjected to violence at the hands of police officers including rape, after which red chili powder was put into his anus. Dogar's wife Riffat Rani and her younger sisters, 12 and 19, were also allegedly beaten by policemen and by law-maker Iftekhhar Baloch and arrested on trumped up charges, and since their release, have been threatened by Iftekhhar Baloch, who continues to enjoy impunity. The medical report

28 <http://www.abrchk.net/ua/mainfile.php/2009/3159/>

on Mr. Fazal has been released but contains no mention of sodomy and was apparently written in such a manner so as to protect the police.

In another of many possible examples, as people around the world gathered to observe the UN international day in support of torture victims on June 26, Inter-Service Intelligence agents in the north of Pakistan were fatally torturing a young man, Mr. Sadiq Ali, age 30, in their custody. Mr. Sadiq Ali, was arrested by Gilgit police on 17 June 2009. At that time he lived far from home (Jaffarabad village, Tehsil, Gilgit) and worked at the canteen of a community centre, the Nagir House in Rawalpindi, Punjab province, where he was known for his social work. He died in hospital early on the 27 June.²⁹

Outsourcing Torture: The “war on terror” has intensified the use of torture in Pakistan. Those suspected of going against the government or allegedly conducting terrorist activities have been arbitrarily detained and tortured. The ‘war on terror’ has meant that in the name of national security torture has become legalized. Coerced confessions are admissible under provisions of the Anti-Terrorist Act. In its efforts to protect Pakistan’s national security Pakistan’s Inter-Services Intelligence has worked with the United States and the U.K.

The ISI has provided assistance to the US and UK for combating their counter-terrorism operations. Cases have been documented in which the British MI5 intelligence agency has allegedly colluded with the Pakistani authorities in detaining and torturing British Muslims. Interrogation procedures including torture have reportedly been carried out by Pakistan’s ISI in order to prepare suspected terrorists for interrogation by MI5 agents.

The outsourcing of torture for the United States reportedly takes the form of a classified directive that was created after September 11, 2001 authorizing the CIA to detain and interrogate suspected terrorists. The CIA secret detention operation has been aided by foreign governments. Pakistan has been instrumental in providing the U.S. with suspected terrorists and a place to conduct its methods of torture.

Britain is condemned in a highly critical Human Rights Watch report³⁰ for breaching basic human rights and “trying to conceal illegal acts” in the fight against terrorism. The report is sharply critical of British co-operation in the transfer of detainees to places where they are likely to be tortured as part of the US rendition programme. It accuses British intelligence officers of interviewing detainees held incommunicado in Pakistan in “so-called safe houses where they were being tortured”.

29 <http://www.abrchk.net/ua/mainfile.php/2009/3193/>

30 <http://www.hrw.org/en/reports/2009/11/24/cruel-britannia-0>

Torture is seen to be vital in order to combat the war on terrorism. As the cases above reveal, human rights are suspended in the interests of national security. Governments aid other governments in supplying the means of torture. Take the case of a woman doctor, Aafia Siddiqui who is thought to have ties with terrorists. Dr. Aafia Siddiqui was arrested by Pakistan authorities and held in an Afghanistan prison. She is still being held without any charges brought against her, and remains in a psychological facility in New York where her lawyer and children are denied access.

The Convention against Torture (CAT) prohibits torture, and requires parties to take effective measures to prevent it in any territory under its jurisdiction. This prohibition is absolute and non-derogable. “No exceptional circumstances whatsoever” may be invoked to justify torture, including war, threat of war, internal political instability, public emergency, terrorist acts, violent crime, or any form of armed conflict. Torture cannot be justified as a means to protect public safety or prevent emergencies. Neither can it be justified by orders from superior officers or public officials. The prohibition on torture applies to all territories under a party’s effective jurisdiction, and protects all people under its effective control, regardless of citizenship or how that control is exercised. Since the Conventions entry into force, this absolute prohibition has become accepted as a principle of customary international law.

As a result of the government of Pakistan signing the International Covenant on Civil and Political Rights (ICCPR) and also Convention against Torture (CAT) acts of torture while in custody remain solely the responsibility of the Pakistan government. Violations of the ICCPR and the CAT must be placed on the government and in cases of proxy torture for other governments both should be held responsible.

There is a dire need to make torture a crime in Pakistan law and the AHRC urges the government to pass legislation to this effect without delay if they are to have any credibility in terms of respecting human rights.

Violence against women

Pakistan’s women face a many human rights abuses and violence. They face discrimination based on centuries-old customs and traditions. Women make up 49% of the population of Pakistan, yet they are marginalized and discriminated against by the political, social and economical structures of the country.

As an explicitly Muslim state, the women of Pakistan are beholden to a number of Islamic principles. For one, the family is seen as the nucleus of society, the fundamental building block from which the rest of society emerges and evolves. Women are seen to be responsible for maintaining the sanctity of the family, and are thus those who are most

likely to disrupt this sanctity. As such, the woman becomes the lynch pin of an ordered society; it is on her back that responsibility and power lies, both for her family and by extension, for all of society. While the violence against women enacted in this society occurs for manifold reasons, it seems that this understanding of women as both the lynch pin and the one with the power to unravel society, is a contributing factor to the continual mistreatment of women in Pakistan.

Women face all kinds of violence perpetuated by the state and its agents, ranging from rape, gang rape, torture by state agents, registration of false cases of adultery, killing in the name of honour, Jirga (an illegal and parallel judicial system for the exchange of minor girls in land disputes) no free choice of marriages, restriction of freedom of movement and expression, domestic violence, sexual harassment at the workplace, forceful conversion to Islam, arbitrary punishment for blasphemy, deprivation of property rights, disappearance after arrest and being used as sex slaves in military torture cells. In extreme cases, punishments can include being buried alive or having acid thrown on them.

The main causes of this violence stem from a lack of proper investigative mechanisms by the police, and the presence of a strong feudal system, which contribute to the ultimate failure of the judicial system. In the urban centres of the country, the judiciary is indirectly under pressure from the landed aristocracy, as in the case of rural areas where there is no question of women getting relief (not even bail after arrest) from the lower judiciary.

Bills adopted against sexual harassment and domestic violence: Even so, there have been advances made in legislation, as mentioned in the introduction section of this report. In a rare show of concern for women, the National Assembly unanimously passed a bill to provide harsher punishments for those who commit sexual harassment, expanding the definition of the crime to facilitate prosecution of the perpetrators. The punishment for the crime was increased to up to three years imprisonment and a fine of up to Rs. 500,000. Effectively, women should feel encouraged to enter the workplace, as their protection is hopefully assured by a bill that makes sexual harassment laws less vague and open to interpretation. While this initiative is truly commendable, it is important to note that the Senate has yet to approve this bill. Indeed, while this is certainly a laudable effort, we must remember that the strength of these laws comes in their application and not simply their approval. Indeed, in one recent case, a senior anchorperson at Dunya Television News was pressured to keep silent about her sexual harassment by the managing director of the company.

A senior female broadcaster is pressured to keep quiet about being sexually harassed at a major TV news station: In one case, a senior anchorperson at Dunya TV News is being pressured to keep silent about being sexually harassed by the company's managing

director. After the news director and chief executive officer (CEO) of the company were informed the journalist started to experience serious professional setbacks, and though internal investigation committees were set up (after her resignation), these appear to have been intentionally delayed. There are concerns that the power of the media house explains the lack of action by civil and political groups, including the National Press Club, in the case so far. The victim currently faces two defamation suits. The case is timely, since a proposal to increase the punishment for sexual harassment in the workplace is pending in Parliament.

Ms. Maheen Usmani was a senior anchorperson at Dunya TV News, a private television channel in Islamabad. On 11 May 2009 she received two late-night calls from the channel's managing director, Mr. Yusuf Baig Mirza. He allegedly asked Ms. Usmani to confirm her cell number and made inappropriate comments on her appearance, before offering her certain favours and reimbursements if she were to keep in touch with him on his personal number. According to the victim's later letter to the Director of Human Resources of Dunya News after the event, Mirza's speech was 'suggestive' and loaded with innuendoes.³¹

In light of these the events, the AHRC calls for the Pakistani government's assurance of legal provisions to uphold this bill in practice; to protect women against violations of their rights, within both the domestic and public realm, and ensure that those who violate these provisions be swiftly brought to justice.

The National Assembly has also adopted a women's protection bill, for the prevention of domestic violence, and the provision of aid and services to victims of the same. According to the bill, protection committees, comprising police officers, would provide legal and medical protection. They would assist and if necessary, relocate the aggrieved and their children. The bill also states that at any stage of the hearing, the accused may be directed to pay monetary relief to meet the expenses incurred and losses suffered, including loss of earnings, medical expenses and maintenance of the aggrieved person and her dependents. The bill states that domestic violence is an offence, and that if a person repeats such act(s), they are liable to one-year's imprisonment and a fine of Rs. 200,000. The bill also maintains that the federal government must ensure that the National Commission on the Status of Women reviews the legal provisions on domestic violence at regular intervals, and suggest improvements when necessary.

Indeed, while these logistical changes are commendable, we must persist on changing the attitudes and values of the public. It is clear that these misogynistic values are systemic, so there must be a re-education of values from the ground up. We must remember that

31 <http://www.ahrchk.net/ua/mainfile.php/2009/3250/>

new laws don't necessarily make for new minds, and that change needs to happen at a number of places within the justice system. We see in this case, that regardless of the new bill, the attitudes of those in power remained unchanged. As such, the suggestion that the protection committees be comprised of police officers should be questioned. The negligent attitude and corrupt values of those who are in positions of power, beg the question: are the police right for this job? We question the use of the police, who are often perpetrators of violence, and their ability to offer advice, guidance and protection in a time of need. We call for an understanding of the violence that emanate from both the state and sections of civil society. We call for an accountability of those in positions of public power.

Many cases reflect the need for the police to be held accountable for actions which undercut the rule of law. The AHRC received information that the rape and murder of a woman last year by a group of men, included two police officers.

Police officers participate in the rape and murder of a woman with impunity: In a case that is emblematic of the impunity with which violence against women is carried out, no investigation is being conducted into the rape and murder of a woman last year by a group of men, which included two police officers. Station heads have allegedly requested bribes from the victim's family and accepted large sums from the accused, and no investigation has been done. The family has reported an escalation in threats pressuring them to withdraw their case, one being that the victim's daughters will soon suffer her fate. They have asked for protection but have received none. The AHRC is gravely concerned for their safety, and for those living under the jurisdiction of Cantt police station, where there appears to be gross corruption and scant regard for the rule of law.³² Station heads allegedly requested bribes from the victim's family and accepted large sums from the accused, and no investigation has been conducted.

In another recent case, police made no moves to arrest five men accused of gang-raping a sixteen-year old girl and were instead said to be supporting an illegal out-of-court settlement.

Police protection continues for teachers accused of gang raping their students: In another case, senior police officials are reportedly preventing an investigation into the alleged gang rapes of female students by a group of teachers. The family of one victim is being pressured to settle outside legal channels in a feudal jirga court, despite directions from the Chief Minister of Sindh to have the accused arrested. Their case has been compromised by local police, who willfully delayed the girl's medical examination by a week. This incident shows the freedom enjoyed by Sindh police to work against the law

32 <http://www.abrchk.net/ua/mainfile.php/2009/3213/>

and the public on behalf of wealthy patrons. If the accused men had been arrested after the first allegation of rape, other young girls may not have suffered the same violation. The latest victim's family is now being threatened and needs urgent protection and legal support.³³

It seems that since the accused are members of a powerful political party, the police do not intend to take DNA samples of the accused. In another case, in which a group of schoolteachers have been accused of gang-raping several students, the police wilfully delayed the victims' medical examination.

Unfortunately, it seems that the police are not the only officials who willingly compromise their professional integrity in the name of personal or political gain. Gender biases and misogynistic values can be seen in cases such as one where a judge was highly inappropriate and unprofessional during the rape trial of a young girl, putting her through a gruelling, sexually-explicit cross-examination in front of her alleged attackers, using aggressive, sarcastic language and asking for specifics and demonstrations of the act.

Gender-biased judge should be transferred from rape trials: Court spectators and prosecutors expressed outrage at the behaviour of Additional District and Sessions Judge Nizar Ali Khawaja on March 25, 2009 in Karachi, Sindh province, when he allowed the case of a teenage gang rape victim, Ms. Kainat Soomro, to become a spectacle in his courtroom. The judge put the girl (who was raped two years ago as a 13-year-old) through a grueling, sexually explicit cross examination in front of her alleged attackers. He used aggressive, sarcastic language and prompted for specifics and demonstrations of the sex act. Justice Khawaja also denied the prosecuting counsel's request to clear the room of at least eighty non-related onlookers who were crowded at the back, according to media. The experience for the girl was intensely traumatic; it affected her testimony and will do little to encourage other rape victims into court.³⁴

Every two hours a woman is raped: According to the Human Rights Commission of Pakistan, it is estimated that a woman is raped every two hours, a gang rape occurs every eight hours, and about 1000 women die annually in honour killings. The newly made Women's Protection Act has failed to deter acts of violence against women who continue to fall victim to honour killings. The increase in violence in Pakistan cities has prompted new concerns that militants have begun to specifically target women in their terror campaign.

As a result of the state's complicity, access to justice remains extremely limited for most

33 <http://www.abrchk.net/ua/mainfile.php/2009/3301/>

34 <http://www.abrchk.net/ua/mainfile.php/2009/3135/>

female victims. Especially in cases where perpetrators are members of influential political groups, even those courageous enough to report their crimes often do so at the risk of their own lives and that of their families. The failure of the judicial system and political corruption is taking a long-lasting toll on the community, with more and more victims giving up on the system as a whole, and allowing cases of violence to go unreported.

Since the 'War on Terror' started at the end of 2001, acts of discrimination and violence against women have increased. According to reports, acts of violence against women in 2005 had increased three hundred-fold as compared to previous years. According to press reports and reports collected from different women's organizations, since 9/11 and the 'War on Terror,' 72,162 cases of violence against women were reported. Incidences of violence against women take many forms.

In one recent case, reported on September 30, 2009, the ritual abuse and naked humiliation of three women cast a deeper shame on the justice system that supported it. The violent humiliation of three women reported from Punjab this week has thrown stark light on the complicity of the police and the courts in gender-based crimes -- and on the continued degeneration of law enforcement in the region.³⁵ Three women accused of prostitution were forced to parade naked through their neighborhood and onto a local highway; they were stripped and physically tormented under the direction of a man who leads a banned militant organisation. Yet when the police arrived on the scene they arrested the women. The courts complied with the arrest. The gravest abuse of all was that neither the police nor the judge considered the rights of those being abused and defiled, because they were women; though many of these rights are clearly and very strongly represented in the constitution and the penal code. The one clear crime taking place when the police arrived, under Section 354-A of the PPC, can be met with the death penalty. Yet instead possible prostitution and the satisfying the irrational zeal of a mob took the officers' priority -- perfectly symbolic of the ways in which Pakistan's laws are being belittled, mocked and abused by those meant to uphold them.

Acid Throwing: This horrifying form of violence against women involves throwing acid, usually sulphuric acid, on women with the malicious intent to permanently disfigure her face and body features. The incidence of acid attacks is reflective of the misogynistic values that are inextricably intertwined into social systems where acts of disagreement by women can invite morbid vengeance. In one case, Maria Shah, a health worker from Shikarpur, was burnt from her face down to her thighs for refusing to marry the rickshaw driver who had been hired by her family to take her to school. National Assembly Speaker Fehmida Mirza enquired after her health, and noted that the government would bear the expenditure of Shah's treatment. Maria Shah died on February 25th 2009.

35 <http://www.abrchk.net/statements/mainfile.php/2009statements/2246/>

Plight of Women in Prison: The Punjab province has the highest number of prisoners under trial in Pakistan. Official statistics show that 1,225,879 cases remain pending in subordinate courts, with 144,942 in the Sindh region, 187,441 in the NFWP and 7,664 in Balochistan. The National Judicial Policy has stressed the importance of granting bail to those under trial, issuing directions to give priority to the disposal of the cases of women and juveniles.

According to a survey conducted by the AGHS Legal Aid Cell Team while visiting different jails, most women prisoners were subjected to physical abuse during interrogations by police. The survey also noted that female prisoners constituted 1.4% of the total prisoners held in the Punjab jails, with 876 adult jails and five juvenile jails. Over 67% of these women are under trial.

The survey states that at least 80% of women prisoners are unaware of the status of their legal proceedings and 35% have not engaged lawyers. It adds that at least 70% of female prisoners are illiterate. Only 6% have made allegations of abuse by jail authorities. Over 48% of women prisoners are accused of murder, and 0.5% are convicted to the death sentence.

The AGHS survey maintains that 30% of women in these jails are accused under the Control of Narcotics Substance Act 1997. The rest of the women are accused of Zina or of other minor offences. Five juvenile female prisoners are under trial in murder cases as well.

More than 4000 people have died in Jirga-sanctified murders over the last six years, and two thirds of them have been women. Their deaths have often occurred under the most barbaric of circumstances. Many are charged with having a relationship outside of their marriages (an often fabricated claim,) while others are suspected of planning love marriages, as opposed to the arranged marriages planned by their families.

Love Marriage as Crimes: As an explicitly Muslim state, the battle between secular, Christian and Islamic societies within Pakistan are particularly pronounced. In order to maintain these separations, love marriages across caste or religious lines are strongly discouraged, with family members using their political ties to arrest and torture the families of those involved in love marriages, so as to 'teach them a lesson.' In one particularly heinous case mentioned in the section above concerning torture, assembly member Iftekar Baloch is said to be behind the arrest and torture of six close relatives of the man who married a wealthier girl from a different tribe. It is alleged that the judge was under pressure by Baloch to renew the detention orders of these victims, despite there being no evidence against them. Ashraf's mother has been released on bail, but the rest are still in prison and have been told that they won't be released until the couple return.

In another case, a man and a woman from different sects married, and were in hiding due to death threats that they had received. Members of the groom's family were abducted, and others were arrested on false charges. In both cases, the involvement of politicians and their collusion with the police for political and personal gain seemed to spur on these incidents.

Jirga courts perpetuate violations of women's rights: In the feudal, fiercely patriarchal north of Pakistan, women's lives are seen to be of little worth. It is a matter of prestige to have more than one wife, and young girls are often sold into marriage to settle disputes. In one case, under the orders of Jirga (illegal, traditional courts), and with the knowledge and apparent acquiescence of the police, three young girls aged ten, twelve and thirteen, were handed over as compensation to a man who claimed that the girls' father had slept with his wife. The complainant had openly killed the wife, as he had his previous wife. That young girls can be given to a known double-murderer of women, speaks to the fundamental problems of the Jirga system in terms of respecting and protecting human rights.

In one recent case involving a Jirga, an 18-year old girl, trafficked to a family through marriage, was raped repeatedly by her father-in-law and other male members of the family.³⁶

After she managed to escape, a Jirga was held and it was ordered that the girl be returned to her parents. However, a second Jirga ordered that she be returned to her husband and his family on the grounds that the girl's parents had taken money for the marriage of the girl. With the order of the Jirga, the girl was kidnapped on October 21, 2008 and her whereabouts remain unknown. The nephew of a provincial minister was reportedly involved in conducting the Jirga, and because of his involvement, the police are unwilling to take action. The involvement of ministers in the Jirga system demonstrates that the confluence of this illegal court system with the supposedly higher, established legal system speaks to the failure of Pakistan's legal system, through, and at the hands of its politicians and judges. In maintaining two legal systems, which are used at whim for personal gain, the pursuit of justice is rendered entirely impossible.

Women are traded and bartered to resolve minor disputes, and as a display of personal and political power through these underground court systems. So long as there remains an alternative 'justice' system, the law will not be respected. The AHRC calls for the Pakistani government's acknowledgment of these illegal courts, and calls for their eradication, for the ultimate furthering of the respect for human rights and the rule of law.

36 <http://www.abrchk.net/ua/mainfile.php/2009/3103/>

Discrimination is still strong in employment and education: In the workplace, sexual misconduct is common, and women must contend with lower salaries than that of their male colleagues. They are generally not paid according to the law and receive few benefits. The majority of working women are not officially registered with governmental institutions, and are thus especially vulnerable to occupational abuse. It is mostly women that work in government factories and other informal sectors (unregistered under government laws), and in such places, they have no labor law benefits, such as medical allowances, pregnancy allowances, transport or childcare services from the factory management. Through a finance bill passed during the Musharraf government, most women are now expected to work twelve hours rather than the original eight. In rural areas, women are often required by employers or landlords to work all day alongside their husbands for little extra remuneration, often as bonded labor, to pay off loans.

The majority of schools cater to either boys or girls. In remote areas, several hundred schools were recently burned by tribe-members to protest against the education of girls in the northern province bordering Afghanistan, that is under the control of Taliban and militant Muslim organizations. In such areas, girls are not allowed to pass above grade five (primary school level) even though grade ten is required for many jobs. Authorities often fail to intervene in these areas.

Religious Freedom and Minorities

Pakistan's religious minority groups – including Hindus, Christians, Sikhs, Jews, Ahmedis, and Buddhists - face continuing difficulties in 2009, with a disappointing lack of progress on the part of the government to guarantee basic security and protection to the country's minorities, and to amend or revoke laws and constitutional provisions that demonstrably perpetuate discrimination.

The use of mosque loud speakers to incited hatred and violence: The AHRC is concerned about the increasing frequency with which Muslim religious leaders illegally use mosque loud speakers to broadcast provocative speeches to stir up the fundamentalist sentiments of Muslim believers. Their behaviour constitutes a gross violation of Section 3 of Loud Speaker Act 1965 which bans all types of speech other than Azan (the call to prayer) and Khutba (the Friday sermon in Arabic). Disturbingly, perpetrators enjoy de facto impunity and are rarely, if ever, brought before the court due to the reluctance of police and local administration to antagonize religious authorities.

An example of this took place on September 11, 2009, in the village of Jethki, Sambrial tehsil of Sialkot district, Punjab district.³⁷ A mob, reportedly responding to their religious

37 <http://www.abrchk.net/statements/mainfile.php/2009statements/2225/>

leaders' call to "teach Christians a lesson" after the clerics used mosque loud speakers to accuse five Christian boys of desecrating the Holy Quran, attacked Christian residents, ransacked a church and set it ablaze along with two neighbouring houses. Police did not launch an investigation nor arrest the clerics who illegally used the loud speakers. Instead, the District Police Officer (DPO) "negotiated" with Muslim party leaders and promised to arrest the accused Christian boys within a 24-hour deadline, one of which, Fanish Maseeh (20), was allegedly tortured and killed extra-judicially within the prison.

Legislation institutionalising religious hierarchy

Religious radicals are further empowered by the many laws and legal provisions in Pakistan's Constitution and Penal Code that institutionalise inequality between Islam and non-Islamic religions. The Constitution declares Islam to be the state religion and that sovereignty belongs to Allah, effectively granting the Muslim clergy, who claim that it alone knows the will of Allah, exclusive authority in legislating and interpreting the laws. Islamic provisions of the Constitution, including Articles 227, 228, 229, require all laws to be interpreted in the light of the Quran and that "all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Quran and Sunnah." These provisions greatly enhance the authority of the Muslim clergy and are easily exploited by radicals to justify the perpetuation of religious hate and intolerance.

The government of Pakistan must review its legal provisions to ensure that they are not repugnant to each and every individual's right to the freedom of thought, conscience and religion as enshrined in Article 18 of the International Covenant on Civil and Political Rights. Article 20 of Pakistan's Constitution also guarantees each citizen's freedom "to profess religion and to manage religious institutions". Article 33 makes it the responsibility of the state to "discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens, while Article 36 ensures that the state "shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services". These legal principles must be enacted with genuine political will on the part of the government to generate positive impact.

Relevant excerpts from the Constitution of Pakistan:

227. Provisions relating to the Holy Qur'an and Sunnah.

(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.

[242] [Explanation:- In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and

Sunnah as interpreted by that sect.]

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.

(3) Nothing in this Part shall affect the personal laws of non- Muslim citizens or their status as citizens.

228. Composition, etc. of Islamic Council

(1) There shall be [243] constituted within a period of ninety days from the commencing day a Council of Islamic Ideology, in this part referred to as the Islamic Council.

(2) The Islamic Council shall consist of such members, being not less than eight and not more than [244] [twenty], as the President may appoint from amongst persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan.

(3) While appointing members of the Islamic Council the President shall ensure that:

(a) so far as practicable various schools of thought are represented in the Council;

(b) not less than two of the members are persons each of whom is, or has been, a Judge of the Supreme Court or of a High Court;

(c) not less than four of the members are persons each of whom has been engaged, for a period of not less than fifteen years, in Islamic research or instruction; and (d) at least one member is a woman.

[245] [(4) The President shall appoint one of the members of the Islamic Council to be the Chairman thereof.]

(5) Subject to clause (6) a member of the Islamic Council shall hold office for a period of three years.

(6) A member may, by writing under his hand addressed to the President, resign his office or may be removed by the President upon the passing of a resolution for his removal by a majority of the total membership of the Islamic Council.

229. Reference by Majlis-e-Shoora (Parliament), etc. to Islamic Council.

The President or the Governor of a Province may, or if two-fifths of its total membership so requires, a House or a Provincial Assembly shall, refer to the Islamic Council for advice any question as to whether a proposed law is or is not repugnant to the Injunctions of Islam.

The Blasphemy Laws

Despite vocal criticism at home and abroad, Pakistan's infamous Blasphemy Laws remain in effect and charges of blasphemy are still punishable with the death penalty, while

desecration of the Holy Quran carries a life sentence. The laws were a British colonial legacy introduced in 1885 to prohibit the instigation of religious hatred, and became part of Pakistan Penal Code as Section 295 in 1927. The provision granted equal protection to all religious groups, until General Zia ul Haq, in deference to demands made by radical Islamicists, introduced two new clauses (295-B and C) in 1982 and 1986 that specifically outlaw desecration of the Holy Quran and defilement of the name of the Holy Prophet Muhammad. The deliberate institutionalisation of the unequal status between Islam and non-Islamic religions opened the door for the perpetuation of religious intolerance by Islamic fundamentalists. According to data collected by the National Commission for Justice and Peace (NCJP), at least 964 persons were alleged under these anti-blasphemy clauses from 1986 to August 2009, while over 30 persons were killed extra-judicially by the angry mob or by individuals.

In April 2001 an attempt was made by the Musharraf government to amend the procedures in the registration of blasphemy cases, but he quickly withdrew the new order upon vehement opposition from Islamic fundamentalists. In August 2009 after the Gojra attack in which seven Christians were burnt alive, the current Prime Minister Yousuf Raza Gilani again announced plans to review “laws detrimental to religious harmony” in a committee comprising of constitutional experts, the minister for minorities, the religious affairs minister and other representatives, but the government has again hesitated to initiate change due to their unwillingness to antagonize fundamentalist groups. In fact, recent cases in Pakistan suggest a criminal nexus between government authorities, police, and fundamentalist organizations, in which the Muslim clergy, on receiving bribes from land-grabbers in the National and Provincial Assemblies, colluded with local police to expropriate land owned by minorities by bringing blasphemy allegations against them. The situation is especially worrying in Punjab province after the formation of the PML-N government, which has a record of intolerant policies against Christians and Ahmadis in particular.

Children arrested for blasphemy: In January this year four children and one man were arbitrarily arrested and charged with blasphemy for writing the name of the Prophet Muhammad on the walls of a toilet.³⁸ Charges were filed against them under section 295-C of the Penal Code, and family members were reportedly told that the police were compelled to act against the children by fundamentalists, who threatened to close down the whole city and attack the houses of Ahmadi sect members. Another five Ahmadis were detained on blasphemy charges in Layyah district without virtually any proof of witnesses in February.

38 <http://www.abrchk.net/statements/mainfile.php/2009statements/1859/>

Persons falsely charged with desecrating the Holy Book: On July 1, 2009 Imran Masih, a young Christian grocer was wrongfully arrested under the blasphemy law.³⁹ Masih was advised to burn an Arabic booklet he found by his neighboring shopkeeper. Then he was accused by the same person for burning the Quran and offending Islam. Imran Masih remains in Faisalabad Jail since the incident happened. His family have been publicly threatened to leave their shop and house.

Similarly, a 65-year-old Christian, Mr. Lawrence was falsely accused of blasphemy in September 2009.⁴⁰ Mr. Lawrence was falsely charged with desecrating the Quran and other religious papers. Four relatives of Mr. Lawrence were arrested and were also forced to confess to desecrating the Quran. They were released after bribing the police. Mr. Lawrence was only released with the help of the town mayor. The security of Christians and other religious minorities are threatened throughout the country.

Continuing discrimination and violence against Ahmadis

The second amendment of Pakistan's Constitution (1974) adopts an exclusionary definition of Islam and declares Ahmadis a non-Muslim minority. Clause C (b) of Article 260 states that "non-Muslim' means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani group or Lahori group (who will call themselves 'Ahmadis' or by any other name), or a Baha'I, and a person belonging to any of the scheduled castes."

The Pakistan Penal Code also contains legal provisions that institutionalize explicit discrimination against the Ahmadi sect, including Section 298-C, which stipulates that "any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine." This provision stands in direct contradiction to the right to freedom of speech and religion enshrined in Articles 19 and 20 of the Constitution. In March, fifteen men from Sillanwali tehsil, Sargodha district, Punjab province were booked under Section 298-C for attending a place of worship that resembles a mosque, thus for the "impersonation of Muslims".

39 <http://www.abrchk.net/ua/mainfile.php/2009/3221/>

40 <http://www.abrchk.net/ua/mainfile.php/2009/3265/>

The blasphemy laws are also widely used against the Ahmadis, with about 340 out of the 964 persons alleged under blasphemy laws from 1986 to August 2009 being members of the sect, according to a NCJP report. At present more than one thousand Ahmadis are estimated to be in Pakistan's jails on charges of blasphemy.

At least five members of the Ahmadi sect were murdered in targeted killings in 2009, resulting in a total of over one hundred killings since the introduction of anti-Ahmadiyya laws by the Zia ul Haq government in 1984. In a conference earlier this year, held under the auspices of the Punjab provincial government, the people in the audience, many of them uneducated, were instructed by Islamic fundamentalists that they have a duty to kill Ahmadis. They were led to believe that they would be greatly rewarded for shedding the blood of Ahmadis.

In Faisalabad, a well known Ahmadi trader, Mian Laiq Ahmad, was attacked by three armed men whilst sitting in his car on May 8, 2009.⁴¹ The armed men blocked the road to his house and shot him to death. On August 6, 2009 an Ahmedi, Rana Ata-ul Karim, was shot to death after his wife was harassed by three Muslim extremists in Multan.⁴² They were targeted for being members of a minority sect of Islam.

Human Rights Defenders

Police negligence and an apparent lack of political will on the part of the government to offer protection to religious minorities is contributing to a threatening environment for defenders of human rights, particularly minority rights, in Pakistan. The AHRC continues to learn of cases in which human rights activists were targeted by radicals for offering support and assistance to religious minorities. Laws related to the maintenance of public order and anti-terrorist laws have been exploited to criminalize and thereby limit the activities of human rights defenders, deterring many from speaking out against injustices.

The AHRC has received information that Mr. Rao Zafar Iqbal, the executive director of the National Council for Human Rights and a human rights lawyer who offers free legal counsel to victims of the country's harsh blasphemy laws, has escaped an attempt on his life in July 2009, but continues to receive death threats from Muslim fundamentalist groups.⁴³ A fatwa (religious declaration) was published in the local newspaper Daily Pavel on August 4 which called for the lawyer's murder as a service to Islam, referring to his legal support to detainee Mohammad Ayube, who is under arrest for claiming to be the

41 <http://www.abrchk.net/statements/mainfile.php/2009statements/2074>

42 <http://www.abrchk.net/statements/mainfile.php/2009statements/2168/>

43 <http://www.abrchk.net/ua/mainfile.php/2009/3254/>

prophet, and to Imran Masih, a Christian who was falsely charged and wrongly arrested under blasphemy laws earlier this year. Local police officers have repeatedly rebuffed Mr. Iqbal's requests for help and protection.

Another prominent human rights activist working for the Human Rights Commission of Pakistan (HRCP) and the Labour Party of Pakistan, Mr. Tariq Mehmood (24), was arrested and remanded by police on August 10 for organizing a "black day" of protest against the police and local authorities for the July Gojra attack.⁴⁴ He was charged under Article 7 of the Anti Terrorist Act, which prohibits acts "intended or likely to stir up sectarian hatred" and terrorist acts punishable with death penalty, as well as Article 13 of Maintenance of Public Order Ordinance, which pronounces a punishment of imprisonment of up to three years, among others.

Prominent human rights defender, Nisar Baloch, was shot dead the day after he predicted his death at the hands of local politicians. Police have refused to mention the names of the murderers in the First Investigation Report (FIR), owing to the fact that the accused belong to the MQM political party, which has a background of targeted killings. In a press conference the day before his death, Baloch blamed the party for their encroachment on the land of Gutter Baghicha, an amenity plot of 1017 acres. His death is the second incident in the victimization of housing rights defenders in the past five years in Karachi.

Clearly, the values which uphold law and order in this country have deteriorated significantly. When a man says in a press conference that he will be killed the following day by the local politicians and the police fail to provide protection to him because of the political pressure they are under, it is clear that the situation is deplorable.

Conclusions and recommendations

The human rights situation is grave and worsening in Pakistan, even though the government has, through changes in legislation, made attempts to improve the situation. The government has restored the judiciary which was disbanded by General Musharraf in 2007, and has proposed to release the political prisoners from Balochistan. The government has passed two bills regarding the status of women. These include one on the prevention of domestic violence and the provision of aid and services to victims of such violence, and another providing harsher punishments for those who commit sexual harassment, expanding the definition of the crime to facilitate prosecution of the perpetrators. It is important to remember that while these changes in legislation are undoubtedly commendable, the true test lies in their application to the everyday lives of

⁴⁴ <http://www.abrchk.net/ua/mainfile.php/2009/3233/>

Pakistani civilians, and their impact on the attitudes and values of both state-agents and the country's citizens.

Violence and conflict in many parts of the country and increasingly frequent acts of terrorism have given rise to the serious degradation of the protection and enjoyment of human rights. Violations include torture, deaths in custody, attacks on minorities, enforced disappearances, extra-judicial killings, punishments resulting from traditional practices that are not in line with international human rights laws and standards, honour killings and domestic violence. The AHRC notes that while Pakistan is increasingly being understood as a country that elicits international concern, it is vital to gain an understanding of the institutional weaknesses and the weakness of the civilian democratic institutions that should be protecting human rights and tailor efforts to improve these weaknesses, in order to eradicate violence. Supporting the military and permitting the intelligence agencies, notably the ISI, to continue to act above and beyond the law may have short-term benefits in terms of counter-terrorism objectives in the short term, but will ultimately only engender a worsening of the insecurity that currently prevails. During this time, countless violations of human rights will continue to be perpetrated.

The military in Pakistan are urged to ensure that the lives and human rights of civilians are their top priority when carrying out any operations against militants and the fully comply with international humanitarian and human rights laws and standards during the conduct of such operations. It is imperative that independent monitoring by the media be allowed to cover operations as well as monitoring by civil society. Effective and impartial investigations into allegations of abuses by the military must be allowed to take place with the full cooperation of the military establishment.

In April 2008, Pakistan ratified the International Covenant on Economic, Social and Cultural Rights and signed the International Covenant on Civil and Political Rights, as well as the UN Convention against Torture. In May, the government announced that Pakistan would accede to the International Convention on the Protection of all Persons from Enforced Disappearance, but it has not done so as yet. On 15 October, the cabinet approved a draft bill to set up a National Human Rights Commission but Parliament has not passed the bill as yet. In November, a separate Human Rights Ministry was established.

Although Pakistan has ratified the UN International Covenant on Economic, Social, Cultural and Political Rights (ICESCR) and signed UN International Covenant on Civil and Political rights (ICCPR) and Convention against Torture (CAT) in April 2008, this pressing issue has not been discussed on the floors of the elected forums or the provincial assemblies, nor has it been discussed by the National Assembly or the Senate. No steps have been taken to make torture a criminal offence, and it has not been reviewed in Parliament.

The AHRC strongly urges the government to ratify and implement the core international human rights instruments to which it is legally beholden, in line with repeated calls from members of civil society, national and international experts and Special Rapporteurs on torture. The government is urged to establish of a credible, independent body to investigate claims of torture. All enquiries that are conducted should be transparent to all members of civil society, and members of the press should be freely allowed to report on the proceedings of various cases. Adequate measures must be taken to ensure the protection of victims or witnesses who give evidence, as well as effective investigations into claims of threats by governmental agents against witnesses or victims. Appropriate legal sanctioning for the government agents responsible must also be ensured.

The government has also pledged its commitment to commute pending death sentences into life imprisonment, but as with the legislation on torture, this has yet to be carried out. According to Amnesty International, around forty people were executed in the eighteen months after the government announced it would convert the sentences.

The AHRC strongly urges the government to declare the Jirga court system illegal and unconstitutional, and to swiftly bring to justice the persons responsible for holding Jirgas that award death sentences. Secondly, an independent investigation must be held without delay concerning the cases of burial alive of women and other extra-judicial killings carried out as the result of the Jirga decisions. Those who have conducted Jirgas should be banned from holding public office, and those already in office must be immediately ejected. In this manner, a clear signal would be sent that the constitutional law of Pakistan needs to be respected by ministers and government officials who are in positions of public power, first and foremost.

The AHRC calls for the government's attention to the pressing and distressing situation of the rights of women. We call for an overhaul of the political, social and economic systems which are deeply misogynistic and encourage the government to re-create these institutions from the ground up, making for an environment that allows for women to be seen as equal to men, with the same rights and responsibilities.

PHILIPPINES

ANOTHER YEAR OF VIOLATIONS, IMPUNITY AND A LACK OF EFFECTIVE REMEDIES

I. Introduction

The following report on the state of human rights in the Philippines in 2009 will focus on the cases and situations that the Asian Human Rights Commission (AHRC) encountered during the year. This overview does not claim to be an exhaustive report on all human rights violations and developments, but focuses on core issues and events that have been documented by the AHRC throughout its work.

The AHRC monitors the conduct of the government of the Philippines to verify the extent to which it is fulfilling its domestic and international obligations concerning human rights laws and standards, as well as living up to its pledges and commitments. The AHRC is not alone in this. During 2009, the United Nations' (UN) relevant Treaty Bodies, conducted reviews of the country's record in implementing the provisions of the Convention Against Torture (CAT) and the Convention on the Rights of the Child (CRC). These reviews were conducted by the Committee Against Torture and the Committee on the Rights of the Child respectively, and produced Concluding Observations and recommendations concerning the steps that the government needs to take to improve its record. These add to the many recommendations produced by various UN mechanisms concerning a range of human rights issues, notably extra-judicial killings, abductions and enforced disappearances and threats against activists and human rights defenders in the country.

In this introduction, the various aspects that will be developed in the report below are summarised in order to present an overview of the pertinent issues that the AHRC views as being significant in 2009.

The first noteworthy point concerns the well-publicised massacre that occurred in the province of Maguindanao in central Mindanao on November 23, 2009. This massacre, in which 57 people were killed, among them two human rights lawyers and 30 local journalists, has shocked the world. In response, on December 5, 2009, President Macapagal-Arroyo signed Proclamation No. 1959, placing the province under a state of martial law, which the AHRC has denounced as being unconstitutional. This massacre,

in which the highest number of journalists have been killed in a single incident anywhere in the world, has focused much attention around the world, but at the time of writing of this report it was too early to see whether some good may come out the tragedy, with those responsible being brought to account, or whether the tradition of botched investigations and impunity would continue.

The country's legislative branch, comprising the Senate and House of Representatives, took action to produce domestic laws designed to facilitate the protection of human rights. It enacted the Magna Carta of Women, a domestic law which prohibits discrimination against women; ratified a domestic law on the criminalization of torture; and began the process of enacting domestic legislation against enforced and involuntary disappearances. The legislature, however, failed to repeal or amend laws that do not comply with the Philippines' international or Constitutional human rights standards. The Human Security Act (2007) should have been repealed, while amendments remain necessary to the Witness Protection, Security and Benefit Act (RA 6981). In general, 2009 saw an improvement concerning the level of action taken by the legislature concerning human rights, as compared with its past passivity.

The Supreme Court's (SC) rule on writ of amparo, despite its limitations, has been very helpful in providing temporary protection orders (TPOs) to a number of human rights and political activists whose lives, security and liberty were threatened. The writ of habeas data, can be used by any citizen against any manual or automated data register to find out what information is held about his or her person. A court rules to allow correction or destruction of records undermining the safety and security of any person, and this has provided human rights and political activists with the legal remedies needed to counter propaganda and vilification by the authorities, including their being included in the military's black-lists, such as the notorious Order of Battle (OB).

The Philippines continued to be beset by insecurity and armed conflicts in 2009. However, the declaration of ceasefire in July 2009 in southern Mindanao has at least temporarily brought to an end the decades-old conflict between government forces and the Moro Islamic Liberation Front (MILF), hopefully preventing the further loss of many lives, property and massive displacements of civilians. The National Disaster Coordinating Council (NDCC) has announced that about 51,326 families of Internally Displaced Persons (IDPs) were located in evacuation centres or in refuge in houses outside the evacuation centres as of July 2009. It is understood that the cease-fire has allowed many IDPs to return home, with the numbers of those still displaced at the end of 2009 not known to the AHRC with precision at the time of writing of this report in December 2009, due to difficulties to monitor the situation there. Some IDPs, who were victims of human rights violations by the military have also lodged cases in court since the ceasefire began.

The government's intervention into the problems of unresolved vigilante killings in the southern part of Mindanao, particularly in Davao City, has also improved. The AHRC had previously intervened repeatedly concerning the government's inaction in this regard. The country's Commission on Human Rights (CHR) has taken a pro-active role in investigating cases, holding public hearings and issuing resolutions to facilitate the protection of witnesses and complainants. The CHR has affirmed the existence of the "Davao Death Squad (DDS)" and subsequently created a task force to focus on investigating and prosecuting cases related to the DDS in court.

During 2009, the Philippines also faced significant natural disasters, notably due to two tropical storms, Ondoy and Peping, in September 2009, which flooded some 80 percent of Metro Manila and devastated the northern part of Luzon. These two disasters killed hundreds of people with many others still missing. Such disasters represent significant obstacles to development for an already poor country.

One of the main obstacles to the protection and prevention of human rights abuses has been the lack of effective avenues for victims of abuses to make use of in seeking remedies. This has perpetuated a climate of impunity and enabled large numbers of grave rights abuses to be committed unabated, such as the hundreds of extra-judicial killings that have targeted left-leaning political activists, lawyers, clergymen and human rights defenders since the current government took power in 2001.

2009 has seen an improvement to the avenues available to those seeking remedies, at least in theory. The intervention of the European Union (EU) and international agencies have been important factors in getting the government of the Philippines to take the steps that they have. An International Labour Organization (ILO) High Level Mission conducted in September 2009 highlighted violations of labour rights and the freedom of association.

Despite some steps that could lead to progress in terms of the protection of rights in theory, the reality of the enjoyment of rights and the prevention of further abuses remained problematic in the Philippines in 2009. The lack of accountability of those thought to be responsible for human rights violations in particular, and of the authorities as a whole, remains as the main barrier to the implementation of human rights in the country in practice. The Philippines has many laws on its books and institutions in place, but the AHRC's experience garnered by documenting individual cases of abuse and attempts to seek remedies, indicate that impunity prevails in practice.

In recent years, a major hurdle has been the government's denial of the existence of human rights violations, particularly concerning the phenomenon of extra-judicial killings of human rights and political activists. In 2009, the government has made steps towards acknowledging the problem, which is helpful. Efforts have been made to

introduce judicial remedies. Task forces have been created to focus on investigating cases of extra-judicial killings. These moves have gone some way to restore a modicum of trust on the part of victims in the authorities and the possibility of seeking legal remedies by filing judicial remedies and pursuing cases in courts. The recommendations made by international institutions are thought to have been key in framing the need for specific changes required to tackle difficult human rights violations, notably extra-judicial killings, torture and forced disappearances. Despite some measure of progress by the authorities in the Philippines, killings continue to take place and there continues to be a lack of prosecutions of the alleged perpetrators, while activists remain under threat. Victims are still waiting for justice and reparation.

The assistance provided by the European Union to help improve the country's justice system is welcomed as an approach that tackles areas that must be improved in order to effectively address institutional lacunae that are preventing progress concerning human rights. The EU has provided funding to the government to help resolve the cases of extra-judicial killings. The AHRC welcomes this move and hopes that the government will ensure the transparent and effective use of these resources to effect tangible improvement, justice and the prevention of further killings. Reservations remain as to how the authorities will make use of this assistance, given the country's track record in terms of impunity as well as corruption. The Philippines is notorious for enacting and adopting good laws that it never implements effectively, and making pledges to foreign governments, the United Nations and other international agencies to give it the veneer of a cooperative State at the international level.

In the sections below, the areas mentioned in this introduction will be developed in order to provide insight into the human rights challenges that continue to ensure impunity and deny victims the justice and reparation that they are due.

II. The massacre in Maguindanao province

The first human rights situation that will be presented in this report actually occurred late in the year, but will be given priority here as it is one of the most noteworthy and terrible single incidents to have occurred in the Philippines during 2009. While numerous extra-judicial killings have been occurring in the country over the years, often without much attention being given, the massacre that took place on November 23, 2009 in Maguindanao province, central Mindanao, has, due to its scale, focused international attention on the Philippines.¹ 57 people were killed, among them two human rights

¹ For more information concerning the Maguindanao massacre, please see the following: <http://www.ahrchk.net/ua/mainfile.php/2009/3328/> and <http://www.ahrchk.net/statements/mainfile.php/2009/statements/2318/>

lawyers and 30 local journalists, making this the highest number of journalists killed in a single incident in the world, according to Reporters Without Borders.

The victims were part of a convoy of over 50 people, which included the wife, other relatives and supporters of a local politician, Esmael Mangudadatu. He had asked his wife, Genalyn and his two sisters, Eden and Farida Sabdula, to file a Certificate of Candidacy on his behalf at the provincial office of the Commission on Elections (Comelec) in Shariff Aguak, the provincial capital. In doing so, Esmael Mangudadatu was entering an election race against the Ampatuan family, a powerful political dynasty in the province. Andal Ampatuan Sr., the incumbent governor, was reported to have been grooming one of his sons, Andal Ampatuan Jr., to succeed him in the May 2010 general elections. The elder Ampatuan is a close ally of President Gloria Macapagal-Arroyo and had served as the Governor of Maguindanao, a province under the Autonomous Region of Muslim Mindanao (ARMM), for three consecutive terms.

Before the massacre happened, some of the involved journalists had received information that should they persist in covering the event they would be killed and buried. However, because they were given assurances by Alfredo Cayton, the General in command of the Army's 6th Infantry Division, that the area is safe, the group decided to proceed.

Despite security precautions having been made, including the sending of Esmael's relatives to file his candidacy rather than him risking to do so himself, the large convoy was stopped by as many as 100 armed men, who blocked the convoy of vehicles in broad daylight, took its members to a remote hilly area, executed them and then buried them in shallow graves.

The alleged leader of the attack, Andal Ampatuan Jr., is reported to have made use of the Civilian Volunteer Organisation (CVO), one of the government's militia forces, to carry out the massacre. The CVO should have been under the control and oversight of the Philippine National Police (PNP), not a political family, but local police forces and militia often function as henchmen for the ruling elites in the Philippines and are used to do their dirty work, as appears to be the case in this extreme and bloody case.

After the massacre, the PNP had to relieve six of its top officials in Maguindanao for their alleged complicity in the attack, including the Chief of Police of Shariff Aguak and of Ampatuan towns. According to the PNP, they are not yet being considered as suspects, but reports indicate that one of them was seen by witnesses at the location where the victims were executed.

The plight of the few persons that witnessed the massacre and survived has further exposed the absence of any protection mechanisms in the country. At least three of the

journalists who survived the massacre approached the Department of Justice (DoJ) informing them of the information they had to help the investigation and prosecution of the case, but the DoJ has reportedly ignored them. They have also not been provided with any protection by the State despite the evidently grave danger that they and other eye-witnesses face at present.

One of the survivors had already received death threats believed to have come from the Ampatuans since 2004, when he had written a special newspaper report that exposed details of summary executions in Maguindanao, which were allegedly linked to the Ampatuans, including cases of personal or political rivals of the family being cut into pieces with a chainsaw so that their remains would be harder to identify. The lack of credible investigations into such killings and the impunity that accompanies all such forms of brutality and human rights violations by state-agents or their allies - which has been documented and denounced in the past by the AHRC and many other NGOs and international human rights experts - has undoubtedly led to the massacre in question here. It is hoped that the authorities will hear this wake-up call and begin to address this issue, not only in relation to the massacre in question here, but concerning the wider problem of impunity that pervades the system and society in the Philippines as a whole.

Unconstitutional martial law adding fuel to the flames: In response to the massacre, on December 5, 2009, President Macapagal-Arroyo signed Proclamation No. 1959, placing the Maguindanao province's 36 Municipalities (except the areas previously identified as having been occupied by Moro rebels), under martial law and suspending the privilege of the writ of habeas corpus. The AHRC has denounced this measure as unconstitutional.² Article 7, section 18 of the 1987 Constitution only permits such a proclamation in cases where the presence of "lawless violence, invasion or rebellion" can be established. While it is true that the authorities are facing difficulties in getting the Ampatuans' armed henchmen to surrender as part of attempts to arrest and investigate those thought to be responsible, the situation does not justify the use of martial law and the suspension of fundamental rights throughout the entire province.

In justifying the Proclamation, President Arroyo claimed that armed groups have established positions to resist government troops and that peace and order has deteriorated to the extent that the local judicial system is not functioning. However, these two elements are not recognized by the 1987 Constitution as constituting the basis for declaring martial law.

2 For statements released concerning the unconstitutional martial law proclamation in Maguindanao, please see the following: <http://www.abrchk.net/statements/mainfile.php/2009statements/2326/> and <http://www.abrchk.net/statements/mainfile.php/2009statements/2334/>

The Proclamation's justification that the local judicial system is no longer functioning also appears to be incorrect. The charges filed against the perpetrators have already made considerable progress in the local courts and the houses of some of those accused of taking part in the massacre have already been the object of searches and arrests. On December 2, 2009, Supreme Court (SC) Chief Justice Reynato Puno appointed Judge Melanio Guerero, a trial judge of the Regional Trial Court (RTC) in Tacurong City, to take over the handling of the murder charges filed against Andal Ampatuan Jr., after judges in a court Cotabato City refused to take up the case.

The DoJ has, in fact, sought the Supreme Court's intervention for the transfer of the hearing of the case from Cotabato City to Manila. The City of Cotabato where the charges of murder have been filed is also not part of Maguindanao and the Autonomous Region in Mindanao (ARMM). The Proclamation's justification that the local judicial system in the province is no longer functioning, even if it were true, would be irrelevant, since the case has been filed outside of the province.

It is feared that martial law will only add to a situation in which the increased powers awarded to law-enforcement will lead to further violations of rights. The AHRC has called upon the members of the Senate and House of Representatives to revoke the Proclamation in order to protect and uphold the fundamental rights of the over one million people in this province.

III. The failure to investigate hundreds of political killings attributable to the State - unfulfilled pledges, unfinished business

Extra-judicial, politically motivate killings attributable to the State have been one of the most important human rights issues in recent years. Estimates by civil society groups vary, but up to 1000 persons may have been subjected to political killings since 2001 in the Philippines, with the Army of the Philippines thought to be responsible for these as part of its counter-insurgency against left-wing armed groups, The military has been targeting and killing anyone it arbitrarily suspects of being part of or supporting such leftist groups.

Following concerted pressure from local, regional and international human rights organisations, including the AHRC, as well as important monitoring and condemnation by international institutions and experts, notably the UN Special Rapporteur on extra-judicial killings, Professor Philip Alston, the number and frequency of these killings reduced significantly. The number of extra-judicial killings began to drop after the Rapporteur conducted a country visit to investigate the phenomenon of targeted attacks and killings of human rights and political activists in February 2007 and released a highly

critical report on the matter that received wide attention within the UN Human Rights Council and more widely at the international level.

The government and the military have found that they cannot carry out such large scale killings without being noticed. However, those responsible have remained above the law. Given this, the AHRC is concerned that such killings could resume once international attention has dwindled, as there are no effective legal deterrents in place.

Before the European Union (EU) signed an agreement with the Philippines concerning the EU-Philippines Justice Support Programme in October 2009, the country claimed that it was taking measures to solve cases of extra-judicial killings of human rights and political activists, but no results have been evident. It is hoped that with increased political will on the part of the country's authorities and the EU's assistance, much-needed progress will eventuate in the near future. The AHRC is of the opinion that the lack of political will has been the main barrier to progress concerning the hundreds of politically-motivated targeted killings in the Philippines and hopes that the EU programme will provide impetus to resolve the stagnation that has beset attempts to resolve this issue.

The government has publicly announced that it is tackling the killings since August 2006, at which time President Gloria Macapagal-Arroyo gave orders to Task Force Usig, a police-led investigation unit created in May 2006, to probe the killings and resolve at least 'ten cases of alleged extra-judicial killings within ten weeks'. Over three years later, there is no evidence to suggest that the task force has been able to meet the target President Macapagal-Arroyo had set. In the task force's official website³ there are no details concerning this.

Even if the task force had been able to meet its target of resolving one case a week, in mid-2006 there were already some 700 allegations of political killings and this would have taken the task force 14 years to complete the job. While this would have been an improvement as compared with the task force's apparent failure to have made any progress in resolving these cases, it is still not a desirable time-frame in terms of the State's obligation to provide redress concerning such serious abuses. The criticism by the AHRC and others concerning the fact that Philippine National Police (PNP) would claim to have "solved" cases after it had conducted some form of preliminary investigation, rather than considering a case to be solved once the alleged perpetrator had been successfully prosecuted and justice provided, the police and Task Force Usig have not even been able to resolve cases enough to qualify under their insufficient definition.

³ Task Force Usig website: http://www.pnp.gov.ph/about/content/offices/spl_units/tf_usigupdates/usig_sept/usigreports.html

One and a half years after Task Force Usig's creation, President Macapagal-Arroyo created another task force, Task Force Against Political Violence (TFAPV). President Macapagal-Arroyo issued Administrative Order 211 for its creation in November 2007, leading to it also being known as "Task Force 211". The mandate of Task Force 211, which operates under the Department of Justice (DoJ), was in part a repetition to the PNP's Task Force Usig's. Task Force 211 was to "harness and mobilize government agencies...for the prevention, investigation, prosecution and punishment of political violence." The Department of Interior and Local Government (DILG), which created Task Force Usig, became one of the member agencies of the Task Force 211. The DILG has jurisdiction over the functioning of the PNP.

Unlike the PNP's Task Force Usig, the DoJ's Task Force 211 is seen to have been taking steps to address the extra-judicial killings of human rights and political activists. It claims to have investigated, monitored and/or collected evidence in order to create case files in over 200 cases, with three of these cases having resulted in the conviction⁴ of the perpetrators as of April 2009. While Task Force 211's efforts are an improvement with regard to Task Force Usig much more is required to address such a large backlog of grave human rights violation cases.

The AHRC hopes that the EU's 3.9 million Euros grant (about USD5.8 million or P270 million) to the Philippine government "to help the government stop extra-judicial killings and disappearances of activists" will lead to improved results in the investigation and prosecution of such cases. By stipulating as a priority the strengthening of the criminal justice system, notably the investigation, prosecution, and judiciary, as the purpose of the funding, it has been recognised, including by the government of the Philippines, that there are significant defects in the country's system of justice and that these are proving to be a major obstacles for victims of violations seeking justice and reparation. According to Agence France Press (AFP) and local media, the EU's Ambassador Alistair MacDonald, also pointed out that "it is regrettable that there have as yet been so few convictions in relation to the killings of political activists."⁵

Another area of concern is the lack of progress concerning the implementation of the PNP's "one-strike policy," under which the police station commander was to be temporarily suspended once a political killing took place, pending the result of an investigation. This policy was announced by former PNP chief Oscar Calderon in November 2006, however, there is no information available concerning any commanders

4 *Task Force 211 Accomplishment Report:* http://www.taskforce211.com.ph/tf211_sub/accomplishment/accomrep_ops_tf211.htm

5 <http://globalnation.inquirer.net/news/breakingnews/view/20091008-229029/EU-to-help-RP-tackle-extra-judicial-killings>

having been suspended, sacked or sanctioned for their failure to prevent such killings. The PNP's Task Force Usig "does not issue public reports and its website is out of date,"

according to a statement made by UN Special Rapporteur on extra-judicial killings, Philip Alston, to the Human Rights Council.

In a special report in its *Article 2* publication issued in February 2007, entitled "the Criminal Justice System of the Philippines is Rotten"⁶, the Asian Legal Resource Centre (ALRC) provided details and analysis as to how cases are investigated, prosecuted and taken to court. The report revealed that widespread impunity and the lack of convictions and legal remedies are aggravated by systemic defects within the country's institution of justice. The ALRC is the AHRC's sister-organisation.

The creation of a succession of task forces to conduct field investigation, interview the families of the dead and witnesses, and suchlike, would have not been necessary if the police, the prosecutors and judges had performed their rudimentary duties and obligations. The need for such task forces is an indictment of the failure by the other state agents in the administration of justice.

Before Task Force 211 signed a Memorandum of Agreement (MoA) with the Lyceum of the Philippines College of Law for the "active monitoring of some extra-judicial killings cases pending before different Metro Manila courts,"⁷ the Supreme Court (SC) had already given guidelines to judges and court staff of the 99 special courts it had designated in March 2007 to deal with the political killings and orders "to include the status of the extra-judicial cases in their monthly report of cases."⁸ The SC also warned the judges and court staff that their salaries and allowances would be withheld if they failed to do so.

Despite the SC's guidelines, however, there are no known monthly status reports available. It is not known whether any sanctions were imposed on judges and court staff as a result. Had this guideline been effectively implemented, it would have been unnecessary for Task Force 211 to enter into agreement with the law school to monitor the progress of cases in court.

6 Full text of *Article 2: Special Report: The criminal justice system of the Philippines is rotten* <http://www.article2.org/pdf/v06n01.pdf>

7 Task Force 211 Activities, December 19, 2007

8 Reuters; *Manila forms special courts for political killings*; March 4, 2007

IV. Judges subverting judicial remedies

After the Supreme Court (SC) promulgated the writ of amparo in October 2007 and the writ of habeas data in February 2008, legal remedies were made available in theory for persons whose right to life, liberty and security were threatened. When these remedies came into effect, however, inconsistent interpretations by judges as to how evidence should be dealt with in granting writs has undermined the good intentions of these remedies.

When the writ of amparo was promulgated it was not as a form of criminal action but as a means of protection, resulting in different threshold in terms of the burden of proof. Proof beyond reasonable doubt concerning threats should have not been required as a prerequisite for providing protection to potential victims. However, some judges applied overly stringent requirements in this regard when hearing petitions. 45 of a total of 52 petitions for protection under the writ of amparo as of February 2009⁹ were rejected, which is seriously alarming given the number of threats that have resulted in killings in the country in recent months and years.

In explaining these dismissals, the SC mentioned five reasons: “The subjects themselves denied there was enforced disappearance, force, torture, threat or the like on them; the petition was withdrawn as the subject is facing a charge in the lower court; the writ of amparo is not the appropriate remedy; insufficient evidence; or the petitioner failed to show up in the hearings.”¹⁰ It could not be accurately ascertained how many of these rejected petition were on the basis of ‘insufficient evidence’, but in most of the rejections this has been cited as the dominant reason.

Three human rights lawyers, Carlos Zarate, Angela Librado-Trinidad and Lilibeth Ladaga, who are members of the Union of Peoples Lawyers in Mindanao (UPLM), sought judicial protection under the writ of amparo, after their names were included in a PowerPoint presentation that was reportedly leaked from within the military and contains the a list of persons targeted by the military’s so-called ‘Order of Battle.’¹¹ The three lawyers filed separate petitions for writ of amparo on June 16, 2009, before the Office of the Clerk of Court (OCC) of the Regional Trial Court (RTC) in Davao City.

One of the petitioners, Zarate, argued in the petition that the “mere inclusion of the petitioner’s name in the said Order of Battle is not only putting his life in danger, but

⁹ *GMA News; Writ of amparo: How effective is it?; March 30, 2009*

¹⁰ *Ibid, footnote 6.*

¹¹ *Full text of the PowerPoint Presentation: <http://www.urgentappeals.net/pdf/AHRC-UAU-022-2009-04.pdf>*

a clear threat as well to his liberty and security, including that of his family.”¹² The PowerPoint presentation also “clearly show that the names listed therein have been branded as enemies of the state.” Zarate’s concern for his and his family’s security and liberty was prompted by the murder of Celso Pojas, a farmer activist, on May 2008. His name also appeared in the list. Other lawyers included in the list (which names 105 people, among them lawyers, journalists, human rights and political activists, physicians, union leaders and religious leaders in Davao City) have also been receiving threats.

However, Judge Jose Manuel Castillo of the Regional Trial Court (RTC), Branch 10, ruled in rejecting Zarate’s petition that he had failed to prove “by substantial evidence, that indeed, his perceived threat to his life, liberty and security is attributable to the unlawful act or omission of the respondents. “ Judge Castillo also declared that there was not enough evidence to link Celso Pojas’ murder with the target list.

Judge Castillo has also argued that even if Satur Ocampo – the member of the House of Representatives who first received the leaked presentation – testified in court, his testimony would be ‘empty’ if he could not testify alongside his anonymous source. It would be concluded that “he has no direct or personal knowledge about the authenticity of the subject ‘OB List’, hence, whatever he says about it is hearsay.” The petitions of Trinidad and Ladaga were also rejected on the same grounds.

Similar reasoning was used in the criminal trial of the Abadilla Five¹³ – innocent men that were handed death sentences for a murder they did not commit – when evidence from a third absent party which could exonerate them was rejected. The court argued that unless the person appeared in court and handed in the evidence himself it could not be admitted. Even in this criminal case it was an impractical demand; the person who had personal knowledge of the Colonel’s murder was part of the illegal armed group who had committed the killing. He was later killed.

There are also limitations to the effectiveness of the writ of amparo although it deserves recognition in upholding the right to life, security and liberty of persons who have their petitions approved. There are no guarantees that even if the court grants a petition a person will benefit from its protection. The relatives of James Balao,¹⁴ a human rights activist who disappeared in September 2008 in La Trinidad, Benguet, were successful in a writ of amparo petition on January 19, 2009, under which the government was asked to “disclose where (Balao) is detained or confined (and) release (him)”. Balao’s whereabouts had still not been located as of the writing of this report in early December 2009.

12 <http://www.urgentappeals.net/pdf/AHRC-UAU-022-2009-01.pdf>

13 Abadilla Five campaign website: <http://campaigns.abrchk.net/abadilla5/>

14 AHRC Urgent Appeals: Human rights activist disappears; subject of overt surveillance

The Balao family's petition under the writ of amparo was granted by Judge Benigno Galacgac of the Regional Trial Court (RTC) in Benguet. Despite Judge Galacgac's findings that the police and military had "failed in conducting an effective investigation of (Balao's) abduction,"¹⁵ those responsible have still not been held to account. This case illustrates that even if the court reveals the police and the military's failure in carrying out effective investigation concerning cases of disappearance they would nevertheless not be punished or sanctioned for their negligence.

In cases wherein the petitioner for protection under the writ of amparo is himself the object of prosecution concerning fabricated charges, they are effectively denied this remedy. The writ, when promulgated excludes subjects facing charges in court. One such petitioner is lawyer Remigio Saladero,¹⁶ a labour lawyer who is working for the Pro-Labor Legal Assistance Center (PLACE). Saladero is one of 19 activists who were falsely charged with arson and conspiracy to commit rebellion for the alleged burning of a cell site of a telecommunication company in Lemery, Batangas on August 2, 2008 as well as multiple alleged murders and multiple attempted murders in an ambush of policemen by a rebel group on March 3, 2006 in Puerto Galera, Oriental Mindoro.

On February 5, 2009, Saladero and his 18 co-accused were exonerated for technical reasons from the murder charges. In his decision, RTC judge Manuel C. Luna, Jr., held that the respondents could not be charged for the multiple murder and frustrated murder of six different individuals altogether in one complaint. Also, it ruled that "each act of murder and frustrated murder should have been charged in separate information (complaint)".

But on February 11, 2009, a few days after they were released from jail, Remigio and his fellow respondents were once again informed of another murder charge laid against them. This time, the case involved the killing of a Ricky Garmino, 37, a member of a government-backed paramilitary group, the Civilian Auxiliary Forces Geographical Unit (CAFGU). The crime concerning which they were charged took place in Rodriguez, Rizal province on July 29, 2008. The case was filed on August 4, 2008. Most of the respondents included in this are the same persons who are also included as respondents in the murder case in Puerto Galera, Oriental Mindoro and the arson in Lemery, Batangas. It is understood that a number of the group have never even been to the locations in question.

When Saladero filed his petition under the writ of amparo asking the court to issue a

¹⁵ *Inquirer.net*; 'Amparo' issued for Baguio activist; January 25, 2009

¹⁶ *AHRC Urgent Appeals: Arbitrary arrest and detention of a labour lawyer; 18 other activists falsely charged*, October 28, 2008

“temporary restraining order against his arrest” due to the filing of a series of questionable charges against him, the Supreme Court in March 2009 rejected his petition ruling that: “considering that a criminal action had been commenced against the petitioner, the Court resolved to deny the instant petition for non-compliance with the rules on the writ of amparo”¹⁷. Saladero and his fellow accused had to endure a trial in court after having been denied judicial protection, while those responsible of fabricating false charges against them were free to continue with the unjust prosecution with impunity.

Some of the 19 human rights and political activists accused in the arson case were reportedly forced into hiding, when it became clear that they would not be provided with judicial protection, after Saladero’s petition had been rejected by the court.

V. The notion of guilt by association persists

The observation that Philip Alston, UN special rapporteur on extrajudicial, summary or arbitrary executions, made in his report to the Human Rights Council on 16 April 2008,¹⁸ that human rights and political activists “appear to be (killed) due more to their association with leftist groups than to their particular activities” continues to be a concern. This notion of guilt by association remains deeply entrenched amongst the members of security forces in performing their duties and leads to human rights violations, as the military conducts extra-judicial actions, including killings, as a result. Although this is not openly admitted or a written government policy, the military continues to act with bias against those that it suspects of being in any way sympathetic or connected to leftist groups. Armed leftist groups operate in the Philippines. While it is the responsibility of the State to combat armed groups operating in its territory, the arbitrary targeting of unarmed civilians is unacceptable.

The previously-mentioned ‘Order of Battle’ blacklist allegedly compiled by the military in Davao City, southern Philippines, that lists 105 names of individuals and groups, accuses them of colluding with the communist movement to “takeover of the seat of government”. The 67-page PowerPoint presentation was leaked by a member of the military to Satur Ocampo, a lawmaker. Ocampo has claimed that a “conscientious soldier” had leaked the document to him.

Even before a credible investigation could commence to establish whether or not the document had indeed originated in the military establishment, Maj. Gen. Reynaldo Mapagu, the commander of the 10th Infantry Division, Philippine Army, whose unit is

¹⁷ *Inquirer.net*; SC junks labor lawyer’s writ of amparo bid; March 10, 2009

¹⁸ Full text of Alston’s report: <http://www.urgentappeals.net/pdf/AHRC-UAU-022-2009-03.pdf>

accused of authoring the document, made a general denial of its existence. He dismissed the existence of the document and accused Ocampo of spreading “pure propaganda... they (the communists) are just trying to come up with a big propaganda because they are being defeated”¹⁹.

The said PowerPoint is the second blacklist to have been made in public. In early 2005, a PowerPoint presentation entitled “Knowing the Enemy” reportedly produced by the Intelligence Service of the Armed Forces of the Philippines (ISAFP), which accused several human rights and political activists of colluding with the communist, also surfaced. Over four years after the “Knowing the Enemy” was made known to public, the ISAFP and those individuals who took part in the production of this document have still not been held accountable. Numerous human rights and political activists named in this list became victims of extra-judicial killings. At least one person - Celso Pojas²⁰ - named in the more recent Order of Battle list has already been killed and there are serious concerns that others may follow.

The rejection by Judge Castillo of the petitions concerning the writ of amparo made by human rights lawyers Carlos Zarate, Angela Librado-Trinidad and Lilibeth Ladaga, are of particular concern as they it fails to provide justifiable protection to persons under threat and protects the military by quashing evidence that they are compiling list of targets for extra-judicial killings. The Supreme Court’s (SC) ruling concerning the writ of habeas data²¹ has been ignored by the military establishment. This required the military unit allegedly involved in creating the document to produce the list and the documents upon which it was based.

Concerning guilt by association, there have also been cases of harassment and intimidation of human rights and labour rights defenders merely because of their affiliations to the Kilusang Mayo Uno (KMU) and National Federation of Labor Union (NAFLU), groups the military claims “are members of the Communist Party of the Philippines”. These are the groups Alston described in his report to have “lost numerous members to extra-judicial executions” and who are “commonly cited by Government officials as a CPP front group”.

In Compostela Valley, southern Philippines, the military is deliberately engaged in systematically harassing, intimidating and forcing union leaders to disaffiliate from any organization they claim is ‘communist’. The military has formed a specific unit, called the

19 *GMA News.TV: Journalist claims his name is in Army ‘order of battle’; May 20, 2009*

20 *AHRC Urgent Appeals; Farmer leader object of overt surveillance and threat shot dead, May 19, 2008*

21 *Full text of the Rule on writ of habeas data: <http://sc.judiciary.gov.ph/rulesofcourt/2008/jan/A.M.No.08-1-16-SC.pdf>*

Workers for Industrial Peace and Economic Reform (WIPER). The unit is attached to the military and is supposedly tasked with maintaining ‘industrial peace’ in areas where multi-national corporations are operating, but has instead been involved in harassing and intimidating labour leaders.

Soldiers who are attached to the WIPER demanded that Cerila Anding (President of Nagkahiusang Mamumuo sa Os Miguel - NAMAOS), Roldan Anover (the auditor), and Aurelia Yray (treasurer)²² cease their affiliation with the KMU-NAFLU. On separate occasions, soldiers went to their houses looking for them, followed them from their houses to their workplaces and deliberately accused the labour groups where their union is affiliated of being communist fronts. The soldiers also offered to pay them off in exchange for ceasing their affiliation with the KMU.

This case illustrates that Alston’s recommendation in which he called on the government to “direct all military officers to cease making public statements linking political or other civil society groups to those engaged in armed insurgencies,” has not been acted upon. The military has instead created a unit to focus on systematically harassing and intimidating activists under the pretext of upholding ‘industrial peace’ and represent blatant violations of the workers’ right to the freedom of association and organize unions. It is extremely difficult to hold these soldiers to account because their deployment in factories and plantations results from a government policy. It is imperative that the government immediately abandon this practice and ensure that such units are immediately disbanded.

These types of activities are typical of those used by the military throughout their counter-insurgency campaign between 2006 and 2008, in which uniformed and heavily armed soldiers have been deployed in slum and urban areas in Metro Manila; soldiers have been conducting lectures and forums in universities concerning the evils of communism and using these to vilify students groups they claim collude with or are fronts of the communist movement.

Although these types of activities have declined in Metro Manila in 2009, the deployment of soldiers in factories and plantations in remote areas in order to subject workers and activists to surveillance has increased. Factory and plantation owners allow the military to deploy and set up detachments in their premises and allow soldiers to be present during meetings concerning matters that should remain between the employee and employer. Soldiers take these opportunities to vilify and discredit labour groups and accuse them of being communist fronts. Given that the military is engaged in armed combat with communist armed groups, such accusations can amount to death threats.

22 AHRC Urgent Appeals; Soldiers threaten, intimidates three labour rights defenders; June 29, 2009

VI. Increase in the use of legal persecution

As mentioned in the section above concerning extra-judicial killings, the number of such killings reduced in the country in 2008 and 2009 as a result of international pressure and condemnation. After the number of extra-judicial killings sharply dropped, the AHRC observed a different phenomenon starting in 2008 the use of legal measures to persecute the same groups of human rights and political activists that had also been the targets of killings. As was mentioned in the Philippines chapter²³ of the AHRC's annual report on the State of Human Rights in Eleven Asian Human Nations in 2008, there has been an increasing number of prosecutions of human rights defenders and political activists based on fabricated charges. The authorities have settled for keeping such persons in detention rather than killing them outright, due to international pressure, which is something of an improvement, but still represents a pattern of grave human rights abuse that must be halted.

Although President Macapagal-Arroyo, appears to have complied with on of Alston's recommendations by abolishing the Interagency Legal Affairs Group (IALAG) on May 15, 2009, those who were falsely charged and detained in jail as a result of its work, have had to endure lengthy and expensive court proceedings suffer. The AHRC is aware of six different cases of this type, based on fabricated charges, affecting 205 individuals, many of which face charges in one or more of the six cases. President Macapagal-Arroyo signed Executive Order (EO) 808 revoking the IALAG that had been created in 2007, saying that it "already accomplished its mandate." It has mainly accomplished the further perversion of justice and degradations of the rule of law in the country, according to the AHRC. Despite the IALAG's abolition, none of those government agencies or public officials responsible for orchestrating the fabricated charges have been held accountable.

The said agency was supposedly tasked "to provide effective and efficient handling and coordination of the investigative and prosecutorial aspects of the fight against threats to national security" but actually distorted "the priorities of the criminal justice system" as it has "increasingly focused on prosecuting civil society leaders rather than their killers."²⁴ The agency has also been blamed for the filing of fabricated charges, arbitrary arrests and detentions and otherwise threatening human rights and political activists the government claimed had colluded with or were sympathetic to the left.

Separately, 18 falsely-charged labour rights activists remain in detention in Karangalan

²³ *The State of Human Rights in Eleven Asian Nations; Philippines: The Human Cost of Insecurity*, pp. 264, December 2008

²⁴ *AHRC-UAC-239-2008: Arbitrary arrest and detention of a labour lawyer; 18 other activists falsely charged*, October 28, 2008

Police Station, Cainta, Rizal. Two of their colleagues have already died in detention.²⁵ As a result of their participation in a strike, they were arbitrarily charged with Serious Illegal Detention at the Regional Trial Court (RTC), Branch 80, in Morong, Rizal. The court hearing their case should have had no jurisdiction to try their case because the case arose from a labour dispute. However, the court resolved that there was no employee-employer relationship between the complainants and the accused to justify its taking over the case, effectively giving it legal authority to try the case under labour laws.

Their case illustrates the lack of remedy for victims facing false charges. The victims are forced to endure unjust and arbitrary detention as they continue to wait for the conclusion of their case in court. Apart from enduring the an unfair trial based on fabricated charges, the detainees are also exposed to the risk of contracting illnesses and even dying in detention due to poor prison conditions. Two of these detainees, who were physically fit and healthy prior to their detention, have died after contracting tuberculosis in jail.

VII. Death Squad exists and is no laughing matter

In its 2008 Human Rights report,²⁶ the AHRC pointed out the police's inability to prevent incidents of vigilante killings in Davao City and other areas in the southern part of the Philippines. The police claim that a lack of witnesses is hampering their attempts to address the vigilante-style killings, but have done little to provide effective protection to potential witnesses. This failure has been tolerated by local officials in Davao City for many years, who, according to Commissioner Leila de Lima, the chairperson of the Commission on Human Rights (CHR), "are still in a state of denial about what's really happening."²⁷

In June 2009, in concluding a field investigation and series of public hearings, the CHR claimed to have discovered convincing evidence that proves the existence of the 'Davao Death Squad'. In July 2009, the CHR was able to exhume skeletal remains of persons believed to have been victims of vigilante killings. It claimed that a self-confessed member of the death squad had helped the CHR and other government agencies to locate the victims' remains, which had been dumped in Barangay (village) Maa in Davao City.

The CHR's investigation was unfortunately damage by problems in following legal

²⁵ *AHRC Urgent Appeals; Another detainee dies in jail; 18 others at risk for lack of medical attention, September 29, 2009*

²⁶ *Ibid, footnote 19*

²⁷ *Statement of Leila M. De Lima, chairperson of the Commission on Human Rights (CHR), June 26, 2009*

protocols. The procedures used to obtain search warrants when they excavated the site on July 6, 2009, proved problematic. The CHR chooses to secure search warrants from two Regional Trial Courts (RTCs) in Metro Manila, which according to legal experts should have been secured from local courts in Davao City that have jurisdiction into the area. The CHR has argued that the investigators “felt unwelcome in Davao...and there was a possibility of a leak.”²⁸ A court in Manila, “quashed the warrant, rendering the retrieved remains inadmissible in any court proceedings.”²⁹

Also, the detainees whom the CHR earlier claimed as a “self-confessed Davao Death Squad member”, Jonathan Balo, reportedly turned hostile and filed charges against the De Lima and others for allegedly illegally getting him out from a detention centre in Panabo City to point out the location of the grave site.

The CHR’s finding that a death squad was operating in Davao City supports such claims made in the AHRC’s human rights report in 2008. De Lima concluded that “DDS is no laughing matter and we maintain that it exists.”³⁰ The CHR was looking into the killing of at least 538 persons, including women and children, since 1998. The cases include a number that the AHRC documented and concerning which it sought the intervention of the CHR, which prompted the Commission to launch its investigations into the vigilante killings.³¹ The AHRC has documented cases in General Santos City, Tagum, Digos and Cagayan de Oro.

The CHR’s active role has provided encouragement to the families of the dead and those targeted by vigilante action that there are increased avenues to seek protection and remedies. The CHR promulgated Resolution No. CHR (IV) A2009-064³² creating Task Force DDS, which seeks to help the CHR to “broaden not just the investigative aspect but other areas of coordination and assistance as well, for a more expeditious and effective investigation of...extra-legal killings”. It also issued numerous public statements categorically condemning the continuing vigilante killings, the failure on part of the police and negligence by officials of the local administration to address the killing.

The CHR’s difficulty in pursuing this investigation has also been aggravated by the lack of a legal basis to invoke the principle of “command responsibility” in instances where the local police and public officials have failed to prevent abuses or been negligent in

28 *Inquirer.net*; *Legal woes stump Davao killings probe*, August 16, 2009

29 *Ibid*, footnote 19

30 *Ibid*, footnote 22

31 *Mindanews*; *CHR to probe vigilante killings in Davao City; Duterte vows support to CHR probe*; February 15, 2009

32 *Full text of Resolution CHR (IV) A2009-064*: http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/advisories/adv_17June09_CHR4A2009_064.htm

the performance of their duties. The Melo Commission – a body set up in 2006 to investigate allegations of political killings – concluded in a report issued on January 22, 2007, that legislation was needed to “require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extra-judicial killings and other offences committed by personnel under their command, control or authority.”³³ The notion of command responsibility exists in theory, but there is no implementing law and therefore no high officials are being held accountable for the numerous killings in practice.

For example, police and local officials in Davao City have been protected from prosecutions by the absence of such a law, even though the Melo Commission has stated that: “anyone with higher authority, who authorized, tolerated or ignored these acts are liable for them”. There is no substantial progress to a proposed law, the Command Responsibility Act, which was introduced in 2007 in response to the Melo Commission’s recommendations but remains pending in the Senate.

VIII. The role of the legislature in providing protection for human rights

In July 2007, Justice Reynato Puno, the chief justice of the Supreme Court, described the Philippines’ legislature as having “betrayed the human rights of the people by defaulting to enact appropriate law” and for “exercise(ing) its power to be powerless.” The legislature has since made some progress concerning long-overdue legislation for the protection and promotion of human rights.

The final version of the domestic law on torture, the Anti-Torture Bill, was ratified by the two chambers of Congress, the Senate and the House of Representative, in August 2009. It was submitted to President Gloria Macapagal-Arroyo for her signature on October 14, 2009 and was signed into law on November 12. This law is particularly welcomed by the AHRC, as the Philippines has been struggling to pass this law for two decades. The implementation of this law, if achieved in practice, will represent a significant positive development, although this will likely face many obstacles.

Also, a proposed law against forced or involuntary disappearance also made progress in the legislature. As of June 2009, the proposed bill had passed its third and final reading in the House of Representatives. Under the Philippines’ legislation procedures, after the bill has passed the final reading, a bicameral conference would be held, in which the Senate and House of Representatives simultaneously deliberate on the substance and merits of

33 *Melo Commission Report; January 22, 2007; pp 76*

the bill in order to ratify an agreed version. This had not been held as of Decemebr 2009, and the AHRC urges the government to ensure that this is held without delay in 2010.

The Republic Act 9710 - also known as the Magna Carta of Women - a domestic law which prohibits discrimination against women, was signed into law on August 14, 2009. Myrna T. Yao, the chairman of the National Commission on the Role of Filipino Women, described the newly-passed law as seeking to “eliminate all forms of discrimination against women by recognizing, protecting, fulfilling and promoting all human rights and fundamental freedoms of Filipino women, particularly those in the marginalized sector.”³⁴

The Senate and the House of Representatives deserves recognition for the landmark legislation that was passed in 2009. However, Congress failed to repeal provisions of the Human Security Act of 2007³⁵ that has been declared by Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, as “not (being) in accordance with international human rights standards” on November 28, 2007.

There is no substantial progress in repealing the arbitrary provisions of the law, particularly Sections 18 and 19, which allow police or law enforcement to detain persons who are suspected of committing terrorism for 72 hours, perpetuating arbitrary arrest and torture, “without incurring any criminal liability”; and the punishment of 40 years jail terms to persons found guilty of committing the crime of terrorism without the benefit of parole. These are some of the provisions that Martin Scheinin found contrary to human rights standards.

The government announced on several occasions to the media that it would strengthen the Witness Protection, Security and Benefit (Republic Act 6981), a law which is to provide protection to witnesses. Despite promises having been made by the office of the President and the Department of Justice, when it was headed Secretary Raul Gonzales, these have remained unfulfilled. The recommendation to introduce a provision to provide interim protection for witnesses pending the approval of their applications to the program has not yet been implemented. Under the current law, witnesses can only be admitted to the program and given protection once the case they are to testify in has been filed in court. However, most witnesses require protection before this, as most extra-judicial killings cases do not even reach the courts. This failure to protect witnesses when required damages the prospects for conducting effective investigations and prosecution of cases in courts, as the police depend heavily on testimonial evidence from witnesses in

³⁴ *BusinessWorld*; *Magna Carta of Women signed into law*; August 15, 2009

³⁵ *Full text of the Human Security Act of 2007*: <http://material.abrchk.net/docs/Philippines-HumanSecurityAct.pdf>

investigations. The perceived complicity of the police in the killings also breeds distrust for witnesses.

Also, since the government publicly announced in April 2008 that it would ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),³⁶ this remains unfulfilled. The Presidential Human Rights Committee (PHRC) made this pledge during the United Nations' Human Rights Council's Universal Periodic Review (UPR) of the Philippines in Geneva. As of the end of 2009, a public hearing had been held in the Senate. Although the government has agreed to ratify the OPCAT, it has sought to defer the implementation of the creation of the National Preventive Mechanisms for three years after its ratification. The NPM is required under Part IV of the OPCAT, but the delays to their creation represent a protection gap that the government should work with all speed to eradicate.

Furthermore, eleven years after the government adopted the United Nations Guiding Principles on Internal Displacement (UNGPID), there are no legal remedies or domestic mechanisms to deal with violations of these principles. The lack of domestic law on this has deprived internally displaced persons (IDPs), particularly the IDPs arising from the four decades-old conflict in Mindanao, of any possibility of seeking legal remedies and redress. The conflict in Mindanao entered into a ceasefire during 2009, but may again ignite in future, if patterns seen in the past continue. IDPs continue to face resettlement problems and a lack of reparation there at present. The Philippines is amongst the countries in the world with the highest numbers of IDPs, According to the International Committee of the Red Cross (ICRC), as the result of the government's counter-insurgency operations and internal conflicts.

IX. Lawlessness in Sulu's 'State of Emergency'

After Abdusakur M. Tan, the governor of Sulu province, southern Mindanao, issued Proclamation No. 1 Series of 2009³⁷ on March 31, 2009, the province has been under a 'State of Emergency'. In issuing the Proclamation, Governor Tan invoked powers under Section 465 of the Local Government Code of 1991 (RA 7160), granting the local chief of the executive the power "to carry out such emergency measures as may be necessary during and in the aftermath of man-made and natural disaster and calamities." The kidnapping of three ICRC workers - a Swiss national, an Italian and a Filipina - on

³⁶ *Philippine Daily Inquirer*; *Philippines set to join UN protocol vs torture--Ermita, April 15, 2008*

³⁷ *Full text of Proclamation No. 1, Series of 2009*: <http://material.ahrchk.net/philippines/AHRC-STM-082-2009-01.pdf>

January 15, was invoked as the justification for the declaration. All of the kidnap victims were released separately in April and June. However, the kidnapping of three ICRC workers, while deeply regrettable, is not sufficient justification to amount to a disaster or calamity and the emergency is therefore illegal. This incident is not the first occasion in which local and/or foreign nationals have been kidnapped in order to secure ransoms. This cannot be used to justify to place the entire province under a state of emergency is not justifiable.

Governor Tan issued Proclamation No. 1 and its Implementing Rules and Regulations³⁸ (IRR) simultaneously, without properly consulting the members of the Provincial Council or holding public consultations. Under the Guidelines on the Implementation of the Proclamation, the Governor abdicated any notion of civilian authority by allowing a police and a military colonel respectively, to act as signatories needed for the its approval.

Only the President of the Philippines can declare a State of Emergency. The Local Government Code (LGC) of 1991 gives the local chief executive permission to carry out “emergency measures”. It is only the sitting President of the country, who has the power of the chief executive and commander-in-chief, who could declare a man-made or natural disaster or calamities and states of emergency. The unilateral declaration by Governor Tan is devoid of any legal basis and fails to meet fundamental conditions under which emergency declaration could be invoked: threats to the life of the nation.

The declaration has instead provided blanket impunity to the security forces who are engaged in human rights violations, in particular concerning the conduct of arrest, searches and detention of persons. In its General Comment No. 29, the Committee of the International Covenant on Civil and Political Rights (ICCPR), to which the government of the Philippines is a State party, laid out conditions for governments declaring states of emergency. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.

Under Article 4 of the ICCPR:

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

³⁸ Full text of the Implementing Rules and Regulations of Proclamation No. 1: <http://material.abrchk.net/philippines/AHRC-STM-082-2009-02.pdf>

When Governor Tan issued Proclamation No. 1, the purpose of placing the province under a state of emergency was to respond to the kidnapping of three ICRC volunteers. However, despite their release, instead of lifting the declaration, Governor Tan had it “indefinitely (extended) to support a new offensive to finish off al-Qaeda-linked militants.”³⁹ Despite irregularities and questions of legality concerning this emergency, the Governor has enjoyed a certain level of approval and tolerance, even from the Department of Justice (DoJ) and the regional Commission on Human Rights, as seen by their failure to condemn his actions.

Then-Secretary of the Department of Justice (DoJ), Raul Gonzalez, knew that Governor Tan’s actions were illegal, and was quoted as saying: “Sulu Governor Abdusakur Tan was not authorized to declare a state of emergency in the province since only the President of the Philippines is allowed to do so.”⁴⁰ However he nevertheless applauded him for “showing counter-defiance to the Abu Sayyaf Group,” saying that Tan’s stance “may have prevented the beheading of the three International Committee of the Red Cross (ICRC) hostages”. No actions have been taken by the President or the DoJ concerning this illegal emergency.

Lawyer Faith delos Reyes Kong, a senior legal officer of CHR in Region 9, was quoted to have said: “it is the local chief executive’s right to declare a state of emergency, should the official see the need to uphold law and order for the benefit of the general public.”⁴¹ The CHR’s legal opinion also contradicts the opinion laid down by Justice Secretary Gonzalez and the ICCPR’s provisions in relation to the declaration of a state of emergency.

At first, the emergency was justified as being: “very good (for) the public since this will result in pressuring the kidnappers to release the two remaining kidnap victims.”⁴² However, even the government agency responsible for monitoring disasters and calamities, the National Disaster Coordinating Body (NDCC), reported that the placing of the entire province under an emergency had displaced at least 1,586 families or 7,658 persons⁴³ from eight villages in Indanan town, Sulu. The displaced fled their homes to avoid being accused of abetting the kidnappers and out of fear of being subjected to arbitrary arrest and detention, as has been the case as part of the search for the ICRC staffers.

39 *GMA News.TV; Sulu emergency prolonged to rout Abu Sayyaf; July 20, 2009*

40 *ABS CBN News; Emergency rule in Sulu ‘illegal’; crackdown starts; April 2, 2009*

41 *Ibid, footnote 40*

42 *GMA News.TV; State of emergency in Sulu intended for public safety - AFP; April 16, 2009*

43 *GMA News.TV; NDCC: Nearly 7,700 affected by state of emergency in Sulu; April 11, 2009*

SALIGAN Mindanaw, a group of lawyers in Mindanao, reported that: “the arrests, searches and seizures are done away from checkpoints. One of the detainees is a jeepney (passenger utility vehicle) driver, who was arrested while waiting for passengers inside his jeepney and another was selling his wares at the market. Most were taken from their homes.”

The group also added that those “who were ‘invited’ and who went (voluntarily) to the municipal halls to clear their names were instead arrested there”. Furthermore, a few persons who voluntarily handed themselves over to the authorities after hearing that they were accused of being involved, in order to clear their names, have been instead allegedly been falsely implicated in the kidnappings. At least 43 persons, including three police officers and a village chairman, were reportedly arrested in relation to the kidnappings, with 35 of them being released later on.

Three of those who were arrested and briefly held, including Hadji Mohammad Ismi, Ahajan Awadi (the former Punong Barangay (village chief) of Sawaki, Municipality of Indanan, Sulu), and Senior Police Officer 1 (SPO1) Sattal Jadjuli, have sought the intervention of the Supreme Court (SC) in Manila, asking it to declare as unconstitutional Proclamation No. 1 in a Petition for Certiorari and Prohibition⁴⁴ they filed on April 8, 2009. They also asked the SC to issue a Temporary Restraining Order (TRO) against the respondents to restrain them from enforcing and/or executing the Proclamation No. 1 and its implementing Guidelines. They asked the SC to revoke the declaration, to declare it as unconstitutional and to provide them with compensation. The SC has yet to decide on their victims’ petition.

X. Absence of remedy for civilians affected by conflict and displacement in Mindanao

The renewed fighting in August 2008 between the government’s security forces and the Moro rebels, following a ceasefire agreement signed in 2004, have added to the mounting cases of human rights violations. Those who have perpetrated extra-judicial killings, illegal arrests and detention, abductions and attacks on civilians triggering massive displacements have not been held to account in the long-standing cycle of conflict in the region.

The Government of the Republic of the Philippines (GRP) and the Moro Islamic Liberation Front (MILF) signed an agreement for the Suspension of Military Operations

⁴⁴ *Full Text of the Petition for Certiorari and Prohibition on the State of Emergency in Sulu*; <http://material.ab-rchb.net/philippines/PetitionForCertiorariProhibitionOnStateOfEmergencyInSulu.pdf>

(SOMO) for the Armed Forces of the Philippines (AFP) and for the Suspension of Military Activities (SOMA) for the MILF. A suspension of offensive military operations (SOMO) was declared on July 23, 2009, since which time incidents of armed encounters have declined sharply, although there are still reports of fighting in some areas of Mindanao. There are also prospects for the resumption of formal peace talks with the MILF, after the signing of an agreement on the protection of civilians in armed conflict⁴⁵ on October 27, 2009.

The AHRC's sister organization, the Asian Legal Resource Center (ALRC), in a written submission⁴⁶ to the U.N. Human Rights Council in September 2009, expressed concern about the failure of the government to investigate cases of house demolitions, torture, enforced disappearances and the killing of civilians as a result of the conflict. The police, who are under obligations to investigate crimes, have failed to perform their duties and have become subservient to the military in areas where the latter are operating. One example is the failure by the police of a Municipal Police Station in Datu Odin Sinsuat to promptly investigate and record in their daily log the extra-judicial killing of a farmer, Katog Sapalon⁴⁷, on June 3, 2009. The soldiers were conducting military offensives in Barangay Makir, Datu Odin Sinsuat, Maguindanao province when the incident took place.

In another case, the local police have refused to take responsibility into the continued disappearance of a fisherman who was last reported to have been in police custody on May 18, 2009. Soldiers arrested and illegally detained 37 year-old Dag Sandag Guimalon and two other men on mere suspicions that they were Moro rebels in Barangay (village) Nabalawag, Midsayap, North Cotabato. Chief Inspector Emeliana Piang Mangansakan, the chief of police of the Datu Piang Municipal Police Station, denied that the victim was ever held in their custody despite having signed document that confirms and acknowledges his being turned over to them by the military. She has denied it without giving sufficient reasons. But, when showed the document with her name and signature on it, she claimed the victim was turned over to her deputy and not to her.

The continued disappearance of Guimalon, and the killing Sapalon, are two of the numerous cases of unsolved human rights violations. The notion of accountability and command responsibility amongst the police and security forces in this protracted conflict, spanning 41 years since the of Moro rebellion in Mindanao, hardly exists and impunity prevails.

45 *The Philippine Star: Gov't, MILF ready to open peace talks: senior official, October 29, 2009*

46 *ALRC written submission; Authorities failing to investigate house demolitions, torture, disappearance and killing of civilians resulting from the conflict in Mindanao; September 4, 2009*

47 *AHRC Urgent Appeals: Soldiers torture and shoot a farmer dead in front of his family; July 9, 2009*

The International Committee of the Red Cross (ICRC), which has been stationed in the country since 1982, listed the Philippines as one of eight of the countries in the world they have described as the “most troubled places in the world...which are either experiencing situations of armed conflict or armed violence or suffering their aftermath”⁴⁸ in a survey report in August 2009.

In the Philippines, there is no complaint mechanism through which civilians can send complaints to court for violation of the International Humanitarian Law (IHL). The ICRC, however, is promoting the “inclusion of international humanitarian law (IHL) in military training and raised awareness of international policing standards within police forces”.⁴⁹ Despite the government’s adoption to the principles of UNGPID, there is no mechanism allowing civilians and IDPs to file complaints invoking the principles contained therein. IDPs are not able to complain when they are accused of being a reserve force for the rebels, when their property is destroyed or when food rations to them are blockaded by the authorities, as has been witnessed recently. Food aid to IDPs were blockaded on the pretext that there were security concerns for relief groups distributing the relief and food rations. This pretext is considered dubious.

The government’s National Disaster Coordination Council (NDCC) has set-up an internal mechanism to which “complaints, reports of injustice or wrongdoings (from disaster victims and IDPs), accusations, criticisms or gripes about the on-going humanitarian efforts” could be filed on matters regarding the delivery of services. In Joint Memorandum Circular No. 17, Series of 2008, the NDCC required all the regional Disaster Response Coordination Desks to act on grievances “within three (3) days receipt of the complaint”.

In June 2009, when the AHRC reported the afore-mentioned incident of a food blockade⁵⁰ that the military had imposed in Maguindanao, depriving over 34,000 IDP families, no sanctions or actions were taken against the soldiers involved. The military authorities have also begun publicly labelling the IDPs as being an “enemy reserve force.” On June 30, 2009, Lt. Col. Jonathan Ponce, spokesperson of the 6th Infantry Division, openly labelled the IDPs as being an “enemy reserve force” during a media forum comprising military and civilian officials at the Estosan Garden Hotel in Cotabato.

The signing by the GRP and the MILF of the “Agreement on the Protection of Civilian Component” is also meaningless as it lacks an effective complaint mechanisms. This

48 ICRC; *Our World, Views from the field; The Philippines; Opinion Survey, 2009*

49 ICRC; *Philippines: tens of thousands of people are still displaced in Central Mindanao, August 25, 2009*

50 AHRC *Urgent Appeals; Soldiers burn houses, blocks food supply for over 34,000 displaced families in Maguindanao; June 4, 2009*

component is merely “delegated as an added function of the International Monitoring Team (IMT)”⁵¹. This team is composed of four countries - Malaysia, Brunei Darussalam, Libya and Japan – that are tasked with monitoring the implementation the ceasefire agreement. The IMT’s mandate ended on November 30, 2008 and has not resumed its activities, leading to a gap in monitoring, notably under the new cease-fire. The GRP and MILF are urged to agree to such monitoring and ensure an effective complaint mechanism this time.

Previous agreements and monitoring Committees that the Government and rebel groups have created have failed because they are heavily dependent on progress in peace talks. For example, in armed conflicts elsewhere in the country, the Government and the National Democratic Front of the Philippines (NDF) set-up a Joint Secretariat of the Joint Monitoring Committee (JMC) but it failed to carry out its mandate after peace talks collapsed in August 2005. The Committee was established on February 14, 2004, as part of the implementation of the Comprehensive Agreement on the Respect on Human Rights and International Humanitarian Law (CAHRIHL). The Committee was to receive complaints concerning human rights violations committed by government soldiers and the New People’s Army (NPA) rebels.

Marissa Dumanjug-Palo,⁵² the head of the NDFP-Nominated Section of the Joint Secretariat of the Joint Monitoring Committee, became the subject of threats and intimidation by unidentified persons. On May 31, 2006, Dumanjug-Palo was followed by unidentified men riding on two motorcycles on her way to her office in a taxi. The Committee has failed to act and resolve the numerous complaints of the violations of the CAHRIHL by the government and the rebels. It is reported, however, that the JMC has been has not been able to meet or function since April 2004.

Despite difficulties, some IDPs in Mindanao have filed criminal charges against soldiers with the regional office 12 of the Commission on Human Rights (CHR) and the Office of the Ombudsman for Military and Other Law Enforcement Offices (MOLEO).

In May 2009, civilians whose houses were allegedly burned by the military, filed criminal charges of arson with the CHR. The complainants were villagers who owned some of the over one hundred houses burned in the provinces Maguindanao and North Cotabato, in Central Mindanao⁵³ following the resumption of conflict in 2008. In September, the Ombudsman started preliminary investigations into the complaint and required the

⁵¹ *Mindanao Peoples Caucus (MPC); Media Statement; October 28, 2009*

⁵² *AHRC Urgent Appeals; Threat and intimidation of human rights lawyer and activist, June 5, 2006*

⁵³ *AHRC Urgent Appeals; Soldiers burn houses, blocks food supply for over 34,000 displaced families in Maguindanao; June 4, 2009*

military to submit counter-affidavits. This complaint is landmark as it is “the first time IDPs filed cases against the military in the midst of a war.”⁵⁴

While this attempt to make a complaint is laudable, there are serious concerns as to the MOLEO’s record, as it has typically failed to promptly conclude investigations in the past. Emilio Gonzalez, Deputy Ombudsman, Office of the Deputy Ombudsman for the Military, who required the military to submit their affidavits, is the head of the same office that failed to conclude its actions concerning the complaint of torture relating to the case known as the Abadilla Five⁵⁵ (five detainees who filed complaints of torture that have been pending with the MOLEO for 13 years). This is despite the CHR’s findings that there is sufficient evidence to proceed with the prosecution of the perpetrators in court.

Also, even before the IDPs complaints could be filed in court, they were subjected to harassment and intimidation. “Some people we do not know have been looking for us,” said Akmad Kanacan, one of the seven complainants.⁵⁶ There are serious concerns that the complainants may be forced to abandon the case as a result of intimidation. The Mindanao People’s Caucus (MPC), a local group that is providing legal assistance to the complainants, has expressed concern that t progress in the landmark complaint that they help facilitate could be undermined due to a lack of adequate security and protection provided to the already vulnerable complainants.

As mentioned earlier, the legislature’s failure to introduce amendments to the provision of the Witness Protection, Security and Benefit Act (RA 6981), including interim protection for complaints and witnesses prior to the filing of their cases in court, has deprived witnesses and complainants in this case from being afforded protection. They cannot avail themselves of the Witness Protection Program (WPP), because their case has not been yet filed in court.

XI. Conclusions and Recommendations

The government of the Philippines has been making certain efforts to introduce legal reforms and policies that would help improve the protection of human rights in the country in 2009. However, the lack of complaints mechanisms and implementation of laws mean that such efforts risk remaining on paper and not in practice.

⁵⁴ *MindaNews: Ombudsman for Military probes arson, misconduct complaint filed by IDPs vs 6th ID officials; September 19, 2009*

⁵⁵ *Abadilla Five: Jailed for a decade without justice: <http://campaigns.ahrchk.net/abadilla5/>*

⁵⁶ *MindaNews; “Bakwits” who filed arson complaint seek security assistance; October 17, 2009*

The AHRC has in the past repeatedly argued that improving the country's system of justice - notably policing, the prosecution and the judiciary - in conformity with international laws and accepted norms and standards, is fundamental if the Philippines is to attain the possibility of sustainable long-term improvements regarding the protection of human rights. The passing of a law criminalizing torture, the use of the writs of amparo and of habeas data, that has led to the conviction of perpetrators in three cases are all good signs, but a great deal must be done to make such implementation of laws and rights commonplace rather than exceptional.

To regain the trust and confidence of victims of human rights violations and the wider public concerning the predictability of governance and the system of justice is a lengthy process. It requires the government to begin exhibiting good faith and a willingness to apply command responsibility and to credibly tackle impunity. The government must show through verifiable actions rather than further words that it is complying with its pledges, commitments. It must issue public statements denouncing abuses and ensure that a culture of accountability and responsibility is instilled amongst public officials and the military.

On extra-judicial killings, enforced disappearances and torture:

The government should ensure that they have implemented all recommendations made in:

1. The Melo Commission report in January 2007
2. The follow-up report by U.N. Special Rapporteur Philip Alston to the U.N. Human Rights Council in April 2009
3. The observations and comments by Commissioner Leila de Lima, chairperson of the Commission on Human Rights (CHR) on the follow up report of the Special Rapporteur on extra-judicial, summary or arbitrary executions, April 2009
4. The Report of the Working Group on the Universal Periodic Review (UPR) in 23 May 2008, and;
5. The Committee Against Torture in the conclusion of its periodic review in May 2009.

In addition to the general recommendations mentioned in these documents, there the immediate amendments to the Witness Protection, Security and Benefit Act (RA 6981), the repeal of the Human Security Act of 2007 and the legislation of the Command Responsibility Act introduced in 2007 should be given utmost priority.

The Philippine National Police (PNP) should implement section 1 of the Memorandum Circular No. 2000-008 of the National Police Commission (NAPOLCOM), which

requires the police, in particular the heads of the police stations, to decide for themselves and to make available protection to persons who are “under actual threat/s of deaths” should they be requested. Pending the amendments to RA6981, this could be used as an interim protection mechanism for individuals who are experiencing threats.

The concerned government agencies should effectively implement existing policies designed to address the issues of extra-judicial killings, in particular the Philippine National Police (PNP) ‘one-strike policy,’ guidelines laid out for the PNP’s Task Force Usig for them to promptly conclude the cases of extra-judicial killings and the Supreme Court’s (SC) guidelines requiring judges and court staff to submit monthly progress reports extra-judicial killing cases and progress in the performance of the 100 Special Courts or all courts currently mandated to handle such cases.

The result of this evaluation report, for example, who had been punished, what sanctions and punishments have been laid down to the officials involved for failing to comply and whether the policy had been implemented, should also be made public. This is necessary to ensure transparency in the implementation and the accountability into the pledges and commitments the governments has already made.

On legislation of human rights laws; emergency declarations:

The members of the Senate and the House of Representatives should prioritise the enactment of the domestic law on enforced and involuntary disappearances and the creation of a mechanism that provides for the domestic implementation of International Humanitarian Laws (IHL).

The domestic legislation and implementing mechanism concerning the United Nations Guiding Principles on Internal Displacement (UNGPID), which the government adopted eleven years ago, should also be introduced in Congress. This would address the gross and ongoing violations committed against civilians and IDPs in conflict-affected areas, who are deprived of legal remedies and redress.

The state of emergency in Sulu, which is illegal, must be lifted without any delay. If the President confirms this state of emergency, the Department of Foreign Affairs (DFA) must inform the Committee of the International Covenant on Civil and Police Rights (ICCPR) to comply with its obligation to acknowledge any declaration of a state of emergencies within its territory in order to enable the Committee to monitor its implementation of the ICCPR in this regard.

On the use of legal persecution of activists:

The authorities, in particular the Department of Justice (DoJ) and the Court Administrator of the Supreme Court (SC) of the Philippines, should prioritise the prompt adjudication of questionable charges laid against human rights and political activists. Although the Interagency Legal Affairs Group (IALAG), which was accused of being responsible for orchestrating fabricated charges, was dissolved on May 15, 2009, those falsely charged as a result continue to have their rights abused through lengthy trials and arbitrary detention. Those who took part in the implementation and the operation of the IALAG must be held to account.

The Supreme Court must reviewing the use and application of the writ of amparo, particularly judges ruling to reject applications made by petitioners who have been charged or are facing charges in court. The authorities are using false charges to deprive persons of needed and justifiable protection under the writ.

SOUTH KOREA

GOVERNMENT SACRIFICING HUMAN RIGHTS AND THE LAW IN FAVOUR OF ORDER

This report concerns the evolving situation of human rights in the Republic of Korea (South Korea) in 2009. The situation of human rights in the country, while still significantly better than most if not all other countries in Asia, is becoming an increasing source of concern as it has seen deterioration in several instances since the current government came into power in 2008. There have been increasing limitations on key freedoms, such as the freedoms of the press, of expression and of assembly. The Asian Human Rights Commission (AHRC) has witnessed increasingly repressive measures against peaceful demonstrators, attacks on the independence of the judiciary, attacks on human rights defenders and actions taken by the government to restrict and undermine the functioning of the country's National Human Rights Commission. This report does not purport to be comprehensive, but instead highlights the events, cases and concerns that the AHRC has encountered during 2009.

After the inauguration of Mr. Lee Myung-bak in February 2008, the government had come to an agreement to restart importing US beef, with several changed conditionality clauses, such as the expansion of the concerned beef products and the ages of livestock used, as compared with the previous agreement, which contained greater restrictions and therefore better health protection for South Korea's people. People were concerned about their health due to the fears concerning risks associated with Bovine Spongiform Encephalitis, or Mad Cow Disease. The changes in the agreement prompted public demonstrations, typically by persons holding candles, asking for a renegotiation to secure people's health and strengthen the national quarantine system. A coalition of about 1,700 organisations nationwide was formed on May 6, 2008 and tens of thousands of people protested for about 100 days asking for such a renegotiation. However, the police on instruction from the government but not in compliance with the law took disproportionately forceful actions against the demonstrating civilians, including by arresting numerous protesters on the spot. The police took photos during the protest to identify the protesters and later arrested them under the Road Traffic Act and Act on Assembly and Demonstration.

During the presidential elections, Mr. Lee said he would implement business-friendly policies. These policies ostensibly designed to boost the country's economy include large

construction and development works, such as area redevelopment plans and the revival of four rivers plan in 2008. Along with cracking down on the afore-mentioned anti US beef demonstrations, the government has also taken tough measures to crack down on demonstrators opposing redevelopment projects that are being conducted without due consideration to the rights of affected persons. Clashes between protestors and government forces resulted in six deaths in Youngsan in January 2009.

Under the new administration, the deterioration of rights began with restrictions to the freedom of expression with an attempt to control the media by appointing a figure who supported the new administration and the misuse of the Act on Assembly and Demonstration to restrict people's freedom of assembly.

Union leaders have had cases filed against them and are also targeted by enterprises. The government has excluded civil society and human rights organisations that have been critical of the government's "business-friendly" policies from the list of those receiving support from the State, while providing budget allocations to those that supported the government, even though in several cases the organisations in question had not been in existence for the period required under regulations in order to qualify for such support. The government has also taken action to nullify the institutional human rights watchdog, the National Human Rights Commission of Korea.

These actions by the current administration and President are having a worrying negative effect on the rule of law and predictability of institutions, and are undermining a wide range of crucial freedoms and fundamental rights. Institutions that are mandated to uphold the rule of law, in particular the law enforcement agencies, are increasingly ignoring the law and acting to undermine rights, with impunity.

Furthermore, in producing media-related bills, the ruling Grand National Party ignored the procedures of the National Assembly and forced the bills through using its majority, without allowing for discussions of the bills' content. When the opposition party brought this case to the Constitutional Court, the Constitutional Court found that the procedures followed were illegal, but the acts in question remain in effect. As the decision drew attention from the public, the relevant authorities from the Constitutional Court, under pressure, stated that the court did not rule that they were unconstitutional, leaving the National Assembly to address the flaws in its procedures. The judiciary and National Assembly have so far failed to address the above problems and as a result the level of arbitrary use of law by the prosecutor and police has increased.

Under the current government, the independence of the judiciary has come under pressure, threatening the rule of law in the country. As the country has stood as an example of rule of law and development of human rights, such attacks undermine efforts throughout the region to establish the primacy of human rights.

In its response to the Universal Periodic Review held in August 2008, the South Korean government accepted the recommendations concerning the freedom of assembly raised by Algeria and the need for investigations into all allegations of torture and ill-treatment by law enforcement officers raised by Canada. The Act on Assembly and Demonstration allows a single individual to hold a solo protest without permission from the police station, however, the police are now arresting even lone individuals holding protests, according to reports. With regards to ill treatment by law enforcement officers, those who were beaten during the candlelit vigils in 2008 have not been investigated or punished.

As will be shown in greater detail further on in this report, the case concerning the deaths of protestors in Youngsan and workers of the Ssangyong Motor Company have never been investigated. In addition, the criminalisation of conscientious objectors due to a lack of alternative ways of fulfilling national service remains a problem. During the review, the government stated that alternative service programmes were being studied. Before the review, the then-government announced that an alternative service system was to be adopted starting in 2009. However, after the new government came to power, it has not taken any action in this regard. In July 2008, the ministry of defence announced that such a programme would only be implemented depending on public opinion and then appointed a research team which later reported on the alleged negative effect that the implementation of an alternative service system would have, leading the government to shelve any plans to establish alternative service, which the AHRC deeply regrets.

Government undermining the independence of the judiciary

Over 1,700 organisations that joined the candlelit vigil in May 2008 were targeted by the police and some 1'500 of their members were arrested for allegedly illegal assembly and demonstration under the Act on Assembly and Demonstration and the Road Traffic Act. In one such a case, human rights activist Mr. Ahn Jin-geol, asked for the Constitutional Court to review Article 10 of the Act on Assembly and Demonstration, which prohibits holding assemblies after sunset. The judge, Mr. Park Jae-young who was hearing Mr Ahn's case, accepted his application and asked for a constitutional review. The judge later resigned, saying that it would be difficult for him to perform as a judge under the current administration.

It was later revealed that when cases relating to the candlelit vigil were brought to the court, they were allocated to a particular bench court not per the usual the computerised case allocation system. This intervention is deemed to be a clear attempt to ensure that such persons are directed to a court that is likely to find the persons guilty. Thirteen out of sixteen criminal judges in the Seoul Central District Court challenged the changes and later the case allotment system was returned to normal. The computerise case allotment

system was established in order to prevent any influence by senior judges or politicians, as had been seen under the country's military dictatorship when sensitive cases were allocated to a particular judge in order to ensure favourable outcomes for the government.

Mr. Shin Young-Cheol, the above court's chief judge, then asked criminal judges handling cases related to the candlelight vigils to increase sentences, including replacing fines with detention orders. The police can detain persons for ten days and can extend this once, with the initial detention and extension requiring warrants, which judges were urged to facilitate.

The chief-judge influenced judges dealing with such cases including by sending them several emails, in which he urged them to obstruct the releasing of candlelit vigil protesters on bail" and not to "bother about the result of constitutional court" which was at the time reviewing articles of the Act on Assembly and Demonstration. He became a justice at the Supreme Court in February 2009.

This case was delivered for investigation to the Ethics Committee of the Supreme Court, which found the behaviour of the then chief-judge was not appropriate, which resulted in a warning to the chief-judge by the Chief Justice, but no further action. The AHRC deplors that the chief-judge got away with a slap on the wrists for these serious offences and remains on the Supreme Court to date and calls on the judiciary to take appropriate action against the then-chief judge through its disciplinary committee, ensuring that such offences cannot re-occur and that those committed are effectively punished.

Several attempts were made for him to voluntarily resign and later an impeachment against him was submitted to the National Assembly in November 2009, but it went nowhere due to the ruling party's refusal to act on the call for impeachment within the prescribed 48 hour period, leading to it being dismissed.

Arbitrary use of law by the police and prosecution

Reports by local and international NGOs reveal that the police assaulted, hit and attacked many demonstrators during the candlelit vigil in May 2008, but that no one has been held accountable for this unnecessary and excessive use of force. In fact, such force was encouraged by repeated remarks from high-ranking officials, including the President, the Prime Minister, the Police Commander and the Minister of Justice calling for order to be ensured. Due to these public speeches, police now arbitrarily arrest and detain anyone they wish that are taking part in demonstrations on the pretence of ensuring order. This has continued to date and shows how the degradation of the protection of rights that began during the 2008 crack-down on protests continues into 2009.

In labour union-led protests or strikes, police action is typically even more heavy-handed, involving greater use of force and arbitrary arrests. The case of Ssang Yong Motor Company is indicative of this. The company fired around three thousands workers in May 2009 after negotiations between the employer and unions failed to find another solution. Subsequently, in July, the workers and members of the labour union occupied the work place for 77 days in Pyeongtaek-si, Gyeonggi province, to protest against the dismissals. The company prevented basic necessities such as food, water and medicine for a patient with diabetes were not allowed to enter the premises under occupation. Rights activists and voluntary medical personnel were also prevented from entering and even arrested by the police and detained for some 40 hours for "illegal assembly and demonstration." Two workers who agreed to voluntarily retire committed suicide. The wife of a labour union leader committed suicide after facing threats and legal action from the company. Meanwhile, the company allegedly instigated other workers who were not dismissed to mobilise to fight against those staging the occupation and oust them from the work-place.

The police used helicopters to indiscriminately disperse a particularly toxic type of pepper spray that has reportedly since been shown to have a risk of causing cancer. Tests performed by a group of doctors on the substance, dichloromethane, of which some 2042 litres were reportedly sprayed on the protesting workers, show that is capable of causing cancer. It is classified as a second degree substance on a scale of carcinogens by the International Agency for Research on Cancer (IARC) under the UN's WHO. The skin of those who were sprayed with pepper spray reportedly peeled of and blistered.

The workers also suffer from a lack of water. At a time when the number of protesting workers had reduced from some 1500 to around 500, the police launched an attack, and used taser guns in attempting to disperse the workers. A worker was reportedly shot in the face with a taser gun and left for three hours without proper medical treatment. Many workers suffered from bruises and fractured bones. Like other cases, the police allegedly invited so called 'security guards' hired by the company to take part in the dispersal and even allowed them to use violence against the workers with their consent and acquiescence. During the crackdown, the police also beat, hit and attacked workers with their shields and batons.

However, physical attacks by State actors are only the beginning of the crack-down against demonstrators, as many legal actions have also been launched against them. Around 1,500 people have been prosecuted or are currently in court proceedings for participating in the candlelit vigil in May 2008. On September 24, 2009, the Constitutional Court decided that two articles of the Act on Assembly and Demonstration were unconstitutional. They are Article 10 of the Act prohibiting assembly and demonstrations before sunrise and after sunset, and Article 21(2) describing punishment for a person who violates Article

10. In its judgment the Constitutional Court left the responsibility to the legislature for the amendment of those provisions of the Act with a note that if no amendment is made by June 30, 2010, the articles found unconstitutional shall lose their effect from July 1, 2010.

However, on following day, the prosecutors' office emphasised the point that the Constitutional Court temporarily allows the application of those provisions until such time as the amendment of those provisions is made and further concluded that those who violate the current provisions of the Act were to be punished, despite these provisions and the punishment ascribed having been shown to be unconstitutional.

According to the article 47(2) of the Constitutional Court, "Any law or provisions thereof decided as being unconstitutional shall lose its effect from the day on which the decision is made." Any penalties provided under such unconstitutional laws or provisions should also lose effect. However, the prosecutor's office has been acting against this article. Based on the judgement in question, the prosecutor's office must halt any proceedings against those accused of allegedly violating Article 10 of the Act on Assembly and Demonstration and release them. It is also worth noting that the court should find those accused innocent and that they should therefore be released.

In addition, the article 47(3) of the constitutional court also stipulates, "In cases referred to in the proviso of paragraph (2), re-adjudication may be requested with respect to a conviction based on the law or provisions thereof decided as unconstitutional." If those prosecutors continue to proceed in the cases until those provisions of the Act are amended, and the court finds the accused guilty based on the provisions found unconstitutional, those convicted can also bring their cases for re-adjudication.

Seven staff members of the YMCA, including Mr. Lee Hack-young, the national general secretary, were beaten by the police on June 29, 2008 and they brought this case to court, which ruled on October 21, 2009 that the government has to pay compensation for damages worth around 10,000,000 Korean Won (around 10,000 USD) to the seven persons. Even though they won this case in civil court, they lost the criminal case, as they were unable to identify the policemen responsible as they had concealed their identities (names or number on their uniforms).

Absence of protection for those who are affected by re-development projects

Under President Mr. Lee Myung-bak's redevelopment policies designed to bolster the South Korean economy, around 300 areas were designated for redevelopment in so-called

'New Towns'. This policy replicates infrastructure and construction development projects launched in the 1970s that significantly boosted the country's economy at that time. Such policies in the past led to large scale forced evictions and related human rights violations. The current administration is again taking the country down a path in which economic considerations are far outweighing the human rights problems that they engender.

Once an area has been designated for redevelopment, the city hires companies to redevelop the area, who in turn hire demolition firms. These demolition companies hire thugs to evacuate residents who do not want to leave, often through intimidation and force, and with the acquiescence of the police.

On January 19, 2009, about 30 people affected by forced evictions occupied the rooftop of a four-story empty building in Youngsan 4-ga, in Seoul, where they held a protest, calling on the authorities to provide them with temporary homes and livelihoods. They built a temporary watchtower on the roof, from which they conducted the protests.

In response, and without any attempt to negotiate with them, some 1,400 police were deployed there at 4 a.m. on January 20, 2009, including a 100-member police special unit.

The protestors threw Molotov cocktails at the large police force, which responded by spraying the watchtower with water cannon. A police unit inside a container hanging from a crane was then used to launch an attack on the watchtower. During this attack, flammable substances in the watchtower ignited and the ensuing fire killed six persons, including one police officer, and injured about 20 people. The deaths and injuries are regrettable and the AHRC believes that these could have been prevented, notably if the police had not launched the heavy-handed attack on the protesters. The AHRC understands that the police were aware that there were flammable substances in the watchtower and went ahead with the attack despite knowing the risks involved. Furthermore, despite the risks, no fire or medical services were deployed.

Immediately following the incident, the police blocked access to the building and surrounding areas and did not allow family members of the protesters or the media to approach the scene. They reportedly transported the dead bodies to an ambulance while blocking them from sight with their riot shields in order to ensure that they were not recognised. Autopsies were conducted without obtaining the consent of the families of the victims or allowing family members to be present. The family members were not even allowed to see the bodies after the autopsies had been conducted.

The prosecutor's office vowed to thoroughly investigate the case and punish those involved. As the first step of the investigation, the police arrested and interrogated 27

protesters who were on site at the time of the fire. Based on the police's report, the investigation division at the Seoul Central District Prosecutors' Office then indicted 24 of the arrested protesters. They reportedly did so without investigating crucial facts, including how and where the fire started, and why the autopsies were conducted in such a hurry without the consent or presence of family members. The indictments included for: special obstruction of public duty under the Criminal Act, obstruction of business (of construction companies), and infiltration in a building used as a residence. Special obstruction of public duty is stipulated under Article 144(1) of the Criminal Act which reads that "a person who, through the threat of collective force or by carrying a dangerous weapon, commits the crimes specified in Article 136 (Obstruction of performance of official duties), 138 (Contempt of Court or the National Assembly)...shall be punished by increasing by one half the punishments specified in the relevant Articles." Article 144(2) stipulates that "any person who commits a crime as stipulated in paragraph (1) and injures a public official, shall be punished by imprisonment for a definite term of three or more years. If this results in the death a public official, this shall be punished by imprisonment for life or a definite term of five or more years." In this case, the court applied Article 144(2).

After the indictment, the defence lawyer applied for civil participation in the trial (a South Korean system of jury participation in which with final decision is taken by a judge), but this was denied. When submitting the investigation reports concerning the case to the court, the prosecution omitted one third of the documents, amounting to 3000 pages. When the defence lawyer brought this to the court's attention, the court ordered the prosecutor to allow the defence access to all investigation records on April 14, in accordance with article 266 (4) of the Criminal Procedure Act. On April 16, the prosecutor notified the defence lawyer of his refusal to allow him such access. In response, the defence lawyer asked the court to issue a warrant to seize the reports, provided for under article 106 of the Criminal Procedure Act, which the court refused, saying that only the prosecutor can ask for a warrant from the court. The court also took no action against the prosecutor's office concerning its failure to respect the court's orders. Finally, the defence lawyer filed an application to have the judge changed, which was dismissed. The above clearly violates internationally accepted standards for fair trials.

The case was reopened on August 20, 2009, and during the trial, the defence lawyers again asked for access to the investigation report. However, the court prohibited them from raising the matter again. When the defence lawyer argued that they could no longer provide legal advice without access to the report, the court asked them to leave the court room. The defence's request for the intervention of the court with regard to the report was again rejected. The case was finally postponed on September 1 and the defence lawyer resigned, on the basis that this was an unjust trial. On September 1, the accused asked for the court to delay the court proceedings since there were no longer defence

lawyers, the court refused this saying that they would be assigned counsel.¹

Since January, family members, members of rights groups, religious groups and individuals have been holding prayer meetings and religious ceremonies such as Catholic Mass in which they have also called for the government to resolve this case.

Such groups have also submitted an application for a permit to demonstrate in accordance with the Act on Assembly and Demonstration, but the police have not allowed them to proceed. A group of supporters performed a type of march associated with Buddhism used in South Korea, in which participants march and bow each fourth step (which has been authorised as a citizen's legitimate means of expression by the Supreme Court but the police accused the people of illegal assembly and demonstration and arrested 19 people on August 29, 2009. They also arrest 16 persons on August 31, 2009, including one family member whose husband died during the fire and whose son is one of the accused facing trial.

During the cross-examination in court, several witnesses reportedly changed their testimony as compared with that presented by the prosecution in making their case, but the judge ignored the changes and found all accused guilty as charged on October 28. The defence lawyer appealed the case, which was before the High Court (Appellate Court) as of the end of 2009. The corpses of those killed in the fire remained in the possession of the hospital at that time.

Restrictions on media freedoms and the use of defamation by the government

After the candlelit vigil in 2008, the government ramped up its control of the media and free speech on the internet. Firstly, President Lee appointed a close supporter as CEO of the Korean Communications Commission (KCC) on March 26, 2008. Following this, Mr. Jeong Yeong-ju, the CEO of the Korea Broadcasting System (KBS), was dismissed by the KBS's board members. Mr. Jeong had been pressured into voluntarily resigning since the new administration took office, even though his tenure was guaranteed under the law. Several government institutions such as the police, prosecutors and the Board of Audit and Inspection (BAI) participated in efforts to make him resign. Mr. Jeong filed a case in court on August 11, 2008 and the court found him not guilty on breach of trust on business on August 2009 and his illegal dismissal in November 2009. Currently, these two cases have been appealed and remain pending against him in the Seoul High Court's appellate court.

¹ For the complete details concerning this case, please see the following: <http://www.abrchk.net/statements/mainfile.php/2009statements/2097/> and <http://www.abrchk.net/statements/mainfile.php/2009statements/2216/>

Mr. Ro Jong-myeon, a union leader from the YTN--24 hour News Channel, who protested against the appointment of a new KCC CEO by President Lee Myung-bak, was dismissed along with five other union members on October 6, 2008. Thirty three members of the union received disciplinary punishment at that time. The workers went on strike leading to the union leader being arrested for obstruction of business on March 24, 2009. He was released on April 2. Then, six employees, including Mr. Ro, were dismissed. The Seoul Central District Court ruled that their dismissals were illegal on November 13. However, the company prohibited them from entering its premises by hiring security guards on November 16.

Mr. Park Dae-sung - a blogger also known as 'Minerva' - was arrested on January 6, 2009 and detained until April 20, 2009, for publishing articles on the internet, notably concerning gloomy predictions about the future of the Korean economy. The prosecutor had him arrested for "distributing false information on the internet," accusing him of "impeding public interest" under article 49(1) of Framework Act on Telecommunications as the result of two of his articles. The Seoul District Court released him on April 20, 2009, having found him not guilty, but the prosecutor appealed this decision on April 24. The case remained pending before the High Court's Appellate Court at the end of 2009. The arrest of this well-known blogger has had a particularly negative effect of the freedom of expression. As a result, many bloggers have stopped publishing on the internet and have deleted all their previous content out of fear of arrest and prosecution.

In July 2008, the Ministry of National Defence labelled 23 books as being seditious. Some of them had previously been awarded prizes, including "Book of the Year." The 23 books include titles such as: "Why is 80 controlled by 20?", "One spoon in the earth", "Bad Samaritans", "History of Korea", "Salt flower tree", "Guerillas of Samsung Kingdom", "Tale of our history", "Our Jesus", "US military crimes and Korean-USA SOFA (status of forces agreement)", "Missile strategy of North Korea", "Nuclear and Korean Peninsula", "21 Century's Philosophy", "What uncle Sam really wants (by Noam Chomsky)", "Reunification, the last blue ocean of our nation", "Korean style of culture in North Korea", and "Die Globalisierungsfalle". Noam Chomsky's 'Year 501' was also included.

In October, seven military judicial advocates submitted a constitutional complaint alleging the selection of books violated the right to pursue happiness (under article 10 of the Constitution). Two out of the seven later withdrew their complaint. On March 18, 2009, two were dismissed on the grounds that they were damaging army dignity, disobeying orders and being defamatory. Three others were disciplined but not dismissed.

Despite recommendations by the UN Human Rights Committee for the government to repeal or abolish the National Security Act, this is being used with increasing frequency. Mr. Choi Bo-kyung, a history teacher at Gandhi Alternative Elementary School, was

arrested and prosecuted under article 7 (1) (5) of the National Security Act in August 2008. This Article states that, "Any person who praises, incites or propagates the activities of an antigovernment organisation, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years." Due to the absence of witnesses for the prosecution, the case has been pending since then.

Mr. Park Won-soon, a human rights lawyer and civil activist alleged illegal activities by the National Intelligence Service (NIS) in an interview with a weekly magazine on June 10, 2009, and based on this, the NIS sued him on September 14 for civil defamation requesting a huge amount of money (Korean Won 200 million, or around US\$ 170,000) in damages. This is first ever defamation suit against a civilian by the NIS and is a worrying precedent.

The use of DPI (Deep Packet Inspection) activities by the intelligence agencies have been revealed during a court case in which persons working for Korean reunification have been subjected to such surveillance over a period of six years. DPI entails the use of network equipment to intercept and modify, examine, restrict, or copy the content of data communications. According to article 6 (7) of the Protection of Communication Secrets Act, the period of communication restriction measures and such surveillance activities cannot exceed two months and will immediately finish when the purpose of such measures is achieved. If there is sufficient reason to justify an extension in order to deal with a crime, the period may be extended for a further period of two months. There is, however, no limitation to the number of extensions that can be granted - in one case, the National Intelligence Service received approval from a court to use DPI 14 times in the same case. However, the authorities have abused their powers by gathering and conducting surveillance on tens of thousands of phone numbers and e-mail accounts and internet traffic without sufficient justification or respecting the provisions of privacy regulations, according to reports.

As part of the National Assembly's oversight of the government's agencies, it was revealed that 31 DPI facilities had been used and there were around 100 cases in which internet service providers provided DPI information to the investigation agencies in 2008.

Several bills that will likely further undermine the freedom of expression have been introduced without adequate public discourse. They include measures to expand the number of internet portal websites that have to adopt a 'self-verification identity system' that registers the identity of users; the creation of a new form of an illegal act, known as a cyber insult, concerning which legislation was introduced by a member of parliament,

who is a former judge; as well as the amendment of the Protection of Communications Secrets Act, which allows the government to conduct wiretapping whenever they deem it necessary. A defence lawyer acting concerning the case of the 14 consecutive DPI measures cited above has requested a constitutional review of this amendment, which was accepted by a court and sent to the Constitutional Court on November 27, 2009.

Mr. Lee Choon-keun, the producer of the Munhwa Broadcasting Corporation's 'PD Notebook' programme aired by the Munhwa Broadcasting Corporation (MBC) was arrested on March 25, 2009, before being released 48 hours later. Another producer, Ms. Kim Bo-seul from the same media corporation was arrested on April 15 and released after being held for some 47 hours. Both had broadcasted information concerning the safety of importing beef from the United States of America and focused on the government's inspection system in 2008. Five journalists - Mr. Cho Neung-Hee, Mr. Song Il-Jun, Ms. Kim Bo-Seul, Mr. Lee Choon-Keun and Ms. Kim Eun-Hee – were sued charged with criminal defamation by the former Minister for Food, Agriculture, Forestry and Fisheries, Mr. Chung Un-cheon, after he had retired from office. A prosecutor in charge of initial investigations in this case resigned in protest at the unjust nature of the prosecution. However, the case continued and a trial began on September 9, 2009. Thereafter, Mr. Um Ki-Young, the CEO of MBC was also reportedly put under pressure to resign by Mr. Kim U-Ryong, the chairperson of the Foundation for Broadcast Culture. This Foundation connected to MBC receives a large percentage of MBC government funding. The government is therefore exerting pressure indirectly, if evidently, in this way. In addition, producers of 'PD Notebook' have been replaced and some programmes that have been critical of government policy have been halted.

Continuing attacks on activists and human rights defenders

During the candlelit vigil in May 2008, rights groups organized peaceful protests and issued several statements jointly with other civil society groups. Since the number of protests dramatically increased, the government ordered the police not to permit protests, but this did not stop the demonstrations from going ahead. Since then the government has been targeting activists, rights groups and human rights defenders. The protests were essentially motivated by South Korean citizens' concerns over their right to health.

In February 2009, the police reportedly selected around 1,800 non-government organizations that joined in a coalition that joined the last May candlelight vigil and labelled them as being 'illegal and violent organisations.' Based on this, the Ministry of Public Administration and Security has suspended funding and withdrawn cooperation projects with these organisations, which has in several cases had a significant impact on their ability to carry out their activities in favour of human rights and social aid. In

addition, the country's national intelligence service has allegedly pressurised companies to also stop funding these organisations, further compounding the problem. The defence security command – part of the military intelligence services – engaged in the illegal surveillance of activists, and the security services monitored, wiretapped and conducted surveillance of human rights activists, notably those working to protect the rights of those being forcibly evicted as part of redevelopment projects, through communications systems including the internet. It is illegal for the military to conduct surveillance activities targeting civilians in South Korea. Such activities have in particular allegedly targeted persons working towards the reunification of the Korean peninsula, according to reports.

Government undermining the National Human Rights Commission

The government has taken steps to seriously undermine the independence and functioning of the National Human Rights Commission of Korea (NHRCK), as well as its legal status. Of note is the fact that the government attempted to place the NHRCK under the direct control of the country's President in early 2008, attempting to justify this move as being conducted to increase the body's efficiency. When this proposal was announced, many human rights groups, scholars and civil society groups criticised the plan and asked for it to be abandoned. Human rights activists held a protest. The chair of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) and two successive United Nations High Commissioner for Human Rights – Ms. Louise Arbour and Ms. Navi Pillay – sent letters to the government concerning the independence of NHRCK. Coinciding with the latter's letter on February 25, 2008, 248 legal scholars also wrote a joint statement calling on the government to withdraw the Ministry of Public Administration and Security's plan to restructure the NHRCK. Ultimately, the plan was withdrawn, but attacks on the NHRCK's independence have continued through other means.

The NHRCK has had to face increased scrutiny by the government. The Board of Audit and Inspection launched a rigorous audit of the NHRCK's activities and budget, which is believed to have been done for political reasons in order to put the body under pressure. The government reportedly fielded a large team of auditors over a long period of time during the nationwide candle-light demonstrations concerning the US beef imports. The timing is suspicious and it is believed that the audit coincided with the demonstrations on purpose in order to prevent the NHRCK from being able to effectively monitor any violations of human rights during the police's crack-down on the demonstrations. The audit report stated that the NHRCK needed to be restructured in line with the restructuring of several government institutions that were ongoing at the time. In

response to this report, the NHRCK prepared a plan to restructure in accordance with the audit report, but the Ministry of Public Administration and Security then informed the NHRCK of the need for it to downsize its staff by 30 percent in early 2009, despite the fact that the audit report did not mention such a reduction. The government argued that several ministries were also downsizing as part of the President's policy of reducing the size of the government. However, these government institutions were only going to downsize by 2 or 3 percent. The current administration has shown its disdain for the NHRC since it took power, including by ignoring several policy recommendations made by the body.

Despite criticisms, the NHRCK was restructured and 44 out of 208 staff members were removed – representing a downsizing of some 21 percent. In April 2007, prior to the current administration taking power, the same Ministry and the NHRC had agreed to increase the body's staff by 20 members in preparation for the implementation of the Act on Anti-discrimination against persons with disabilities. In addition to downsizing the number of staff, the government has sought the closure of three of the NHRCK's regional offices but this had not been carried out by the end of 2009. Such a plan would mean that the NHRCK would no longer have a presence in three of South Korea's provinces and would therefore not be able to work effectively or be as accessible to victims of human rights abuses in those provinces.

Due to the series of attacks on the independence of the NHRCK by the new administration and, the chairperson of the NHRCK, Mr. Ahn Kyong-Whan, who was also the vice chair of the ICC, resigned on June 30, 2009. Following this, the President nominated Mr. Hyun Byung-chul as the chairperson on July 16 and appointed him on July 17 without public discussion, publicity or input.

When being interviewed on July 17 by a local newspaper, Mr. Hyun said he did not know about human rights, but that he would learn by doing. He apparently has no experience in the field of human rights, although he worked as a university law professor, specialised in the country's Civil Act. This new appointment is directly contrary to not only section 2 of the principles on composition and guarantees of pluralism (7 out of 11 commissioners including the chairperson of the NHRCK are lawyers or legal scholars) but also article 5 (3) of the National Human Rights Commission Act, which states that the President shall appoint the chairperson of the commission from among the commissioners, which was not observed in this case.

Mr. Hyun Byung-chul stated in a letter on July 31, 2009, in response to a letter sent to him by human rights groups, that he would try to abolish the National Security Act. However, he reversed his position when being interviewed by the Chosun conservation newspaper on August 11, following criticism by so-called 'conservative' groups, many of

which espouse the idea of reunifying the Korean peninsula by force. Many international human rights institutions have recommended that the government should repeal or amend the Act, including the UN Human Rights Committee (Concluding Observations: CCPR/C/KOR/CO/3, CCPR/C/79/Add.114, CCPR/C/79/Add.6), Committee Against Torture (CAT/C/KOR/CO/2, A/52/44), Human Rights Committee (individual communications: CCPR/C/64/D/574/1994, CCPR/C/57/D/628/1995, CCPR/C/80/D/926/2000, CCPR/C/84/D/1119/2002) and the Special Rapporteur on the freedom of opinion and expression (E/CN.4/1996/39/Add.1). In 2004, the NHRCK itself recommended that the government should repeal the National Security Act.

This recommendation is in accordance to section 3 of the Paris Principles, which points out that a national institution shall have amongst its responsibilities to “(b) promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation”.

Mr. Hyun attended a hearing at the National Assembly on September 18, 2009 and testified that he agreed to the NHRCK staff reduction planned by the Ministry of Public Administration and Security, despite this being currently under review by the Constitutional Court. On March 30, 2009, the previous NHRCK Chairperson, Mr. Ahn, had asked for a review of the decision made by the ministry by the Constitutional Court which remained pending at the end of 2009.

Mr. Hyan also said that legally, the NHRCK belonged to the administration, although he added “but I have yet to think more about it”. This comment does little to camouflage what is a serious attempt at nullifying the independence of the NHRCK. In addition, it is in complete contradiction to the concept of independence of national human rights institutions included in the Paris Principles, notably section 5, which stipulates that, “the national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.”

The National Human Rights Commission Act itself clearly indicates that the NHRCK does not belong to any government institution and is independent from all administrative, legislative and judicial bodies with regard to performing its work.

Mr. Hyun appointed Mr. Kim Ok-sin as Secretary General of the commission despite the opposition of commission members due to his lack of a human rights background. According to article 16(2) of the National Human Rights Commission Act, “the Secretary General shall be appointed by the President of the Republic of Korea on the

recommendation of the Chairperson of the Commission after due deliberation of the Commission.” Mr. Hyun simply ignored the majority of commission members who opposed his recommendation, and Mr. Kim was appointed on October 5. Mr. Kim is well known for a decision he took as a judge in 1999, in which he sentenced seven people under article 3 of the National Security Act, which concerns the formation of anti-governmental organisations. This judgment was later overturned by the Supreme Court.

In a further sign of the current lack of independence arising during the restructuring of the institution, Mr. Hyun dismissed a staff member of the NHRCK on October 6, 2009, following a request by the Ministry of Public Administration and Security. This was done with no proper deliberation between commission members. Afterwards, three standing commission members requested an urgent meeting to be held regarding the staff-member’s dismissal, which Mr. Hyun ignored. The previous practice regarding restructuring was that the NHRCK would submit a plan, which would be approved by the government.

The selection and appointment processes concerning the restructured National Human Rights Commission and serious setbacks to its independence are serious concerns which illustrate the current administration’s utter disinterest in upholding and protecting human rights. The NHRC been relegated to a second-class institution. The NHRCK is now ignoring the implementation of international human rights norms and standards, and is aligning itself with the administration’s interests. It is failing to make rights-based recommendations to steer government policy, and therefore serves little purpose at present.

In conclusion, it is clear from the above report that there is a risk that the Republic of Korea, which is often looked to as a beacon of post-military dictatorship, development and human rights and democratic progress in the Asian region, is slipping back towards autocracy and the undermining of the rule of law and the primacy of human rights. The current government’s undermining of key institutions and rights is a grave concern as such momentum away from human rights can snow-ball and have a deleterious effect not only on the enjoyment of rights within South Korea itself, but also in the region, notably given the heightening tensions with North Korea. The Asian Human Rights Commission therefore calls upon the government of the Republic of Korea to realise that democracy, freedom, development and security are all best served through the upholding of fundamental freedoms and human rights, even if this means that there is an open discourse that includes criticism of governmental policy and actions. Only through vigorous and unrestrained discourse can democracy be upheld. Diversity of views and the freedom to express them will assist the country in enduring in peace and security beyond those systems in Asia where fear, social order at the expense of right, and single-party political systems reign.

SRI LANKA

ABYSMAL LAWLESSNESS & ZERO STATUS OF CITIZENS

From its work over the last 15 years, the Asian Human Rights Commission (AHRC) has concluded that what exists in Sri Lanka today is a situation of abysmal lawlessness, resulting in the zero status of citizens. The word “abysmal” is here used in its ordinary meaning to mean limitless, bottomless, immeasurably bad and wretched to the point of despair. Lawlessness of this sort differs from simple illegality or disregard for law, which to differing degrees can happen anywhere. Lawlessness is abysmal when law ceases to be a reference. What would normally be crime ceases to be thought of crime and lawlessness becomes routine. This kind of abysmal lawlessness manifests itself in “arrests”, “detentions”, and “trials” that require no legal justification.

Under these circumstances, the idea of legal remedy or redress also ceases to have any meaning. All legal systems are built around the idea of legal redress. Laws and procedures are meant to make redress possible, to one degree or another. Abysmal lawlessness implies a complete loss of the linkage between redress and whatever that may be called law.

The situation of abysmal lawlessness will not be changed through the victory over the Liberation Tigers of Tamil Eelam (LTTE) that the military finally achieved this year. The suppressing of violence does not in itself guarantee that human rights will be better protected. In fact, the military victory can easily be utilized to further strengthen authoritarianism and to suppress democracy and the rule of law even more.

With this perspective, this chapter of the AHRC’s 2009 report is organised according to the following themes: the lost meaning of legality; the predominance of the security apparatus; the disappearance of truth through propaganda; the superman controller; destroyed public institutions; and, the zero status of citizens. The material for the chapter has been drawn and adapted from the AHRC’s statements and other appeals as well as articles by the organisations’ director, Basil Fernando, on online websites, including the *Sri Lanka Guardian* and *Ground Views*, and also some outside sources, which are cited in the text.

The Special Session of the United Nations Human Rights Council on the situation of human rights in Sri Lanka

It is worth noting at this juncture that one of the key events of the year within the United Nations Human Rights Council was the holding of a special session concerning the situation of human rights in Sri Lanka. Such special sessions are only held in response to particularly grave and urgent situations. NGOs and human rights-friendly and progressive governments mobilised their efforts to ensure that such a session was held. The Council's 11th special session was held on May 26 and 27, 2009. The mere holding of this session is testimony to the fact that situation of human rights in Sri Lanka is amongst the worst in the world. The timing of this meeting coincided with the violent end-game of the conflict between government forces and the LTTE, in which hundreds of thousands were internally displaced and suffered a range of humanitarian law and human rights law violations.

In a statement during the special session, the Asian Legal Resource Centre (ALRC), the AHRC's sister-organisation, intervened to strongly condemn the grave crimes committed by the brutal LTTE terrorist organization. These include terror attacks on civilians, using civilians as human shields, the killing of large numbers of persons after capture, and the forced recruitment and use of child soldiers.

The ALRC was gravely concerned that the Council may producing an outcome that failed to condemn the gross violations of international humanitarian law and human rights allegedly committed by the government of Sri Lanka. It welcomed the High Commissioner's renewed offer to set up a field presence, notably in light of: the lack of information about the fate of many in the conflict-affected areas; past and ongoing human rights violations committed with impunity; and serious threats to those working to shed light on rights abuses, including the media, human rights defenders, and victims and witnesses of IHL and human rights violations.

The ALRC stated that: *"The government continues to show disdain and unwillingness to meaningfully address violations, evidenced by the lack of credible investigations and prosecutions concerning the many cases of torture, disappearances and other grave abuses, giving rise to concerns about continuing impunity. The Council must ensure that independent, credible and effective monitoring, investigations and prosecutions take place in Sri Lanka. The country's failed institutions of the rule of law must be overhauled as a result, with international monitoring a necessity until this has been ensured."*

Increasing suppression of information and repressive acts against the press and human rights defenders, forcing many to flee the country and to not attend this session out of fear for their security, must be halted.

The government must immediately locate and make public the whereabouts of all disappeared persons, and hold accountable those responsible. Victims who seek redress and reparation currently pay the price: police torture victim Gerald Perera was assassinated on November 21, 2004, days before he was to give evidence against the police in court. Sugath Nishanta Fernando, who was a fundamental rights applicant concerning torture by the police, was assassinated on September 20, 2008. His lawyer has since been threatened and his offices were burned to the ground on January 30, 2009. The list goes on.

The concept of sovereignty is being misappropriated in order to cover up a litany of abuses. Despite numerous allegations of widespread, gross abuses, many of which are not conflict-related, it is feared that this Council will produce an outcome that ignores violations, obstructs international monitoring, ensures impunity and removes prospects for future scrutiny by the Council.” (The full text of the statement can be found here: http://www.alrc.net/doc/mainfile.php/alrc_st2009/555/).

The ALRC's fears were confirmed as the meeting failed to produce a useful outcome. Efforts to address the many serious human rights concerns were wrecked by the negative actions of those states that are bent on undermining the international system of human rights protections, lead, of course, by the Sri Lanka government itself. For example, Cuba took procedural action to block amendments to the outcome text concerning the grave human rights violations of human rights and the need for a follow-up mechanism. Following the end of the conflict, the humanitarian situation may be improving, notably as reports are surfacing in late 2009 of hopes for the resettlement of the several hundred thousand IDPs that have been illegally detained in camps in northern Sri Lanka, but the human rights situation remains dire and precarious. Any voices critical of the State and the military are being silenced, as will be shown in the report below.

The lost meaning of legality

The law in Sri Lanka today is an exercise in futility. After 31 years of the 1978 Constitution, it is not even possible to recognize what is law and what is not. When the executive president placed himself above the law, there began a process in which law gradually diminished to the point of no significance. This is unsurprising. The constitution itself destroyed constitutional law, by negating all checks and balances over the executive. When the paramount law declares itself irrelevant, its irrelevance penetrates all other laws. Thereafter, public institutions also lose their power and value

The consequences would be comical were they not life threatening. Take the whole debate on the 17th and 13th Amendments to the Constitution. Debate goes on endlessly about these amendments because of an underlying false assumption that a constitutional

amendment to an irrelevant constitution is a matter of some significance. There is unwillingness to accept that the grafting of a living branch to a dead tree brings life neither to the branch nor to the tree.

Today, underground elements have taken over the functions of law enforcement agencies, guided by the institutions of administration of justice. For example, if a debtor does not pay back his loans, the creditor may turn to a reputed criminal to get his money back. The criminal is able not only to get the money back, but also to do so quickly, whereas the legal process is so beset with delays that a creditor may have to wait years and spend more money than what is owed to have the same result. The criminal is far more efficient in this setting than the legal process.

Politicians too rely more on criminal elements than they do on legal agencies. Every election is a contest between criminals supporting this or that party. Instead of a democratic process to persuade voters about policies for the improvement of their lives, there is a coercive one to intimidate voters about the risks of not choosing this candidate or that.

When there is a loss of meaning in legality, terms such as “judge”, “lawyer”, “state counsel” and “police officer” are superficially used as in the past; however, their inner meanings are substantially changed. Those who bear such titles no longer have similar authority, power and responsibility as their counterparts had before, when law still had meaning as an organising principle.

For instance, under normal criminal procedure in a society based on the rule of law there is an obligation to investigate all crimes, and the methods of investigation are standardised. Now there is no such obligation in Sri Lanka. Where investigations are carried out, they are done so manipulatively. If someone desires to destroy another person, completely bogus inquiries can be conducted. The criminal investigation process ceases to be a mode of maintaining law and order, and becomes a mode through which to victimise and terrorise citizens.

The diminishment of the lawyers’ role is also indicative of the loss of meaning of law. Today, even constables run roughshod over lawyers who intervene on behalf of their clients at police stations, or in magistrate courts. Bribing policemen is a better method for getting bail than following procedures and insisting on legal rights. Questioning police illegality will only provoke harassment of the client as well as of the lawyer him or herself. When the law loses meaning, the quality of legal practice naturally diminishes. No one will waste energy on futile exercises. If people can be arrested, detained and punished without trial, without recourse to the protection of the Criminal Procedure Code, then lawyers too can do no more than look for methods that are outside of the normal process. In this way their role too ceases to have legal meaning.

The judiciary is the biggest loser of all. The conceptual basis of judicial independence has been completely displaced in Sri Lanka. In the early years of the constitution's operation, judges, lawyers and citizens still had thinking and behavioural patterns from earlier times that acted to buffer the courts against its impact. Now that resistance has been greatly diminished. As the system has adjusted itself to the executive presidency and everything that it entails, it has been emptied of significance.

The lost meaning of legality can be illustrated with reference to the government policy to abduct and kill alleged criminals—not those criminal elements working with politicians, but those identified as criminals to be eliminated for political advantage. The method of killing is, like the collecting of debts, now cheaper, quicker and less risky than going through the courts. The police, military or anyone acting under them, including other criminal elements, are assured of impunity because of the secretive manner in which killings are conducted and the many protections afforded to the perpetrators. This is revealed in two incidents that occurred during 2009.

An assistant coordination officer working under the centre for management of the Ministry of Disaster Management and Human Rights was abducted from his house. After receiving frenetic calls on his behalf, the minister made telephone calls all over and managed to locate this person in the custody of some police; it was the minister's intervention alone that saved him. The police accused the person of being a dangerous criminal and a leader of a criminal gang. They also, according to reports, stated that they found a firearm and ammunition in his house. The minister himself had to make a public statement condemning the kidnapping.

In another case, Ravindra, a school-going son of the director of the Colombo Criminal Investigation Division (CID), had a quarrel with another schoolmate named Chamie. When Chamie and a friend Nipuna were having tea, Ravindra came and tried to provoke a fight. When the two left the teashop and were walking towards their boarding house, a police jeep followed them. The jeep turned and blocked their path. About four persons with firearms got out of the jeep. They held Chamie against a wall and put a pistol to his head, and another to that of



Nipuna Ramanayake a student of a technical college who was assaulted by a group of policemen associated with the wife and son of Vaas Gunawardena, the director of the Criminal Investigation Division of Colombo relating some personal dispute of the family. The student Ramanayake suffered serious injuries and the case is now pending in court.

Nipuna. The latter shouted to let go of Chamie and to take him instead.

Then, these policemen took Nipuna in the jeep to the house of Ravindra. He was told to get down and forced to crawl. While he was crawling, he was beaten with poles. The mother of Ravindra, wife of the director of the CID in Colombo, allegedly stood on his body and asked, “Do you know my weight now?” After that the police took Nipuna to the Paliyagoda CID, where the director himself allegedly joined in, threatening to charge him with possession of bombs, and telling him that the only way to avoid the charge was to sign a statement. In this case the boy’s life was saved due to quick intervention from his family, who reported the matter to the Inspector General of Police (IGP) and other authorities.

Not only is it institutionally more convenient to kill, but also the very notion of killing as an illegal act has been lost upon the persons responsible for this policy. When the Sinhala BBC service interviewed the official police spokesman on the killings, the correspondent asked how the victims of killings are treated as criminals when in fact they are only suspects in alleged crimes. The spokesman said that according to the police, they are criminals and not suspects.

According to the law, anyone at or before the stage of interrogation is merely a suspect, and cannot be named as an accused. A person is named as an accused only when the charges are filed before courts; however, the official spokesman for the police does not accept this distinction. Since what he says represents the official position of the Sri Lankan police, then the police themselves have taken the power to convict, through killing. Thus, the presumption of innocence is no longer of any significance, and nor is judging a person and imposing punishment any longer the sole prerogative of the judiciary.

The lost meaning of legality coinciding with the rise of extrajudicial killings under the pretext of crime prevention is not merely confined to the work and reasoning of the police themselves. It has also taken a sinister shape in the magistrate courts, where in most instances magistrates declare “justifiable homicide” purely based on



On the 29th of October 2009 Balavarnam Sivakumar, a 26 year-old man was pursued by a group of policemen from the Bambilipitiya Police Station in an attempt to arrest him. He went into the sea to escape the assault with poles. The policemen pursued him into the sea and he finally drowned. A group of onlookers said to be about 100 persons merely watched the incident and did not intervene. A TV camera from a nearby station caught part of the incident. Brutal attacks on people is part of the arrest strategy of the Sri Lankan police.

the police's own incident reports. Thus the police spokesman told the BBC that obviously no such killings of criminals are taking place in the country because the judges have confirmed that these are justifiable homicides.

When magistrates conduct inquests and other inquiries, they are expected to follow the legal procedure in the country. The Criminal Procedure Code obligates investigations into all suspicious deaths, particularly in cases where the police conduct is suspicious. It is the duty of the magistrates to ensure that proper legal process is carried out in all cases of suspicious deaths, including that independent investigating units, which are able to resist the pressure from police of local areas, should carry out these inquiries. The failure of magistrates to perform this duty is a further illustration of the loss of meaning of legality in Sri Lanka.

The predominance of the security apparatus

The security apparatus that arose through the conflict with the LTTE will continue to exist despite the declared end of the conflict. Judging by the statements of the government, the strategy is to strengthen and broaden this apparatus to cover the whole country. In the north and east this will be done on the pretext of preventing the LTTE from reappearing. Elsewhere, it will be done to ensure political control and to paralyse institutions for the advantage of the ruling regime.

The targets of the security apparatus are ordinary citizens. They include people engaged in simple protest, whether about wages, living conditions or other matters of societal importance. Everything is now under surveillance of this apparatus. Trade unions, journalists, civil society organisations and opposition political parties are all of special concern.

The security apparatus is particularly keen to control the electoral process. It targets the grassroots political activities of opposition parties so as to deny fair contest during elections. In fact, it acts to prevent any opposition group from operating freely at any time. It also targets groups within the ruling party itself, who compete for privileged positions in electoral lists or in local government bodies. The system of preferential votes encourages this. There is an assumption that those who receive a larger number of preferential votes may obtain higher positions as ministers or members of local governments. It in turn gives rise to intense competition among members of the ruling group.

Groups exist within the security apparatus for the purpose of activities that are not authorised by law. They monitor political leaders and any other persons whom the government targets, and abduct, torture, interrogate and kill with impunity.

The Prevention of Terrorism Act (PTA) continues to give very wide powers to the security apparatus. All legal safeguards available through the normal law can be suspended through use of the PTA. Most of its provisions cannot be justified to deal with an emergency; their real purpose is to arbitrarily extend state power.

But the security apparatus does not feel limited to the provisions of the PTA. It can do anything whether the PTA allows it or not, because with the loss of the meaning of legality there is nothing to stop it from acting completely outside the law. There is no way for the parliament or the judiciary to monitor or intervene.

Within the last few years there have been no investigations into complaints against the security apparatus. Calls for such investigations are actively opposed. The mentality developed during the conflict, which persists today, is that demands for investigations are treacherous, analogous to acts of sabotage or the aiding and abetting of terrorism. The security apparatus has consistently attacked the media from this ideological position.

Today the term security apparatus refers not to the military and policing structures of the state in Sri Lanka, nor the laws that are supposed to guide their work, but to a whole political system and a way of life. The predominant position of this apparatus reflects the reduction of law to meaninglessness. This is why in various places during the last year the AHRC has referred to Sri Lanka as the Gulag Island.

Aleksandr Solzhenitsyn used the word “gulag” to describe a type of experience that is being repeated in many parts of the world. His own three-volume study was of Russia from 1918 to 1956. The dreaded Cheka, the security organisation, exercised the function of informer, arresting authority, interrogator, judge, executioner and even gravedigger. All these functions were exercised in complete secrecy with whatever procedures it chose to adopt. What the law in the country was and how it was implemented was almost completely left to the Cheka; only the communist party general secretary had greater authority. Within this system decisions of life and liberty were made casually, and without transparency or accountability.

The insurgencies in Sri Lanka from 1971 paved the way for the emergence of such an authority in the form of the security apparatus there. Tens of thousands of people from all parts of the country have been forcibly disappeared in a similar manner to what Solzhenitsyn described.

The recent investigations into an open letter that 133 well-known Sri Lankan citizens signed illustrate how the gulag is extending into and overwhelming all parts of the judicial process. The letter was published in newspapers to condemn the death threat against Dr. P. Saravanamuttu, a civil society activist. The president instructed the defence secretary to

verify the facts, asking if there was such a threat or that there might be some international conspiracy against Sri Lanka. Officers from the CID then visited and questioned many of the signatories. The officers asked how they know of Dr. Saravanamuttu; whether there was any meeting of all the signatories; whether they had in fact seen the threatening letter, and who had sent it.

The CID visits and questions had no legal basis. They were direct interference into the basic rights of citizens to engage in any solidarity work within the law. The defence secretary has no legal authority to direct inquiries into the legitimate acts of citizens. The CID officers have no duty to obey such orders. They particularly should not be carrying out political work aimed at suppressing those that the government considers its political opponents.

In this instance the letter containing the death threat was brought to the notice of the government and it was very widely publicized right from the start. But like in earlier similar cases, no investigations were carried out into the letter itself. Instead, when the prominent citizens published the letter condemning the threat and demanding protection for the target, it was they who were subject to investigation. In this manner the entire legal process has been turned upside down and inside out.

The defence ministry in 2009 also went to the stage of directly threatening lawyers who appear for clients against it in court. In mid year, the following article appeared on its website:

Leader Publications (Pvt) Ltd, publishers of the Sunday Leader newspaper was charged with Contempt of Court for publishing an article comparing Secretary of Defence, Mr. Gotabaya Rajapaksa with Velupillai Prabhakaran, who was responsible for the death and destruction of over 100,000 civilians, despite extending an assurance in Court not to publish any defamatory content in reference to the Secretary Defence and the Sri Lanka Forces. The article in question was published minus a by line, which is a rarity in professional journalism.

Leader Publications (Pvt) Ltd was given time to show cause and the case was heard yesterday 9 July 2009 at the Mt. Lavinia Courts before the Additional District Judge Mohammed Macky. The original Defence team had voluntarily resigned from handling the case citing it was against their ethical and moral standing to oppose a national hero like the Secretary of Defence, with whose unwavering commitment and focus Sri Lanka is a free country today.

A new team comprising of some who have a history of appearing for and defending LTTE suspects in the past, namely Srinath Perera, Upul Jayasuriya, S. Sumanthiran,

Attorney-at-Law Viran Corea, Attorney-at-Law instructed by Athula Ranagala, Attorney-at-Law appeared for Leader Publications.

It was the observation of some senior independent Lawyers who were present in court that day, that this team of Lawyers share a common anti-patriotic sentiment fired by pro UNP activism and following. One such Lawyer speaking to the media mentioned his disbelief and shock at the manner in which these Lawyers had banded together in the face of prima facie proof of Contempt of Court. As a respected senior member of the legal fraternity, he opined that the behaviour of these Lawyers was an insult to the whole profession and totally unacceptable at a time when Sri Lanka is enjoying its veritable independence after 30 long years. He went to the extent of branding these Lawyers as traitors of the nation.

Lawyers are officers of the court. Any attack on them in relation to their official functions amounts to contempt. The publication of this article, with photographs of three of the lawyers, is an attack not only on them but also on their official function. The article calls these lawyers traitors simply because in this case they appeared against the defence ministry. It also implies that the status of a “national hero” before the law is unequal to that of other parties, even though the basic principle of the law is the equality of all citizens before it. Such is the condition of law under this security apparatus.

The disappearance of truth through propaganda

Over years of conflict the government has increasingly adopted a position that it alone should have a monopoly on information. A part of the military strategy was to create a single version of truth. The LTTE for its part claimed to be the sole representative of the Tamil people and from that position to be the single source for the true situation of the country and its history. The war was of arms and of interpretation. People were called to stand at one or the other of these two polarities.

Society has for the most part accepted the claim of the state to be the sole arbiter of what is true and false. Those who run the media also usually comply with demands to reproduce and disseminate government propaganda. Those who do not comply are threatened.

In this way, a cynical attitude has developed regarding the concept of truth. Accusations against the government are described as the conspiracies of international agents or opposition figures. No critic is regarded as a person with genuine intentions. At best he or she has unintentionally fallen into the traps set by people whose sole aim is to destroy the nation.

When the distinction between truth and falsehood is cynically disregarded, it leads to a lack of interest in information itself. People cease expecting to know the truth of anything. This cynicism then seeps down to the minute details of life. People do not know what to believe about a death even in their very neighbourhood. Was it natural, or a murder? Was it done for a political purpose or for no purpose at all? Was it suicide or some trick? Who knows?

Government spokesmen deny allegations of gross human rights abuses and accounts of crimes by replying simply that they have not seen any evidence of such incidents. They can take for granted that no one will really come forward to state whatever they know, either because of fear or out of a sense of sheer futility.

The extent to which propaganda has overtaken the truth can be found in an episode around a letter from Justice P.N. Bagwati, the chairman of the International Independent Group of Eminent Persons (IIGEP), which was established to observe investigations into recent grave human rights abuses in Sri Lanka. Justice Bhagwati wrote his letter of to the president, Mahinda Rajapaksa, in response to the meeting of a number of members of the IIGEP with the president to discuss and clarify some of the issues arising from the public statement of the IIGEP, announcing its resignation from the monitoring mission due to the government's disregard for the group's mandate. In his letter, Justice Bhagwati wrote that

I would like to point out to Your Excellency that if you would kindly look at the Public Statement at the relevant part you will find that IIGEP has not accused the Government of Sri Lanka of any lack of political will insofar as the functioning of [Commission of Inquiry into serious rights abuses] is concerned. What has been recited in the Public Statement is about "IIGEP's apprehension regarding absence of political will". IIGEP has never alleged that there was absence of political will on the part of the Government of Sri Lanka. It was merely an apprehension which was voiced by IIGEP in view of the facts before them.

IIGEP of course could not voice anything more than a mere apprehension because it was not within their jurisdiction to find whether there was absence of political will on the part of Government of Sri Lanka or not. That was not within their terms of reference which were confined merely to observing whether the proceedings before the Commission of Inquiry were transparent and in accordance with the international principles and norms.

The government propagandists thereafter used this letter to create the false impression that the IIGEP had retracted its April 15 final report (available online at <http://www.ruleoflawsrilanka.org/resources/IIGEPnbspsTM.pdf>). Nowhere in the letter is there any

such retraction, neither of the apprehension of the lack of political will on the part of the government to uncover the truth, nor over conflicts of interest in the role of the Attorney General's Department or the problems of witness protection. The letter itself was not reproduced in the propagandists' materials or in the media in Sri Lanka.

Among the leading propagandists using the letter for this purpose was the secretary general of the government's Secretariat for Coordinating the Peace Process, Dr. Rajiva Wijesinha. The role of the so-called peace chief throughout this and other recent episodes has been to spread the official version of truth. In a statement responding to comments on the letter by another member of the IIGEP, Sir Nigel Rodley, Wijesinha accused Rodley of "sanctimonious bluster" and of not understanding the IIGEP's mandate.

Wijesinha is himself aware of how bad things have got. For many years he has been writing books and articles on the erosion of democracy in Sri Lanka. Among his best are the detailed analyses of J.R. Jayawardene's contribution to the collapse of democracy via the executive presidency and other measures when he became the first executive president. Unfortunately, Jayawardene's scheme is continuing with greater vehemence now, and, sadly, even some critics of that scheme such as Mahinda Rajapakse and Rajiva Wijesinha have also become its agents, as executive president and peace secretariat chief respectively.

Wijesinha also knows that questions of the sort raised by the IIGEP are not new to anyone who has followed the decline of the legal system in Sri Lanka. For a person who wrote a book entitled *Declining Sri Lanka*, the outcome of the IIGEP's work could not have caused any surprise. Therefore, his expressions of outrage in response to this type of international intervention can only be understood as part of his role as master propagandist-cum-peace chief.

Wijesinha writes about the emotional language of what he calls the foot soldiers of the human rights army. The choice of this expression is no accident. He is a spokesman for the real army, therefore he sees his opponents in the same form. Like Don Quixote, Wijesinha as propagandist needs to invent armies that he can fight and conquer.

As propagandist he has also acquired the capacity to speak unemotionally about, for example, the massacre of 17 aid workers belonging to Action Contre La Faim. His comments on the issue to the effect that this French aid agency was itself responsible for the deaths caused embarrassment even to his employer, which through the foreign affairs minister clearly stated that his comments did not represent the view of the government. An appeal to be unemotional while talking about mass disappearances, extrajudicial killings, torture and lawlessness implies that one has to accept these things rationally as the unavoidable consequences of conflict, and as inevitable features of the security apparatus on whose behalf he is working.

This is quite a different Wijesinha from the one who once wrote emotionally about the killing of his schoolmate, Richard de Zoysa. In that article he exposed everyone involved in the killing, including the role of the then Attorney General, Sunil Silva, regarding the subsequent inquiries. Perhaps his school chum deserved different treatment from the aid workers as he was also a member of the aristocracy to which Wijesinha also thinks he belongs, and whom he likewise represents as propagandist. The elite are of course quite unemotional when talking about the disappearances, killings and torture of people belonging to classes in the south, north or east whom they have either never met or hope not to meet.

The superman controller

At the heart of the political, social and psychological problems of Sri Lanka is the executive presidency of the 1978 Constitution. It has turned into a political monster with virtually no parallel. The executive president is a person freed from any and every kind of check and balance. He is not under any constitutional, economic or social force. He is a power unto himself.

The executive president, while holding such power, is completely disconnected from the apparatus of the government. Since he alone has power, nobody else has real independence to run the institutions of state. He must run them. All below depend upon him. None have authority or entitlements of their own. This is unworkable. It is not possible for any single person to run all institutions all the time. Therefore, institutions malfunction, to the point of complete dysfunction in Sri Lanka to which the AHRC has adverted many times previously. The dysfunction characterising Sri Lanka's public institutions will continue for as long as the executive presidential system under the 1978 constitution is in effect.

Michael Roberts has described this style of misgovernment as a consequence of the 'Ashokan Persona':

The Big Man (invariably male) has to control every fiddling little thing. My theory therefore highlights a deeply-rooted cultural tendency towards the over-concentration of power at the head of organisations and a failure (if not an ingrained inability) to delegate power.

Elsewhere, novelist Aravind Adiga has in *The White Tiger* brought out a similar idea of social control through 'the rooster coop':

The greatest thing to come out of this country in the ten thousand years of its history is the Rooster Coop. Go to Old Delhi, behind the Jama Masjid, and look

at the way they keep chickens there in the market. Hundreds of pale hens and brightly coloured roosters, stuffed tightly into wire-mesh cages, packed as tightly as worms in a belly, pecking each other and shitting on each other, jostling just for breathing space; the whole cage giving off a horrible stench — the stench of terrified, feathered flesh. On the wooden desk above this coop sits a grinning young butcher, showing off the flesh and organs of a recently chopped-up chicken, still oleaginous with a coating of dark blood. The roosters in the coop smell the blood from above. They see the organs of their brothers lying around them. They know they're next. Yet they do not rebel. They do not try to get out of the coop. The very same thing is done with human beings in this country.

He thereafter explains why the rooster coop was made possible. He attributes it to the Indian conception of family and the system of punishment where entire families of the servant class are punished for any transgression of one member. Asking the reason for its existence and why no one tries to get out of it, he continues:

The answer to the first question is that the pride and glory of our nation, the repository of all our love and sacrifice, the subject of no doubt considerable space in the pamphlet that the prime minister will hand over to you, the Indian family, is the reason we are trapped and fled to the coop. The answer to the second question is that only a man who is prepared to see his family destroyed — hunted, beaten, and burned alive by the masters — can break out of the coop. That would take no normal human being, but a freak, a pervert of nature.

From this perspective we can return to the problem of the superman controller in the 1978 Constitution. This constitution was meant to dismantle, or at least to undermine seriously, the rule-of-law system introduced by the British so that the 'rooster coop' could resurface. It was meant to remove barriers against corruption, undermine every possible avenue—including judicial intervention—to abuse of authority and not to have any system at all except the direct use of force on all, trade unions, and opposition political parties, young radicals looking for new avenues and on everyone else. A further important component was to close the electoral map.

The survival of the constitution was greatly enhanced by the rise of militancy in the south from the mid 1980s and Tamil nationalism, which finally came under the grip of the LTTE. It was possible to deflect the attention of people to the need for repressing terrorism and thereby to ensure that no real democratic challenge was made against the constitution itself.

Roberts correctly points out that, "What the Sri Lankan President gives as a constitutional gift, he can withdraw too"; the 17th Amendment is an example of this. This remains possible as long as the constitution is premised on the notion of the superman controller

rather than the balance of powers. In a place where the law has little meaning and the supremacy of the law has been removed and replaced with the supremacy of the 'Big Man' all that can happen is the continuance of the 'rooster coop'.

Destroyed public institutions

The AHRC has over a number of years emphasised how the destruction of Sri Lanka's public institutions has been related to the collapse of the rule of law. In this section some aspects of the problem are again taken up through recent writings on the police, the attorney general's department and the judiciary.

An article by retired Senior Deputy Inspector General (DIG) Gamini Gunawardane, "What is wrong with the police?" was published on the Sinhale Hot News website on 7 September 2009; the following is an extract that speaks to the problems of policing attendant to the loss of meaning of legality in Sri Lanka today:

The police department in its existence for the last 142 years has passed through several stages of evolution: 1. A colonial police (1867-1948) 2. A post-colonial police (1948-1972) 3. Political interference stage (1972-1988) 4. Politicization stage (1988-2001) 5. Reduction to a status of a virtual private security service of the party in power (2001-to date). Though specific years are given for convenience, they really overlap, because it is an evolutionary process.

Of course, there is a strong reason among others for the rapid passage in to the latter three stages. It is the damage caused to the police service while it was going through the socio-political trauma owing to the coup d'état in 1962 and the 3 insurgencies that occurred in this country since 1971.

In fact, after the post-colonial stage we should have evolved ourselves into a 'people's police' as vaguely envisioned by the Mr. Osmund de Silva IGP [Inspector General of Police]. But [because of] the rapid political developments since his time followed by the insurgencies, the police instead became militarized and in the process, many sound policing practices of the post-colonial era fell by the wayside.

Owing to the fifth stage above, even the most junior police constable knows that [the] people are not the primary client of the police, but that his top client really is the politician. Politician's requirement always takes priority. Though the politician is supposed to be only a representative of the people, the peoples' requirement came only after his requirement. Sometimes some members of the public with political clout do get their things done when they too approach the police through

a government party politician. That is how the parents of the SLITT student were able to stop the police from doing what they intended to do with their abducted son. The parents moved fast through a relative who was a Minister. The people of Angulana had no such luck. The parents of the deceased youth had to be consoled after the event, by an embarrassed President, having being invited to his residence. Naturally, one is embarrassed when one's domestics misbehave.

The Angulana case to which the former senior DIG refers is indicative of the extent to which abuse of police power in Sri Lanka is associated with corruption. The Angulana police murders of two youths, Dinesh Tharanga Fernando and Danushka Udaya, shook the whole area and led to violent protests. The army and Special Forces had to be sent in to restore peace, while the local officers were transferred out. According to the mother of Tharanga, speaking to the BBC Sinhala service,

That gentleman [the Officer in Charge, OIC, of the police station] can't stand the sight of young boys. He arrests them and takes them to the police station and assaults them. Parents go to the police station and pay money to get the boys released. He arrests the boys in order to make money. We also went to the police station when we heard about the arrest of our son, and we took money to give him. But we were not shown the boy and we were unable to rescue him.

The father of the boy said, "When we went to the police station we found that all the police officers were heavily drunk." Jeevan Kumaranathunga, the Angulana parliamentarian, told the BBC that he had received many reports about the drunkenness of police at the Angulana police post and that he had made representations to the relevant authorities about this situation, but because no action had been taken, this unfortunate tragedy occurred.

Drunken police misbehaviour is not exceptional to the Angulana police. It happens everywhere, like torture, extrajudicial killing and bribery. It is the duty of the member of parliament of an area to receive complaints about state officers, including policemen. It is also his or her duty to intervene promptly on behalf of citizens whom the police harass.

However, in the Angulana case there is no indication that the families of the boys rushed to the house of their member of parliament to get his intervention so as to save the lives of their children. In so many other cases also, people do not go to their members of parliament seeking protection when events such as these occur, due to a loss of confidence and alienation of citizens from their supposed representatives.

One reason for this alienation is that around the country members of parliament work hand in glove with the local police. Since people know of these close relationships, there is

a general feeling that it is futile to complain to a parliamentarian about police abuses. It is also well known that local politicians intervene to save suspects when they are supporters of their party. The illicit liquor sellers, drug dealers and others who engage in all kinds of seedy businesses get the patronage of the local politicians. The ordinary citizens who come into contact with the police without breaching any law get into serious trouble and find no support from the politicians.

If the member of parliament for Angulana had received information on the drunkenness of the local police, it was his duty not just to make some representations to authorities—knowing well that nothing would come of it—but rather to take all the measures that he is empowered to take as the representative of the people in order to protect their rights. If his initial protests were not heeded, he could have made representations to the higher police authorities, such as the IGP and the National Police Commission. He could have done so in writing. If that also did not work, he could have taken up the matter through his political party, which is in government.

Even if all these methods had failed, he could have made a statement in parliament. He could have called for an inquiry. He could have sought the intervention of the president. And as a member of the parliament he has access to the media and any statement by him on the drunkenness of policemen at a police station should have created sufficient pressure to get some action.

Thus, looking into the causes of the murders of the two young persons from Angulana and the police abuse that is rife across the island requires some examination not only of the police's own behaviour but also of the responsibility of the member of parliament of the area.

Another agency that should be acting to counter-balance the authority of the police but instead has for years also worked closely with them to the detriment of the system is the Department of Attorney General (AG's department). One feature of the close relationship between this department and the police has been its complicity in cases of police violence and torture.

To reduce torture, complaints must be investigated. However, it is a long-established practice that investigations are deliberately sabotaged. The main saboteurs are of course the police themselves and the AG's department in its capacity as prosecutor.

The role of the AG's department as a co-conspirator in abuses goes back some way. In the late eighties, for instance, emergency laws were used to encourage extrajudicial killings. At least 30,000 persons, mostly from the south, disappeared during this period. The disappearances were caused through the emergency regulations, which were framed in a manner to make such extrajudicial killing possible. Magistrates were deprived of the

rights to conduct inquests into all suspicious deaths by giving police officers the right to grant permissions for burials. As a result of this regulation, which shifted the law that all suspicious deaths must be investigated, the bodies of people whom police or related agencies had killed were not brought before a magistrate, and were buried without autopsy. This was a regulation designed to permit mass murder.

There is reason to believe that AG's department was involved in advising on the draft of these regulations. There is also no evidence at all to indicate that the department in any way opposed them, or pointed to the illegality of arranging for and permitting mass murder. Similarly, when Tamil prisoners were killed inside the Walikada prison in July 1983, officers from the AG's department participated in the inquest proceedings not in order to prosecute the offenders but so as to hush up what really took place.

A case that became famous in the 1990s illustrates the point further. Richard de Zoysa—a well-known film actor, author and journalist and a popular socialite—was abducted from his house, and several days later his body was found washed up on a beach. It is speculated that after he was arrested and tortured, his body was dumped from a helicopter into the sea in the hope that it would never be recovered.

The news of the killing was one of the most shocking events that influenced politics at the time. Local and international media coverage was extensive and fingers were pointed at the security forces, which were then engaged in wiping out an insurgency in the south in which tens of thousands of people were similarly abducted and killed.

Despite enormous pressure, the government of the day persisted in covering up de Zoysa's murder. On the first anniversary of his death, the Liberal Party—which no longer exists—took up de Zoysa's case. A whole volume of the *Liberal Review* was devoted to his assassination.

That volume included a long letter written by the party to the government, analysing the manner in which the inquiry had been sabotaged. The letter blamed the police and the AG's department for failing to investigate. The party called for a commission to inquire into the murder. The reasons it gave are revealing:

There is a significant possibility of the complicity of elements of the police in this crime and the apparent unwillingness of the Attorney General and his department to act impartially in this case, which prompts us to suggest the appointment of a commission of inquiry.

The letter was written in February 1991. From then until now, nothing has happened to improve confidence in either the police or the AG's department with regard to

independent and impartial inquiries into human rights abuses of this sort. One of the major reasons for this failure remains the complicity of the police and the prosecutors, who work to prevent proper inquiries into serious crimes.

Today, the position of the police is much worse than it was in the late 1990s. Everyone acknowledges this, even high-ranking police officers that have made public statements expressing bewilderment about the situation.

In current times, even a person accused of murder can continue to work as a police officer. Suresh Gunaratne, a police sub-inspector accused in the murder of torture victim Gerald Perera, continues to work as an investigator at the Gampaha Police Station. Many others accused of serious crimes are not even subjected to investigation. One of the known pastimes at many police stations is to intimidate witnesses who make complaints against police officers.

What is more shocking is the way the AG's department has undermined its duty to help prevent torture. There were some positive developments in the early part of this century when the department filed a large number of torture indictments against police officers. These were made under the then AG, K.C. Kamalasabayson, who was not one of the destroyers of institutions in Sri Lanka but rather a captive to the destruction.

Kamalasabayson held the post from October 1999 to April 2007. Compared to others, he tried to be more politically neutral and to keep some balance even as the ship of state tossed and turned. By the time Kamalasabayson became the AG, the country had already witnessed some of the most colossal human rights abuses in its modern history. It was a difficult time for anyone with some integrity to hold the post. Kamalasabayson did not deal decisively with the threats to his institution. He was unable even to prosecute effectively many cases of disappearances concerning police and military officers, against whom commissions of inquiry were reported to have adequate evidence. As the prosecuting of police and military officers for disappearances is a highly sensitive issue it would perhaps have taken a giant to withstand political pressure and do his job according to law.

Kamalasabayson was not a giant, but he did show that he was aware of the acute problems caused by the collapsed rule of law. Giving the 13th Kanchana Abhayapala Memorial Lecture on 2 December 2003, he spoke of many of these. He highlighted the absence of a witness protection law and program, delays in courts, lack of legal provisions protecting the victims of crime, lack of investment in administration of justice, and even the inadequacy of staff at his department. He was also aware of the crisis over the country's criminal investigation function, exercised through the police.

His most important decision was to prosecute cases under the Convention against Torture and Other Cruel and Other Inhuman and Punishment Act, No. 22 of 1994. Procedurally, he did this by referring all the complaints of torture received from United Nations agencies or local channels to a Special Inquiry Unit (SIU) of the CID. Within a short time, several SIUs investigated a large number of cases and submitted files to the AG's department for prosecution of officers. The department held over sixty files on which it had decided that it had adequate evidence to prosecute. In many of these cases, it filed indictments in High Courts.

Most cases are still pending. After Kamalasabayson retired it did not take long for the department to change policy on the referral of complaints through SIUs. His successor, C.R. de Silva, often mentioned that the department would not bow to the pressure of NGOs, meaning that prosecuting cases of torture is somehow something that is a result of pressure that should be resisted. Under him, there ceased to be any high-level inquiries into allegations of torture. Even where evidence emerges by other means, the department now most of the time refers the cases to magistrates to be prosecuted under the Penal Code as simple hurt. Departmental officers have also made reports to UN agencies, including the Committee against Torture—which monitors the convention—stating that there is no serious problem of torture in Sri Lanka.

Even in cases where fundamental errors have been made in the facts and application of the law, the AG's department has refused to file appeals or revisions, despite requests on behalf of aggrieved victims. The tacit policy today is not to eliminate torture but to protect perpetrators.

As a consequence, policemen who arrest, detain and torture for the purpose of getting money are common throughout the country. The well-publicized case of Sugath Nishantha Fernando of Negambo illustrates how adventures relating to bribery can lead to so many other police crimes.

Nishantha Fernando initially complained about a police inspector who had sold him a lorry of which he claimed to be the owner, while in fact it was a stolen vehicle. His complaints led to the fabrication of charges against him. He had to pay bribes and to promise payment of more in order to get the charges dropped. Finally, when the demands were too much, he complained to the Bribery Commission. The commission, after inquiries, filed charges against a police inspector.

Thereafter, Nishantha and his wife were pressured not to give evidence in the case. When they failed to pay heed, about 20 police officers, including the OIC of the Negambo police station, surrounded their house and assaulted them and their two young children, and took them to the police station. Later, the family filed a fundamental rights

application regarding torture of all the four family members, and the Supreme Court granted leave to proceed. The family named 12 police officers as respondents.

Then, some unknown persons visited the family and told the couple to withdraw the fundamental rights application in 24 hours or the whole family would be killed. Nishantha complained to the IGP and all the Sri Lankan authorities, including the Ministry of Disaster Management and Human Rights.

On 21 September 2008, two gunmen shot Nishantha Fernando in front of his young son (see “The price of fighting the state in Sri Lanka” by Julianne Porter, article 2, vol. 8, no. 1, March 2009). No one has yet been arrested and there seems to be no inquiry at all about this murder. The mother and the two children received further death threats and they had to move from house to house over several months for security. The family has remained in hiding.

Hundreds of cases of this sort, arising not from security concerns but from the adventures of policemen abusing their authority to make a profit, can be narrated on the basis of cases that the AHRC and its partners have documented over the last few years. The fundamental rights cases before the Supreme Court alone together tell a tale of enormous cruelty and of abuses of power that neither the police authorities nor the government have made any attempt to stop.

In all discussions relating to development as well as peace in Sri Lanka, radical reform of the police should have a significant place. However, as retired DIG Gunawardane points out, this is not likely to happen any time soon:

Judging by what is going on at present, no government is likely to change this arrangement with regard to the police. In the short term it is advantageous to the party in power to be able to directly manipulate the police. For, this is the direct exercise of civil coercive power. The party in power only realizes the adverse effects of this when they become the opposition. They then dare the party in power to hold elections having implemented the 17th Amendment etc. But when they get back into power they do not wish to change this set up, in the interest of the people whose sovereignty they exercise. Neither is there a strong movement by the people to have this situation changed. It is doubtful whether even the public wants a totally independent police or whether they would like a police manipulatable through politicians depending on which side of the law one is placed in a given situation! No proper research has been done on this question. Thus, the saying ‘people get the police they deserve.’

In these circumstances, there is no hope that the character of the police will be allowed to develop oriented towards people as its chief client, despite lip service to

current world trends such as community oriented policing etc. So the police are compelled to work within this latest paradigm. Hence, public interest will be only marginal.

Now I come to my point. I see a problem for the police to function effectively as an organization even under this paradigm. It is really a structural and a managerial defect. Of late, the Senior DIGs who form the Top Management team of the IGP are posted to the provinces, to the forward headquarters. He sits over and above the local DIG in the provincial capital. He is thus drawn towards the ambit of the sphere of activity of the DIG, as the most senior officer present. He is thus compelled to encroach on the work of his DIG. Similarly, the DIG is drawn to do the some of the work of the SSP [Senior Superintendent of Police]. The SSP in turn is led to do some of the work of the ASPs [Assistant Superintendents of Police].

And the ASP is very often seen doing the work of the OIC. Thereby the supervisory function at each level suffers. The OIC in the meantime has not much work to do other than to be present at the many occasions of a VIPs who visits his area. In view of the political character and also owing to the security concerns, the entire local hierarchy tend to be present, mainly to be seen by the VIP. Thus the OIC has not much time to supervise his men or look at his records or do any court work. The snowballing effect is that most senior officers are found to be immersed in office work, working late into the night, mostly doing their subordinates' work. As a result of the senior officers doing the work of their subordinates the subordinates miss the opportunity of acquiring more skill, experience and maturity at their different rank levels. Hence, as they go up the ladder, they possess less and less experience both to manage their jobs and to give appropriate directions to their subordinates. They also do not have sufficient confidence in the subordinate to discharge his responsibility. So superiors themselves do the work of the subordinates to ensure that there is no slip up. This is because, the responsibility of getting the job done falls ultimately on the senior officer. So to be sure, he does the subordinate's job himself! So the subordinate never learns. Thus the situation keeps on deteriorating in a counter snowballing effect. The senior officers on other hand, have no time pay attention to detail or to do any creative work in their higher capacity, beyond performing their routine tasks. The norm is, to get by each day. Neither the officer nor the subordinate is tested or held accountable. So no improvement, or deeper levels of supervision. The result is such as Malabe and Angulana incidents. Many more to follow.

The article talks about some of the problems associated with management of the police hierarchy that had the system not been so heavily politicised for so long would not have emerged as serious threats to its coherence.

A policing system is a hierarchical institution. Those at the top have responsibility for the behavior of those in different layers within the institution. It is the job of those who are at the top to ensure that all those below do as expected of them. Departmental orders lay down the responsibilities of leadership and of supervision. They prescribe intricate arrangements for the maintenance of documents. The officer in charge of a police station is responsible for what happens within it; the ASP of an area inspects books, makes visits and takes his own notes, by which he keeps track of the work of all police stations under him; superintendents supervise and guide the work of the ASPs; senior superintendents exercise further monitoring and supervision; and deputies to the IGP look after the entirety of the institution.

That was how it was and that is how it is supposed to be. But now any police officer may think this is just a fairytale. Today, the police hierarchy from ASP to IGP cannot even arrange for the proper transport of an alleged suspect when he is escorted to find some material evidence. The oft-repeated story is that during the journey the handcuffed suspect takes a gun or bomb and tries to attack the police, who in turn shoot him dead.

Are the officers of the police hierarchy incapable of devising a system for the safe transport of criminals from one place to another for purposes of investigation? Surely it is not such a difficult task to design guidelines and instructions about the transport of suspects during criminal inquiries. All over the world such things are done quite safely. It does not require extraordinary intelligence to design and implement such a system; however, Sri Lanka's police hierarchy has proved incapable of doing this much.

Instead of command responsibility, complete carelessness has spread from top to bottom of the law-enforcement infrastructure. Take the case of Douglas Nimal and his wife. Nimal was a police inspector who took his job seriously and tried to arrest some persons involved in drug dealing. Some persons at the top moved against him, and finally he and his wife were killed. No one was arrested or prosecuted for killing a law enforcer who was discharging his duties.

In the Supreme Court and high courts there are constant revelations of police tampering with documents. In fact, there are hardly any cases relating to fundamental rights or torture complaints at high court trials where police have not tampered with books and made false entries. In all cases where arrested persons are later extrajudicially executed, the documents in the books are also manipulated. Had the ASPs and those above them exercised their supervisory powers as required by departmental orders such distortions would not be possible.

Another feature of the system that Gunawardane identifies is the ever-present danger of greater military control over policing. He notes that:

There seems to be a line of thinking these days that since the military officers who did well under a capable leader, appointing an Army officer will be the panacea to all problems. The naiveté in this thinking is indeed astounding. Because each field is so specialized these days. The thinking seems to be that “you appoint the ‘right’ man and the rest will fall into place.” One shudders to imagine the consequences.

In fact, analyses of the country’s police problems—from the Soertsz Commission Report in 1946, followed by the Basnayake Commission of 1970 and the Police Service Report of 1995—demonstrate that a central problem from the inception of Sri Lanka’s police system has been its militarised rather than civilian policing style. Insurgencies since 1971 have further militarised it. The appointment of an inspector general from military ranks would only compound problems.

These days, anything and everything is possible within that system, however illegal. Whether police officers engage in drug dealing and protecting the drug dealers; whether they use their powers of arrest and detention to obtain bribes for themselves; whether they help politicians by putting their opponents behind bars under false charges, using anti-terrorism laws and anti-drug laws; or engage in any other type of illegality, there is hardly anything the system can do to stop it. Cosmetic measures such as arresting a few low-ranking officers do not make any difference.

How can these problems be resolved by appointing a military officer to head the police force? Can a military officer establish command responsibility for officers from the lowest to the highest rank? Will not the introduction of a military officer only help the errant superior officers even more, because they can easily mislead and even cheat their new leader, who is totally unfamiliar with the area of work in which they are engaged? Similar experiments elsewhere, where top posts have been given to people from completely different fields, provide enough examples of the distortions that can happen under such circumstances.

A policing system is a public service devoted to law enforcement. Thus, the relations with the public that are required of a policing system are of a completely different nature than those of the military. The political leaders who have proposed bringing an inspector general of police from the military are aware of this. Why, then, do they want to introduce a military leader into the already collapsed police system? They may have other ambitions. A more militarised police may be what is needed to subject the population to greater controls and to displace the rule of law altogether.

For a more militarised system, one need only look as far as Burma—whose military supremo in November 2009 visited Sri Lanka after the president had paid him a call in his own country. In this year, the junta again arranged to keep democracy party

leader Daw Aung San Suu Kyi locked up in her house. That case is widely known and condemned globally. A court sentenced Aung San Suu Kyi to five years of rigorous imprisonment. Within hours the junta chief reduced the sentence to 18 months of detention in her own home. The sole exercise of this trial was to give a semblance of legality to an executive order for imprisonment so that this lady cannot participate in any events relating to proposed elections in her country.

In Sri Lanka the case of J.S. Tissainayagam, though not as well known as Aung San Suu Kyi's, also created waves internationally in 2009. The arrest, detention and trial of this man, a prominent journalist and a human rights activist, received the attention of many governments. The American president, Barack Obama, himself mentioned this case as an example of the repression of journalists throughout the world. All leading media organizations worldwide condemned the arrest, detention and trial and repeatedly called on the government for Tissainayagam's unconditional release.

Tissainayagam was charged with aiding and abetting terrorism and instigating racial violence by writing a few lines in an article that referred to the armed conflict then taking place in the north. Tissainayagam, who had been a veteran journalist and a human rights activist, had over a long period of time reported matters regarding internal conflicts in the south as well as the north and east. In the late eighties he helped the incumbent president, who was then in the opposition, by preparing and translating documents relating to disappearances and other atrocities in the south.

There was nothing in Tissainayagam's writing to indicate any attempt to instigate violence or promote racial hatred. There are thousands of similar pieces and none of their authors have been prosecuted. Tissainayagam was singled out for arrest, detention and prosecution solely to intimidate other journalists and newspaper editors publishing materials relating to the war. Several other journalists left the country after his case emerged.

Like the case of Aung San Suu Kyi, in the case of Tissainayagam there were no real grounds on which to base a criminal charge. In both cases the charges were fabricated.



J.S. Tissainayagam, (on the right) a well known journalist and human rights defender who was sentenced to 20 years of rigorous imprisonment for writing an article which he contributed to a magazine edited by him. He was awarded the Peter Mackler Award for Courageous and Ethical Journalism by the Global Media Forum and the US branch of Reporters without Borders. The conviction has been appealed from.

The issue before the court in both cases was to decide on the legality and the validity of the charges in the first instance. Both courts proceeded on the basis that fabricated charges had some basis in law and found the accused guilty.

Joseph Stalin's prosecutor, Andrei Vyshinsky, also conducted trials in which the outcome was predetermined. The trials of the 1930s were known worldwide as show trials. The accused were not really the targets of the proceedings. The accused were mere exhibits to be advertised before the rest of society in order to pass a message to the people. Vyshinsky's biographer Arkady Vaksberg wrote that the "purpose of the trial had not been to disgrace or, indeed, to annihilate some of the accused but to create a precedent and pave the way for a psychological attack on the population".

In a similar fashion, the prosecutor proceeded against Tissainayagam and the court sentenced him to 20 years. Previously the Supreme Court had asserted the rights of citizens to freedom of expression and publication. The court has also upheld the rights of citizens to criticize the existing government. However, the High Court trying a case based on special regulations under anti-terrorism laws has gone completely against these traditions.

Sri Lanka's Ministry of Foreign Affairs has gone even further and in a communiqué stated that criticism of the judgment against Tissainayagam is a slur on the independence of the judiciary. However, in this case, like that of Aung San Suu Kyi, it is the destruction of the judiciary that is the problem, and to point to the court's non-independence is not a slur but a mere statement of fact.

When the Tissainayagam case came before the UN Human Rights Council in Geneva, the AG himself argued that the 20 years of imprisonment was a minimum sentence and that it was a decision of the court, since Sri Lanka respects separation of powers, just as the regime in Burma disingenuously insisted that the court, not it, was responsible for the Aung San Suu Kyi verdict. What was not placed before the council was that under the PTA—through which the conviction was secured—confessions are admissible as evidence, and acts that are not otherwise crimes are under this law considered offences.

Within Sri Lanka, this does not matter as the whole system of criminal justice is anyhow standing on its head. The law is manipulated and twisted to get whatever result the prosecutor wants. The prosecutors can even serve as defenders, particularly when they participate in preliminary enquiries and subvert the process by various means. For instance, on 30 July 2009 the Lanka News Web reported that,

The Attorney General has requested courts to grant bail to two of the five respondents produced before courts for the alleged financial fraud amounting to

Rs. 4,300 million at the Finance and Guarantee Company, which is a subsidiary of the Ceylinco Group.

The reason for requesting to grant bail to the two respective respondents in the case according to the Attorney General is that they had cooperated with the inquiry into the company.

However, it is learnt that the Attorney General's friendship with the respondents developed during the time he served as the Legal Advisor to the Finance and Guarantee Company is the reason for the request to grant bail to two of the respondents.

The accused in the financial fraud case, who were produced before courts are Deputy Chairman and Chief Executive, Finance and Guarantee Company, Mervyn Jayasinghe, Financial Director Sunil Jayatissa, Executive Director Mohan Srinath Perera, Legal Officer Malini Sabharathnam and Deputy Financial Director Samanthika Jayasekera.

Legal sources say that although the Attorney General wanted to get bail only for Sabharathnam, Jayasekera's name had to be included to avoid any suspicion.

A team of lawyers led by Attorney Kalinga Indatissa appeared for the respondents when the case was taken before Colombo Chief Magistrate Nishantha Hapuarachchi.

Upon being told by the Attorney General that two respondents should be granted bail due to their cooperation with the CID investigation, Indatissa had challenged the Attorney General in open court to reveal how the said respondents aided in the inquiry.

He had further said the five respondents had equally cooperated with the investigation. The Attorney General was represented by Deputy Solicitor General Yasantha Kodagoda. Lanka News Web earlier revealed in a story that the Attorney General did not institute legal action against the respective company due to his close affiliations with it.

Following the Attorney General's request Sabharathnam and Jayasekera were released on a surety bail of Rs. 100 lakhs each and a financial bail of Rs. 1 lakh each. The other respondents were remanded till August 11.

In September the AG shocked the nation by requesting the High Court of Colombo

withdraw an indictment against an accused charged with preparation of forged documents and misleading the CID. The accused, B.A. Abeyratne, is the principal of a well-known Colombo school who was indicted in 2008. The indictment stated that he had influenced an investigating police officer to accept a number of forged documents in an inquiry with regard to the admission of children to the school.

The request to withdraw the indictment was made on the basis of an affidavit filed by the accused, which stated that he would resign from his service at the school and in which he expressed regret about the damage caused to the school by his actions. Besides this, a number of persons wrote to the AG asking him to exonerate the principal, considering his service to the country, to the school and to the sphere of education. It was on the basis of this affidavit and the letters that the AG made the request for the withdrawal of the criminal indictment, despite of the fact that there was sufficient evidence to continue with the prosecution.

Although the High Court refused the request and ordered the trial, the very attempt to withdraw it raises disturbing questions. Are affidavits from accused persons promising good behaviour and letters by others about various services rendered now going to be grounds for the chief prosecutor to withdraw criminal charges? If these are valid criteria for not prosecuting then the AG should not prosecute anyone, as every accused will be willing to give an affidavit promising not to misbehave again. And these days, it would not be difficult for any accused to get letters of recommendation from even the highest places, requesting that an indictment be withdrawn. Only innocent persons, who have failed to develop connections with the corrupt and the powerful, might fail to get such letters.

Let us suppose that the judge allowed the application. Then the AG would argue that it is the court that has made this decision to not prosecute, not his department, and that Sri Lanka respects the separation of powers. Thus, the responsibility for the decision would have been placed on the court. This is the manner in which the responsibility of the absence of investigations and prosecutions into extrajudicial killings at police stations has been explained away on many occasions, where the decision of a magistrate that a killing is “justifiable homicide” is used to exonerate all other parties and cease prosecution.

What is not discussed in these cases is that the investigative authorities and the prosecutors have invariably not placed all the circumstances relating to the killing before the court. With no impartial investigations into such killings and documents forged to give the police version of events, the courts only have the evidence that the police and the prosecutors place before them. Yet later when complaints are made over the absence of investigations and improper prosecutions, the magistrate’s finding is pointed to as the reason for inactivity or inadequacy.

From the above it can be said that whereas at one time there existed a department called the Attorney General's department, today it exists only in name. It has lost its place as the government's legal adviser and lost its way as the prosecuting agency. From the way that the government acts now, it is not doing so on the basis of proper legal advice. And judging from the number of cases that constitute serious crimes that are not prosecuted, it is also not possible to say that there is a genuine and an authentic prosecuting agency in the country. Nor is it possible to say that the prosecutions in Sri Lanka are being undertaken on the basis of law.

The demise of the AG's department is a matter of grave concern because its functions are vital if a nation is to accord with the rule of law. By contrast, where legality itself ceases to have meaning, as in Sri Lanka, the department also becomes meaningless.

How did the department lose its role and arrive at the present position of pathetic subservience to the executive? It did not happen within one day. It was a long journey in which the department leaders gave in to the wishes of the executive, some due to pressures, but mostly due to the opportunism of officers who were too eager to please the executive.

Some episodes are well known: under presidents Jayawardane and Premadasa, the department's legal advisory function was ignored. It did not resist the 1978 Constitution. There is no evidence to suggest that the department had given any advice to the government about the implications of this constitution for the legal system of Sri Lanka. When Jayawardane started a war on the judiciary, the department did not give advice to the government on the unconstitutional nature of his interference and its possible adverse consequences.

Under these two regimes, the AG's department persecuted political opponents. The case against Srimawo Bandaranayake and others had its full cooperation. During this time there were also several criminal cases file against SLFP politicians such as Vijaya Kumaranatunga, the present president Mahinda Rajapaksa and others, purely for political reasons. Though these cases didn't end up in prosecutions, the initial steps were initiated through the department.

The 1982 proposal for holding a referendum to extend the term of parliament for another six years would have shocked any legal department working according to common law traditions; however, Sri Lanka's AG had no legal advice to offer against this move. Not only was the country's electoral system completely destroyed, but so too was the very basis of law through which government derived legitimacy.

The best test of legal advice is the advice given on constitutional matters. The AG

should have resisted executive moves to undo the basis of constitutionalism. If that led to conflict, the legal adviser should have faced the conflict, rather than avoid it by unconscionable compromises. Had the AG resisted, it would have set off alarm bells about the executive's serious attack on the legal framework of the country. Even if the executive would not have wavered from its path, it would have met opposition, and the complete destruction of the institutions of law could have been avoided.

While the AG's department failed to act to oppose extralegal executive actions done in the name of law, the judiciary was dramatically attacked and damaged from within thanks to the work of the former chief justice, Sarath Silva, who resigned mid-year. On 7 July 2009 *The Sunday Leader* published an article by telecommunications expert Dr. Rohan Samarajiva, "Curtain closes on the Sarath Silva saga" to mark the occasion, of which extracts follow:

The Supreme Court is the final bulwark against assaults on the Constitution in any country. It is customary to say that the Constitution of a country is not what is written down in black and white on paper, but what it is said to mean by the highest Court. But how did the Silva Court safeguard the Constitution?

Abject failure on the 17th Amendment. Selective enforcement on the 13th Amendment (annulling the ad hoc merger of the Northern and Eastern Provinces while turning a Nelsonian eye to the other egregious violations). Outright failure on safeguarding the principle of parliamentary control of public finance, something fundamental to the parliamentary system of government and something written into our Constitution: "Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by parliament or of any existing law" (Article 148).

The 2006 budget allowed the Treasury to move funds around among different heads without parliamentary approval, blessed by the Silva Court.

The list goes on. Court tries to set petrol prices, infringing on the powers of the executive; executive refuses to implement court orders; court withdraws orders. Persons held on non-bailable offences are released without explanation by the highest court. The Constitutional terrain at the end of the Silva term looks like what Lanka must have looked after Lord Hanuman's tail was set on fire. No principles established; no doctrines for guidance; just random devastation.

...

The broad sweep of judicial activism has signalled to all who make economic policies and implement them that it is no longer enough to follow procedure, but to act in ways that would be acceptable to a future court... or to ensure that no one will be offended by the decision, thereby precluding a fundamental-rights challenge. These being impossible, the best course of action is inaction.

This is worse than what happened with government-personnel decisions a decade or so ago. But at least, people in government knew what the rule was and what it applied to: personnel decisions. Now, there is no such certainty or delimitation. All executive actions are fair game. The rule is that there is no rule; one has to guess what the Supreme Court would find acceptable.

A friend of former AG Kamalasabayson said that when asked at time of retirement what he thought of the legal system of the country, he is said to have remarked that he saw nothing anymore that can be called a legal system; only some buildings. While the former AG tried to keep something of the system intact, the former chief justice played a part in its destruction. In the end, both of their institutions have fallen to zero, and with them, the status of the citizenry who depend upon them.

The zero status of citizens

When all legal entitlements are deprived to citizens their formal rights are insignificant. Anything can be done to them and no consequences will follow. Today every Sri Lankan citizen is a legal non-entity in this sense. Their entitlements on statute books but have no actual relevance. Abysmal lawlessness and individual rights cannot coexist.

The situation in Sri Lanka at present demonstrates this fact with great clarity. Even senior persons suffer from misunderstandings about this fact until they themselves are made victims of it. For instance, in several video clips Dayan Jayatilaka, a former ambassador to Geneva, talks about his removal from his post. He states that Sri Lanka has no foreign policy, as if it should be a surprise to learn that there is anything other than the abuse of power. He talks about his removal as irrational as if it should come as a surprise for the Sri Lankan state to act irrationally. In fact, everyone there is treated irrationally all the time. The concept of merit in appointments and rationality in decision-making is absent. The 17th Amendment failed for this reason. The parliament made an attempt to acknowledge merit in appointments, dismissals and transfers of civil servants. It did not succeed. The principle now is that irrationality in appointments, dismissals and all such matters is normal.

Why is it that many people still do not grasp that the system in the country has gotten so warped that it is not capable of rational behaviour? Here the notion of zero status requires further explanation. The word here is used in the sense that Solzhenitsyn used it. Millions of Russian citizens were turned into zeroes just by somebody knocking on their doors or telling them that they were under arrest. Many citizens began to expect such a call at any time. However, the group that was surprised when such a call came and would never understand it, even after being brought into prisons, were the privileged sector that belonged to the party. Solzhenitsyn devotes an entire chapter of *The Gulag Archipelago* to describe the plight of these people, who could not grasp how the system could treat them so irrationally. It never occurred to them that the rest of the country was treated far more irrationally all the time. They had participated in the creating of a society of zeroes and were shocked to find that they too were counted among those with no status or value whatsoever.

This is why the irrationality of the entire country escapes the attention and comprehension of those from the more privileged sections of Sri Lankan society, who still think that they have some kind of status by virtue of their positions in the hierarchy and relative wealth. The problem for them is that when society is reduced to a zero through the devaluing and destruction of public institutions, then the rights on which the system is premised too have no meaning, and no more for them than for anyone else.

The murder of Lasantha Wickramatunga, a prominent journalist, can be used to illustrate. Wickramatunga was the chief editor of *The Sunday Leader*. Two gunmen shot him and one of the newspaper's senior journalists on 8 January 2009, as they went to work; the second man was wounded.

Wickramatunga was a prime target of the government and particularly the Secretary of the Ministry of Defence, Gotabaya Rajapakse, which had earlier tried to have him arrested. Thereafter a group of unidentified persons attacked and burned his paper's printing press; they were never arrested. It is widely believed that the ruling party sent the group, and that it was probably from some section of the armed forces.

Just two days earlier about 20 unidentified attackers raided the premises of Sirasa TV and caused huge damage to equipment. The group assaulted the staff and left a large Claymore mine. Sirasa TV is the most important centre for the independent media in Sri Lanka. The opposition leader said that the government was responsible for the attack and that members of a military unit carried it out. The attack provoked protests from journalists and opposition also from foreign embassies. Following the attack the AHRC issued a statement ("The attack on Sirasa TV an early warning of worse things to come", 7 January 2009), which predicted:

The massive attack on the Sirasa TV station brings gloomy predictions of things to come in the very near future to a country, which is already bedeviled by lawlessness, violence and corruption. However, there is no rational basis to expect things to become any better but in fact reason to believe that worse things are yet to come. If there was to be political assassinations of opposition leaders, trade union leaders, journalists, human rights activists and others who stand for democracy, rule of law and human rights it would be the natural course of things arising out of a build up which has already taken place.

In less than 48 hours this prediction unfortunately proved true. Globally Sri Lanka has been declared as the second most dangerous place for journalists, the first being Iraq. It is also among the most dangerous places for anyone that the government suspects to be an opponent, as shown in the case of Ranga Bandara, an opposition parliamentarian whose house was attacked and burned on 6 October 2009. Shortly after he gave a recorded interview to the AHRC, of which the following is a summary:

A group of people entered my premises on Sunday night, October 4 after breaking the decorations outside. They arrived in two vans. After entering my premises they spread highly inflammable liquid throughout the premises and set the premises on fire. The spread of the liquid had been done very carefully to ensure that they could raze the premises to the ground in the shortest possible time. Then they left the premises.

I was away attending to election work on behalf of my party at the time. I learned that the neighbours gathered immediately but were afraid to go in because they were aware of recent experiences where bombs were placed inside when this type of attack is done. The people tried to throw water from outside to stop the fire. It was only after one of my employees, a lady, rushed to the place and entered the premises that others also entered and tried to put out the fire. However, they could not do much to stop everything from being destroyed.

My house and office are situated next door to each other. All the documents relating to my work as a member of parliament was inside both premises. I also had five computers for the purposes of my work. There were many other pieces of equipment that were also used for communications. And there were also the household goods. All has been burned down and the total damage in monetary terms is about Rs. 11 million.

Immediately when the news about the fire had been spread the police were informed and they in turn informed the fire department of the Negombo area. The head of the fire department and the chairman of the provincial council were also

informed. Initially, the fire department asked for Rs 15,000 as costs for putting out the fire. The police informed that they will pay the money but the order had not been given for the fire department to move. So, they did not come at any time to deal with the fire. In fact, during this same time the vehicles used by the fire department were seen in the roads in Negombo being used for putting up flags for the ruling party.

The police in the area of Negombo also have water bowzers but none of these were sent despite of the information that they had to help in putting out the fire.

After I arrived at the place with several others I received a lot of detailed information about who was involved. It is a member of the provincial council who had given orders to the group of people who attacked my house. According to the information I received they will be protected because he, the provincial council member, received these orders from high above. I have also been told about the names of several of the persons who participated in this attack. I have also got to know the number of one of the vehicles that were used for this attack.

However, there is a big problem. The people who confided in me and gave me this information are mortally scared. They don't want to take the risk of coming forward to give evidence in these matters because it means very serious trouble for them. Of course the fear is real and everybody in the country would understand that kind of fear.

Among those who talked to me were two police officers. They gave me a lot of information about whom and how this attack was carried out. However, they also told me that they simply have to keep quiet because if they try to do their duty in terms of the information they have received, they will lose their jobs. Once again this is not a surprising revelation.

A complaint about the incident has been made to the police and three witnesses have given statements regarding what they have seen at the initial stages of this incident. The police have said that they will also record a statement from me. I will make that statement. However, I do not have the least amount of faith that there will be any sort of credible inquiry. It is not simply possible for the police to do that kind of inquiry in Sri Lanka now because of the political directions that they have to work under.

So here we have evidence about who did this act and how, but what is the use of that information? The police are not going to do what they are expected to do under the law on the basis of such information. On the other hand these people

who come forward to give information would be put at very great and real risk. That is the situation that I am facing about the investigations into this system and regarding that I do not know what to do.

I have no doubt at all that this is a completely political attack directed to ruin me completely, politically and otherwise. Now all that I had is lost. Even the basic equipment I used for my work has been burned down. I do not have any money at all to buy any of these things back.

Now I have been reduced to a position below zero.

Another person targeted in 2009 for opposing the government was Stephen Suntharaj, 39, who had been working for Centre for Human Rights and Development (CHRD) since March 2008 as a program officer. He formerly worked for the Child Protection Authority in Jaffna, where he took up so many cases of child abuse that he was threatened and ultimately had to leave the area.

In early March, a group of armed men in uniform took him from the front of the CHRD office in Aloe Avenue Kolpity, Colombo. A colleague witnessed the event. Immediately, CHRD sent its lawyer to nearby police stations and found Stephen at Kolpity police station. Stephen was kept at the Kolpity station for two months, under a detention order. During this period Stephen's wife and his lawyer had regular access, and he told them that he was treated decently but that the CID had interrogated him. On May 7, the Supreme Court (Halstrup) ordered his release and he went with his lawyer back to the office. Later Stephen's wife and three children joined him there, and a colleague volunteered to take them to her house. Since the Kolpity police had withheld Stephen's passport and national identity card, they went to the station and collected the documents. At this point the lawyer left.

But some minutes later the lawyer got a call from the colleague who had accompanied Stephen that a few men in uniform abducted Stephen in a white van. The car that carried Stephen was stopped by a motorbike just close by the Buddhist Ladies college (near Turret Road junction), with one man holding a pistol at the driver's side, while another man in uniform opened the side door, dragged Stephen out and then pushed him into a white van parked by the side of the car. There were many bystanders and Stephen's 8-year-old son begged the man in uniform not to hurt his father. Stephen's wife and others saw the men's faces, except for the man on the motorbike, whose face was fully covered. All were in uniform and armed with pistols. Despite this, the abduction remains unsolved.

There is no reason to believe that those who abducted Stephen were acting on any other instructions other than those from the people who authorised his detention in the first

place. The entire responsibility for this abduction lies with the Sri Lankan government, as with those of tens of thousands of other victims of recent decades.

The zero status of Sri Lankan citizens today is perhaps best illustrated in the detention camps that have been created completely outside the law to house hundreds of thousands of persons whose lives have been constantly and tremendously disrupted by civil conflict. It must be noted that just prior to the writing of this report, in November 2009, large numbers of internally displaced people (IDPs) were reportedly being released from the camps in the North of Sri Lanka. The releases are welcomed, as conditions in the camps were reported as being difficult. There remain questions about a large number of persons thought to have disappeared as the result of actions by the military. With the releases of persons from the camps, it is hoped that it will now be possible to locate the whereabouts of all missing persons. According to the Internal Displacement Monitoring Centre (<http://www.internal-displacement.org/countries/srilanka>), on 20 November 2009, the Government of Sri Lanka announced that more than half of the IDPs had been released and that there would be total freedom of movement for all remaining IDPs by 1 December 2009. Government officials also reportedly confirmed that all the camps would be emptied by the end of January, which falls before upcoming general elections in the country.

If detention centres within the framework of the PTA had some form of legality, the IDP detention camps, by contrast, have no legality of any sort. The internally displaced people have been completely outside legal jurisdiction—a fact that even the former chief justice, Sarath Silva, acknowledged in June before a gathering at a new court premises, just prior to his resignation.

Meanwhile, the Sri Lankan ambassador to the United Nations in Geneva responded to international concerns, stating that there was absolutely no problem with humanitarian access to the camps. He added that the high commissioner's offer of assistance would be accepted as soon as her office was "regionally a far more representative and transparent body". He further said that Sri Lanka is a sovereign country and would decide the degree of access it grants.

By the chief justice's own declaration, the people in the camps have been held completely outside the domestic law. By the invocation of "sovereignty" they are also being kept outside the purview of international law. This raises questions on the meaning of the word "sovereignty" as used with regard to these people. The position of the Sri Lankan ambassador to Geneva on sovereignty is problematic, given the chief justice's forthright statement that he and the law he represents have no jurisdiction.

What defines sovereignty is the law. Anything that is outside the purview of law in

Sri Lanka and outside the jurisdiction of the courts is outside its sovereignty. The tent people in Sri Lanka have been, by the very declaration of the chief justice himself, held through naked political power that does not subject itself to the law. The high-sounding claims to sovereignty as a defence against international intervention are nothing more than abdications of responsibility for protection. Protection is guaranteed only within a framework of law. When the law does not exist, claims of sovereignty are nothing but rhetoric to justify neglect.

The neglect of citizens also is not an attribute of sovereignty. If a state claims that it has a sovereign right to neglect its people, if it wishes to treat them as zeroes, this is a corruption of the use of the word sovereignty. The Sri Lankan government has extended its disregard of the law to the international sphere. By arguing that human rights and humanitarian assistance should remain within the purview of sovereignty, it has made a mockery of the international process.

Not only were international monitors and agencies denied access to the camps, but also elected politicians have also encountered difficulty in getting access to them. The People's Liberation Party complained that access to the camps was restricted and that even handing over aid donated for people in the camps was proving difficult. The leading opposition party, the United National Party, had also repeatedly had to demand access to the camps and it has condemned the continued restrictions on their populaces.



Internally displaced persons in a camp

The government argues that when compared to the risk to national security, the sufferings that internally displaced persons may have to undergo are of no importance. This is unsurprising, as it reflects their zero status as citizens in a country where public institutions also have fallen to zero. Whereas for centuries even the poorest people in Sri Lanka had learned to put up safe roofs over their heads when the rainy season arrived and live comfortably with warm cups of tea and homes arranged with their modest means, now even that much has been deprived to those in the camps.

After the chief justice spoke, members of a Sri Lankan family who lost their home in the fighting and were among those in a tent camp filed a case with the Supreme Court, asking that their rights as citizens—including the right to freedom of movement—be respected. The petitioner claimed that these people had relatives and friends who were willing to take them into their homes, but the Sri Lankan authorities were holding them

by force inside the squalid camps. The court granted leave to proceed with the case and posted it for November.

In another case, the AG's department objected in court to an application by a family divided in four camps to be united. The family moved the court to allow a 13-year-old girl suffering from injuries to be examined by a specialist doctor. Despite the AG's claim that she had already been taken to a hospital, the court allowed the girl to be taken to a specialist.

It is not clear on what legal grounds the department objected to the family's application to be united, but what is clear is that refugees and displaced persons are those who choose to leave their homes due to life-threatening dangers. The decision to leave, and later to seek government help for an alternative place to stay, is their choice, though compelled by circumstances. Anyone in such circumstances has the choice to seek refuge or to live by his or her own resources.

No government has the right to keep people forcibly in refugee camps if they choose to leave and find their own means of living. No government has the right to force people to live under conditions to which they do not consent. Just as all citizens have the right of consent regarding what they do, whom they marry and under whom they work, they have the right of consent regarding their living circumstances. The only exception is people who have violated the law. Internally displaced persons are not criminals and therefore no government is entitled to treat them as such.

This tragic drama of the camps is also a metaphor for the tragedy of all people in Sri Lanka, living without roof or comfort under a political system that demolishes the institutions that should afford some sort of protection and relentlessly rains down all manner of injustices. Devoid of avenues through which to have genuine complaints genuinely heard, all that Sri Lankans can do is suffer. Abysmal lawlessness is the handmaiden of citizens' zero status; it offers no refuge or relief.

THAILAND

THE RETURN OF THE INTERNAL-SECURITY STATE

Since the military coup in Thailand of September 2006 regressive anti-human rights forces and their allies have firmly re-entrenched themselves in all parts of government, including in agencies ostensibly established to protect human rights. Accompanying their resurgence is a new type of internal-security state, in certain respects reminiscent of its forebears of earlier decades, in others, exhibiting an original authoritarian style, with a more refined public-relations and a sharper concern for new types of political and technological threats to its control of society.

Among the features of this resurgent internal-security state are greater executive control over the judiciary; the targeting of speech and thought criminals for alleged computer offences and lese majesty; impunity for all manner of criminal acts and abuses—not only for state forces like police and army personnel but also for persons allied with the internal-security state's interests or which it finds expedient to use to make fast political gains; and, the continued institutional entrenching of anti-human rights interests.

Double legal standards and sliding judicial credibility

At a meeting of lawyers and jurists at the Asian Human Rights Commission (AHRC) in Hong Kong during April a participant from Thailand identified the key issue for her country's legal system as political control of the judiciary. Her statement was remarkable not because it revealed something that other participants didn't already know, but because not long ago few professionals from Thailand willingly admitted that their laws and courts operate according to double standards. Now, few can deny it.

The double standards were all too apparent throughout 2009. Following protests that forced leaders of the Association of Southeast Asian Nations and partner countries to flee from a summit venue in Pattaya, the prime minister, Abhisit Vejjajiva, imposed a state of emergency as blockades and violence spread in Bangkok. The army deployed. A court promptly issued arrest warrants for the red-shirted demonstrators' leaders. Some were quickly rounded up and detained, while others went into hiding. At subsequent events throughout the year, special powers were repeatedly invoked to prevent protestors from gathering.

The red-shirt protests adopted many of the methods that the yellow shirts that took over Government House and two international airports for an extended period towards the end of 2008, but were treated very differently. The yellow shirts—mobilized as a proxy force for the internal-security state—were allowed to stay put until the government was forced out through a court ruling on a narrow question under the army-imposed 2007 Constitution. No soldiers came to eject them. The legal process took weeks to move against the organizers. When the new prime minister was questioned on the authorities' inactivity he disingenuously said that it was a matter for the police, not him. The criminal inquiries have been repeatedly postponed and although charges are now being brought against yellow shirt leader Sondhi Limthongkul and others it remains to be seen whether or not they will ever be held to account. If they are, it will not be because the criminal process has been allowed to run its course but because they will have served their purpose and it may no longer be expedient for their military backers and others to have them around any longer.

The extent of impunity enjoyed by the yellow shirts is extraordinary also because theirs were not merely criminal offences but criminal offences going to the heart of the integrity of the government. The takeover of the prime minister's quarters was not just an assault on a particular incumbent but on the notion of an elected legislative head, and on the notion of parliamentary democracy itself. This diminishing of certain symbols and concepts of government is a further indicator of the internal-security state's return.

At the beginning of September, the National Anti-Corruption Commission (NACC) ruled that former Prime Minister Somchai Wongsawat should be charged with abuse of power and former Deputy Prime Minister Chavalit Yongchaiyudh should be charged with excessive force leading to injuries to demonstrators, while four senior police officers should receive administrative punishment for abuses of authority, leading to deaths and injuries during the People's Alliance for Democracy (PAD) demonstrations on October 7 last year.

Another case concerning demonstrations happened in the country's North, where three leaders of a farmer's demonstration in June 2009 urging the government to increase the price of rice were punished with six months imprisonment by the Chiangrai Provincial Court in July 2009, following an extremely rapid trial process.



Meanwhile, a variety of criminal cases throughout the year demonstrated the extent to which the courts, which a decade ago were beginning to assert some independence and display a higher level of integrity, are back under the thumb of the internal-security state.

Among them, the Songkhla Provincial Court issued a remarkable finding in the post-mortem inquest into the deaths of 78 men in army trucks after the protests outside the Tak Bai District Police Station of October 2004. Despite overwhelming evidence to implicate senior army officers, the court absolved all officials and military persons of responsibility for the deaths. The court acknowledged that the victims had suffocated to death, but glossed over how and why: namely that the men were beaten and then piled five-deep in trucks for five to six hours. This is despite the fact that the purpose of the inquest was to document and reveal as many details about the incident as possible, and despite the detailed testimonies of forensic experts, doctors and others which were omitted from the court's findings. The court also implied that extenuating circumstances meant that the army officers could not be held responsible, even though the purpose of the inquest was not to determine guilt of innocence—or even suggest it—but simply to document the facts and establish whether or not a case exists for criminal trial. The files from the inquest have now been transferred back to the public prosecutor, but after five years of delays and obfuscation, few of the people involved have any expectancy that justice will be done.

Computer crimes, speech crimes, thought crimes

According to an article in the Bangkok Post of April 20,

Security agencies are keeping a close watch on a group they suspect of feeding lies to international media outlets on the recent red shirt riots.

Government spokesman Panithan Wattanayagorn said members of the group had left the country in recent days to disseminate a “different version of events and accounts” to the international media.

Details of the group, which is believed to consist of about 10 people, could only be made public by the army and police chiefs, Mr Panithan said.

The government would counter them by releasing its own information to the international media, explaining what is really happening.

The report is typical of many throughout the year, speaking to the return of the internal-security state through the army and police joint monitoring of speech and ideas that

challenges the internal-security state's version of national events and affairs.

Nowhere is the attack on free speech and thought more evident than in the use of law against persons critical of the monarchy, in the desperate attempts to silence Internet debate on pressing problems of national importance, and in the intersection of these two.

One of the enormous changes between the old Thailand and the new is in the field of technology and communications. It is no coincidence that many persons now accused of lese-majesty have been accused of it because of their use of computers. Among them is 34-year-old Suwicha Takor, an engineer with three young children, who a court sentenced in April to 10 years' imprisonment for posting images on the Internet that were allegedly offensive to members of the royal family. He was convicted of lese-majesty and also with having wrongfully used a computer under the nebulous provisions of the 2007 Computer Crime Act, such that he imported "false computer data in a manner that is likely to damage the country's security or cause a public panic". (Photo: Suwicha Takor)



The month before, police officers raided the Bangkok office of an independent online news site, Prachatai, and arrested Chiranuch Premchaiporn, its director, under a provision of the same so-called act—which was passed without debate by an army-appointed legislature—that allows service providers to be charged with the same offences as persons posting content deemed to threaten the internal-security state. In Chiranuch's case, the "offence" was that she had not removed comments offensive to the monarchy from the website fast enough.

The Prachatai raid is part of a pattern under the internal-security state to target certain groups and individuals for harassment, arrest and prosecution as a warning to others not to overstep the many boundaries that prohibit free debate on topics of great importance to the country and its people, including through the use of lese-majesty and criminal defamation laws, as well numerous other ambiguous offences that may be stretched to cover just about anybody and any situation.

The proliferation of many types of media in Thailand gives the false impression that there is a relatively high level of free expression. In fact, most of the broadcast media are tightly controlled and much of them are in the hands of government agencies and the armed forces. The newspapers and other print periodicals, which in the 1990s had a good reputation, have for the most part in recent years practiced heavy self-censorship or have become openly biased in their reporting. The Internet and streets remain spaces for communication, which is why the authorities have tried to patrol both vigorously and make examples out of their targets. The few groups that dare to publish and allow debate on otherwise prohibited topics, like Prachatai, become prey for politically motivated legal actions.

In August, another example of this pattern came in the case of 47-year-old Darunee Chanchoenkilapakul, a supporter of ousted premier Pol. Lt. Col. Thaksin Shinawatra, whose public invectives against the monarchy resulted in her conviction and sentencing to 18 years in prison. Darunee attempted three times to obtain bail but it was denied, although the court had no specific grounds upon which to refuse it. The court also tried her behind closed doors, on the pretext that it was in the interests of public order and national security. Her lawyer submitted an application to the Constitution Court for the trial to be invalidated on the basis that it was in violation of her constitutional rights to try her in this manner, but it was refused. The internal-security state again had its way with the justice system.

The AHRC is not aware of another case in recent times in which a defendant has been held up as an extraordinary threat over a question of free expression. Darunee was apparently treated in this manner because she was impertinent enough to think that she could actually exercise her legal rights and fight the charges, rather than plead guilty and seek a royal pardon as other defendants in lese majesty cases chose to do, including Suwicha.

Another feature of the entrenched abuse of human rights in Thailand that emerged in Darunee's case is the use of informal methods of punishment, particularly for people accused of crimes that are portrayed as socially reprehensible, such as hers. After her transfer to the Central Women's Correctional Institution, Darunee suffered a number of forms of maltreatment, including a lack of medical care, isolation from other detainees, and being forced to wear a type of uniform for serious prisoners and a card indicating her crime to other detainees, which was written in the strongest language possible. Although the first of these is a systemic problem, the others seem to have been intended as forms of special punishment because of the nature of her offence. The AHRC has since expressed its concerns regarding her case to international agencies and to the Kamlangjai Project for women detainees, under the directorship of Princess Bajrakitiyabha Mahidol.

“Unsubstantiated” police abuses and entrenched impunity

In 2009, the permanent representative of the government of Thailand at the UN Human Rights Council, Sihasak Phuangketkeow, complained that allegations that the police are the top violators of human rights in his country are “sweeping” and “unsubstantiated”. Yet throughout the year the police continued to enjoy blanket impunity for all types of gross abuses in the country, from the forced abduction, disappearance and presumed murder of human rights lawyer Somchai Neelaphaijit, to the alleged killing of at least 28 people by police at a single station in Kalasin.

The investigations into the abductors and killers of Somchai made no discernible progress during the year, even though in March, five years after his disappearance, the permanent representative in Geneva insisted that his government “attaches the highest priority” to solving the case. If this is true then it is an indictment on the entire criminal justice system of Thailand that after five years and innumerable squandered leads and opportunities, as well as a huge amount of publicity at home and abroad, no one has been held to account for this offence. There are some reports that even the one police officer found guilty of a relatively minor crime in connection with the disappearance, Pol. Maj. Ngern Tongasuk—who was released pending appeal—may have faked his own death in order to escape justice, which is something that he could only have done with the assistance of other police and authorities.



Somchai Neelaphaijit

Meanwhile, out of 28 cases of alleged killings by the police in Kalasin that have been brought to the attention of the Department of Special Investigation (DSI), Ministry of Justice, so far just two are being formally investigated and carried forward, despite repeated requests of family members. To date only one has come to court—yet already there are grave concerns that justice in this case too will be quickly perverted. The six police accused—Pol. Col. Montree Sriboonloue, Pol. Lt. Col. Samphao Indee, Pol. Lt. Col. Sumitr Nanthasathit, Pol. Snr. Sgt. Maj. Angkarn Kammoonna, Pol. Snr. Sgt. Maj. Sutthinant Noenthing and Pol. Snr. Sgt. Maj. Phansilp Uppanant—were all promptly given bail, which leaves them free to take many actions to intimidate the relatives of the victim and threaten or kill, if necessary, witnesses.

Such threats are not idle and are easily carried out: for instance, in the case of the murder of environmentalist monk Phra Supoj Suwajo in 2005, in which the police are believed to have colluded to protect the persons behind the killing, so far three witnesses have also been killed under mysterious circumstances, within a short period of time from each

other. In one case, the victim was found dead in a small canal. The police refused to treat the death as suspicious and pressured the family to conduct the funeral and dispose of his remains on the same day the inquiries were completed. However, other inquiries found that his neck had been broken and that there was more evidence to suggest murder, such as that the victim had a lighter in one hand, which he would not have been holding on to if he had been trying to swim to save his life in a natural drowning incident.

The manner in which the bail was given to the police accused in the case from Kalasin that is going to court—the murder and faked suicide of Kiettisak Thitboonkrong—also was suspicious: Angkarn, Sutthinant and Phansilp appeared on 20 May 2009, Samphao on May 28, Montree on June 17 and Sumitr on July 2, and on each occasion the same judge appeared to hear the bail requests. The granting of bail by a single judge over a number of days in this manner is highly irregular, as judges are assigned this task on rotation and it is improbable that the same judge would appear repeatedly to hear each one of these applications in the same case, leading persons close to the case to suspect that the trial has already been compromised even before it has begun.

There are many reasons that the police enjoy impunity and that the number of actual reported cases of police abuse in Thailand is but a tiny fraction of the total. One important reason is that the majority of victims do not bother to complain, or thereafter retract their complaints. Experience shows that the lodging of complaints invariably only brings official letters saying that the matter is being looked into and perhaps finally a letter from the police saying that they investigated themselves and found that they had done nothing wrong. In the absence of any credible mechanisms to receive and investigate complaints against the police and prosecute alleged perpetrators, there is no way that large numbers of people will come forward and risk harassment, threats and inducements in an attempt to obtain justice. Complainants soon get the message and reach arrangements so that formal inquiries or prosecutions are rare. And as most victims are poor and unable to hire a lawyer or find other persons who can help, only a few cases are brought to public attention through the intervention of local rights groups, journalists or other civic-minded citizens.

To illustrate, in the latter part of 2009 the AHRC was informed of a case of a police shooting in a central province. The victim was typical: a young man who had been allegedly involved in some petty crime and towards whom the police feel no compunction in treating as they wish; they are aware that this type of target will not attract interest or sympathy. The police officer shot at the young man three times during a fight at a concert, hitting him twice as he was scaling a fence; according to witnesses, the victim was only trying to get away when the policeman fired. The officer then allegedly walked over to where he was lying, seriously wounded on the ground, and began kicking him before others intervened. When a group of his friends addressed other officers at the scene

over the killing, they accused one of them, not the policeman, of shooting the victim and around half a dozen officers and security volunteers assaulted him too.

The young man's relatives found him at a local hospital, in a serious condition but alive. The family members went to the police station to make a complaint. As they made it, they saw an officer matching the description of the shooter moving around in the background and watching them. Shortly after, they started getting phone calls from the police, asking them how they could help to settle the matter. The family fearfully obliged and suggested an amount that would cover the cost of hospital expenses and then some. They negotiated directly with a senior officer on behalf of his subordinate. In the end they got less than a third of what they asked for, paid in cash by the same officer. The young man survived his injuries, but out of persistent concern that the police could make more trouble with him, the family sent him away from the area.

Underlying all of this is the notion, closely tied to the internal-security state, that the extent to which redress exists at all it should be personalized, not institutionalized. A police officer can come to make a payment with which to satisfy the problem of a shooting, but there should not be institutional arrangements to address such an incident. This type of thinking goes to the highest levels of all parts of government, including among those who pretend to have liberal outlooks.

For instance, after the raid on Prachatai, the prime minister said that Chiranuch would be entitled to make a complaint if she feels that the police action against her was unjustified. He reportedly added that, "If [Prachatai] feel there was an error in law enforcement they can make a complaint to me, I will take care of it." His comment is reminiscent of the type of statements made by his predecessor, Thaksin, to aggrieved families of victims during the 2004 "war on drugs", and it reveals the extent to which the notion of complaint and redress is trivialized. How would the prime minister "take care of it"? What measures are in place for the prime minister to undertake routine inquiries into police operations? Would he be implying that all persons in Thailand with complaints against law enforcement authorities should take them up with him? If so, the prime minister would soon find himself overwhelmed daily with thousands of complaints of illegal arrest, arbitrary detention, fabricated evidence, falsified charges, corruption, entrapment, extortion, custodial assault and torture, extrajudicial killing and enforced disappearance, just to name a few of the abuses that the police in Thailand routinely perpetrate.

The prime minister's flippant promise to "take care of it", which anyhow he did not, is indicative of the feudal patterns of thought that underpin the internal-security state. When someone has something bad happen to her then she is expected to make a complaint like one of her ancestors, coming to the outside of a palace to ring a bell or

stand at a post and cry out her petition in the faint hope of receiving a kind hearing from its occupant. When these types of practices are continued in modern forms then institutional measures and systematic procedures for handling and processing complaints and dealing with abuse are not established, or if established, they are not taken seriously either by the general public or even the people responsible for giving them effect.

This is the real story of Thailand's "unsubstantiated" police abuses—a story of countless untold incidents of this sort that go on around the country every day, in which ordinary citizens who given a chance would make a protest and fight a case are instead forced to reach humiliating compromises if only to save their lives and livelihoods. Even in cases involving high-profile persons, like Angkhana Neelaphaijit, the wife of disappeared lawyer Somchai and founder of a group dedicated to address forced disappearances, there are persistent concerns for the safety of her and her family. In mid-2009 somebody broke into two vehicles belonging the family, one the car from which Somchai was abducted, on two separate dates. The manner of the break-ins suggest that they were not attempted thefts of property or of the vehicles, but that the perpetrators were sending a message to the family that they are not safe.

In 2005 the Human Rights Committee presented the following findings and recommendations to the government of Thailand concerning its compliance with the International Covenant on Civil and Political Rights, which is a legally-binding treaty that the country joined voluntarily:

"10. The Committee is concerned at the persistent allegations of serious human rights violations, including widespread instances of extrajudicial killings and ill-treatment by the police and members of armed forces, illustrated by... the extraordinarily large number of killings during the 'war on drugs' which began in February 2003. Human rights defenders, community leaders, demonstrators and other members of civil society continue to be targets of such actions, and any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a culture of impunity...

"The State party should conduct full and impartial investigations into these and such other events and should, depending on the findings of the investigations, institute proceedings against the perpetrators. The State party should also ensure that victims and their families, including the relatives of missing and disappeared persons, receive adequate redress... The State party should actively pursue the idea of establishing an independent civilian body to investigate complaints filed against law enforcement officials...

“15. The Committee is concerned about the persistent allegations of excessive use of force by law enforcement officials, as well as ill-treatment at the time of arrest and during police custody. The Committee is also concerned about reports of the widespread use of torture and cruel, inhuman or degrading treatment of detainees by law enforcement officials, including in the so-called ‘safe houses’. It is also concerned at the impunity flowing from the fact that only a few of the investigations into cases of ill-treatment have resulted in prosecutions, and fewer, in convictions, and that adequate compensation to victims has not been provided...

“The State party should guarantee in practice unimpeded access to legal counsel and doctors immediately after arrest and during detention. The arrested person should have an opportunity immediately to inform the family about the arrest and place of detention. Provision should be made for a medical examination at the beginning and end of the detention period. Provision should also be made for prompt and effective remedies to allow detainees to challenge the legality of their detention. Anyone arrested or detained on a criminal charge must be brought promptly before a judge. The State party should ensure that all alleged cases of torture, ill-treatment, disproportionate use of force by police and death in custody are fully and promptly investigated, that those found responsible are brought to justice, and that compensation is provided to the victims or their families.” (CCPR/CO/84/THA)

The government has not ever seriously followed through on any of these recommendations. Until it does, the problem of “unsubstantiated” abuses and entrenched impunity will remain.

A human rights commission for human rights violators

The insidious influence of the police has now reached right into the National Human Rights Commission, which this year made a retired police general one of its members, and then gave him responsibility for the sub-committee on justice, from where he is now in a strong position to ensure that the commission does nothing to bring police perpetrators of rights abuse to account.

According to the new commission’s chairwoman, Amara Pongsapich, in an interview during July, the reason that Pol. Gen. Vanchai Srinuwalnad got the job of monitoring legal and judicial affairs is that he has the “experience and interests”. This is true enough: a police officer will certainly have the experience and interest to conceal human rights abuse. In fact, this has been a great tradition in Thailand, where police have also been appointed to the justice and interior ministries to protect their peers against allegations

that they have violated human rights. It is the reason that this general was appointed to the commission, and from all accounts so far he has been doing a very good job at this. So far, he has managed to appoint a subcommittee to work with him on these issues that also consists only of police and other government officials; however, information about this and other subcommittees has not been made public—at time of writing, details only of the subcommittees under the former commission were on the commission's website.

The police officer shares his seat on the commission with—among others—a drafter of the regressive 2007 Constitution, a judicial bureaucrat, a ministerial inspector, and a businessman whom the former commission named as a human rights violator. Parinya Sirisaragarn, the owner of a salt extraction license, was named in a report of the National Human Rights Commission in April 2007 as being responsible for environmental degradation in the northeast. The damage includes soil erosion, land subsidence and collapse, and the entry of salt into the water table, making water undrinkable and unsuited for agriculture. The report recommended, among other things, that his licence be revoked; however, the AHRC confirmed that Parinya, in his capacity as managing director of Kijsubudom Co. Ltd., has continued to extract salt from the area.

The naming of Parinya as a human rights violator in an official document of the former commission apparently was not sufficient an obstacle to his appointment to the post. Nor, it seems, were his outrageous comments to senators prior to his election, including that if made a commissioner he would not necessarily welcome international intervention on human rights issues in Thailand because this might be intended to interfere in the country's internal affairs; he then illustrated the point by alleging that the Falun Gong is backed by the CIA to interfere on human rights issues in China. He added that other countries are also violating the rights of the military regime in Burma, with which he is demonstrated great sympathy, by using human rights discourse to isolate the country.

Following the commission's appointment, the AHRC wrote to the International Coordinating Committee overseeing the status of national rights institutions under the Paris Principles in United Nations forums, to have its status downgraded. The AHRC pointed out that its selection and composition failed in every respect to comply with the principles, specifically that:

The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: (a) Non-governmental organizations responsible for human rights and efforts

to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists...

None of the components of this section were complied with in the selection and appointment of the seven new commissioners in Thailand. The procedure for nomination and appointment did not afford any necessary guarantees to ensure pluralist representation. No effort was made to publicize the process of selection and appointment to the commission, whether by radio, television, Internet or other media, nor was any genuine effort made to solicit comments. The whole selection process, like the workings of the commission since, was secretive and contrary to human rights. No effort was made to check and interview the candidates, and the committees established for that purpose and appointed Senate—consisting of former army and police officers, senior bureaucrats and others from the internal-security state elite—simply rubberstamped the names that were put before them. It is therefore unsurprising that the new commission is neither pluralist nor independent and does not consist of social forces involved in the protection and promotion of human rights. None of its seven members are representatives of non-governmental organizations responsible for human rights, trade unions or concerned social and professional organizations, despite the fact that there were applicants from these backgrounds to the commission whose names were not selected.

The pluralistic composition of a national rights institution and its independence are integral features for compliance with the Paris Principles. They are not optional. Therefore, the AHRC has sought for this commission to lose its status in international forums, and at time of writing is awaiting news of an upcoming review of its status.

Beyond this, the selection and appointment of the new National Human Rights Commission in a manner contrary to the very principles that the commission is supposed to represent is indicative of the return of the internal-security state, which has as its objective the emasculating of agencies that can threaten its mandate through their cooption. The manner of selection and appointment of the new commission as well as its composition are indicators of the deep anti-human rights culture that pervades all official institutions in Thailand, now including the National Human Rights Commission itself. The unfortunate consequence is that the commission is today not only of little significance to the government of Thailand, but also to the people of Thailand on behalf of whom and for whose rights it is supposed to act. It is not a human rights commission for human rights victims and defenders, but a human rights commission for the violators of rights. It is a human rights commission for the internal-security state of 2009.

In “The State of Human Rights in Ten Asian Nations - 2009” the Asian Human Rights Commission (AHRC) presents analysis concerning the human rights situations, violations and developments it has encountered during its work in 2009.

The AHRC, which is a leading regional human rights non-governmental organisation based in Hong Kong, documents and launches campaigns concerning hundreds of individual cases of grave human rights abuses each year in these countries. This allows it to identify trends in human rights violations and lacuna in the protection of rights that need to be addressed.

While the details of the situations encountered vary significantly from one country to another in the region, many serious problems, including endemic torture, threats to human rights defenders, attacks on the freedoms of expression and of the media, corruption and unfair trials, are witnessed in most countries in the region. Such serious problems are typically accompanied by impunity for the perpetrators.

Dysfunctional State-institutions that are supposed to uphold the rule of law, such as the police, prosecutions and judiciaries, in fact encourage ongoing violations and ensure that those responsible are not held accountable.

In this report, the AHRC presents such issues and challenges arising in Bangladesh, Burma, India, Indonesia, Nepal, Pakistan, the Philippines, South Korea, Sri Lanka and Thailand.

