The State of Human Rights in Ten Asian Nations - 2005

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

The State of Human Rights in Ten Asian Nations - 2005

Thailand • India • Nepal

Sri Lanka • Bangladesh • Burma

Philippines • Cambodia

South Korea • Indonesia

Asian Human Rights Commission

ISBN-10: 962-8314-26-2
ISBN-13: 978-962-8314-26-3

Published by

Asian Human Rights Commission (AHRC)
19th Floor, Go-Up Commercial Building
998 Canton Road, Mongkok, Kowloon
Hong Kong, China
Telephone: +(852) 2698-6339
Fax: +(852) 2698-6367
E-mail: ahrchk@ahrchk.net
Web: www.ahrchk.net

December 2005

Printed by Clear-Cut Publishing and Printing Co.
B1, 15/F, Fortune Factory Building
40, Lee Chung Street, Chai Wan, Hong Kong

Front cover illustration: an unarmed demonstrator is kicked while being detained by the police in Bangladesh. Such images are prevalent in the country and throughout Asia. A fundamental barrier to the enjoyment of human rights is the fact that in many countries in Asia, the rule of law has collapsed, with the police and military forces contributing to its disintegration.

Back cover illustration: peaceful protestors marking international human rights day 2005 hold banners denouncing torture and court delays, as well as calling for witness protection, in Sri Lanka. This year's demonstration, on the sole issue of human rights, was held on an unprecedented scale. The concrete steps required to address human rights violations in Asia are the focus of this publication.

CONTENTS

Foreword

On the occasion of International Human Rights Day, December 10, 2005, the Asian Human Rights Commission (AHRC) has produced the following series of reports, in order to present the state of human rights in the following ten Asian countries: Thailand, India, Nepal, Sri Lanka, Bangladesh, Burma, the Philippines, Cambodia, South Korea and Indonesia.

In 2005, AHRC concentrated much of its efforts on the human rights situations in these countries in particular, due to the serious nature of the human rights violations being perpetrated and the activity of the organisation's network members within these contexts. This publication is the first collection of annual reports to be produced by AHRC on the human rights situations in these countries, and is based on the experience gained through the organisation's work throughout the year. It marks the beginning of a process that will be sustained in subsequent years. The continued monitoring of country-situations through this process will permit AHRC to chart any advances, or the lack thereof, concerning the issues raised in these reports.

The reports on separate countries have been made from the perspective of the implementation of rights in terms of article 2 of the ICCPR. While the number of ratifications of UN covenants and conventions has improved in the region, the situation of human rights is continuing to deteriorate. This is due to the failure of the state parties to take the steps required by article 2 concerning the implementation of rights. Torture remains endemic and the rule of law has seen serious setbacks. The reports record the manner in which the lives of people are affected by the limitations in the rule of law and the consequent incapacity of the states to ensure the enjoyment of rights for the people. The states' implementation of specific recommendations made in these reports will form the basis of future campaigns and analysis.

AHRC wishes to thank the following persons for their contributions to this report: Michael Anthony, Md. Ashrafuzzaman, Nick Cheesman, Meryam Dabhoiwala, Basil Fernando, Indria Fernida, Bijo Francis, Kate Hurst, Kim Soo A, Anastasia Liu, Sanjeewa Liyanage, Payal Rajpal, Danilo Reyes, Philip Setunga and Bruce Van Voorhis.

International Human Rights Day Message

The Absence of the Rule of Law and the Actualisation of Human Rights: A Contradiction that Must Be Resolved

International Human Rights Day on December 10 should be a moment in Asia to reflect soberly as to why on this continent, where more than half of the world's population live, basic human rights are denied to most people. Although there are complex factors that contribute to this denial of people's rights, one factor stands clearly above all others: the rule of law does not exist in most parts of this vast continent.

The nexus between the rule of law and the actual realisation of human rights is not something to which the global human rights community has paid sufficient attention. The result is that while enormous attempts have been made to propagate the basic ideas of human rights, as enshrined in the 1948 Universal Declaration of Human Rights (UDHR) and other covenants and conventions adopted by the international community under the sponsorship of the United Nations, the effort to create the conditions that are necessary for the actual realisation of human rights compares very poorly with the hard work that has been undertaken to create an awareness of human rights. The result is that people whose rights are so blatantly and continuously violated ask their governments as well as the United Nations, "Where are my rights?" To this question, neither the governments nor the United Nations and the international community are able to give a satisfactory answer as of now.

Burma, Nepal and Cambodia are among the countries in Asia that have no possibility of enforcing the rights of their people. Various political obstructions stand in the way of creating a type of state that is capable of undertaking the responsibilities necessary for the realisation of people's rights. While democratic and human rights jargon may be used by these states, they are preventing the development of the elementary forms of state development within which citizens can approach their state with even a most rudimentary level of confidence and belief that the state intends to respect their rights. From the point of view of accountability for respecting human rights, these states do not even have the basic structures to make such accountability possible. The

international community, in approaching such countries, should take into consideration this key issue which, if left unresolved, will make the efforts of the international community likely to bear few tangible results. The example of Cambodia, where enormous international efforts and resources have been allocated over the last 10 years, demonstrates the type of internal contradictions that prohibit even small positive developments in this country. The same problems are evident in Burma and Nepal as well. We therefore urge the United Nations and the international community to pay special attention to these three countries and to develop a more comprehensive strategy to assist the development of state institutions through which people can seek redress and protection of their rights.

Many other countries in the region reflect how the absence of the rule of law in varying degrees obstructs the realisation of human rights. India and China are the countries with the largest populations in the world. Although the political systems and the history of their justice systems differ, there are similar patterns of obstructing the rights of people in both countries through defects in their rule of law systems.

India, for instance, claims long years of legal and constitutional development and the development of judicial institutions from colonial times up to now. However, the enormous delays that affect India's justice system and vast defects in India's policing system deprive ordinary citizens of their basic rights. India today stands as a glaring example of the adage that justice delayed is justice betrayed. Thus, those who suffer violations of their rights naturally have a deeply inherent pessimism about the possibility of actually achieving these rights. Moreover, the corruption and inefficiency embedded in India's policing system is a constant source of torture, particularly for India's poorer and marginalised sections of society, such as the country's minorities. The discriminatory psychology of caste is inbuilt into the policing system of India as well. Those who are considered to be Dalits and lower castes are among the people who are most brutalised by torture and are denied all of their rights. Other minorities, such as India's *adivasis*, or indigenous people, and Muslims, Christians and Sikhs, are also denied the possibility of equality and fairness in their relationships with the police and justice within the basic institutions of the judicial system. It should be noted that although a request has been pending by the U.N. special rapporteur on torture to visit India since 1997 the government of India has not made this visit possible.

The denial of justice in China takes place in a different manner. China's struggle

to build a system based on law instead of the arbitrary rule of individuals extends back more than two decades. Although some progress has been made in this direction, China, however, is far from establishing a system based on the rule of law. When social order is maintained without the rule of law, there are hardly any effective means of redress for people who feel that their rights have been violated. China does not recognise a separation of powers between the institutions of the state, and therefore, the independence of the judiciary from the executive does not exist. This present reality prevents the possibility of the judiciary intervening as an adjudicator on basic rights issues and obstructs the development of the rule of law in the country. This contradiction is a matter that China's people and the authorities will have to resolve in the future. The recent visit of Manfred Nowak, the U.N. special rapporteur on torture, reflects the results of these contradictions. He notes that the use of torture is still widespread, though it is not always for political reasons. The general contradiction of the police and other institutions, such as prisons and rehabilitation centres and the like that are operating outside of the basic framework of the rule of law, will remain sources of torture and other violations of human rights. This contradiction cannot be cured by the imposition of the death sentence as China does now. The wide use of the death penalty is only a reflection of executive action to resolve perceived problems in an arbitrary manner rather than through institutional processes that strengthen the state and society.

Moreover, the rule of law is seriously flawed and torture is endemic and widespread in the following countries: Bangladesh, Pakistan, Sri Lanka, the Philippines, Thailand, Indonesia and Malaysia in addition to the countries mentioned above. The key issues are the extremely arbitrary nature of policing systems; the lack of effective redress mechanisms in justice systems; enormous obstacles faced by people, particularly the poor, which constitute the majority of the population in these countries, in terms of access to the law; enormous delays in judicial systems; an absence of protection to the complainants and victims, particularly when they make complaints against state authorities; and the weak development of the legal profession in these countries, either due to intense pressure that intimidates lawyers or the lack of traditions of fearlessly defending people seeking justice. The net result is that, despite ratification of the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and other U.N. conventions and covenants against discrimination, people have little or no possibility of actually asserting these rights. While a facade of compliance to international treaty bodies is maintained,

the observations and recommendations of these U.N. bodies are shamelessly flouted and ignored over and over again, in effect mocking the international effort to make it possible for everyone to enjoy their basic rights.

Meanwhile, the denial of human rights in Singapore belongs to a special category. Singapore makes it effectively impossible for people to live in an environment in which individual rights can exist. The ruling party is also virtually the state. Freedom of assembly, freedom of expression and the capacity to assert one's rights do not exist in this environment at all. The absolute denial of rights makes it impossible for the realisation of any of the rights enshrined in the international covenants and conventions. In fact, the official political ideology does not recognise the validity of these covenants and conventions.

Under these circumstances, the Asian Human Rights Commission (AHRC) calls upon the peoples of Asia, as well as all others concerned with the actual realisation of human rights, to pay special attention to the link between the rule of law and human rights. Finding ways to resolve this contradiction is the path that has to be tread if human rights are to be a practical reality. As a symbolic means of stressing this issue and keeping it alive for discussion in the immediate future, the AHRC has launched an Asian Charter on the Rule of Law. This effort is a follow-up to AHRC's earlier effort to work towards drafting a People's Charter on Human Rights. We urge everyone to support this effort and to make the theme of improving the rule of law for the achievement of human rights a central theme of engagement in the coming year.

This year on International Human Rights Day the AHRC is presenting a report on the state of human rights in 10 Asian countries—Thailand, India, Nepal, Sri Lanka, Bangladesh, Burma, the Philippines, Cambodia, South Korea and Indonesia.

THAILAND

Government of Thailand shows little serious effort to meet commitments under the ICCPR

In July 2005 Thailand went before the UN Human Rights Committee for the first time, to be assessed on its compliance with the International Covenant on Civil and Political Rights (ICCPR), to which the country became a party in 1997. In its concluding observations at the end of the month (CCPR/CO/84/THA), the Committee pointed to some key areas for the government to address in order for the national human rights situation to be improved. These included the prevailing culture of impunity enjoyed by the country's security forces, torture and custodial abuses, prison conditions, attacks on human rights defenders and the media, among others:

CULTURE OF IMPUNITY

"The Committee is concerned at the persistent allegations of serious human rights violations, including widespread instances of extra-judicial killings and ill-treatment by the police and members of armed forces, illustrated by incidents such as the Tak Bai incident in October 2004, the Krue Se Mosque incident on 28 April 2004 and 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 Committee further notes with concern that this situation reflects a lack of effective remedies available to victims of human rights violations, which is incompatible with article 2, paragraph 3 of the Covenant (arts. 2, 6, 7). **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. Furthermore, it should continue its efforts to train police agents, members of the military and prison officers to scrupulously respect applicable international standards. The State party should actively pursue the idea of instituting an independent civilian body to investigate complaints filed against law enforcement officials." [Paragraph 10]

The wanton killings of thousands of alleged drug dealers in 2003 still reverberate through Thailand. In March of that year, arranged killings were a daily event at many police stations: sufficiently well-organised that the victims were shot in the same place, at the same time and with the same little blue bag of 70 to 200 pills neatly inserted into the back pocket. Although that time was a nadir in the protection of human rights in Thailand, extrajudicial killings were a fact of life in the country before then, and have been a fact of life there since. The police still have very little fear of any consequences. Even in the most outrageous cases, they are safe to insist upon 'suicide': junior personnel are backed by powerful senior officers. Expressions of patronage are more powerful than those of justice.

Sunthorn Wongdao, for instance, died of five bullet wounds after being surrounded by the police in May, who then said that he committed suicide. After the then deputy-director of the new semi-independent Central Institute of Forensic Science investigated the case, she said on television that it was impossible that Sunthorn could have killed himself. The police sued her. At the start of December she was arrested, fingerprinted and bailed, in accordance with Thailand's outdated criminal defamation code. Meanwhile, a police report insisting on suicide was submitted to the public prosecutor, who is limited in power to accept or reject the police findings. In the case of the latter, the prosecutor can do no more than to close the file or request further police inquiries. However, unless the Department of Special Investigation gets involved in the case, it will at most just continue to bounce back and forth between the prosecutor and the police, who most cases control all stages of investigation, arrest, and the laying of charges. At last report, Sunthorn's death was still on the desk of the prosecutor. For the forensic scientist who was sued, it bore an ugly resemblance to an earlier case in which she also faced litigation for alleging that police in the south of Thailand had tortured a suspect to death, including by burning a platic bottle on his penis and jumping on his chest: the police autopsy had said the victim had died from asphyxia, a commonly recorded cause of death in Thailand. Although she won the case, the police were never investigated or prosecuted over the death.

Somchai Neelaphaijit

The Department of Special Investigation under the Justice Ministry, established under the 1997 Constitution, is the only investigating and prosecuting agency in Thailand not under direct police control. Although staffed by police, it is answerable to the justice minister. As such, it exists as a de facto agency to investigate serious criminal acts by police officers, given that there is no specific unit established for this purpose. However, even in high-profile cases it has shown little evidence of success. In perhaps the best-known case of recent times that it has handled—the 12 March 2004 abduction and disappearance of human rights lawyer Somchai Neelaphaijit, allegedly by police officers—it has so far come up with nothing. The victim's wife has repeatedly expressed deep disillusionment with the department, and has gone so far as to say that she no longer expects justice, but would just like to know what really happened to her husband's body. It seems at present that even this may be too much to ask.

No better recent example exists of the impunity enjoyed by the security forces than the killings pointed to by the Human Rights Committee that occurred in the south of Thailand during April and October 2004. The deaths of over 200 young men—at least 78 while in custody—have never been investigated by any agency with the proper judicial authority. The ad-hoc inquiries established in both cases did what was expected of them, defusing political pressure for answers and exonerating those responsible. The generals fingered as primarily responsible in each case have continued their career paths, safe in the assurance of the army commander-in-chief that they will not—and cannot—be disciplined. The widows and mothers of the dead victims have been left to pursue civil claims for compensation, which are likely to drag on for many years. Meanwhile, it was reported that the provincial governor had offered cash payments to families who would drop legal suits against the authorities: another common feature of responses to gross abuses of human rights in Thailand.

Since that time, the situation in the south of Thailand has worsened dramatically. The killings, disappearances, torture and other gross abuses of human rights that are the daily fare of the people living there come as a direct consequence of the manner with which the situation has been mishandled by the government. The sheer lawlessness with which the security forces are operating in the south makes it extremely difficult for independent groups and monitors, even those

with some endorsement of the state, to conduct inquiries. That lawlessness is itself a part of law, as the emergency decree introduced by the prime minister in response to the situation during July guarantees impunity to state agents operating in accordance with orders issued under the decree. However, whereas the conflict there is understood as a regional crisis, it should be better understood as a problem with enormous ramifications for the entire country. For so long as the police, military and related agencies are able to operate without scrutiny in the south the same practices will remain rooted in the whole of Thailand. The fact that under the emergency regulations security forces in the south are permitted to detain suspects for up to 30 days without judicial scrutiny is itself a manifestation of the systemic practices allowing for extended detention of detainees with minimal oversight throughout the entire country. Similarly, the practice of forced disappearance, while believed to be more widespread in the south compared to elsewhere, is an issue of concern that needs to be addressed with reference to Thailand as a whole and not merely one part of it. In this respect, the Asian Human Rights Commission has repeatedly observed that the proposed missing-persons centre to be established under the Central Institute of Forensic Science must be a comprehensive agency with a national mandate coupled to a new law to criminalize enforced disappearances in accordance with international standards. Unfortunately, since it came up for discussion early in 2005, the missing-persons centre has itself gone missing, a victim of bureaucratic infighting and administrative politicking.

The Asian Human Rights Commission has also consistently pointed to the lack of effective remedies for victims of grave human rights violations in Thailand as envisaged in article 2 of the ICCPR, and the need for an independent channel to receive complaints, investigate and prosecute law-enforcement officials for serious abuses. However, such an institution will only become a reality when accompanied by other key elements. Among those, of primary importance is the establishment of a nationwide comprehensive witness protection scheme. While the Witness Protection Office recently set up under the Justice Ministry is an important and laudable first step, it is at present extremely limited in its functions and abilities. This office, among others, deserves very much to be strengthened if the government of Thailand is serious about its commitments to the ICCPR.

TORTURE & CUSTODIAL ABUSE

"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 on 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 prosecution, and if any, in conviction, and that adequate compensation to victims has not been provided (arts. 2, 7, 9). **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 the 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.**" [Paragraph 15]

Although torture victims in Thailand may survive to tell their stories, the obstacles to their obtaining justice are not just formidable: at present they are literally insurmountable. Thailand has not ratified the U.N. Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, and nor it has introduced a domestic law on torture. This is despite repeated statements to the effect that it would do so, and as well as despite torture being prohibited both under the ICCPR and Thailand's own 1997 Constitution. However, in Thailand there is no legal avenue that enables victims of abuse to appeal to the courts on the grounds of a constitutional violation. Therefore, the prohibition of torture under the constitution remains unenforceable in the absence of an enabling law.

The lack of a law criminalising torture encourages Thai police to persist with extremely primitive policing methods. Investigations are directed almost exclusively towards extracting confessions from suspects. Forensic science and other modern techniques of investigation are treated with skepticism, or are otherwise unknown to the investigating officers. Police forensic scientists in Thailand are not crime scene investigators: they stay in the labs while investigations

are done by officers with little or no knowledge of how to preserve and collect vital evidence, and who may under any circumstances be interested to destroy such evidence. Many questions persist over the role of the police forensic science units in assisting them to cover up, rather than reveal, suspicious deaths. Relatives of dead persons bring the remains to the Central Institute of Forensic Science for a second opinion after police forensic professionals attribute the deaths to accident or suicide. Recently the director of the institute described one case in which a police autopsy concluded that a lawyer had died due to a fall from a bicycle; her institute found that the man had been beaten to death. In a bleak reminder of the 2003 custodial death of an alleged drug trafficker who was said to have committed suicide by drowning himself in a bucket of water, this October police in Lamphun claimed that three men arrested on drugs charges all committed suicide in the same way and at the same time: by hanging themselves with shoelaces from the roof of their cell within less than 24 hours of arrest. Police forensic scientists concurred with this assessment, despite many questions hanging over the circumstances of death. The case looked to be headed for the shelf, along with so many others, until another inmate died in the same way and in the same police station during November and promises were made of reinvestigation.

Not only is there little if any prospect of a torture victim securing a criminal charge against a perpetrator in Thailand, but there is also little expectation that any justice or compensation can be obtained through a civil suit. One of the most blatant cases of torture to obtain public attention during 2004 was the subhuman genital electrocution of Ekkawat Srimanta by police in Ayutthaya. Ekkawat's injuries were documented for the world to see, and he went on to speak about his ordeal at public forums. Yet, despite claims by the government that the perpetrators were punished for their crimes, there is no evidence that anything was done other than to temporarily suspend and transfer a handful of officers. This November 2005 Ekkawat dropped his civil claim against the perpetrators, after apparently reaching the same point that Urai Srineh had come to much earlier. Urai was also subjected to horrendous genital torture, allegedly at the Chonburi Provincial Police Station, in June this year. After his ordeal, he was visited in hospital by the police. He took what they offered him, and moved to another province. With the prospects of being able to lay criminal charges next to none, the prospects of obtaining compensation slim and a long way off, and the prospects of getting adequate and immediate protection also dim and little known, the average victim of torture in Thailand has few choices. Inevitably, the withdrawal of cases under coercion and offers of money is a common occurence. Similarly, few lawyers are prepared to

take on such cases, averse to the risks taken by those who do, such as Somchai Neelaphaijit. The lawyers appointed to represent clients who have allegedly been tortured are known to collude with the police and deny having seen or heard any evidence of abuse.

There is a culture of deliberate and consistent falsification of police records in Thailand. When there is no such thing as a reliable record, the possibilities of identifying perpetrators of alleged crimes, including torture, become far lower. In the case of Anek Yingnuek and friends, who also alleged that they were brutally tortured by the police in Ayutthaya during September 2004, it was revealed in court during July 2005 that the officer named on official documents as the investigator did not do the investigation. Another officer who was not named on the documents, the alleged ringleader of the torture, did the investigation. Also common is the inclusion of names in investigations where the officers have played no actual role. In the hearings against five police in connection with the abduction of human rights lawyer Somchai Neelaphaijit, police denied in open court that they were involved in investigations where the suspects have alleged that they were tortured, although their names have been on the lists of investigators. One pointed out that in a high-profile case virtually his entire division was listed as having been involved, although the true number of investigators was small.

Under normal circumstances, once the police in Thailand have someone in their custody, they are able to hold them without charge through successive extensions for up to 84 days. This system of extended detention permits the police to hold victims of torture until evidence is lost. The initial period of detention before going to the court is 48 hours; however, the taking of detainees for extension of detention periods is routine and judges are not sensitised to make inquiries into the treatment of detainees. Nor is there any special procedure for raising questions about possible abuse committed by the police. When a person goes into prison, the routine examination then is unlikely to uncover any evidence of torture. At a recent court hearing observed by staff of the Asian Human Rights Commission, a prison nurse testified before the court that the main purposes of the prison medical inspection are to identify if the detainee is carrying anything illegal in his or her body, and to check for any fresh injuries. He would not record evidence of older injuries, he said, adding that he takes around three minutes for an examination. Hence the correct emphasis by the U.N. Human Rights Committee on detainees having access to doctors at the earliest possible point, with the express purpose of checking for signs of abuse.

PRISON CONDITIONS

"The Committee is concerned at the overcrowding and conditions of places of detention, particularly with regard to sanitation and access to health care and adequate food. The Committee is also concerned that the right of detainees of access to lawyers and members of the family is not always observed in practice. The Committee considers the duration of detention before a person is brought before a judge to be incompatible with the requirements of the Covenant. The Committee deplores the continued shackling of death row prisoners and reports of prolonged solitary confinement. Pre-trial detainees frequently are not segregated from convicted prisoners. Furthermore, the Committee is concerned at the significant number of women in the prison population and the fact that juveniles are often held in adult cells (arts. 7, 10 and 24). **The State party should bring prison conditions into line with the United Nations Standard Minimum Rules for the Treatment of Prisoners as a matter of priority. The State party should guarantee the right of detainees to be treated humanely and with respect for their dignity, particularly with regard to hygienic conditions, access to health care and adequate food. Detention should be viewed only as a last resort, and provision should be made for alternative measures. The use of shackling and long period of solitary confinement should be stopped immediately. Special protection should be provided for juveniles, including their compulsory segregation from adults**." [Paragraph 16]

Although the Asian Human Rights Commission has no illusions about the conditions inside Thai prisons, it was recently alarmed to hear of a case where a young man in an ordinary criminal case who had dared to complain of police abuse, since convicted, has been kept in shackles and solitary confinement, in blatant violation of the country's international obligations under the ICCPR. The wardens are reported to have said that the shackling and confinement was routine, despite the fact that others convicted along with the man who had not complained were not treated similarly. For reasons of the inmate's personal safety it has not been possible to publicise the case: to die in a prison in Thailand is exceedingly easy. Adisorn Satakurama, for instance, died in prison in August 2004 just two days after his house was shot up by an anti-narcotics task force. His parents miraculously survived by hiding behind a refrigerator, which was riddled with bullet holes. The prison autopsy concluded that he died from asphyxia, but a police forensic report unusually concluded that the death was due to poisoning. In August 2005 the news reached the family, which immediately demanded that the case be reopened. The head of the

police forensic medicine institute insisted that the conclusion was due to a typing error until it was also revealed that a doctor had testified in court to the same effect that the victim was poisoned. The doctor was forced to retract his conclusion and a further autopsy found no evidence of poison, although by this time over a year had passed and the family went away unconvinced.

CRIMINAL DEFAMATION

"The Committee is concerned about reports of intimidation and harassment against local and foreign journalists and media personnel as well as of defamation suits against them, originating at the highest political level. It is also concerned at the impact of the Emergency Decree on Government Administration in States of Emergency, B.E. 2548, which impose serious restrictions on media freedom (art. 19, para. 3). **The State party should take adequate measures to prevent further erosion of freedom of expression, in particular, threats to and harassment of media personnel and journalists, and ensure that such cases are investigated promptly and suitable action is taken against those responsible, regardless of rank or status.**" [Paragraph 18]

The Asian Human Rights Commission has throughout 2005 expressed concern at the rise and rise in the use of criminal defamation by powerful persons in Thailand to silence and intimidate critics. In particular, it has closely followed the case of Supinya Klangnarong, who is being sued by the family company of the prime minister. It is also concerned by the case of Ticha Na-Nakorn, who in November was forced to post bail in a criminal defamation case lodged by the former police chief over an allegation of sexual harassment.

There are many problems associated with criminal libel and the concomitant deeply negative effects that they have on a society in which some persons are struggling to have their voices heard on issues of public concern. Many of these have been articulated by concerned individuals and groups inside and outside Thailand, and there is evidence of growing opposition to government efforts to silence dissent through libel. Among the onerous and patently outmoded features of criminal defamation in Thailand are that complainants can lodge multiple suits in various jurisdictions on a single case, that defendants are fingerprinted and detained if they cannot put up bail, and that the courts make prima facie inquiries into complaints filed by the public prosecutor, without hearing from the defendant until and unless the case goes to full trial. These provisions, among others, are completely at odds with a modern system

of criminal justice and deserve to be struck off the books without delay. Without regards to other factors, Thailand should follow the example set by Sri Lanka and immediately erase its law on criminal defamation.

Closely related to the growth in spurious criminal libel suits by powerful persons in Thailand has been a consistent campaign against community radio stations, which culminated in August in repeated raids, legal action and intimidation of an outspoken station and its staff in Bangkok. Although community radio has been accorded a place in Thailand under the 1997 Constitution, the government has manipulated the process for the creation of a regulating body and successfully undermined the constitution's objectives. Simultaneously, local authorities have used various pretexts to target radio stations that have raised critical questions. In November 55-year-old farmer Sathien Janthorn was taken to court on charges of illegal broadcasting, despite the fact that he had been trained and funded in the establishment of the station by a government agency, and had hosted local officials on his programmes. Sathien has insisted that he has been targeted because he had raised questions about misuse of provincial government resources. This is a familiar refrain among embattled broadcasters and one that speaks to the real reasons that the authorities are increasingly hostile to community radio.

ATTACKS ON HUMAN RIGHTS DEFENDERS

"While welcoming the aspiration of the State party to accept and foster a vibrant civil society, including many human rights organisations, the Committee is nevertheless concerned at the number of incidents against human rights defenders and community leaders, including intimidation and verbal and physical attacks, enforced disappearances and extra-judicial killings (arts. 19, 21 and 22). **The State party must take measures to immediately halt and protect against the harassment and attacks against human rights defenders and community leaders. The State party must systematically investigate all reported instances of intimidation, harassment and attacks and guarantee effective remedies to victims and their families.** " [Paragraph 19]

By taking a stand on the principle of free expression, Sathien Janthorn has established himself as a human rights defender, and he now risks the consequences of a jail term and fine. Many others have risked more: human rights defenders, environmentalists and social reformers in Thailand continue to face death threats for their work. These are not idle threats. Lawyer Somchai

Neelaphaijit was warned repeatedly that he was in danger prior to his abduction. A year after environmentalist Charoen Wat-aksorn was gunned down in 2004, Buddhist monk Phra Supoj Suwajano was murdered in June apparently due to a conflict over forest land with influential figures in Chiang Mai. Shortly after, the house of a key witness—who had complained of police harassment—was burned to the ground. All these cases have been taken up by the Department of Special Investigation, and yet in none has it shown any evidence of its work: Somchai's final whereabouts are a mystery; Charoen's killer has denied links with the alleged mastermind; and the investigation in Phra Supoj's case has turned up nothing, with the local police reportedly having succeeded in destroying any evidence and intimidating any witnesses who may have led to the killers.

In August the Asian Human Rights Commission issued an appeal after a grenade attack on the car of Wiwat Thamee, who is challenging corrupt local authorities in the north of Thailand. Wiwat is one of the few human rights defenders in the country who believed that it is better to speak out and risk a confrontation with the perpetrators rather than remain silent in the face of intimidation. Most human rights defenders in Thailand behave differently, keeping quiet about the daily intimidation that they experience and taking precautions for their personal safety. Hence the number of reported threats and attacks on rights defenders and social activists in Thailand remains far lower than the number that has really occurred.

This silence must be broken. Attacks and threats against human rights defenders must be accompanied by outrage. All cases must be treated seriously and responded to with vigour. The concerned authorities must be forced to take responsibility and react. The Asian Human Rights Commission calls on all human rights defenders, social and community leaders and others facing threats in Thailand who are able to document and make public what they face, rather than persist in seeking quiet ways out that may today or tomorrow have some effect but in the longer term only serve to reinforce the culture of impunity that they are ostensibly combating.

DENIAL OF RIGHTS TO MIGRANT WORKERS

"The Committee is concerned about the lack of full protection of the rights of registered and unregistered migrant workers in Thailand, particularly with regard to liberty of movement, access to social services and education, and access to personal documents. The deplorable conditions in which migrants

are obliged to live and work indicate serious violations of articles 8 and 26 of the Covenant. The Committee notes that ethnic minorities and migrants from Myanmar are particularly vulnerable to exploitation by employers as well as to deportation by the Thai authorities. The Committee is also concerned that a significant number of mainly Burmese migrant workers remain missing in the aftermath of the Tsunami in December 2004 and that others were not provided with the necessary humanitarian assistance due to their lack of legal status. (arts. 2, 8 and 26). **The State party must take measures to effectively implement the existing legislation providing for the rights of migrant workers. Migrant workers should be afforded full and effective access to social services, educational facilities and personal documents, in accordance with the principle of nondiscrimination. The State party should consider establishing a governmental mechanism to which migrant workers can report violations of their rights by their employers, including illegal withholding of their personal documents. The Committee also recommends that humanitarian assistance is effectively provided to all victims of the Tsunami disaster without discrimination, regardless of their legal status**." [Paragraph 23]

While the ordinary person in Thailand daily may encounter problems associated with the country's flawed policing and judicial systems, for the millions of migrant workers there these difficulties are compounded by a range of other obstacles. Up until recently, it was unheard of for Thai citizens, and certainly persons of authority, to be held criminally liable for the murder, rape or other physical abuse of migrant workers. The Asian Human Rights Commission has reported on how it has taken years for the case against an airforce officer and his wife accused of brutally killing an 18-year old Burmese woman in 2003 to be brought into the courts: hearings are due to commence in January 2006. In the meantime, a group of men in Tak, including a village headman, were in September found guilty of murdering six Burmese migrants: the first conviction of its kind. Notwithstanding, abuses against migrant workers by government agents in Thailand continue to be rife, and are rarely reported or officially documented. In October, for instance, a police officer in Tak attempted to rape a migrant worker there, leaving behind ample forensic evidence to prove that he forcibly entered her house and assaulted another woman. However, the victims of the assault fled back to Burma rather than attempt to lodge a complaint, speaking to their overwhelming fear of the Thai authorities, and particularly the apparently unassailable power of the police.

WHAT CAN BE DONE?

In a short time during 2005 spent examining the record of Thailand, the U.N. Human Rights Committee reached these conclusions, among many others. The question arises, what can be done about them? The wrong answer would be to ignore them and hope they will go away. They won't, because the problems that they describe won't. The right answer is to begin with the committee's key recommendations, and come back to them again and again, as long as necessary, until there is progress: investigate abuses, especially incidents of torture, cruel treatment, extrajudicial killing and enforced disappearance; begin proceedings against perpetrators; ensure that victims and their families receive adequate redress; set up an independent body to investigate complaints filed against police; guarantee detainees free access to lawyers, doctors and family; allow for prompt challenges to illegal detention in the courts; stop the attacks on human rights defenders and introduce laws to that the fundamental rights of all people in Thailand are protected, regardless of background.

Some of these steps would require relatively little effort from the government of Thailand. Others may require more, but are deserving of the effort. The ultimate question that arises, though, is whether or not the government of Thailand is sincere in its adherence to the principles laid down in the International Covenant on Civil and Political Rights, to which it has voluntarily subscribed: a set of principles which determine that society should be governed by the rule of law and not rule of lords. This is of course a question not only for the government of Thailand, but for the entire people of Thailand. It deserves serious thought, and a serious answer.

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms Arbour,

RE: THAILAND MUST RATIFY THE CONVENTION AGAINST TORTURE

On this international Human Rights Day, December 10, 2005, the Asian Human Rights Commission (AHRC) calls upon you to make it a personal objective that Thailand ratifies the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2006.

Torture is widely practiced by the police and security forces in Thailand. Very brutal forms of torture are also used. During the last year, the AHRC has documented a number of instances of electrocution and burning of suspects' genitals in ordinary criminal cases.

Torture in Thailand is also closely linked to other serious human rights abuses. These include widespread extrajudicial killings and deaths in custody, enforced disappearances and severe custodial maltreatment. Some persons, including a senior forensic scientist, have also faced criminal libel suits under outdated defamation laws for alleging that the police use torture.

As you may know, the Government of Thailand has frequently said that it will join the Convention against Torture. The AHRC is aware from contact with staff in various ministries that they are familiar with the Convention and are prepared to put it into domestic law.

Accordingly, the Asian Human Rights Commission urges you to make it your personal objective to ensure that the Government of Thailand ratifies the Convention against Torture in 2006. Becoming a party to the convention would do much to enhance Thailand's international reputation and would be an important first step in openly addressing the practice of torture there.

Yours sincerely,

Basil Fernando
Executive Director

I N D I A

The lack of domestic remedies for human rights victims and the collapse of the rule of law

Introduction

A few hundred people from the dalits and the members of the backward community in Belwa village in Varanasi district, Uttar Pradesh, the most populated state in the largest democracy in the world, India, have been able to cast their vote in local elections for the first time in 27 years. The election was held on August 17, 2005. In the past they were not allowed to vote and whoever tried to, faced immediate consequences, including mass lynching, social ostracism and even death.

The Constitution of India is the repository of guarantees that ensure the right to vote, the right against discrimination, the right to life, the right against discrimination and the right to participate in the democratic process. There are also local legislations catering for these rights to be implemented at the domestic level, such as the Criminal Procedure Code, the Penal Code, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act. The domestic mechanisms in the country, more specifically the Constitutional Courts, have made use of the powers emanating from the Constitution to interpret it, in order to ensure that Constitutional guarantees are met.

However, the operation of domestic law and the ability to challenge violations of basic rights have remained inaccessible to the ordinary people. When the executive organs of the state fail, and instead become perpetrators requiring reparation be given to victims, as is the case in relation to the police in India, it is often to the courts that people look to redress their grievances and to seek remedies. Even though the courts in India have on various occasions risen to the mark of the expectation of the people, and have come up with directives, far too often these directives remain in the theoretical realm, and are of no use at all to the people.

Domestic remedies often remain inaccessible to the people. This inaccessibility is due to various reasons. Fear of reprisals, a lack of protection mechanisms, enormous delays in Judicial procedures, a lack of proper legal assistance, taboos stemming from caste discrimination; and ineffective laws and/or improper implementation of laws. This has been categorically spelt out in the Concluding Observations of the Human Rights Committee in its report dated August 4, 1997.[1] India is yet to positively implement the directives of the Committee and has failed in submitting the periodic report that was due to the Committee in 2001.

The failure to safeguard human rights standards has resulted in a complete collapse of the rule of law in India. It is reflected in day to day life, and as of today for an average Indian, the concept of the rule of law is a mirage which never yields result. The government, on the contrary, has taken refuge in its domestic laws and Constitution to ward off any criticism. The Asian Human Rights Commission (AHRC), through its work in India, has identified various elements in domestic mechanisms that must immediately be addressed if the human rights situation in India is to improve.

Key areas of concern:

- Custodial torture by the police and the security forces and the impunity enjoyed by these perpetrators
- The lack of accessibility to remedial measures, the absence of judicial process and the failure of the justice dispensation mechanism and its procedures
- Caste based discrimination

1. Custodial torture and impunity by the police and the security forces

India signed the International Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment on October 14 1997. However, it failed to ratify the convention and all requests and pressures for this have been warded off by the government on the pretext that the domestic mechanisms available in the country are well-enough equipped to prevent custodial torture in India.

From its work in India, the AHRC has come across numerous cases of custodial torture in 2005. AHRC has so far received 73 new cases of custodial violence from India during this year. A study of each case would indicate that torture

is widely practiced in India and that there is a consistent and widespread pattern of the use of torture, not only as an instrument in investigations, but also as a means to impart threats and fear upon the people, often in order to cater to the rich and influential.

Brutal forms of torture are reported as being used in India. These include beatings with wooden poles, rapes and cases of extra-judicial killings. This is reflected in the report of the Special Rapporteur on Torture to the 44th Session of the Commission on Human Rights.[2] In this report the rapporteur observed:

> *The methods of torture reported include beatings with fists, boots, lathis (long bamboo canes), pattas (leather straps with wooden handles), leather belts with metal buckles or rifle butts; being suspended by the wrists or ankles and beaten; kachcha fansi (suspension of the whole body from the wrists, which are tied behind the back); having the hands trodden upon or hammered; application of electric shocks; burning of the skin, sometimes with a hot iron rod; removing nails with pliers; cheera (forcing the hips apart, sometimes to 180 degrees and often repeatedly, for 30 minutes or more; and the roller method (a log of wood or ghotna (pestle for grinding spices) is rolled over the thighs or calves with one or more police officers standing upon it); and insertion of chili peppers into the rectum.*

1. (a) The lack of skill, equipment and training

The lack of proper training and absence of proper investigative tools force the police to resort to inhuman acts while investigating a crime. Police stations lack basic infrastructure, in many places even telephones. In the state of Kerala, police stations' telephone connections have been severed for prolonged periods since the state government had failed to pay its telephone bills. A similar problem arose for police vehicles, when local petrol pumps refused to provide petrol and diesel to police vehicles, due to the non-payment of bills.

The state police are also severely under-staffed. Police officers are required to parade in the streets for protocol duties for ministers and dignitaries, keeping them away from their primary duty of protecting the citizens. Politicians, their partners in trade, the rich, and criminals, have undue influence on the policing system. It is a common feature in the police stations in India that the moment a person is arrested, the local leader of the political party either gives a call to the police station ordering release of the person or even comes to the police station asking for the immediate release of the detainee. All these elements add up to heap pressure upon the police to solve crimes, for which they are ill-equipped.

1. (b) Autopsy procedures

One shocking example of a lack of equipment and mechanisms is the primitive nature of post mortem procedures in many states in India. One such state is West Bengal. The procedure for post-mortem examinations in West Bengal is unreliable at best. Most morgues in the state are located in sub-divisional and district hospitals. The conditions defy description: without air conditioning and freezers, or other equipment to deal with the bodies, corpses rot within hours. Even though the doctors must perform post-mortem examinations according to Indian laws, in fact this is left to a caste group, the Dom, a sub-group of the Dalits (the so-called untouchables) who are officially assigned the task of handling dead bodies.

The Doms, who are usually completely uneducated, open the bodies with hammers, rusty nails and axes, and call out what they see to the doctor, who is sitting 30, 40 or perhaps 50 metres away. The doctor then records their observations, and the body parts are discarded. The failure to treat a victim's body with due respect and diligence is a violation of human dignity.

The lack of autopsy procedures not only obstructs the investigation into a crime, but also benefits the corrupt police officers and the criminals in uniform. As of today, there is no credible mechanism in West Bengal which could be relied upon in cases of custodial deaths. Scientific medical examinations, as mentioned above, are open to extreme manipulations which undermine their credibility in any investigation. The private, but government-recognized agencies that also could be used for such examinations, if not for autopsy, but for other scientific examinations like DNA finger printing, are extremely costly and are beyond the reach of even the average Indian middle class, let alone the poor. A simple examination of blood to decide parentage costs more than 2000 US $ and can take at least three to four years. Expenses coupled with delays make these alternate means even more inaccessible to the needy. There are no other alternatives or initiatives by the government to correct this problem.

However, a more serious problem is that the failure of the system for post-mortem examinations is deeply connected to the failure of the legal system in India. In particular, in terms of the cases of torture or extra-judicial killings committed by the police, the situation is worse and these abuses tend to be conducted systemically. In many cases, the perpetrators manufacture false post-mortem reports with close cooperation by the doctors and the police. Then,

these false reports are used as important evidence in court. As a result, the perpetrators enjoy total impunity.

1. (c) Torture exploited by the rich and the influential

In addition to the concept that torture is often resorted to as a brutal tool for investigation of cases, in India, torture is also resorted to as a tool for oppression.

The case mentioned in the introduction is one such example. In Belwa, in the past, the police used to take members from the dalit and backward communities into custody if they dared to file a nomination for the election or if they tried to voice their protest. The police misused their authority to please the local political leader who had won uncontested elections for about 27 years. The one and only time he remained out of power was when the constituency was reserved for a woman candidate, at which time he placed his wife as a candidate and got her into power unopposed.

The absence of any sort of opposition and absolute impunity is one of the primary reasons for torture continuing to prevail in India. Anyone who dares to complain against the police must do so at the police station or with a higher ranking police officer, who entertains jurisdiction over the policemen who are alleged to have committed the offence. Any person who dares to complain about police officers in India faces the wrath of the law enforcement agency.

As with so many others, this was the experience of Mr. Madhusudan Seth, a businessman from Bardhaman district, West Bengal. Mr. Seth was taken into custody on a petty charge, for which the prescribed punishment is a fine of less than 250 Rupees. However, Mr. Seth was detained in custody at Manteswar police lockup for the night, where he was allowed to wear only his underwear. The next morning he was paraded in public semi-naked and then put onto a public bus and taken to Kalna Magistrate's Court. The magistrate did not take any action about the parading and presenting of the detainee in court in only his underwear, despite Mr. Seth making a complaint regarding this.

The police had detained Mr. Seth after he lodged a complaint against a police officer from Chapra police station in Nadia district. Mr. Seth complained that the officer had behaved in an inhuman manner and used vile language when Mr. Seth had attended the Chapra police station regarding another matter. Mr. Seth further lodged a complaint with the National Human Rights Commission, although the Commission is yet to take any action. Mr. Seth is

perhaps lucky, as many in his position have been killed in retaliation for complaints that they have made, notably those who are detained in prisons.

1. (d) Prisons and places of detention

The conditions of prisons in India are deplorable. The money spent on prison reforms and the development of their basic amenities is negligible. The Government of India ignores the plight of thousands of citizens languishing in custody under horrifying conditions. It is common to find convicts and pre-trial prisoners held together in crowded cells, without proper facilities for basic human existence like fresh air, moving space, decent food, clothing, medical attention and communication. Many are tortured, killed, or face other abuses at the hands of fellow detainees and the authorities.

Of particular concern are the conditions of detention of juvenile prisoners. The Prisoners Act of 1900 (Act No. 3 of 1900) regulates India's prisons and all aspects of prisoner management to this day. State governments can also legislate, wherever permitted by this Act. Apart from the Prisoners Act, all states except for Nagaland, have acts on children that provide for the management of juvenile prisoners.

Despite legislation protecting juvenile prisoners, children committed to prisons in India experience extreme cruelty and neglect. In most cases, juvenile prisoners are put together with hardened criminals. They are often sexually abused and compelled to do hard labour. Older detainees make them do the heavy work allotted to them, usually in connivance with jail officials. This takes place in spite of a Supreme Court ruling stating that care is to be taken to ensure such practices do not occur.

Legal provisions for the counselling of children are often ignored. The government does not concern itself with appointing mental health professionals to vacant posts, and where it does, the persons filling them are invariably inexperienced and ill-motivated, defeating the purpose of counselling. Children are frequently denied access to their parents and it is also common for prison officials to demand 'gifts' from parents coming to meet their children.

Corrupt prison officers also arrange preferential treatment for prisoners with connections to crime bosses. Such treatment may be the provision of entertainment - including sexual pleasures, often at the expense of another inmate's liberty and body - unrestricted movement inside the jail, and

uninterrupted visitor sessions. Meanwhile, common convicts in the same jail will be denied even basic facilities. In Viyyur Central Jail, Kerala, affluent prisoners are allowed to bring food from the best hotels in town, a share of which goes to the prison officials and other designated inmates. They also enjoy the privileges of freshly ironed clothes brought from home, the use of mobile phones, and comfortable beds with pillows and mosquito repellents.

Jail rules often provide for inspections by higher officials, and sometimes by judges or the State or National Human Rights Commissions. During these inspections, however, inmates are not in a position to make complaints, since jail officers accompany the visitors. Anyone daring to make a complaint faces the consequences once the inspection is over. In a case reported from the Viyyur Central Jail, contraband drugs were allegedly seized from a convict. However, at the trial, it was proved that he was being falsely implicated because he had tried to lodge a complaint about prison conditions when a local magistrate made a visit to the jail.

Ill-treatment of prisoners is common throughout India. In Kerala, for example, every male convict entering prison must face the ordeal of 'jail call'. Immediately on arrival, the prisoner is told to bend down, after which a few heavy blows are delivered, causing serious pain along the length of the victim's spine. The inmate's cries of pain can be heard throughout the prison, and so this is known as the 'jail call'. While female inmates do not get this treatment, they suffer continuous ill-treatment throughout custody, often including sexual harassment and rape.

In a country where the privacy of free citizens is often at stake, it comes as no surprise that prison inmates have none at all. Jail wardens read all letters coming in and out. Although done on the pretext of ensuring security, this is an unquestionable intrusion into inmates' civil rights. Prisoners are also denied the right to vote while in jail.

1. (e) Criminals in uniform

Many officers in the police and law enforcement agencies in India are criminals and killers in uniform. Torture in India is widespread, unaccounted for and rarely prosecuted. It contributes to the state of anarchy and lawlessness in many parts of the country. Recently, the police in India are also engaged in making extra money, collecting funds from the people to settle civil disputes. In the past, it was done by local criminals, but now the police have stepped in

to replace them, and are accepting money to bully people. Even private money lending firms are employing police to collect money from defaulters. In the hands of the wealthy and influential, Indian law enforcement agencies have also strengthened their links with criminal elements. Even the judiciary in India cannot sever the nexus between police and criminals.

1. (f) Impossibility to complain and to prosecute

To register a complaint against the police, one needs to register a complaint with the police. This complaint, if registered, is considered as the First Information Report. However, the police often refuse to register the complaints, with the only option left to the complainant being to approach the court. What happens when the person approaches the court is even more tragic. This is dealt with in detail in the latter part of this report.

However, to summarize, a person who dares to file a complaint risks running the chance of facing organized brutality by the police. Often, false charges are filed against the victim and in most cases such charges are for non-bailable offences, which ensure the detention of the victim for lengthy periods. The victims have to face enormous hurdles if they are to successfully prosecute a perpetrator of torture, which often pose an insurmountable barrier for any ordinary Indian.

To successfully prosecute a perpetrator, a complaint has to be registered in the first place. Due to the absence of any monitoring mechanisms and a lack of proper laws, the only course available is under the Criminal Procedure Code of India, where a person can either register a complaint against the police officer at the same police station where the officer is working or approach the court by way of a private complaint. The fate of a complaint at the police station where the officer in question works is none other than to be thrown into a waste paper bin. If the complaint is instead filed in court, the only option available to the court is to direct the complaint to the same police station to conduct an inquiry and to register a crime, if the inquiry reveals that a crime has been committed. So in any case, the odds are against the complainant.

These procedures and the lack of a credible mechanism facilitate the complete impunity of police officers. In spite of all this, the government of India still maintains that domestic mechanisms are sufficient to prevent custodial torture in India. In 1997, in a landmark case, the Supreme Court of India ruled and

issued directives regarding the procedures to be adopted at the time of arrest, detention and investigation.[3] The court ordered:

(i) police personnel carrying out arrest and interrogation should wear accurate, visible and clear identification and name tags with their designations, the details of which should be recorded in a register;

(ii) a memo of arrest (including the relevant date and time) shall be prepared by the arresting police officer and shall be attested by at least one witness (either a relative of the arrestee or a respectable local person) and countersigned by the arrestee;

(iii) one friend or relative of the arrestee (or another person known to him or her who has an interest in his or her welfare) shall be informed, as soon as practicable, of the arrest and detention at the place in question;

(iv) where the next friend or relative of the arrestee lives outside the district or town in question, he or she must be notified by the police of the time, place of arrest and venue of custody within 8 to 12 hours of the arrest;

(v) the arrestee must be informed of this right as soon as he or she is arrested or detained;

(vi) an entry must be made in the diary at the place of detention regarding the arrest of the person, including the name of the next friend who has been informed and the names and particulars of the police officers in whose custody the arrestee is detained;

(vii) on request, the arrestee should be examined for injuries at the time of arrest and provided with a copy of the resulting report, signed by both the officer and arrestee;

(viii) the arrestee should undergo a medical examination every 48 hours by a doctor from an approved panel;

(ix) copies of all documents regarding the arrest are to be sent to the appropriate local Magistrate for his or her records;

(x) the arrestee may be permitted to meet with his or her lawyer during interrogation, though not throughout the interrogation;

(xi) a police control room must be established at all district and State headquarters where information regarding the arrest should be received within 12 hours of the arrest and displayed on a conspicuous notice board.

(xii) These requirements are in addition to existing safeguards and do not detract from other directions given by the courts on this matter. They will apply with equal force to the other governmental agencies which have the power to detain and interrogate individuals. They need to be followed strictly; failure to comply shall render the official concerned liable for departmental action and contempt of court proceedings.

Eight years have elapsed since this judgment was pronounced. However, the AHRC can quote at least a few dozen cases which were reported from West Bengal during 2005 where none of these guidelines were followed.[4] Even

though such cases were brought to the notice of the Supreme Court, the court is yet to take any action on these cases.

1. (g) Draconian laws

If for the rest of India the police is playing havoc with people by employing torture, it is the security forces which replace the police in the eastern states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. The special law promulgated by the government of India grants special powers to the security forces deployed in these states to impart torture and violence under the pretext of counter-insurgent activities. [5] This law stipulates that:

> *Any commissioned officer, warrant officer, non commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area-*
>
> *(a) if he is of opinion that it is necessary so to do for the maintenance of Public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;*
>
> *(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offence;*
>
> *(c) arrest, without warrant, any person who has committed a cognisable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognisable offence and may use such force as may be necessary to effect the arrest;*
>
> *(d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that Purpose use such force as may be necessary.*

Section 6 of the Act also provides for:

> *No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.*

The Armed Forces Special Powers Act (AFSPA) contravenes the Indian Constitution and international human rights standards. This Act is in derogation to the fundamental rights as guaranteed under the Indian Constitution and also surpasses many provisions in the Criminal Procedure Code.

The government of India has again extended the period of enforceability of the AFSPA by repeating its declaration of the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura as disturbed areas for a further period of one year. Under international human rights and humanitarian law standards, there is no justification for such an act as the AFSPA. The AFSPA, by its form and in its application, violates the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Civil and Political Rights (the "ICCPR"), the Convention Against Torture, the UN Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under any form of Detention, and the UN Principles on Effective Prevention and Investigation of Extra- legal and summary executions.

1. (h) Summary

Torture is widespread and has routinely been practiced at police stations in India. Unchallenged and unopposed, it has become a 'normal' and 'legitimate' practice. Torture often leads to custodial deaths, disappearances and deaths in 'encounters'. The numbers of reported custodial deaths are high and keep escalating. Besides this, there are fatal injuries, permanent disabilities, mental derailment, loss of faculties and psychological trauma.

With the emergence of new sanctions for torture - like the Prevention of Terrorism Act, Terrorism and Destructive Activities Act (Prevention), and Essential Services Maintenance Act - that justify or legalize any amount of torture, the police enjoy enormous freedom of action, and freedom to abuse. The use of extremely crude and filthy language is very common at police stations. It amounts to cruel, inhuman or degrading treatment, and is grossly derogatory to the dignity of the human person. Torture has also been practiced on women and girls, in the form of custodial rape, molestation and other forms of sexual harassment. Torture has been inflicted not only upon the accused, but also on bona-fide petitioners, complainants or informants. The police deliberately delay the submitting of First Information Reports and unnecessarily harass and torture such persons for no reason.

There is no impartial mechanism for receiving complaints against torture. The complaints must be made to the police authorities themselves. This only allows the police to pressure and harass the victims, who are de facto complainants. The Convention against Torture requires impartial investigations. Unfortunately, the police are not impartial concerning cases where members of police are the alleged perpetrators of abuses. In India, the police are not independent. The National and State Human Rights Commissions, and other national institutions of India, have neither the power nor the provisions to deal with torture effectively. The National Commission for Police Reforms many years ago recommended that the police in India should be made independent. The National Human Rights Commission itself has gone to the Supreme Court with a plea that the recommendations of the National Police Commission be implemented. However, the absence of political will has meant that these attempts have failed.

Torture and the fabrication of cases are closely linked. In attempting to save offenders for various, corrupt reasons, the police implicate innocent people and impose any amount of cruelty and torture on them until a 'confession' is extracted.

Torture is not treated in India in the way required by the Convention Against Torture. Only section 330 in the Penal Code deals with punishment for the use of force in obtaining confessions. However, if torture is to be dealt with effectively, it is essential that it be made an offence, as per the terms of the Convention. This also involves provisions for the adequate punishment for acts of torture. Thus, the law against torture in India is extremely defective in terms of international understanding and social jurisprudence.

The prosecution system as it exists now in India only militates against the rights of victims of human rights violations. The prosecutors act in many ways to protect the perpetrators. Prosecutors should be independent, competent, and appointed through a judicious process to scrupulously uphold the values enshrined in the Criminal Procedure Code.

In the present criminal justice system in India, the victims or complainants have no decisive role in seeking redress. Everything depends on the mercy of the investigating officer and the state prosecutor, who are often subject to manipulation and malpractice. Therefore, the de facto complainants or victims, if they are resourceful and confident, should be allowed to appoint their own lawyers to conduct prosecutions on their behalf.

With India not having ratified the Convention Against Torture, its citizens do not have the opportunity to find recourse in remedies that are available under international law. Indian practices with respect to torture do not come under international scrutiny. Access to the UN Committee Against Torture, and other mechanisms, is effectively denied to people living in the largest democracy in the world. Since the country has also not signed the Optional Protocol to the International Covenant on Civil and Political Rights, its citizens also do not have the right to make individual complaints to the UN Human Rights Committee. The victims are trapped within the local system, which in every aspect acts against their rights. Many victims conclude that a justice system accessible to the poor of the land does not exist at all.

The so-called "Human Rights Court" is a misnomer. What exists is an additional duty appended to already overworked judges. Thus, adjudication on human rights matters is trapped within the same cycle of delay and neglect that affects other cases. The general principle that 'justice delayed is justice mocked' equally applies to these courts. The concept of Human Rights Courts needs to be revamped and re-envisaged so that an effective mechanism can be introduced. Judges who sit in such courts need to have thorough knowledge of human rights law and should be endowed with a deep sense of the sublime supremacy of human life over all else.

The early ratification of the Convention Against Torture is imperative to defend the human rights of torture victims. It is mandatory for any attempt at reforms in the police system to make it an effective mechanism for law enforcement and administration of justice.

Most countries in the world have ratified this Convention and India, as a signatory, has no excuse for not ratifying it. In fact, the unwillingness of the Indian government to ratify the Convention brings only discredit to its people and places the country in a very shameful situation.

Meanwhile, it is highly necessary to document torture cases in a meticulous way. The lack of proper documentation only permits the unfettered continuance of barbaric methods of torture and the acquittal of the culprits. Had there been proper documentation, it would not have been possible to hide the colossal and devastating atrocities of the police, whose constitutional mandate is to protect the people. NGOs should undertake scientific and systematic documentation of torture and follow-up on these cases.

The communal and caste divide in India is closely linked to torture. Police and law enforcement agencies have been instrumental in much of the recent communally charged violence in the country. Torture remains unaccounted for and not prosecuted. It leads to total anarchy and the rule of vandalism and lawlessness. When police become a party to such violence, it becomes a state-sponsored crime against the people. The national and state human rights commissions have no authority to change this situation. There is no independent body to inquire into reported cases of torture. Commission orders are mere recommendations and are often ignored. Where torture is state-sponsored, the recommendations rarely get executed. The Human Rights Act is simply eyewash for the international community; since it cannot be enforced, it is useless.

India has signed the CAT, but not ratified it on the pretext that existing laws have adequate provisions to prevent torture, in addition to constitutional safeguards. But the provisions of the Criminal Procedure Code, Indian Evidence Act and Indian Penal Code are worthless, since there is no procedure for independent inquiries into torture and compensation for victims. Apart from this, the government has implemented new draconian laws like the Prevention of Terrorism Act, which denies the accused any guarantees to a fair trial. Constitutional remedies too are meaningless for most victims. The Constitutional Courts are virtually inaccessible to ordinary people, and even if a victim is successful in getting a case heard, they usually experience huge delays. The lack of motivated lawyers and legal assistance, and a defective prosecution system, worsen this situation.

2. The lack of accessibility to remedial measures, the absence of judicial processes and the failure of justice dispensation mechanisms and procedures

2. (a) Court delays

A decade of waiting is not much time in deciding a case in India. This is equally applicable to civil and criminal trials. The legal process in India is always protracted, with parties being made to spend an unlimited amount of money and to run from one place to another in pursuing their claims in court. There are numerous reasons for this protracted process, which in fact could be eliminated by conscious efforts. In civil cases, one such delay is primarily caused by technical snags and delaying tactics by the lawyers. The attitude of the judges once the case has finally been heard, resulting in the reservation of any

open pronouncement of the judgement for years, is another contributing factor. In criminal cases the delay starts from the inability or often refusal of the investigating agency to submit a charge sheet in time after the proper completion of an investigation.

Even if the charge sheet is submitted, the prosecutors' office also plays a role in delaying the process. Many courts do not have sufficient prosecutors to represent cases as and when they are taken up. In a local Magistrate Court in Wadakkanchery, Kerala State for instance, prosecutions are stalled for years due to the fact that the only prosecutor available was on deputation from another court. Only when this officer had enough spare time would he turn up at the Wadakkanchery court. By the end of one year the number of criminal cases pending disposal before the court was so large that it will take several years to clear off these cases, given the fact that every year the number accumulates, adding to the existing backlog. It is shocking to note that when the backlog of cases increases, judges connive with police officers and force people to plead guilty on charges so that cases can be summarily tried.

Another element causing delay in proceedings is the lack of infrastructure to deal with evidence. The police in India are neither trained to gather evidence scientifically, nor understand the importance of forensic evidence. It is common for material evidence to be wrapped in newspapers and bound by threads and then produced in court. The safety of the contents depends upon the quality of newsprint. Given the climatic conditions in India, this evidence can be easily damaged within a few months, which is often well before any preliminary hearing is heard.

In cases where there is a need for forensic examination, the situation is even worse. The objects requiring forensic examination will be detained at the central or state forensic lab for anywhere up to 15 years. This reflects upon the facilities provided for these labs and also the work habits of the forensic technicians. The evidence held at such labs is also prone to manipulation or destruction, as demonstrated in the state of Kerala, where an 'accidental' explosion destroyed several pieces of evidence pending examination. The handling of human remains and dead bodies is equally bad. In cases where there is a requirement of finger print examination or handwriting examination, the minimum period required for the result to be sent back to the referral court from the forensic lab is ten years. These contrived delays in government labs leads to a necessity to hire private experts, which is only to the benefit of 'government recognised' private experts. The hiring of private experts or labs is highly expensive and

often the management of private labs pay kick-backs to officers at the government lab to have this work awarded, engendering systematic delays.

The technical hindrances that cause delays in court proceedings further affect the quality of evidence given by witnesses. When a witness is required to testify concerning an incident she saw a decade earlier, her recollection of events will often be tempered by time. This may affect the quality of her testimony, as well as the entire trial. Evidence can also be affected due to the lack of witness protection provided to those willing to testify. Witnesses may alter their evidence out of fear or even withdraw from the case, as they are more susceptible to threats and intimidation the longer a case is drawn out.

The lack of basic infrastructure within the entire justice system is another crucial issue that causes delays and inefficiency. When a prosecutor's office wants to communicate with a particular police station, there is no mechanism available other than the initiative of the prosecutor to spend from his own pocket or to make the interested party pay for this communication if the entire proceedings are not to be stalled. This lack of basic infrastructure not only results in delays to proceedings but is also a root cause of corruption.

Not even the Supreme Court of India - the highest court in the country - is immune to delays. Its much acclaimed judgment in the D.K. Basu case in 1997, known for its directives aimed at preventing custodial torture, took ten years to be reached. If a judgment takes this long in the Supreme Court, what can be expected from courts of lesser authority?

2. (b) Summary

According to recent statistics, acknowledged by the former Chief Justice of India, Justice Bharucha, the judge population ratio is 12 to 13 judges per million. On April 10, 2004 there were 163 vacancies at various High Courts throughout India. A study conducted by the Ministry of Finance reveals that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts. The Law Commission of India, in its 189th report, published in February 2004, acknowledged that over two million cases are pending in about 13,000 district subordinate courts. About two thirds of these are criminal cases, while about a million are sessions cases which involve heinous offences such as murder, rape, or dacoity (armed robbery). About 30 per cent of the sessions cases have been pending for at least three years.

The denial of justice through delays is a mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system in the country. This has led to people settling scores on their own, resulting in a growing number of criminal syndicates in the country and reflecting the loss of people's confidence in the rule of law.

2. (c) Office of the public prosecutor

The prosecutor's office plays a key role in any criminal case. It plays a vital role in the 'fact finding' mission of the court and is expected to assist the defence as well as the court in its journey to justice. However the quality of this office has deteriorated to such depths that the public no longer has any confidence in it. The prosecutor is often viewed as an extended arm of the police, in court, in a different uniform.

The reasons for such deterioration are manifold. They include: deep rooted corruption, nepotism, inefficiency, caste prejudices, political influence, the influence of the home department of the state and that of the central government. Unless the impact of these effects are not put to an end, the office of the prosecutor will deteriorate further, beyond any possibility of recovery.

The office of the prosecutor is responsible for approving the charge against the accused, and can influence the court in decisions regarding bail for the accused, streamlining the selection of witnesses in a case, and each and every tenet of decisions made in the process of criminal justice. However these duties and responsibilities are discharged with such callousness that throughout the country, with some exceptions, the office of the prosecutor is disgraced.

The appointment to the prosecutor's office only requires qualification, competence and efficiency as its parameters, as per law. However, in practice, these terms have different meanings. Qualification - the amount of money one can offer to the kingpins who play the 'pivotal' role in deciding things and the influence one can invoke on such persons through other external means. Competence - the allegiance you have to the 'god fathers' in the government and your political background - or in some cases how good you are in beating your colleagues in the race. Efficiency - how good you are at not asking questions and ignoring duties, and, in extreme, cases how good you are in accepting money/favours from 'interested parties' in ditching the interest of the real victim, or in some other cases, in the creation of false accused persons and witness.

The prosecutor's office has two different levels. Firstly, the district prosecutor, who is appointed for a period of three to five years - mainly at the pleasure of the government; and the other at the lower magistrate courts, who are appointed on a permanent basis. For the former, the appointment is often in consultation with the district collector and the principal district judge, and a few other players, like the local representative to the legislative assembly. The role of the district judge is limited to that of mere consultation and often his advice is ignored (provided the judge himself does not play into the hands of those in authority). The final say is from those who are at the capital. All the above-mentioned parameters satisfied, the appointment is made. These officers resign at the pleasure of the ministry. This is the case for the high courts as well.

For those in the lower judiciary - in this case the magistrate courts - the appointment is more permanent in nature. Here also the 'key stake holders' decide things, screening away 'unwanted elements' and submitting their list for the approval of the godfathers. Often these appointments get stalled for months and sometimes years, due to internal feuds within the ministry and to high competition.

When these 'prosecutors' appear in court they do a 'good' job. For every bail application at the session's court they request for time to get 'feedback' from the police. However, this request is the indicator to the defence lawyer to 'feed' the requirements. The ignorant defence lawyer will soon learn the 'trick' since, unless this 'feedback' is obtained, the bail application will get postponed on the pretext of gathering detailed information from the concerned police in order to decide whether the bail application is to be opposed or not. It is common that bail applications are decided at the discretion of the prosecutor, even though the law mandates a considered order taking into account the circumstances of the case and the application of a 'judicious' mind.

Furthermore, when the trial commences, the prosecutor is the person who accesses the criminal records at the last moment. Often, the prosecutor cuts a sorry figure in court not knowing the relevancy of the witnesses whom he presents. This is an advantage to the defence lawyer, if the defence is clever enough to get the maximum benefit of the situation. Court proceedings would be stalled waiting for the prosecutor, since he would be engaged with some other 'important' matters. It is a common scene in any criminal trial that the prosecutor is forced to scramble through the file and return a blank stare to the questions put by the judge.

The prosecutor's office is provided with the least conveniences. The payment for a public prosecutor is so meagre, that an average lawyer makes more money out of his private practice. In the Trichur court, Kerala state, the public prosecutor's office often has its telephone line disconnected due to non-payment of bills by the state government. There are no subscriptions to any law journals or any good textbooks. The only 'regular' subscription is the state gazette, which is mailed to the office. There is no mechanism with which the prosecutor's office can establish any communication with the concerned police station in case he needs any feedback on a case. None of the police are willing to take the prosecutor to the scene of a crime and the prosecutor doesn't make such a request, out of a lack of interest and since such requests would never be met.

Many of these public officers allow their offices to be further undermined, by conniving with the police officers, so that they get references from the police station in motor accident cases. This link is used by the prosecutor to get clients who need to file accident compensation claims. Even though this could be termed as 'ambulance chasing' in ethics, this is not a concern for the 'ethics' of the prosecutor's office.

Caste prejudice is another issue that dominates appointment at the prosecutor's office. The vacancies are divided between the different castes that form the majority in the government. It is therefore obvious that those from the lower caste are excluded. If the prosecutor is a person who comes from an upper caste using his money, power, caste influence and political allegiance, one can imagine in which way he would prosecute an accused in a crime against the lower caste.

2. (d) Summary

There are simple methods for correcting these erring officers. Appointments should be made on the basis of competency and not on allegiance, nepotism and influence. The office of the prosecutor should be made accountable for the mistakes it makes while conducting prosecutions, which is not limited to a remark in the judgment. Political influence in appointments should be fully removed. This might require amendments to existing state legislations. The role of the prosecutor should be redefined from that of a clerk in robes to that of a socially committed, independent, professional officer of the court. The prosecutorial office should also be made attractive with conveniences, to attract better professionals. All these require motivation from the people and

through the people. As they say, the people get the government they deserve, as is the case with the prosecutor.

3. Caste based discrimination

3. (a) Discrimination at all levels

The concept of a caste system brings in stratification of society based on duties. It is a defining tool with which to cast obligatory duties on people by birth that can't be taken away. On the surface, it seems to paint a beautiful picture of societal obligation and duty. In reality, it is used as an instrument of exploitation by the upper castes against the lower castes.

The tsunami that hit countries around the Indian Ocean on December 26, 2004 brought misery to all living along their coasts. India was no exception. However, in India, the suffering of the Dalits - so-called 'untouchable' - communities affected by the disaster has been exacerbated due to caste-based discrimination in the provision of relief supplies and other assistance. The world is unaware and the government of India has not acknowledged that relief operations are being carried out with caste as a determining factor.

Places such as Kadapakuppam and Pattipulam of the Kachipuram district in Tamil Nadu have received no relief whatsoever. This is despite 175 families in Kadapakuppam and 280 families in Pattipulam having felt the brunt of the disaster. Despite complaints by villagers in these two places, at the time of writing no government officials or aid agencies have gone to the assistance of these people. Likewise, in Pannanthittu village in Tamil Nadu's Chidambaram Thaluka, all 150 families affected by the tsunami have been denied aid. Villagers in MGR Thattu, meanwhile, protest that they are being discriminated against, as little relief has been provided to them.

Caste-based discrimination has also been evident in relief operations elsewhere. When burying the dead, Dalits have been brought in to handle the bodies, as 'traditionally' they have been obligated to do. Community kitchens, established to distribute food to victims, were divided into two: one for caste Indians and one for Dalits, as upper castes would not consume food prepared by Dalits. It is a sad reality that even in times of extreme necessity, caste prejudices dominate social exchanges.

The tsunami relief operations in South India are indicative of persistent caste discrimination throughout the country. In the state of Maharastra, massive evictions from tribal lands in Nasik District are yet another example. Evictions are not limited to Maharsatra, having also been meticulously carried out isolating lower caste people in various other states. If the claim for land by the Maharastra State Farming Cooperation deprived the basic right of the tribal community in Maharastra, in West Bengal, the eviction from Bellilious Park and Gobindpur Railway Colony was because of the apprehension that the presence of Dalits would pollute the upper caste shrine's atmosphere in the locality. In West Bengal, even the High Court affixed its seal of approval upon the eviction, ignoring the basic legal right for each party to be heard. However, evictions are not the only form of discrimination. The forced labour of manual scavenging and carrying of night soil, slave practices in granite quarries in Karnataka and Tamil Nadu, denial of education in Orrisa, starvation deaths in Maharastra, Bihar and Kerala, are all shocking realities for the Dalits in India.

The Constitution of India provides certain safeguards against caste discrimination. However, constitutional remedy is often inaccessible to Dalits and lower castes. Considering India's vastness and its limited resources and poverty, the possibility of a victim, who is otherwise deprived of basic standards of living, approaching a constitutional court is most unlikely. Compounded by the burden of expenses in litigation and the immense time it takes for reaching a final verdict, such legal attempts are rarely made by victims.

The case of the tribal (adivasi) community from Gujarat, is one such example of discrimination, even though 'technically' a tribal will not come under the 'definition of caste' since a tribal is considered even lower than the untouchable, the lowest in the caste hierarchy. Discrimination defines the lives of *adivasis*, or indigenous people, in India — discrimination in access to land, water, education, employment, health care, roads — almost all aspects of their lives are affected by discrimination.

In the state of Gujarat, the construction of the Ukai Dam about 40 years ago still reverberates in the lives of *adivasis* in Surat District. *Adivasi* families, which had had as much as 120 acres of land before the dam was built, were given only four acres, plus compensation, and even this small amount of land was up to 60 kilometres away from where their resettlement homes were located. As a result of the dam's construction, most of the *adivasis* today in Gujarat's Surat District no longer enjoy self-sufficiency and are forced to encroach on forest land administered by the Forest Service Department to survive, leading

to shootings or beatings of the *adivasis* by Forest Service Department officials. Or, they may be forced to work for the district's sugarcane factories, where families receive 3,000 rupees (US$66) or less after cutting sugarcane for more than 12 hours a day for six months. While the sugarcane fields are irrigated by a canal connected to the Ukai Dam, most of the *adivasis* in the district are still waiting for a canal to be constructed to irrigate their fields, which was planned about four decades ago, as part of the original design of the Ukai Dam. Construction of this canal would allow the *adivasis* to be more self-sufficient and would no longer force them to be a large source of cheap labour for the sugarcane factories.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 provides for penal provisions against atrocities committed against members of the Dalit community and other lower castes. The rules formulated in accordance with the legislation also provide for protection to the lower castes and are more preventive in nature. However, the law and rules are limited. They do not address the root cause of 'the caste system'. In cases where compensation is awarded, the amounts paid in damages are far below international standards.

Section 153A of the Indian Penal Code, which provides for punishment for instigating acts of enmity between groups based on religion, race, place of birth, residence, language and so on, is far less enforceable since the burden of proof in criminal trials is high. But that does not mean the standards of trial should be brought down. The chances of a probable conviction, however, are far too low. These measures do not effectively deal with the issue of caste system in India.

The human rights institutions in the country, namely the national and state-level human rights commissions, do not have any authority to make an affirmative action on receiving a complaint. The powers of these institutions are restricted to that of an advisory nature. Sections 12 and 13 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act limit the authority of the rights commissions to receipt of complaint, inquiry, inspection and either to refer the matter to an appropriate authority for further action or to provide advice to the government.

These limitations effectively make the institutions incapable of taking any affirmative action for the protection of human rights. An order of compensation awarded by these institutions does not have an executable

authority. Such an order can only recommend the government to collect the fine from the perpetrator and disburse the amount to the victim. If the perpetrator is not an employee of the government, the possibility of implementing the compensation order will be low. Even when the perpetrator is a government employee the order is often not executed. That makes the system itself a mockery and may result in discouraging the victims from approaching these institutions.

India also has limited its ratification to the primary international covenants by opting out from the authority of independent committees constituted under the covenants to receive individual complaints. Hence, for a victim of human rights violation, the matter needs to be addressed within the country, where the remedies are inadequate or almost unachievable.

The caste system is in violation of international human rights standards. It tends to weaken the human urge to excel and be free, since there is no liberation from its clutches, unless a person is very determined. Often this determination is clamped down due to societal pressure. It requires collective effort and massive movements to free society from this system. This may not be attained in a short period of time, but conscious effort from the government, which will affect the population, is a necessary prerequisite to counter this abhorrent system.

There is considerable international human rights jurisprudence supporting the link between caste and racial discrimination. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides five grounds for direct or indirect "racial discrimination". These are "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin." The U.N. expert body, the Committee on the Elimination of Racial Discrimination (CERD), has reiterated that discrimination based on "descent" referred to in the ICERD convention, does not solely refer to race but equally covers caste situations and perforce racial discrimination includes acts of discrimination based on caste.

The U.N. Sub-Commission on the Promotion and Protection of Human rights (Sub-Commission), in August 2000, passed a significant resolution declaring discrimination based on work and descent as prohibited under international human rights law, while making reference to several basic features of the caste system. The Sub- Commission employed the broader term "work and descent" to encompass caste and caste-like discrimination. The August

2001 working paper of U.N. expert Rajendra Goonesekere, appointed by the Sub-Commission, also notes that this "discrimination based on descent manifests itself most notably in caste - or tribe-based distinctions" and refers to widespread practices. Also noteworthy is the inclusion of discrimination based on descent and work in paragraph 109 of the report of the World Conference Against Racism (WCAR), within its broad mandate of dealing with "racism, racial discrimination, xenophobia and related intolerance."

3. (b) Summary

The respect for international norms and obligations can help the government to fulfil the task of the complete elimination of caste based discrimination in India. There is international concern about the caste system in India. However, international pressure and help can only be fruitful if the country opens up its doors for criticism and development.

To conclude, the Indian government should face international criticism in a positive way and recognize it as a corrective force to help eradicate the caste system. It should admit the fact that the caste system is a tool for societal segregation and labelling.

Domestic laws should be considered for amendment to incorporate the full spirit of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The amendments should make these international laws enforceable in India. The human rights institutions in the country should be given more power so that they can have independent inquiry mechanisms and that their rulings can be executed without delay.

India should also withdraw the reservations made to the international conventions, especially the ICCPR and CERD, allowing a person to approach the international forums for help through non-governmental organisations, and at the same time allowing international bodies to exert more pressure to improve these situations. The Indian government should positively consider recommendations of national and regional non-governmental organisations to rid India of the caste-based discrimination and exploitation.

4. India's systemic denial of the right to food

4. (a) The right to food

To be free from hunger is a basic right denied to a significant proportion of Indian citizens. While this right falls under the economic, social and cultural rights category, it is firmly linked to civil and political rights, primarily the right to life; food is a basic necessity to the enjoyment of the right to life.

India is not a food deprived country; it is believed that over 50 million tons of grain reserves exist across the country. Yet half of India's population remains under-nourished and hungry. It is therefore obvious that India does not have a food scarcity problem so much as it has a food security problem, where laws, assistance programmes and distribution systems are failing in various ways.

3 year old E.M. Shiva, a resident of Belgachia rubbish dump, died of starvation in December 2003. West Bengal State denies cases of acute starvation.

Social and cultural factors are a significant factor of India's food problem. Women, scheduled castes, religious minorities and forest dwellers all suffer a greater incidence of malnutrition and famine because of discriminatory social and cultural practices that are deeply embedded. Marginalised groups in India are still regarded as inhuman and are not integrated into the rest of society. Starvation is also complicated by land issues, where people who do not own land are unable to support themselves in agricultural areas, and where people who do own land are displaced when the government and private enterprises evict them from their homes.

In response to this hunger situation, the Asian Human Rights Commission (AHRC) launched its hunger alert programme in September 2004. The programme highlights violations of the right to food in an attempt to subsequently address factors responsible for the violations, such as government inaction, land and housing rights, caste discrimination and gender disparity. The programme is at present in its developmental stages and focuses primarily on cases from India.

4. (b) India's obligation to respect, protect and fulfil the right to food

Together with an abundance of grain, India has an abundance of international and national laws to respect, protect and fulfil the right to food. India ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on April 10, 1979. Under article 11 of the ICESCR, India is obliged to respect, protect and fulfil the right to food.

There is a common misconception that respecting the right to food is done through the provision of food assistance during times of drought, famine, disease, economic hardship, ethnic discrimination or natural disasters. In fact, the right to food requires the right to live with dignity, and therefore obliges governments to provide an environment in which its citizens can support themselves and their families.

In theory, India has an impressive national legal framework to safeguard its citizens' right to food and other economic, social and cultural rights. Furthermore, using a creative and rights based approach, the Supreme Court of India has interpreted the country's constitution and given justiciability to those rights in the past considered non-justiciable. The expansion of the right to life under article 21 of the constitution from a mere right to be alive to that of a right to live with dignity is the most significant such interpretation. Many laws exist to enhance a person's right to live with dignity: the Anti Corruption Laws, Land Reforms Act, Essential Commodities Act, Scheduled Caste, Scheduled Tribes (Prevention of Atrocities) Act and the Bonded Labour (Prevention) Act. The Supreme Court has made many judgments encompassing these laws, which in principle should protect and fulfil a person's right to live with dignity, and be free from hunger. In reality however, the laws and the judgments do nothing to feed a hungry Indian citizen, let alone provide redress for other human rights violations.

This can be seen in the Murshidabad district of West Bengal. A Supreme Court judgment of 2001 called for the implementation of the food-for-work programme in over 100 districts throughout India, including Murshidabad. Until today however, the programme has not been implemented and thousands of residents go to bed with empty stomachs. The public distribution shops meant to cater to the poor and needy remain closed, and are in fact used as storage places for goods to be smuggled to neighbouring Bangladesh. Although the district administration as well as the Supreme Court were notified of these malpractices, silence has been the only response. This

situation is found in many parts of the country. In this way, India fails to protect, respect and fulfil its citizens' right to food at every level.

4. (c) Violations of the right to food are linked to violations of civil and political rights

Denial of the right to food requires the use of force for social control. In any society where people's food needs are ignored, this is the result of deliberate actions taken by state authorities. These actions can include threats or abuse of hunger complainants, the non implementation of food and other assistance schemes, physical attacks or detention of human rights defenders. In other words, when the right to food is denied, there exists a collapse of the rule of law.

Hunger then, in India as in many other countries, is not primarily caused by natural disasters, but by systemic denial and neglect. The response of local authorities and even state governments in India to reports of right to food violations are either an unwillingness to acknowledge that hunger exists or to ignore the situation. Such blatant neglect of the victims and their predicament serves to worsen the situation. This attitude also exacerbates food security issues in times of natural disasters, particularly among scheduled castes or indigenous peoples, such as after the 2004 tsunami.

Denial and neglect is prevalent in Jalangi, Murshidabad district, West Bengal where the AHRC has reported closely on severe malnutrition and starvation. The area itself suffers from several problems, one of which is the erosion of the Padma River; over 10 years the river has eroded more than six kilometres of land, swallowing the homes and agricultural land of farmers who were once entirely self sufficient. In the last monsoon season a further half kilometre of land was lost, displacing a few hundred more villagers, who lost their homes and livelihoods. At least seven people died of starvation in the past year, and thousands are unable to eat even one meal a day.

To date however, the government has taken no action to provide any type of compensation, assistance or rehabilitation to the affected persons. In fact, the government has repeatedly denied that a food problem exists, despite the many protests and submissions made to various state agencies and officers. For this reason no measures have been taken to prevent further erosion, distribute land, rebuild homes, provide monetary compensation, create jobs as alternative sources of incomes, establish medical and educational facilities

and provide basic food assistance. Until November 2005—over ten years after the problem began—no one from the local administration had even acknowledged that hunger, malnutrition and starvation is prevalent in the district.

In addition to government neglect and denial of food insecurity, victims in West Bengal have been prevented from voicing their grievances through intimidation and force. In April 2005, a mob of over 500 people, reportedly led by local politicians, attacked the home and relatives of Gopen Sharma, a local human rights defender who has been raising the issue of starvation in Jalangi. In September 2005, Mr Sharma was illegally arrested, detained and assaulted by officers from the Block Development Office in Jalangi for helping starvation victims lodge complaints at the office. In July, a protest against the government by more than 800 hunger victims was attacked by a group of Communist Party of India – Marxist (CPIM) leaders. Furthermore, Jalangi residents are in continuous conflict with the Border Security Forces that strictly control the area, as Jalangi lies on the border between India and Bangladesh. Many villagers are not permitted to enter arable land near the river due to the presence of the BSF, who are not shy to use force against the villagers.

Over 500 villagers of the indigenous Munda community were twice threatened not to speak of their grievances by officials visiting their homes in Kumarpukur village, West Bengal in May 2005. On the first visit, local CPIM leader, Jayanta Bhattacharjee, warned villagers not to speak to reporters and human rights activists about their concerns. Two days later, uniformed policemen in police vehicles again warned the villagers to remain quiet. The victims are currently lacking all basic necessities including food and water; many have taken to eating roots and leaves for survival.

Forced evictions of the rural and urban poor are also commonplace in India, usually with no compensation or rehabilitation provided to those evicted. In urban Howrah, West Bengal thousands of Dalits were evicted from Bellilious Park in February 2003, when the municipality decided to tear down their homes in order to beautify the area. The majority of the Dalits were manual scavengers employed by the municipality, and were given this residence several decades before. While they did not formally own title to the land, under the Law of Adverse Possession and Limitations the Bellilious Park residents should not have been evicted. The evictees now live in huts built on the garbage dump where they work, and have difficulties in attaining all basic necessities including food, education and healthcare.

Hunger as seen in India is primarily a social problem and therefore most prevalent among scheduled castes, scheduled tribes, children, women and the disabled. Among these marginalised groups, a violation of civil rights often precedes or follows a violation of economic, social and cultural rights, where the poor remain hungry as a result of being discriminated against, in many instances by the very agencies established to assist them.

4. (d) Ineffective and inefficient national, state and local assistance programmes

A plethora of government assistance and employment schemes are failing to provide effective relief for victims suffering from malnutrition and starvation. The majority of victims are not aware of these, but even if they are aware, there is little to be gained from such schemes. The Public Distribution System (PDS) in Jalangi for instance, has yet to actually provide food assistance. A list of over 500 hunger victims was submitted to the local administration in early September 2005, where authorities concluded that each person was in critical need of aid. Nonetheless, Below Poverty Line (BPL) cards have still not been provided since the list was posted in ration shops, and two more people have since died of starvation. The PDS in Jalangi is also highly corrupt and inefficient: it is common knowledge that many of the ration dealers sell rice and wheat on the black market and turn away BPL card holders when they come to buy rations. None of the dealers have been prosecuted for this crime, however.

In Raup village, Sonbhadra district, Uttar Pradesh BPL cards have been distributed. However, the 35 kg of rice and wheat provided to each family is not sufficient to sustain the family for one month. Most end up hungry and begging for food after ten days. Other times, several months pass before rations can be bought again because the shop owner either closes his store or refuses to sell to certain cardholders. Age discrimination is also prevalent in Sonbhadra, where elderly people receiving assistance through the Annapurna (old-age) welfare scheme are many times turned away from ration shops empty handed.

Also in Uttar Pradesh, there have been several starvation deaths of persons registered under the food-for-work programme. Most notable is the case of Chirauji Devi, who died on July 10, 2005 from acute lack of food. One month prior to her death, Chirauji was employed as a pond digger under the food-for-work programme. Despite several visits to local officials and the village council requesting her wages and food coupons, she received no

compensation for her work. Chirauji died of starvation after having not cooked food in her home for 14 days. She leaves behind seven family members who can barely provide for themselves and are undernourished.

A National Rural Employment Guarantee Act was recently passed in September 2005, which guarantees 100 days of daily work with minimum wages for any adult living in rural areas. If the programme is effectively implemented, it may be able to secure rural livelihoods. The Indian government should learn from the disasters of its earlier schemes and ensure that this scheme does not follow suit.

4. (e) Civil groups and human rights defenders must create a network enabling their concerns to be heard on a larger scale

In India, there is a false notion that food problems only pertain to one or two victims living in remote areas. This is mainly due to the lack of knowledge by civil society and the outright denial by state authorities. In fact, hunger and starvation are common problems that necessitate a wide audience for the problems to be accepted and assistance to be provided. Thus, human rights activists need to create a network which enables their concerns to be heard on a larger scale. This network should include international agencies, UN mechanisms, local media and local and national level organisations concerned with economic, social and cultural rights.

Such a network has been created in Uttar Pradesh, where small but necessary steps have been made to combat the hunger and poverty concerns. Human rights defenders have linked up with non-profit organizations and the local media to increase the reporting of all human rights violations, including hunger. The starvation deaths of several people in the weaver communities of Varanasi in the past months have therefore been reported. After consistent pressure on the local administration by concerned parties in the media as well as human rights activists, several of the affected families have received food assistance, ration cards and widow's pensions.

A Right to Food Campaign has also recently been established in India where persons concerned with food, as well as the justiciability of economic, social and cultural rights, informally convene to raise awareness on hunger in the country. The campaign is in response to the 2001 Supreme Court hearing where the People's Union for Civil Liberties petitioned the Union of India to have India's food stock immediately used to combat hunger. Through the

Right to Food Campaign, a network of grassroots organisations and volunteers have come together to address specific programmes that include mid-day meal schemes and the Rural Employment Guarantee Act. It is hoped that through these networks a greater understanding and appreciation will be found for economic, social and cultural rights in India, particularly the right to food. However, greater reporting is still needed to bring large scale attention to hunger problems in the country.

The United Nations Children's Fund (Unicef) and the World Food Programme (WFP) are two prevailing international aid organizations concerned with hunger and malnutrition in India. Under Unicef's mandate, child nutrition is a primary concern in India. The organisation claims half of all children in the country are undernourished and that this poses a great threat towards development and learning. The WFP also works towards improving nutrition and the quality of life for the poor in India, particularly among marginalised groups, women and children.

The limitations of these two organisations however, is that all aid is routed through state governments. Therefore, both Unicef and WFP do not provide assistance to complaints made by victims themselves, but rather only provide funding for existing government food assistance programmes, many of which are failing, as already mentioned above. For this reason, while the WFP acknowledges each individual case of hunger brought to its notice by the AHRC or local groups, it simply reiterates that under its mandate assistance cannot be provided to individuals or groups. Many of Unicef's programmes relating to victims of hunger and malnutrition, particularly in West Bengal, have not been realised. It is thus important for civil and other groups to attempt to work more closely with these and other international organisations regarding food issues to strengthen the work of these organisations as well as their own network.

4. (f) National Human Rights Commission's mandate excludes right to food

The National Human Rights Commission of India (NHRC) was established by the central government in 1993 under the Protection for Human Rights Act 1993. The NHRC's main functions are to inquire, investigate and intervene into petitions made by victims on either the violation of a human right, or the negligence in the prevention of such a violation.

To date, the NHRC has received hundreds of reports and has made recommendations on several cases involving custodial deaths, police torture, bonded labour, atrocities on minorities and women, and armed forces violence. However, little has been received on economic, social and cultural rights, and nothing has been done to address these violations.

The AHRC refers all hunger cases in India it receives to the NHRC. Of the 35 complaints the AHRC has registered, not one has resulted in any recommendation or action by the NHRC. The NHRC periodically sends notification that the complaint has been received. The only action stipulated in the notice is a deferral of the matter to the local district magistrate in the area where the right to food violation has occurred. Not one case, even after repeated inquiry by the AHRC on the current status of the hunger cases, has received further attention.

This is a blatant disregard for economic, social and cultural rights. Under its mandate, the NHRC is obligated to investigate and intervene into any violations presented to its office. Instead however, it is clear that when it comes to human rights violations, economic, social and cultural rights are secondary to civil and political rights.

4. (g) India's obligations as a party to international treaties

India severely lacks in regular reporting and submissions to UN bodies regarding the situation of hunger. India's last report to the Committee on Economic, Social and Cultural Rights was submitted in 1990. In the past 15 years, three more reports have been due but have yet to be submitted.

The right to food of ordinary Indians will not be fulfilled until the government respects all of its international obligations and protects all human rights.

5. Conclusion and recommendations

From an analysis of the cases reported from India in 2005, one could safely conclude that there is a consistent and widespread pattern of the erosion of human rights standards in India. At this pace, which is alarming, the country is headed for a complete collapse in the near future. India, as it is divided in various forms by region, culture and religion, needs immediate attention to improve its human rights standards. This must start at the domestic level.

India is one of the countries that has ratified the least number of International Conventions and Instruments. If India is to hold true to its claim that domestic mechanisms are capable of respecting, protecting and fulfilling human rights, then it must first make significant changes to its existing domestic laws and practices. This must start with reforms that are in line with the ICCPR and the ICESCR. The old and obsolete Criminal Procedure Code must be amended to incorporate the provisions of the ICCPR. Draconian laws like the Armed Forces Special Powers Act must be repealed.

Changes in domestic laws alone will not bring improvement. The implementation of domestic laws also requires immediate attention. Some of the key areas which require such attention are policing, the prosecutors' office, the courts and the Human Rights Commissions. Corruption and nepotism in all of these offices must be eradicated forthwith and measures to protect against subsequent contamination must be put in place.

One easy way of implementing this would be the ratification of the Convention Against Torture. The ratification would necessarily require the country to implement the Convention at the domestic level. This would ensure independent inquiries into police excesses and a separate procedure for prosecution. This would also ensure that remedies are accessible to the ordinary Indian. Correcting the policing system in India would definitely go a long way in improving the human rights situation in India. If the entire state is considered as a machine, policing is the oil which makes all parts of the machine function properly. It is this oil which is contaminated in India and until this has been addressed, whatever changes are brought in will have no effect. To start with, India must admit that its human rights record is poor and the chances of remedies are much less for an Indian, when compared to its neighbours.

Concerning the international instruments ratified by India, especially the ICCPR, India must withdraw its reservations, thereby opening up more avenues for international cooperation and better possibilities for redress for the victims.

The national institutions like the Human Rights Commission and the courts must be strengthened by providing adequate infrastructures, so that these institutions can discharge their duties without failure or delay. Unless this problem is addressed immediately, the already established lack of trust in the domestic mechanisms would harden into complete disregard for the law, leading to a state of anarchy.

Last but not least, the burning issue of caste discrimination must be tackled in a more affirmative manner. Currently, it is left with a domestic law - Scheduled Caste, Scheduled Tribe (Prevention of Atrocities) Act - and the Constitutional guarantees. However, it has been proved time and again that these provisions are used more often used to exploit the situation rather than to solve it. Caste is deep rooted in the average Indian's psyche and for this very reason the complete elimination of the caste structure will take strenuous effort, but it must start from the admission that caste-based discrimination exists in India. Only if the government of India is willing to admit that caste-based discrimination exists will it be able to address this issue.

However, admissibility is exactly the problem with the Indian government. For years it has cocooned itself within the cover of lies regarding its domestic implementation of human rights values and the rule of law. But 58 years after independence, for an average Indian, human rights and the rule of law still remain meaningless words.

---

1 Concluding observations of the Human Rights Committee : India 04/08/97 CCPR/C/79/Add.81

2 Commission on Human Rights : Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38 E/CN.4/1998/38

3 D K Basu v State of West Bengal

4 Please see the Urgent Appeals Programme of the Asian Human Rights Commission at <www.ahrchk.net/ua>

5 Armed Forces Special Powers Act 1958

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: India - Constitutional promises and international obligations remain empty rhetoric

The systemic failure of the justice dispensation system in India is marring the state of human rights in India. 58 years since independence, India is plummeting further into lawlessness and a complete collapse of the rule of law. Challenging violations of basic rights remains inaccessible to the ordinary people of the country, and is becoming ever more so.

The failure in justice dispensation mechanisms has meant that avenues to domestic remedies are effectively closed to millions of ordinary persons. This is enabled by the following factors: fear of reprisals, a lack of protection mechanisms, enormous delays in justice procedures, extreme difficulty in obtaining proper legal assistance, taboos emanating from caste discrimination, and ineffective laws and improper implementation thereof. The government of India has failed to ratify many of the international conventions and covenants, or has opted out from essential provisions, so as to block victims' access to international complaints and remedies mechanisms, such as that of the Human Rights Committee. There is a complete collapse of the rule of law in India.

The Asian Human Rights Commission (AHRC) has documented numerous cases in India, which establish a consistent and widespread pattern of denial of rights. Of particular concern are cases of: custodial torture and related impunity by the police and security forces; complete inaccessibility to domestic mechanisms; enormous delays in judicial procedures; and caste based discrimination. AHRC has highlighted these issues as part of a special report published on the occasion of International Human Rights Day, December 10, 2005.

Coupled with draconian laws in the name of the fight against insurgent activities, brutal forms of torture were reported in India in 2005. The government of India has consistently refused to acknowledge the fact that the rule of law in India has completely collapsed. It has shut its doors to any who sought accountability, either by way of domestic procedures or by way of international assistance. The long

pending report to the UN Human Rights Committee, which has been due since 2001. The government has also denied the request of the UN Special Rapporteur on Torture to visit the country. The request has been pending since 1997.

Torture is not only practiced as a crude form of investigation, but is also used to impart fear upon citizens so as to cater the rich and the influential. Torture in India is widespread, unaccounted for and rarely prosecuted. Lack of investigative skills, the absence of equipment and training for modern investigative procedures - particularly relating to autopsy procedures - and the resultant absolute impunity enjoyed by the law enforcing agents are the trademarks of the law enforcement agencies in India. This has also lead to a completely unchallenged state of corruption within the agencies, where justice is auctioned as a commodity in public.

A decade of waiting for decisions on a case is not much time in India. The delays are equally applicable to civil and criminal proceedings. The courts in India are crowded, inefficient and dangerously slow in providing justice to the people. This is even applicable to the High Courts and the Supreme Court. On 4 December 2005 the Chief Justice of India himself stated that there are a minimum of 2.6 million cases pending before various courts in India. The people no longer have any trust in domestic legal mechanisms in India, particularly the poor in the country and the members of the lower caste in the prejudicial caste hierarchy.

The brunt of this complete collapse of the rule of law in India has most affected the dalits and the lower castes in India. Deaths from acute starvation and cases of extreme malnutrition are not only reported from remote areas but also from the cities. Cases of starvation deaths reported from Howrah in West Bengal and Mumbai in Maharastra are two examples. It is an irony that India is rich and self-sufficient in food and is engaged in yearly dumping of grain, which it finds difficult to stock in its granaries, while people within the country die of acute starvation perpetuated by collapsed systems. Discriminatory attitudes in providing assistance are practised all over the country. The case of the tribal community from the state of Gujarat and the 'untouchables' from Varanasi, Uttar Pradesh state are examples.

Yet another international day for human rights may not mean much to the ordinary Indian. Many might not even be aware of this day. India's Constitutional promises and international obligations remain empty rhetoric. Judgements made by courts and orders for implementation are unheeded. International intervention and pressure is completely absent. In spite of this, the government of India is looking forward to a permanent position on the UN Security Council. When the state itself has failed to deliver to its citizens the basic minimum guarantees of respect, protection and fulfilment of rights, how can it justify its claims to be offered permanent membership in an international body where human rights is of prime importance? Thank you for the attention you will give these issues.

Yours sincerely,

Basil Fernando
Executive Director

N E P A L

A worldleader in disappearances, but no parliament or laws to enable change

Introduction and executive summary

2005 has been a tumultuous year in which the people of Nepal have suffered considerable further erosion of their human rights. The Asian Human Rights Commission (AHRC) acknowledges that the entire register of human rights are being violated in varying degrees in the country, but wishes to concentrate here on those that can be considered most grave and that require the most urgent intervention. They include: arbitrary arrest; illegal and incommunicado detention; torture; forced disappearance; and extrajudicial execution. In fact, these violations do not occur in isolation, but often accompany each other in an interrelated process of abuse, and so it is both relevant and opportune to consider them together.

While there has been a grave human rights crisis in Nepal for a number of years, it has undergone significant degradation during this year, notably since the notorious February 1, 2005 royal takeover. On February 1, 2005, King Gyanendra of Nepal dismissed the government of Prime Minister Sher Bahadur Deuba, declared a nationwide state of emergency and suspended the rights of the people of Nepal to the freedom of expression and assembly and the freedom of the press. The King assumed power by putting armed soldiers and police on the streets and appointed a new 10-member cabinet the next day, composed of royalist supporters, placing himself at the head of the cabinet. The King stated that he would restore democracy and peace in the country in three years. The AHRC and its sister-organisation, the Asian Legal Resource Centre (ALRC) were among the many international actors, including States and local and international NGOs, which immediately condemned the King's actions and expressed deep concern for the lives of the Nepalese people.[1] Mass arrests, incommunicado detentions, torture, disappearances, the repression of demonstrations and a media and communications black-out followed the royal takeover.

It is of capital importance to note that as Nepal currently has no functioning parliament, no laws can be enacted in a legal and constitutional way. The efforts of all persons working against torture and forced disappearances have therefore been stymied by the King's dismissal of the government earlier this year. This includes local and international NGOs, and the United Nations, notably through the newly established office of the High Commissioner for Human Rights in Nepal. The implementation of various recommendations made by United Nations bodies should also be considered as impossible to implement due to the absence of a functioning legislature. The international assistance that is being provided concerning human rights in Nepal is, under the present situation, not being used to its full potential. Donor countries, the UN and NGOs must therefore take immediate action to pressure the authorities to hold democratic, transparent, multi-party, all-inclusive elections, through a process agreed upon by all political actors, in order to enable a new government and therefore the legislature to be established. Regardless of the political barriers, civil society groups are urged to begin campaigning on the issues of making torture and forced disappearances criminal offences, in order that they be dealt with as a priority upon the election of a democratic government. Recent developments in the country concerning an agreement between the Maoist insurgents and an alliance of political parties, which are presented below, offer new opportunities for such change.

In having dismissed parliament, the King must be held personally responsible for all acts of torture, forced disappearance and other human rights abuses that have and are occurring in Nepal, as any tangible progress in the situation requires the legislature to be functioning.

The ALRC provided a document on Nepal to the 35th session of the United Nations Committee Against Torture (November 7 to 25, 2005).[2] The ALRC staff members attended the session in Geneva. Some important issues raised and recommendations made by the CAT Committee's members to the official delegation from Nepal have been integrated into this report. Also included are recent recommendations and comments made by: the Special Rapporteurs of the United Nations Commission on Human Rights (CHR) on the question of torture and on extrajudicial, summary or arbitrary executions; as well as the CHR's Working Groups on Arbitrary Detention and on Enforced or Involuntary Disappearances.

The AHRC recalls that the human rights situation in Nepal is one of the most serious in Asia. Over the last two years the United Nations has reportedly received more documented cases of forced disappearance in Nepal than any other country in the world. The use of torture has been labelled as **systematic** by the Special Rapporteur on the question of torture, Professor Manfred Nowak, following a visit to Nepal in September 2005.[3]

The factors that enable the prevailing systematic pattern of human rights violations include: the lack of legal provisions within Nepal's legislation criminalising the practices of torture and forced disappearance; the collapse of the rule of law and state institutions, notably the judiciary; the lack of effective civilian control of the military; rampant impunity; and a lack of avenues for redress for victims. These are enabled or exacerbated by the failings of the Torture Compensation Act and the obstacles put in place to hinder the work of human rights defenders within the country, including the recent Code of Conduct for NGOs, which aims at dangerously curtailing civil society's ability to carry out their work. The Code of Conduct was denounced by the AHRC in a statement and press release.[4] The discussion of these issues will be based on and supported by cases of violations of individuals' rights that the AHRC and ALRC[5] have documented.

The main areas in which developments are required include, *inter alia*:

- re-establishing the legislature through a democratic process;
- enacting into domestic legislation laws that prohibit torture and forced disappearance - the AHRC believes this to be the key to making headway in countering widespread abuses in Nepal;
- the strengthening of institutions and their ability to function, most notably the judiciary – this will permit new legislation to be implemented;
- providing unhindered access to detainees in all places of detention and releasing all persons detained arbitrarily;
- creating independent bodies able to conduct investigations into allegations of violations and bring the perpetrators to justice – this is vital in challenging impunity;
- setting up mechanisms that provide for adequate protection and timely reparation to victims or their families.

The necessity of criminalising torture and forced disappearance

By enacting legislation that prohibits torture and forced disappearance, a new gamut of opportunities will present itself to actors working in favour of

these human rights and the victims of violations thereof. Without such legislation, avenues for concrete legal action are restricted, if not barred all together, as can be seen by the lack of adequate reparation or punishment of perpetrators in Nepal thus far. Human rights will remain in the rhetorical domain until the rule of law is established – there can be no separation of these two notions. By enabling institutions and judicial processes, the rule of law can be re-established in Nepal, and the afore mentioned and urgently needed new laws can be implemented. The AHRC does not pretend that these changes will come easily, but what is required in Nepal is momentum for change in the realm of human rights, which is best enabled by concrete gains in campaigns with specific and limited aims.

While taking into account the current obstacles presented by the lack of a functioning parliament, the AHRC is engaged in concerted campaigns to call for torture and forced disappearances to be criminalised. Local and international human rights actors - including NGOs, the press, religious groups as well as regional and international institutions - are also urged to lobby and campaign on these specific issues, as well as those embodied in the recommendations found later in this document. Laws criminalising torture and forced disappearance need to be accompanied by an executive order from the highest authorities in the country for the law enforcement and security forces to comply without exception or delay to court orders, notably those resulting from habeas corpus writs.

Who can possibly be against making these abhorrent practices recognised as crimes in Nepal – perhaps only the individual perpetrators of these acts? All other persons should be encouraged to join in the movement to have these practices outlawed and accompanied by proportional and appropriate applicable criminal sanctions, which are in line with international laws and standards. Many other targeted campaigns to bring about specific reforms can also be launched. The recommendations presented in this report are destined to highlight the priorities for such actions.

No exceptional circumstances can justify torture or disappearance

The armed conflict between the Royal Nepalese Army and the insurgent Communist Party of Nepal (CPN) - Maoist forces in the country is used as a justification by the authorities to excuse the litany of abuses perpetrated against the people of Nepal by the police and notably the armed forces. The AHRC recalls that, in the case of torture for example, article 2, paragraph 2 of the

United Nations Convention against Torture, to which Nepal is party, states that: "*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*"[6]

Concerning this point, the Committee against Torture (hereafter referred to as the CAT) recalled during its consideration of Nepal's second periodic report in November 2005, that: *"the Convention was a legally binding instrument for all States parties, and article 2 clearly stated that no exceptional circumstances justified the use of torture. It was therefore incumbent on the Government to take stringent measures to eliminate the culture of violence and torture that appeared to pervade in the reporting State."*[7]

The AHRC wishes here to firmly condemn all violent acts, including threats, torture, killings and forced disappearances committed by the CPN – Maoist forces in the context of the insurgency in Nepal. The AHRC calls upon the insurgents to halt all attacks against civilians and abide by international humanitarian and human rights laws and standards at all times.

In view of this, the AHRC welcomes the agreement between the CPN-Maoists and an alliance of seven political opposition parties, in which the Maoists have reportedly agreed to abandon violence and join the political mainstream in due course, in order to establish a constituent assembly through the electoral process. Reports also indicate that the Maoists have agreed to have their forces placed under the supervision of the UN, or another accepted international organization, and to abide by international human rights and humanitarian laws and standards. The agreement also reportedly includes calls for the Royal Nepalese Army to be placed under international supervision. It is hoped that the authorities in Nepal will see this as an opportunity to end the conflict and engage in political rather than violent means to address the concerns and grievances of the people. The AHRC points to recent interventions by the UN Secretary General, the UN High Commissioner for Human Rights and the Presidency of the European Union, who all call on the authorities to take this opportunity to bring an end to the conflict in the country.

Most importantly here, current developments represent an opportunity to significantly reduce human rights abuses by the military and the Maoists, and to work on building the institutions in the country that safeguard human rights and the rule of law. Of paramount importance is the resumption of the functioning of the parliament, as underlined previously, which will permit the

much required legislative changes concerning torture and disappearances to become possible.

It is clear that the most effective means of ending the conflict is by declaring a bilateral ceasefire and holding elections, under a process agreed upon by all parties, to establish a constituent assembly and restore multi party democracy in the country. The ball is now in the King's court.

Beyond this, however, the AHRC believes that the prevalence of human rights violations in Nepal cannot be explained simply by the presence of the internal conflict, but rather, that the cause of these violations lies in the fundamental collapse of institutions and the rule of law in the country. It is also necessary to take immediate steps to dismantle the systematic mechanisms of abuse in the country, without waiting for a resolution to the conflict, as this could spare the suffering and lives of a large number of Nepalese citizens.

A halt to the conflict would, of course, facilitate the process of institution building, and remove some of the justifications for continuing widespread human rights violations. The resumption of multi party democracy and the end to the emergency powers handed to the military are vital in enabling positive change. However, for real and lasting improvement to the situation and the prevention of future violations, the rule of law must be established. In a country where the institutions, such as the judiciary and the legislature, as well as the policing system, have all but collapsed, they must be rebuilt. It is imperative that this be done with all speed, so as not to lose previously available expertise present within the system. If not done rapidly, a vacuum will be formed in the space normally occupied by such institutions within a functioning State, which will be particularly difficult to remove if established.

A law unto themselves: the police and army are free to beat, torture and kill in all impunity in Nepal.

The human rights situation in Nepal

The AHRC receives a large number of cases of arbitrary arrests, illegal and/

or incommunicado detention, torture, forced disappearance and extrajudicial killings from Nepal, and has continued to receive such cases since the royal takeover in February 2005.

This has been possible despite the fact that the ability of local human rights activists to conduct fact finding missions concerning such cases has been greatly curtailed during the period since February 1, 2005, due to the risks to their lives that conducting such work entails. It is worth noting that a significant number of human rights defenders have been threatened into limiting or abandoning their activities, or have even been forced to leave the country during this period, and that the full extent of the use of torture and other grave human rights abuses since the takeover remains hard to ascertain.

The ALRC has also documented and published a large number of cases and analysis in its bimonthly *article 2* publications in December 2004 and February 2005.[8]

Children: no protection against human rights violations

Children are also subjected to illegal detention and torture in Nepal. There is no working juvenile justice system in the country, with children being subject to the same procedures, detention facilities and laws used with respect to adults. Children are arrested and detained for prolonged periods of time, based on allegations of being terrorists, in the same way that adults are. Their access to the outside world is also restricted in the same way, and they are also subjected to torture.[9]

In one example among many, the Special Rapporteur on torture, during a visit to the filthy, overcrowded, inhuman detention facilities in Hanumandhoka Police Office, found that the "*detention of several 14 year-old boys among adults was seriously disturbing.*"[10]

A generation in despair: a young child at a peace rally. Children are particularly at risk of abuse in the conflict in Nepal.

UN recommendation - Nepal should: take necessary steps to protect juveniles from breaches to the Convention (against Torture),

and ensure a proper functioning of a juvenile justice system in compliance with international standards, differentiating treatment according to age.[11]

The systematic use of torture by the army and police

Of particular note is the fact that torture is routinely and systematically used by the authorities, and that failings in legislation and the judiciary afford total impunity for the perpetrators of these acts, and no viable avenues for redress for the victims. Following a visit to the country in September 2005, the Special Rapporteur on torture has concluded "*unequivocally that torture and ill-treatment is* ***systematically practiced in Nepal by the police, armed police and the RNA*** *(emphasis added) in order to extract confessions and to obtain intelligence, among other things."* [12] This is a very damning conclusion.

The AHRC is of the opinion that the same can be said of the other violations mentioned above, due to the fact that arbitrary arrest, incommunicado detention, torture and forced disappearance are interlinked within the system of abuse in Nepal.

The AHRC's sources have, despite difficulties, been able to interview many persons who have been detained by the army or the police. In the majority of cases, these persons allege that they have been severely tortured during detention.

Typically, persons are arrested – for the most part arbitrarily – and detained incommunicado. Access to lawyers, medical services and family members are denied for those detained illegally. Of the around 5000 detainees interviewed, some 80 per cent stated that they were not brought before a court within the 24-hour period prescribed by the Constitution of Nepal. A similar proportion of detainees report having been subjected to torture and ill treatment while in custody. Cases of ill treatment and torture recorded by the AHRC include: lengthy blind folding and handcuffing; beatings, including of the genitals; whipping using sticks and pipes on the soles of the feet, the legs and back; strangulation; death threats, including placing a gun to the head; electrocution, in particular via the ears; hanging upside down and repeatedly being dunked under water. The torture is severe to the point that many victims repeatedly lose consciousness.

There is an urgent need for the authorities to clearly and publicly denounce the

practice of torture, which they have thus far failed to do. This would send a clear message to would-be perpetrators that such illegal practices will no longer be tolerated. Action is required in order to address the "*prevailing culture of impunity*"[13] identified by the Special Rapporteur on torture, who received "*repeated and disturbingly frank admissions by senior police and military officials that torture was acceptable in some instances, and was indeed systematically practiced.*"[14]

UN recommendations - Nepal should:

- **make a public condemnation of the practice of torture and take effective measures to prevent acts of torture in any territory under its jurisdiction.**[15]
- **prohibit the use of incommunicado detention… persons held incommunicado should be released or charged and tried under due process.**[16]

Torture by the Royal Nepalese Army

In every recorded case of arrest and detention by the army, the interviewed victims claim to have been tortured severely. In the current context, the army wields significant power in Nepal without any effective, functioning form of civilian oversight. The dissolution of the parliament by the King, amongst other things, has seen to this.

The CAT, in November 2005, expressed the concerns that *"there seemed to be a lack of control over the security forces, which, in turn, led to their impunity,"* and *"stressed the need to ensure that not only the superior officer who had given the order to resort to torture would be held responsible, but also all other authorities involved, regardless of their rank."*[17]

The army has no specifically expressed constitutional right to arrest and detain civilians – the Constitution clearly limits its jurisdiction to military personnel. The army has previously systematically denied that it was detaining civilians, despite the fact that it is widely known and reported on by NGOs that hundreds of persons were being held in army barracks. It has also reportedly openly lied about having persons in detention to the courts, including the Supreme Court, in cases where habeas corpus writs have been lodged. The army now publicly acknowledges that they are detaining people, despite the fact that such detentions are illegal, but have in no way halted the use of illegal detention, which indicates the levels of impunity and the collapse of the rule of law in the country.

In the current context the army and police operate in collusion, with persons arrested by the police being handed over to be detained and tortured in army barracks. Although military courts do not have jurisdiction over crimes committed against civilians by the army, the armed forces are persistently detaining civilians in their barracks. The military courts claim to be investigating allegations of torture of civilians by the armed forces. The lack of transparency and of results of such investigations continues to foster impunity in Nepal. Further analysis of this can be found below, under the section entitled "The lack of effective and independent investigations into torture."

Detainees who are released from army barracks are routinely placed under surveillance. In most cases they are threatened with further arrest, torture or even death if they report that they were subjected to torture to anybody or any organization, or if they lodge a complaint before a court. Detainees are also released on the condition that they respect regular summons to present themselves at army barracks, in order to make sure that they have not reported their case anywhere. For examples, please refer to the section below entitled "Rearrests used to circumvent court decisions". The AHRC has received information concerning victims being further detained and tortured as a result of accusations that they had shared information with outsiders. In many cases, released persons are also threatened with similar punishment if they refuse to work as spies against the Maoists.

UN recommendations – Nepal should:

- **immediately transfer all detainees to legally designated places of detention which conform to international minimum standards.**[18]
- **take measures to ensure compliance by security forces of all orders of the Courts, including habeas corpus.** [19]
- **(the Government of Nepal and the security forces of Nepal should) ensure that accessible, complete, accurate and fully up-to-date lists of detainees are kept, and shared with families of the detainees and with civilian authorities, including the National Human Rights Commission. These lists should include detainees held in formal detention centres (i.e. Sundarijal) and in informal places of detention such as army barracks. The lists should be held locally, with a national registry created to bring together the names and locations of all detainees.**[20]

Torture by the police

The use of torture is also endemic and systematic within police detention facilities. In a number of recorded cases, police officials reportedly take bribes from actual criminals, who are then released. Following this, the police need to cover up their illegal and corrupt acts, and so require substitutes for the criminals that they have released. They make use of torture to force confessions from other detainees, who are often being held arbitrarily. Corruption plays a significant role in perpetuating the use of torture in Nepal, with the poor being the major victims of this phenomenon.

The victims of torture are detained illegally and incommunicado, until the physical traces of torture have receded or disappeared. The victims in question are then charged with the offences of the released criminals, based on confessions extracted under torture, and the police prepare documents to show that they were only arrested under 24 hours before this time, before presenting them before the courts. The courts reportedly turn a blind eye to this practice, enabling the semblance of adherence to the constitutionally prescribed 24-hour period and the use of torture to become endemic and go unpunished. This also causes significant barriers to attempts by victims to gain reparation at a later stage. For reference, see the example of the case of Maiya Tamang under section "The lack of documentation regarding arrest and detention" below**.**

In addition, the police are effectively subordinate to the army. Since the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) was brought into force in November 2001, the army and the police have been acting under a unified command, with the army taking the lead in heading this command structure. As part of this arrangement, the police are frequently tasked with arresting persons and then handing them over to the army, who then illegally detain and torture them.

UN recommendations – Nepal should: ensure that no recourse is made, under any circumstances by law enforcement personnel to interrogation methods prohibited by the Convention (against Torture)… and adopt the necessary measures to reduce pre-trial detention wherever possible. [21]

Custodial deaths: torture victims and so-called "suicides"

Since October 2004, five detainees have died in army barracks as the result of

"suicides" according to the authorities. The ALRC has been informed that there are credible reasons to suspect that these persons in fact died as the result of torture by members of the army. These allegations require thorough investigations.

Text box - A

Dorje Sherpa (male) - a suspected Maoist reportedly committed suicide in Shreejang army camp in Singhdurbar, Kathmanudu on May 27, 2005. The army claim that he hanged himself from a window using his shoe laces.

Chakra Bahadur Sherestha (male) - a school teacher and suspected Maoist reportedly committed suicide on November 15, 2004 at about 7pm at the Dhadingbeshi Army Barracks. The army claim that he initially tried using a belt to hang himself and later used a sleeping bag rope to do it.

Dipendra Rayamajhi (male) - a permanent resident of the Panauti area of Kabre district, reportedly committed suicide on June 26, 2005 at Sinhanath Army Camp in Bhaktapur district. He was arrested on suspicion of being a Maoist cadre. The army claim that he hanged himself using an electric wire in the cell in which he was being detained.

Top Bahadur Ale Magar (male) – reportedly killed himself on October 20, 2004 at Bhairabagan Barrack in Maharajgunj, Kathmandu. He was arrested on October 16, 2004, reportedly while collecting donations for the Maoists.

Sadhu Ram Devkota (male and alleged Maoist cadre) - reportedly committed suicide at around 3.40pm on December 19, 2004 at the Army Barracks in Balaju, Kathamandu. The army claim that he hanged himself using his shoe laces from a window.

No proper investigations have been launched into these deaths.

Following their release from army barracks, many detainees have reported witnessing the torture of co-detainees, and that those that were tortured until they were in critical physical conditions were taken to the army hospital, but

were never brought back, giving rise to fears that they have died as the result of torture. As is widely known, a great number of people disappear following arrest by the army.

The failings of the Torture Compensation Act

The Constitution of Nepal prohibits the practice of torture.[22] In furtherance to the ratification of the Convention against Torture (hereafter referred to as the Convention), Nepal's domestic law, entitled the Torture Compensation Act, 1996 (hereafter the Act), is ineffective as a tool for preventing torture and enabling the prosecution of cases of torture. The Act falls short of the standards set in the Convention.

The Act does not define torture as a crime. The liability cast upon the perpetrator by virtue of the Act and by article 14 (4) of the Constitution is limited to providing damages. In the absence of any other law to punish the perpetrators of torture, the perpetrators enjoy absolute impunity. Furthermore, as highlighted by the CAT: *"the current definition of torture in State party legislation contained no language regarding the complicity of persons acting in an official capacity who instigated, consented to or acquiesced in torture and was thus narrower than the definition established in the Convention… Pursuant to the Nepal Treaty Act of 1991, international conventions to which Nepal was a party took precedence over domestic legislation. Consequently, the wider definition of torture contained in the Convention should be applied directly."*[23]

UN recommendations – Nepal should: adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are a criminal offence punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996, in compliance with all elements of the definition provided by the Convention.[24]

Given the absence of strict adherence to any legal and procedural framework to ensure the recording of arrests and details regarding detention, the operation of Section 5, which reads *"The victim may file a complaint claiming compensation in the District Court of the District in which he was detained within 35 days of having been subjected to torture or of released from detention,"* is limited in its scope.[25] The time span of 35 days and the jurisdictional clause prescribed in the Act often works as an impediment to the lodging of complaints under the Act.

The CAT has noted with concern that *"the burden of proof is upon the victim of acts of torture, under rules provided for in the Compensation Relating to Torture Act of 1996, and (that there exists) the provision of a statute of limitations to complain against acts of torture and to institute proceedings for compensation, under TADO within 35 days."*

The provisions contained in the draft of the new Penal Code of Nepal are also insufficient. Concerning this, the CAT expressed concerns that *"the maximum sentence provided for under the new draft Penal Code for resorting to torture was a mere three years' imprisonment, and that the period within which victims of torture could file a complaint had been limited to three months."* [26]

UN recommendations – Nepal should:

- **make available to victims of torture the conclusions of any independent enquiry in order to assist them pursuing compensation claims. The State party should amend its current and planned legislation as to have no statute of limitation for complaints against acts of torture, and to have the period of limitation in respect of actions for compensation to be no less than 2 years from the date of availability of the conclusions of enquiries.** [27]
- **ensure that compensation awarded by Courts or decided upon by the National Human Rights Commission is paid in a timely manner.**[28]

Furthermore, the amount of compensation as provided for in the Act and the manner of realisation of compensation also dilutes the concept of *jus cogens* as it applies to torture. The recently promulgated Ordinance on 'communication' – which is widely criticised as curtailing the freedom of the press – provides for a higher value fine to be levied from editors and publishers responsible for 'violating' the ordinance through alleged acts of defamation, than is prescribed for acts of torture under the Act.[29] Any compensation that is to be paid in a case of custodial torture is paid by the state. The rider attached to Section 6 of the Act, which provides for compensatory damages for frivolous litigations, deters anyone who is aware of the existing legal framework in Nepal from approaching the court.[30]

The intention of the legislative process is further clear from Section 10 of the Act, which provides for defence at the expense of the state for the perpetrators. Neither the Act, nor any other law in Nepal, provides for the concept of burden of proof favouring the victim in cases of torture.[31]

The CAT has raised a number of concerns relating to these issues, including that:

- **under the current legislation, torture was not considered a criminal offence. Victims who filed a complaint but failed to prove their allegations were penalised. There had been reports of victims being arrested and tortured until they agreed to withdraw their complaint.** [32]
- **sanctions imposed on perpetrators of torture were very light. For example, the three army officers who had been found guilty of torturing and murdering the 15-year-old girl, Maina Sunuwar, had been sentenced to six months' imprisonment in army barracks.**
- **punishment for acts of torture committed by public officials in Nepal was not commensurate with the gravity of the offence. Given that the Rome Statute of the International Criminal Court codified torture as a crime against humanity, it was unacceptable that sentences ranged from short term imprisonment to a fine. The statute of limitations for torture cases applicable in the State party contradicted the jurisprudence of the Committee and should be abolished.**[33]
- **(while) the judiciary has rendered a number of decisions to award compensation, the Committee regrets that to date in only one case has compensation been paid out. In addition, the Committee is concerned about undue delays in the awarding of compensation by Courts or the National Human Rights Commission.**[34]
- **a provision in the Compensation Relating to Torture Act of 1996 empowering the concerned officer at places of detention to medically examine, at time of arrest and release, a detainee, in the event a doctor would not be available. In particular, the Committee is concerned about reports that medical examinations at the time of arrest and release are not regularly performed,**[35] **and that Nepal should consider amending the relevant section of the Compensation Relating to Torture Act of 1996, to ensure all detainees have access to a proper medical examination at the time of arrest and release.**[36]

Nepal: a world leader in forced disappearances

There is an intrinsic systemic link between torture and forced disappearances. As shown previously in this report, torture is systematic in Nepal. Forced disappearance of endemic proportions is also a feature of the situation in the country. Given the impunity enjoyed by the perpetrators, notably the armed forces, concerning arbitrary arrest, incommunicado detention and torture, there

are no effective barriers to prevent innocent persons from being taken into custody, held in secret, tortured to death, involuntarily disappeared or summarily executed, with no trace of their bodies ever being found.

The Working Group on Enforced or Involuntary Disappearance, in a report following a visit in December 2004 notes that: "*The phenomenon of disappearance in Nepal today is widespread; its use by both the Maoist insurgents and the Nepalese security forces is arbitrary. Perpetrators are shielded by political and legal impunity. Detailed reports that were received from many rural areas suggest that the phenomenon of disappearances is under-acknowledged. We heard consistently from across the country that a culture of silence has sprung up, with villagers too fearful to report disappearances for fear of reprisal from the security forces or the Maoists insurgents. In many cases, relatives who go to army barracks to enquire into the fate of their family members later find themselves caught up in harsh interrogations. Many families have seen multiple disappearances."* [37]

The lack of access of families, lawyers, doctors and local or international monitors to places of detention is one component that facilitates forced disappearances. The failure of the judicial system, notably concerning writs of habeas corpus, is another. When such writs are filed, courts, including Nepal's Supreme Court, have reacted by calling for records of arrest. Since these are rarely available, given that the police and armed forces do not keep such registers in anything like a systematic way, the process stops there. It is assumed that the person has not been arrested, due to a lack of records. The case is closed, and the persons remain in detention, typically being tortured or even killed.

The ALRC's *article 2* publication in December 2004, entitled "The mathematics of barbarity and zero rule of law in Nepal," contains an in-depth look into forced disappearances, including 20 case studies. The report states that, "Worldwide, mass planned disappearances of persons belonging to an 'undesirable' category in society have been made possible only by a policy that favours the erasing of records and non-registration of prisoners belonging to the targeted group. In Nepal, these are Maoists or those "having links with Maoists". The stories in this report are but a few among thousands that clearly show such a policy is operative in Nepal today. Whereas in official reports disappearances number in the thousands, in reality these are only those cases where relatives of the missing had the courage to report their loss and found some avenue through which to register a complaint. There is at present no way to assess the true number of victims. However, the UN Working Group on enforced and involuntary disappearances recently described Nepal as being

among the worst countries for human security in the world at present. In response, the government made some symbolic gestures such as uncovering the whereabouts of a few hundred people, without any action to hold the perpetrators accountable and uphold the rule of law. The government instead persists in itself permitting the casual killings that occur after casual inquiries and casual arrests that the Nepalese security forces now contrive to employ daily."

"It is also clear from international experience that a policy to allow mass disappearances is accompanied by tacit approval at the highest levels of state for the use of massive torture. With planned widespread disappearances, new rules apply in all areas of business. In many instances, disappearances are a necessary consequence after torture. Either the person dies during torture or the wounds caused will incriminate the perpetrators if the person is released. Persons arrested by mistake cannot be released for fear of compromising some aspect of a security operation. They will not return home… Nepal is now in a time of approved killing and torture from which no one in the country can escape."[38]

It must be noted that this was written before the royal takeover in early 2005, since which time the situation in the country concerning forced disappearances is thought to have worsened further still. Access to areas outside the capital, Kathmandu, has been particularly difficult since that time, but there are credible fears that the practices of arbitrary detention, torture and forced disappearance will have accrued throughout the country, as the military has effectively become unrestricted in its activities.

48 year old Jaggu Tharu, arrested on August 11, 2002 – whereabouts unknown.

52 year old Sagunlal Chaudhary, arrested on December 27, 2001- disappeared.

17 year old Budhini Chaudhary, arrested on January 7, 2002 – whereabouts unknown.

Disappearances spare no-one – whether man, woman or child, all at are risk of disappearance in Nepal.

The need to make forced disappearance a crime

As with the practice of torture, there is no specific provision in the Nepalese Penal Code making enforced or involuntary disappearance a crime. Similarly, this is a fundamental flaw that enables the practice to be perpetrated without hindrance, in total impunity. In order to have a chance of succeeding in combating this abhorrent practice, it needs to be criminalised, and the judiciary needs to be empowered to enable it to effectively and impartially prosecute offenders. Without a criminal law prohibiting forced disappearance, it is impossible to provide an effective deterrent against it or prosecute offenders. Given that forced disappearances in Nepal are for the most part conducted by the Royal Nepalese Army, it is necessary to ensure that the civilian judiciary has jurisdiction over such cases.

UN recommendations – Nepal should ensure that:

- **the Judge Advocate General undertake more aggressive prosecution of army personnel accused under the existing law of kidnapping and torturing civilians.** [39]
- **as soon as possible, Nepalese criminal law be amended to create a specific crime of enforced or involuntary disappearance.**
- **the Army Act be amended to provide that security forces personnel accused of enforced or involuntary disappearance in relation to a civilian be tried only in civilian courts; that this amendment also cover the crimes of murder and rape when committed by security forces personnel against a civilian; and furthermore, that no exception be made for crimes alleged to have been committed by security force personnel against civilians during a military operation.** [40]

The concept outlined in the previous recommendation should also be specifically applied to jurisdiction of the courts as relates to allegations of torture committed by members of the Royal Nepalese Army.

Access to detainees

Although a few NGOs visit detention centres on a regular basis, access to the rooms in which detainees are being held is not granted. Furthermore, such organisations are not granted permission to interview detainees who have not already been taken to court, and so the statistics relating to around 80 per cent of detainees being subjected to torture only apply to those persons who have

been produced before the courts. The most serious cases, where persons are detained incommunicado for lengthy periods and are subjected to the most brutal forms of torture, and potentially to forced disappearance or extrajudicial killing, for the most part remain hidden from external scrutiny. Even the International Committee of the Red Cross (ICRC) has terminated its visits programme to army barracks, due to a lack of unhindered access. The absence of external scrutiny is a major component in permitting ill treatment, torture, custodial deaths related to these practices, forced disappearances and extrajudicial executions.

The newly established Nepal Office of the United Nations High Commissioner for Human Rights (OHCHR), which was established following the signing of an agreement between the Government of Nepal and the OHCHR on April 11, 2005, has in its mandate the unrestricted access to places of detention, and has thus far reportedly been granted this access.

The AHRC welcomes the access to places of detention being granted to the OHCHR and recommends that it be widened to include the ICRC and other national and international NGOs, including the National Human Rights Commission (NHRC).

The lack of documentation regarding arrest and detention

There is no credible and functioning mechanism to ensure the maintenance of proper records regarding the arrest and detention of persons. The same applies regarding medical records that could be used in courts to prove physical and psychological injuries suffered while in custody. Medical practitioners refuse to give medical assistance and also to provide records of medical treatment, since they are also under the threat of being falsely accused of helping anti-national activities.

Text box C

> The case of **Maiya Tamang**, which began in late 2004, illustrates how the lack of documentation of persons that have been arrested and detained by the police, and the legitimisation of this process by the courts, are enabling incommunicado detention and torture to be conducted in a systematic way, with total impunity in Nepal. This process has been accentuated since February 1, 2005, as the number of arrests, both by the

police and the army, has increased and human rights monitoring has been further obstructed.

Maiya Tamang was arrested on November 7, 2004, at her residence by members of the police. She was detained at the Boudha police station for two days, where she was severely beaten by police officers using plastic pipes on her thighs and calves. She was subsequently transferred to Kalimati police station, where she was held for another two days. Here she was also beaten for around half an hour with plastic pipes.

Maiya Tamang was then transferred to the District police office in Hanumandhoka. On November 11, she was presented before court. Human rights monitors were finally able to gain access to Maiya Tamang in the District police office on November 16 and noted the presence of contusions and blue scars on her thighs and calves. An application for her to receive a medical examination was then filed in the district court in Kathmandu. On December 27, 2004, a compensation case was filed in the same court. On April 14, the court decided that, as the police report shows that she was only arrested on November 11, there was no proof that she was in detention during the time she claims to have been tortured. The case was then closed. This documentation problem has reportedly caused a number of other such cases to also have been lost in court.

UN recommendations – Nepal should ensure:

- **the keeping of standardised records of persons received into custody in all places of deprivation of liberty.**[41]
- **that all arrests and detentions are systematically documented, in particular concerning juveniles in detention. The State party should consider creating a central register for persons deprived of liberty, to be made accessible to national and international monitors.**[42]

Anti-terrorist measures: a major source of illegal arrests, torture and disappearances

Since November 2001, the government has imposed anti-terrorist legislation, giving greater latitude to the security forces to arrest and detain people. It allows the authorities to detain people for a period of one year without judicial scrutiny. The Terrorist and Disruptive Activities (Control and Punishment)

Ordinance (TADO) was introduced in November 2001 and was then replaced by the then-parliament of Nepal by the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA), which ran for two years. Since then the TADO has been successively reintroduced every six months, notably, most recently, in the absence of parliament, since it was dissolved in February of this year.

Section 9 of the TADO provides that if there are grounds to believe that the person might commit terrorist activities if not prevented from doing so, he or she can be detained preventively for a maximum period of one year. Please see the following (non-official) translation of Section 9 of the TADO for reference:

Section 9. Power to keep under Preventive Detention

> In case there exist appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist and destructive act, the Security Officer may issue an order to keep him under preventive detention up to 6 months in a humane place. If there are reasonable grounds to believe that the person has to be prevented from committing any terrorist activities for longer than that, on the approval of the Government's Home Ministry, the Security Officer can issue additional six months order of preventive detention.

The wording used in this provision enables loose interpretation and therefore abuse by the security forces. The burden of proof of innocence is on the person accused of terrorist activities. The power to detain persons for a year without judicial scrutiny has enabled the practice of torture to flourish in Nepal. Persons being held under preventive detention have no access to their lawyers. The ALRC has received information that many detainees are held for more than a year under these provisions (see the case of Govinda Ghimire below).

The provisions included in the TADA and the TADO are limited to the arrest of persons suspected of terrorist activities. The army does not have any powers allowing it to detain persons and is supposed to hand persons over to the police for detention in cases where they make arrests. Terrorist activities are considered as crimes against the State, and should be dealt with under the State Cases Act.

Under this Act, the police investigate cases and have the power to arrest persons.

The arrestees are then to be brought before the Appellate Court of Nepal within 24 hours. After completing the preliminary investigation and having collected primary evidence, the case is to be handed over to the public prosecutor, who brings the charges against the person in court. The Appellate Court then decides on whether to give permission for the detention of persons for a maximum period of 60 days. Only the court has the power of decision on whether the person should remain in detention for further investigation or can be released on bail.

In practice however, all those arrested in relation to allegations of being involved in terrorist activities are detained by the army for prolonged periods of time, without having any formal allegations or charges made against them. Under such circumstances, the detainees are systematically subjected to torture. The CAT has raised concerns about the *"extensive resort to preventive detention, up to 15 months, and the lack of fundamental guarantees of the rights of persons deprived of liberty under the Terrorist and Disruptive (Control and Punishment) Ordnance 2005."*[43] Furthermore, *"the maximum period for which an individual could be held in preventive detention, namely 15 months, was too long. Another matter of concern was the fact that individuals could be arrested without a warrant, and detained for over a year without access to a lawyer, doctor or family members, or possibility of challenging the legality of their detention."*[44]

Text box - B

For example, 21-year old **Govinda Ghimire,** a resident of Bethan VDC – 1 Ramechap District, Nepal, was reportedly arrested by a group of plainclothes army personnel on August 29, 2003, and detained incommunicado. A writ of habeas corpus was filed in the Supreme Court of Nepal on October 12, 2003. A complaint was also lodged at the National Human Rights Commission on November 14, 2003.

In response to the writ of habeas corpus, the next day, the Supreme Court issued the Police, Army, Home Ministry, Defence Ministry and Chief Divisional Officer's responses, all of which reported to the court denying Govinda Ghimire's arrest and detention.

On October 8, 2004, over one year after his arrest, his family members received a phone call from an unidentified source saying that Govinda Ghimire was being held in the newly established Sundarijal Interrogation and Investigation Centre, and was going to be released. When his family

members contacted the Sundarijal Centre, they were asked to come on Sunday October 10, as he was allegedly going to be released on that day. The release did not take place, however.

Later, they again went to Sundarijal where they were in fact allowed to visit Mr. Govinda Ghimire. Following this, the family members were asked to come on October 16, as he was allegedly going to be released on that day. They were also asked to inform the ICRC and other human rights organisations of this fact.

On October 16 the family members again went to Sundarijal. Family members of other disappeared people, namely: **Narayadhoj Mahat, Ramesh Prasad Guragain, Binod Dhakal, Naresh Chaudhari, Khadka Bahadur Rai,** were also present. They had also been asked to come for the release of their family members. However, the presence of a police van, believed to be there to rearrest those who were going to be released, was noted. The family members were then told by Sundarijal interrogation centre staff that they would not take any responsibility for the released persons, following their release.

The family members were therefore scared to sign for the release of these detainees, for fear of them being rearrested for longer periods, or even forcefully disappeared.

The preventive detention of persons under the TADO for one year is a significant violation of provisions within Nepal's Constitution and of Nepal's international obligations, notably the International Covenant on Civil and Political Rights. It is open to abuse and its duration is unjustifiable in terms of preventing or investigating alleged terrorist activities. It is also fundamental in enabling torture.

UN recommendations:

- **the Terrorist and Disruptive Activities (Control and Punishment) Ordinance be rescinded immediately by the Government of Nepal.**[45]
- **the State Party should bring the practice of preventive detention in line with international human rights norms and ensure fundamental rights of persons deprived of liberty are guaranteed, including the right to habeas corpus, the right to inform a relative, access to a lawyer and to a doctor of one's choice. The State party should ensure**

that any measure taken to combat terrorism is in accordance with the relevant Security Council resolutions 1373 (2001) and 1566 (2004), which require (…) that anti-terrorist measures be carried out with full respect of (…) international human rights law…[46]

Barriers to justice

The lack of effective and independent investigations into allegations of human rights abuses

There is no alternative mechanism in Nepal that can provide for impartial investigations into cases of torture, forced disappearances and other human rights abuses. Inquiries are conducted by the State police, if at all. Torture and forced disappearances are reported as being mainly perpetrated by the Royal Nepalese Army. Article 86 (1) and article 88 (2) (a) of the Constitution of Nepal means that the jurisdiction of even the Supreme Court cannot be invoked in cases where the Royal Nepal Army is accused of torture. It is precisely for this reason that a writ of habeas corpus cannot effectively be invoked in cases of illegal detention and torture whenever the army is alleged to have committed torture in custody or forced disappearance.

Text box - D

Thirty-two-year-old **Mr. Kumar Khadgi,** from Shivadhara, Bhaktapur, was arrested from his house on September 17, 2003 at around 1pm by a group of 50-60 armed Royal Nepalese Army personnel. His younger brother, Ram Khadgi and five other villagers were also arrested from the village on the same night. Kumar was released on April 13, 2004 after having been detained for eight months in two different army barracks, on the condition that he had to report every week to the Rajdal barracks, Lagankhel. Kumar and his brother were severely tortured, and his brother is yet to be released. A habeas corpus writ petition filed on his behalf on September 24, 2003 was dismissed on the grounds of a lack of jurisdiction.

The army also employs various means by which the reasons for the arrests and details regarding detention are not provided to detainees' relatives. In the absence of the express power to arrest civilians, the army is reported to be directing the local police to perform arrests. The army then takes custody of

the detainees, before sheltering themselves behind the powers enjoyed by the army, ousting the jurisdiction of all civilian courts in Nepal. In cases where the relatives of detainees have moved a court for the production of the said detainees, the court has turned down the requests on the grounds of a lack of jurisdiction.

The military courts, to which concerns about detainees are therefore to be addressed, suffer from a lack of impartiality and transparency. A case where a military court has taken any impartial and independent action on complaints of torture and custodial violence is yet to be recorded. This has resulted in absolute impunity being enjoyed by the army in cases of torture.

There are no practical means by which civilian oversight is possible upon the actions of the armed forces in Nepal. Since the declaration of a state of emergency, a series of Ordinances have been promulgated by the King, giving enormous powers to the armed forces on the pretext of countering the insurgency. Functioning public offices, including the National Defence Council, have been further corrupted due to nepotism and a lack of transparency in dealings. Even the National Human Rights Commission has not been immune to this degradation.[47]

UN recommendations – the Nepalese authorities should: take effective legislative, administrative and judicial measures to ensure that all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and punished. In connection with prima facie cases of torture, the accused should be subject to suspension or reassignment during the investigation… the State party should establish an independent body to investigate acts of torture and ill treatment committed by law enforcement personnel. [48]

Rearrests used to circumvent court decisions

In cases where the courts entertain applications and the releases of persons are ordered, such persons are immediately rearrested on further charges, ensuring that they remain in custody indefinitely.[49] The AHRC has encountered numerous cases where released detainees are rearrested by the security forces, including within the court's premises, making a mockery of the justice dispensation system in the country. [50]

Text box - E

Forty-one-year-old **Kumar Rai**, an employee in the carpet industry, was first arrested from his room on February 27, 2004 at around 3pm by a group of four or five security personnel dressed in civilian clothes. After nine days of illegal detention and torture, he was released on the condition that he had to report to the army barracks on a daily basis. He was rearrested on March 15, 2004 and later released from Mahabir Gan, Chauni the next evening. On March 17, Kumar was once again arrested and subjected to torture while in detention. A habeas corpus writ was filed on August 5, 2004 by his wife, with assistance from local NGO Advocacy Forum, which was dismissed. On January 4, 2005, Advocacy Forum again filed a habeas corpus on Kumar's behalf and on January 31, the Supreme Court issued orders for him to be released. However, Kumar was given another detention order under TADA and Advocacy Forum filed a third habeas corpus on May 2, 2005. He was finally released on May 16, 2005 on the Supreme Court's orders. The reasons for his arrests are unknown.

Thirty-eight-year-old **Mr. Jeewan Shrestha**, a resident of Sankhuwa Sabha District, Wana Village Development Council ward no 1, who had been staying in Kathmandu municipality for three years, was first arrested on September 15, 2003 from his shop at Lokanthali, Bhaktapur. Although he was released on November 16, 2004 on court orders, after a habeas corpus was filed by Advocacy Forum, he was rearrested on the same day. Another habeas corpus was filed on his behalf and Jeewan was released on November 24 after international pressure on the detaining authorities. He was arrested once again on December 15, 2004 and then released on December 23 after the international community took up his case. Jeewan was alleged to have been collecting donations in support of the Maoists, according to the security personnel, and was therefore tortured while in detention.

In one case where officers of the National Human Rights Commission and the lawyers appearing on behalf of a detainee insisted upon his release, once the bail application had been allowed, the security forces surrounded the court premises and threatened to use force to take the released detainee into custody on new charges. This is not an uncommon incident.[51]

The CAT has expressed that the "*consistent disregard of the security forces for the rule of law was of great concern. There were reports of detainees being repeatedly arrested after having been released by the court. For example, on 19 September 2000, 11 detainees had been arrested immediately after having been released by the Kanchanpur District Court in the town of Mahendranagar. That was the third time security forces had rearrested the group, despite repeated court orders for their release. The individuals were believed to be at risk of torture."*[52] During deliberations, the CAT's Country Rapporteur also added that "*such contempt of court illustrated the unchecked power exercised by the police and the security forces, and measures must be taken to address that situation."*[53]

Limited access to courts in Nepal

Accessibility to the courts in Nepal is also hindered, creating a barrier to justice. Very few lawyers are willing to take cases of torture to court, given the death threats that they would likely receive and the absolute impunity enjoyed by the perpetrators. Those who dare to accept briefs are threatened by the perpetrators directly and indirectly so that they are forced to withdraw from providing their professional help to their client. Since torture is not defined as a crime in law, the courts treat a case of compensation for torture as one of a civil nature, and the victims are directed to pay huge amounts in court fees prior to adjudication. [54]

Apart from the procedural traps emanating from the Act itself, there is a consistently demonstrated lack of proper understanding about the purpose of the Convention against Torture and the basic concept of torture among the members of the judiciary.

Members of the judiciary frequently state that the use of force is justified under the current circumstances in the country. This attitude also explains why the amount of compensation given concerning acts of torture is often far below that which has been prescribed in the Act. It is also a predominant view amongst judicial officers that the Act can only be applied to under-trial prisoners, but not to convicts.

The **District Court of Morang** had dismissed applications filed by the wife of a torture victim on the ground that the Act only applies to under-trial prisoners and not to convicts, as was the case of the petitioner's husband in question. Such poor and mistaken interpretation of the Act and the lack of understanding about the very purpose of the Convention pose a further hindrance to the realisation of the spirit of the Convention at the domestic level.

The absence of witness protection

On occasions where there are direct eyewitnesses to cases of illegal arrests and detention, the witnesses are precluded from deposing before courts due to the fear for their lives. In the absence of any witness protection programs or other legislative or procedural measures to ensure the safety of witnesses, there is no chance of having individuals present themselves before courts in order to depose against the police or any other officer of the armed forces.

UN recommendation – Nepal should: consider adopting witness protection legislative and administrative measures, ensuring that all persons reporting acts of torture or ill treatment are adequately protected. [55]

The National Human Rights Commission

The National Human Rights Commission is vested with the authority to inspect places of detention and to process cases of human rights violations, but is often prevented from discharging its duties. Requests for inspection of army facilities are turned down by the officers in charge of detention centres. The adjudication of cases by the Commission involving army officers is obstructed due to a lack of cooperation. The officers of the National Human Rights Commission who are engaged in field visits and investigation of cases are often threatened and intimidated by the armed forces. The Committee against Torture has recalled that *"the OHCHR Field Office in Nepal had recommended that the State party should grant the NHRC of Nepal full and unimpeded access without prior notice to places of detention, which would help prevent disappearances, executions, arbitrary arrests and torture."* [56]

There are numerous cases where the National Human Rights Commission, in response to complaints that it has received, has assisted the relatives of the victims in making applications for bail before the courts. The courts, including the Supreme Court, have frequently declined to consider such petitions for bail on the grounds of a lack of proof of arrest.

Persons concerned about the custody of their relatives and friends have sought help from the National Human Rights Commission for the release of these persons. The National Human Rights Commission has in certain cases ascertained through its own independent inquiry that detainees are indeed being held illegally. When the Commission makes bail applications before the courts,

they are turned down, as the courts give more weight to the false statements submitted by the armed forces, denying the arrest and detention of the persons in question, than to the National Human Rights Commission's requests. Since the Supreme Court is reluctant to accept writs of habeas corpus against the army, the armed forces enjoy total impunity regarding arbitrary arrest, illegal detention, torture and forced disappearance of civilians.

UN recommendations – Nepal should ensure:

- **that the necessary measures (are taken) to support the work of the National Human Rights Commission, ensuring its recommendations are fully implemented.** [57]
- **that the National Human Rights Commission be given unhindered access to all places of detention, including all army barracks, without prior notification or permission.**
- **the Government continue to make every effort to strengthen the role of the National Human Rights Commission… and ensure the continuity of the Commission even in the absence of the regular parliamentary appointments process.** [58]

Threats to human rights defenders

Where various human rights organisations have been involved in providing assistance to victims, they have been isolated and targeted by the security forces. Human rights organisations are constantly under observation. The observation extends to wiretapping of conversations and the tailing of human rights defenders. There are many cases where human rights activists are threatened and intimidated by telephone. The most commonly used method for intimidation is to falsely accuse a person of Maoist activities, an offence for which bail is not available.[59]

One particular area of concern is the potential adoption of a Code of Conduct for NGOs. Under the pretext of transparency, the provisions of the conduct restrict the receiving of international aid, the type of work allowed, the prospect of remuneration, political affiliation and financial transactions. The message given to civil society as well as international organisations is that they should either work with the authorities of Nepal or not at all. The AHRC has urgently intervened to denounce the Code of Conduct.[60] Following further intervention by the United Nations, the Supreme Court of Nepal has issued a stay of execution concerning the adoption of the Code. The attempt to have this Code enforced is symbolic of the Nepalese authorities continuing disregard

for human rights–it in fact represents a significant attack on civil society's ability to work in favour of these rights. There remain concerns that, as in other cases, the Supreme Court may be ignored concerning this.

The AHRC urges the Nepalese authorities to immediately abandon plans to bring into force the proposed Code of Conduct.

UN recommendations – Nepal should: consider amending the Code of Conduct for NGOs to be in line with international human rights standards on the protection of Human Rights Defenders. The State party should ensure national and international monitors are granted permission to carry out regular, independent, unannounced and unrestricted visits to all places of detention. The State party should facilitate, for example, visits by the International Committee of the Red Cross, OHCHR, NHRC, and national and international Non-Governmental Organizations. [61]

Impunity

In Nepal, there are various enactments and other ordinances in force that promote impunity for state agents who could face allegations of having perpetrated custodial violence (see the afore mentioned TADO and TADA). As mentioned earlier, if an officer is challenged in court in a torture case, it is very easy for the officer to fabricate charges against the victim in another case and get that case handled by a quasi-judicial tribunal.[62]

The provisions of these laws provide vast powers to the concerned officers to conduct inquiries and adjudicate upon their own inquiries. Furthermore, this facilitates a process by which anyone who challenges an officer alleging custodial torture is at the mercy of the same officer, who can then lodge false charges against the complainant. In practical terms, a person who complains concerning an act of torture is at risk of putting his life and freedom at the disposal of the very same officer against whom the allegation of torture has been made. Under the current circumstances, it is highly difficult for a victim or anybody concerned about the victim, to establish a case of custodial torture in Nepal.

Conclusion and recommendations

The breakdown in systems and institutions, compounded by the total collapse

in the rule of law that has been accentuated by the Royal takeover, mean that torture is endemic, systematic and conducted with total impunity in Nepal. Claims to the contrary by the authorities should be viewed as nothing more than fabrication. As previously stated, the threats proffered and restrictions imposed on the human rights community in Nepal, especially since February 1, 2005, have led to an inability to document and act concerning a significant number of cases of arbitrary detention, torture, extrajudicial killing and/or forced disappearance, yet those already documented place Nepal in the top echelons of human rights violators on the globe.

Despite the numerous cases of violations that have been documented during this period, effective action to prosecute perpetrators and gain redress for victims is virtually impossible. This can be explained by the fact that grave violations such as torture and forced disappearance are not considered crimes under the current Penal Code of Nepal. Despite the best attempts of local lawyers, and the multitude of recommendations by local and international NGOs and institutions, notably the UN, there is a void that simply blocks all attempts at legal remedy.

The absence of a functioning Parliament since the royal takeover on February 1 of this year, means that legislative measures required to counter this problem are not available. This can only be seen as a purposeful policy on the part of the King of Nepal. The AHRC considers the legitimacy of the authorities void given this situation. The inability to effect real change concerning human rights also seriously undermines the work of the Office of the UN High Commissioner for Human Rights in Nepal. While the AHRC firmly supports this office, it sees no way in which it can fulfil its mandatory role of improving human rights under the present circumstance. Similarly, while welcomed, all other forms of human rights assistance being provided by the international community are being derided by this state of affairs. Involved actors have the moral duty to ensure that their efforts have concrete impact, rather than fuelling empty rhetoric. In order to enable such impact, these actors must use whatever means they have at their disposal to pressure the authorities in Nepal to hold transparent, multi party, all-inclusive elections, in a format that is agreed upon by all, as a matter of urgency. The King has already laid plans for elections to be held, but these will not be able to deliver a democratic and acceptable result, due to restrictions on the participation of certain political parties, amongst other things.

In the case of the election of a credible government, the parliament needs to

immediately enact laws that criminalize torture and forced disappearance, in line with the recommendations of the Committee against Torture and Nepal's obligations under international law. The implementation of the provisions of these laws need to be made possible in courts, or risks being futile. The judiciary therefore needs to be strengthened, most notably through orders obliging the police and the military to respect court orders without exception or delay. The rule of law is a prerequisite for the respect of all human rights. Without the rule of law, even the most sophisticated constitution and domestic legislation is worthless in practice.

As the timing of the required political developments is subject to unpredictability, civil society should not wait to begin campaigning on the primordial issue of legislation prohibiting torture and forced disappearances as crimes. In a society where torture and forced disappearances are widespread, systematic and accompanied by total impunity, what hope can there be for the respect of other human rights? Conversely, in a society where such practices are criminal offences and where perpetrators are prosecuted in fair trials and sentenced in accordance with the law and international standards, then there is hope that the enjoyment of all human rights can be achieved.

The armed insurgency should not provide any justification for the continuing perpetration of violations, or as a barrier to reforms. The end to the conflict, when it comes, will also not necessarily engender sustainable improvement in the human rights situation in the country. This can only be brought into being through reforms to the judicial, administrative and legislative institutions, as well as to the policing system, through concrete measures, as outlined below.

Recommendations

The AHRC urges Nepal's highest authorities to:

- **Publicly condemn the practices of torture and forced disappearances;**
- **Immediately abolish the TADO and ensure that anti-terrorist measures are carried out with full respect of international human rights law;**
- **Hold free and fair, all-inclusive multiparty elections, and restore parliament as a priority;**
- **Then, adopt legislation criminalizing torture and forced disappearances, and amend the Torture Compensation Act and Army Act to bring them in line with international laws and standards regarding torture and forced disappearance;**

- **Annul all provisions in domestic law legitimising pre-trial detention beyond 24 hours;**
- **Issue orders to the police and armed forces to comply immediately and without exception to court orders, including those pertaining to habeas corpus writs;**
- **Immediately transfer all detainees to legally designated places of detention;**
- **Ensure that all persons being detained incommunicado be immediately released or charged and tried under due process;**
- **Ensure that all detainees have access to family members, legal representation, and access to medical examinations (in the latter case, particularly at the time of arrest and release);**
- **Ensure that accessible and accurate lists are kept of all arrests and persons in detention;**
- **Create independent, competent bodies for investigating all allegations of arbitrary arrest, illegal and/or incommunicado detention, torture, custodial sexual violence or death, forced disappearance and summary or extrajudicial killings;**
- **Abolish all statutes of limitations for complaints of acts of torture;**
- **Take legislative and administrative measures regarding witness protection;**
- **Ensure that all allegations of violations of civilians' human rights committed by the armed forces are tried by independent, impartial and competent civilian courts;**
- **Ensure that punishments for acts of torture are commensurate with the gravity of the offence and in line with international standards;**
- **Ensure that adequate compensation is awarded to victims or their families, and in a timely manner;**
- **Support the work of the NHRC, ensuring that its recommendations are fully implemented;**
- **Ensure the protection of human rights defenders and abandon all plans to bring into force the Code of Conduct for NGOs. The AHRC welcomes the access to places of detention provided to the OHCHR office in Nepal and urges the authorities to grant the same access to the ICRC, NHRC and other national and international NGOs and institutions.**

---

1 NEPAL: Immediate intervention needed to save human lives in Nepal, The Asian Legal Resource Centre, Statement issued on 1st February 2005 http://www.ahrchk.net/statements/mainfile.php/2005statements/255/

2 ALRC Supplementary Document concerning Torture in Nepal in 2005, November 6th, 2005: http://www.alrc.net/doc/mainfile.php/unar_cat_np_2005/
3 United Nations Press Release, September 16th, 2005: Special Rapporteur on Torture says practice of Torture is Systematic in Nepal, http://www.unhchr.ch/huricane/huricane.nsf/view01/747EA6831C54890AC125707E00508573?opendocument
4 AHRC statement: Nepal: Proposed code of conduct an attempt to suppress civil society**,** November 8, 2005, http://www.ahrchk.net/statements/mainfile.php/2005statements/368/; and AHRC press release: NEPAL: Proposed code of conduct an attempt to control NGOs and international cooperation, November 10, 2005**,** http://www.ahrchk.net/pr/mainfile.php/2005mr/239/
5 ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, http://www.article2.org/mainfile.php/0306/ & Vol. 04 - No. 01 February 2005 – Nepal: Time to act, http://www.article2.org/pdf/v04n01.pdf
6 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Art. 2, para 2.: http://www.ohchr.org/english/law/cat.htm.
7 UN Committee Against Torture, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 4.
8 ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, http://www.article2.org/mainfile.php/0306/ & Vol. 04 - No. 01 February 2005 – Nepal: Time to act, http://www.article2.org/pdf/v04n01.pdf
9 Children Treated as Adults in Nepal's Legal Vacuum, Human Rights Solidarity : Vol. 15 No. 02 MAR 2005 http://www.hrsolidarity.net/mainfile.php/2005vol15no02/2406/
10 United Nations Press Release, September 16th, 2005: Special Rapporteur on Torture says practice of Torture is Systematic in Nepal
11 UN Committee Against Torture, Conclusions and Recommendations of the Committee against Torture, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6: http://www.ohchr.org/english/bodies/cat/docs/CAT_C_NPL_CO_1_CRP.3.doc
12 Ibid
13 Ibid
14 Ibid
15 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3
16 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6
17 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 5
18 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6
19 Ibid
20 UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1page 3
21 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 5
22 Article 14 (4), Constitution of the Kingdom of Nepal
23 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 6
24 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3
25 Torture Compensation Act 2053 B.S (1996)

26 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 5
27 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 8
28 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 9
29 Ordinance Amending some Nepal Acts Related to Communication ; promulgated on 9 October 2005
30 Section 6 (2) of the Torture Compensation Act reads *"While trying a complaint pursuant to sub-section (1) if it is found that the complaint was filed with malafide intention the district court may impose a fine up to five thousand rupees on such complaint"*
31 Section 10 reads *"Concerning the complaint in accordance with section 5, if the chief of the concerned office requests, the Government Attorney shall appear in the court on behalf of the employee and defend him"*
32 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 4
33 Ibid, page 7
34 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 8
35 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 6
36 Ibid
37 UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, p. 2
38 ALRC's Article 2 publication: Vol. 03 - No. 06 December 2004 - Special report: The mathematics of barbarity and zero rule of law in Nepal, Pages 10-11, http://www.article2.org/mainfile.php/0306/.
39 Ibid, page 3
40 UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, p.13
41 Working Group on Arbitrary Detention report, November 26th, 1996, page 7: http://daccessdds.un.org/doc/UNDOC/GEN/G96/142/61/PDF/G9614261.pdf?OpenElement
42 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3
43 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 3
44 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 6
45 UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, p. 3
46 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 4
47 Asian Human Rights Commission Urgent Appeals Programme; FORWARDED APPEAL (Nepal): Human rights groups question the legality of the National Human Rights Commission (NHRC) of Nepal http://www.ahrchk.net/ua/mainfile.php/2005/1106/
48 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 7
49 Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Re-arrest of Nepalese citizens undermines official court orders and rule of law http://www.ahrchk.net/ua/mainfile.php/2005/1098/

50 Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Confirmed re-arrest of at least 32 political activists and human rights defenders in violation of court orders following the royal takeover http://www.ahrchk.net/ua/mainfile.php/2005/1134/
51 Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Two recent incidents involving threats to a Teachers' Union leader and the re-arrest of citizens despite Supreme Court release orders http://www.ahrchk.net/ua/mainfile.php/2005/1130/
52 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 4:
53 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 5:
54 Sanji Danel vs. Shanti Ram filed before the District Court Kathmandu
55 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 8
56 UN CAT, Summary of the 669th meeting, November 16th, 2005, CAT/C/SR.669, page 6:
57 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 4
58 Report UN Working Group on Enforced or Involuntary Disappearances, January 28th, 2005, E/CN.4/2005/65/Add.1, page 3
59 Asian Human Rights Commission Urgent Appeals Programme; NEPAL: Restriction of movement of activists can prevent human rights monitoring http://www.ahrchk.net/ua/mainfile.php/2005/1139/
60 AHRC statement: Nepal: Proposed code of conduct an attempt to suppress civil society**,** November 8, 2005, http://www.ahrchk.net/statements/mainfile.php/2005statements/368/; and AHRC press release: NEPAL: Proposed code of conduct an attempt to control NGOs and international cooperation, November 10, 2005**,** http://www.ahrchk.net/pr/mainfile.php/2005mr/239/
61 UN CAT, Conclusions and Recommendations, November 22nd, 2005, CAT/C/NPL/CO/1/CRP.3, page 7
62 The Public Security Act 1990; The public Offence and Punishment Act 1970; The Police Act 1955; The Terrorist and Destructive Activities (Control and Punishment) (TADA) Act 2001

December 7, 2005

Ms Louise Arbour
High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: Nepal - without a parliament and laws on torture and forced disappearance, the Office of the OHCHR in Nepal cannot fulfil its work for human rights

On the occasion of the December 10, 2005 International Human Rights Day, the Asian Human Rights Commission (AHRC) wishes to highlight the continuing flagrant abuses being perpetrated in Nepal and request your intervention regarding specific issues.

AHRC welcomes the establishment of the Office of the High Commissioner for Human Rights in Nepal and commends you for your commitment and efforts in bringing about this much-needed development. AHRC was involved in efforts to lobby for the establishment of this office and notes with satisfaction that it is now functioning and well staffed.

The reported agreement between the CPN-Maoist insurgents and an alliance of seven opposition political parties presents new opportunities for the resolution of the country's internal conflict through a democratic process. AHRC appreciates the intervention of the High Commissioner in a press release issued on December 1st, 2005, urging the Maoists to extend their unilateral ceasefire (which they have now reportedly done) and respect human rights, and for the Government of King Gyanendra and the security forces to also call a ceasefire and respect the rights to the freedoms of expression and peaceful assembly.

However, the situation in Nepal continues to be of grave concern, with ongoing widespread and systematic abuses - including arbitrary arrest, illegal and/or incommunicado detention, torture, suspicious custodial deaths, forced disappearances and extrajudicial killings – being perpetrated on a daily basis. Impunity remains total for these acts. The perpetrators are free to continue violating and victims receive nothing but threats of further abuse if they risk complaining.

Currently, the Royal Nepalese Army is acting without civilian control or oversight, even ignoring habeas corpus orders from the Supreme Court of Nepal, and sheltering behind opaque military courts. The police collude with the military to ensure impunity. The OHCHR is fully aware of the scale of human rights violations in the country.

AHRC wishes to bring to your attention the fact that all efforts being made by local and international NGOs and institutions, including the office of the OHCHR, concerning the most grave violations human rights, are currently essentially rendered ineffectual due to the fact that there is no functioning parliament.

AHRC's experience leads us to believe that for any concrete steps to be taken in terms of preventing abuses (notably torture and forced disappearances), of prosecuting perpetrators and of providing reparation to victims, these practices must be criminalised under domestic legislation. This need has been noted and action urged by both the Committee Against Torture (in its November 2005 session) and the Working Group on Enforced or Involuntary Disappearances (in a report published in January 2005). However, without a parliament, Nepal has no legal constitutional body that can enact legislation. The authorities in Nepal need to be strongly urged to hold free and fair, fully-participatory, multiparty elections to enable the reinstatement of the legislature.

Torture and forced disappearance will continue unabated unless criminalized, with backing from a judiciary that is able to effectively prosecute violations of the law. With no such laws, the role of the office of the OHCHR is reduced to simply documenting the large number of ongoing cases of torture and disappearances – a situation that is of no succour to victims and no concrete help in protecting human rights in practice. Without these tools, the judiciary is also toothless as regards its ability to independently uphold Nepal's international human rights obligations. AHRC fully supports the OHCHR office in Nepal, and faces similar obstacles in its own actions in the country, but wishes to see improvements to the impact of all actions in favour of human rights in Nepal.

In view of this, AHRC kindly requests your most resolute intervention with the authorities in Nepal, in order to ensure that:

- free and fair, fully-participatory, multiparty elections are held, so that parliament can resume its functions;
- laws criminalizing torture and forced disappearance are thereafter enacted without impediment;
- the armed forces and police are ordered to immediately and without exception comply with all court orders, including those pertaining to habeas corpus writs;
- an independent and competent body is established to investigate all allegations of human rights violations;
- all recommendations made by UN treaty bodies and special procedures are implemented without fail or delay.

King Gyanendra of Nepal should also be urged to make a clear, unequivocal public statement condemning the practices of torture and forced disappearances, as this will serve to deter future violations. Thank you for the kind consideration that you will give these matters.

Basil Fernando
Executive Director

SRI LANKA

Deliberate neglect of U.N. treaty body recommendations adds to general lawlessness in Sri Lanka

Sri Lanka's record of human rights violations has come under severe scrutiny both by the U.N. Human Rights Committee (November 2003) and by the Committee against Torture (November 2005). Other U.N. agencies have also pointed to gross rights abuses within the country, as well as the lack of any credible system of redress. By ignoring the recommendations made by these bodies, the Sri Lankan government is perpetuating the lawlessness prevailing within the country.

It is commonly held within Sri Lanka itself that the rule of law is at its lowest ebb. The weaknesses of the country's police, whose engagement in torture has been criticised both by the Human Rights Commission of Sri Lanka and the National Police Commission, as well as other concerned groups, is endemic and structural. In fact, torture is the common method of criminal investigation. The Sri Lankan prosecution system as organised under the attorney general is extremely defective, as has been manifest in all human rights related cases, including the Bindunuwewa massacre. Only two torture perpetrators have been convicted since 1994; a large number of those prosecuted in courts are now being acquitted. In fact, the general conviction rate in criminal cases is between 2 to 4 per cent. The Sri Lankan judiciary has also come under heavy criticism from the Human Rights Committee, particularly with regard to the case of Tony Fernando. A code of conduct for judges was finally called for by the Bar Association of Sri Lanka, frustrated with the behaviour of certain judges. Over the past year there has been a drastic reduction of fundamental rights cases, and the few cases heard in the courts have been awarded paltry compensation sums. Rather than a decrease in either credible reports on torture or the gruesome acts themselves, this trend reflects the Sri Lankan government's low appraisal of the gravity of torture as well as its international obligations under the various U.N. treaties they are party to.

The general attitude of the government towards the recommendations of the U.N. treaty bodies can be summed up as that of careless disregard and cynical dismissal. While both the Human Rights Committee and the Committee against Torture have considered Sri Lanka under special procedures and have called for reports on the implementation of their recommendations within a year—which has already elapsed since the recommendations of the Human Rights Committee—it is not known whether the government has submitted or is working to submit the reports.

The following matters in particular have come under serious U.N. scrutiny:

Institutional collapse

The purpose of the 17th Amendment to the Sri Lankan Constitution, adopted in 2001 unanimously by all political parties, was to address the collapse of basic public institutions due to decades of emergency and anti-terrorism laws. Under this amendment, several commissions were established to overlook various public institutions, to be headed by persons of integrity who would act above political interests. The appointment of these persons was to be performed by the Constitutional Council, a body consisting of persons beyond reproach.

Unfortunately, this attempt to introduce merit as the criterion of leadership within Sri Lanka's basic institutions, rather than corruption or politicisation, was undermined by the state itself. To illustrate, the former president, Chandrika Bandaranaike Kumaratunga, did not reappoint members of the Constitutional Council for many months after their terms expired, and in fact left office without appointing them. Various excuses were given for this non appointment, such as a delay in the nomination of representatives by certain political parties. However, these excuses were merely a cover up for the power struggle between the president and the independent institutions under the 17th Amendment. The former president, like earlier presidents, wanted to manipulate public authorities by being able to control senior appointments. Where such control was not possible, she obstructed the functioning of these institutions by not signing and issuing appointment letters for commission staff. In this way the Commissions of Elections was never appointed and neither were new members to the Constitutional Council. Without a functioning Constitutional Council, new members to other commissions cannot be appointed, without which those commissions cannot function. This was the fate of the National Police Commission; its members' terms expired on November 24,

2005. Months before this date the issue was raised and brought to the attention of the president and others by the National Police Commission chairman as well as others, all to no effect. At the Committee against Torture sessions in November 2005, the Committee also raised this issue with the Sri Lankan government delegation and made the following recommendations:

> 7. While noting the significant role of the National Police Commission in disciplinary investigations of the police force, the Committee notes that the terms of office of its current Commissioners will expire at the end of November 2005 and is concerned that no new Commissioners have yet been appointed.
>
> The State Party should proceed with the urgent reappointment of the Commissioners of the National Police Commission. Furthermore, the State Party should ensure that the public complaints procedure provided for in Article 155G(2) of the Constitution is implemented and that the Commission is given adequate resources and full cooperation by the Sri Lanka police in its work [CAT/C/LKA/CO/1/CRP.2].

While members of the delegation gave unequivocal assurance to the Committee that the Constitutional Council would be appointed promptly to avoid the present situation of there being no Council commissioners to appoint new members of the National Police Commission, those solemn undertakings proved to be hollow.

Removal of safeguards against police abuse

Without a functioning National Police Commission, the Sri Lankan police are granted further impunity to commit abuses. Among other things, the Commission has the constitutional duty of maintaining discipline within the police force. Amidst the significant criminal behaviour attributed to police officers and the breakdown of discipline within the police force, the involvement of the Commission created hope for the establishment of measures to address the situation. For instance, the Commission's interdiction of over 100 police officers who are facing criminal charges was a progressive step that could discourage further torture and criminal acts by the police. However, the measure brought retaliation from certain officers, including the Inspector General of Police himself. In fact, the Inspector General openly attacked the Commission and objected to its independence, implying that disciplinary control should remain an internal affair, as it had been in the past. This would allow senior

officers to manipulate inquiries and to intimidate the complainants. The Inspector General further complained that the police force would be unable to function if its officers were interdicted. In response, the Commission publicly explained that it was merely carrying out its constitutional mandate and that the interdiction of police officers facing criminal charges is a requirement of the law, which lays down that all civil servants facing criminal charges should be interdicted from their posts.

Following the non appointment of the commissioners, the mandate of disciplinary control has been transferred back to the Inspector General of Police. Complainants against police abuse cannot hope to have a fair inquiry anymore. Instead, criminal elements within the police will be encouraged to blatantly flout legal and disciplinary provisions, while complainants receive threats and intimidation.

Witness intimidation

The killing of torture victim Gerald Perera in November 2004 was such an instance of intimidation. Perera was to give evidence in court against the perpetrators a week after he was killed.

Gerald Perera

Upon hearing this news, torture victim Amarasinghe Morris Elmo De Silva, a former navy officer, said that his body went cold and he did not know what to do even though he wanted to pursue his complaint vigorously. The details of his case are as follows:

> In the case of Amarasinghe Morris Elmo DE Silva, who was allegedly tortured by some officers of the Ja-ela Police Station in January 2001, had to flee the country due to threats to him and his wife as a case against the perpetrators is going on at the Negombo High Court. The indictment in this case was filed on 20 November 2003. However, to date the five police officers who were interdicted are continuing to work as police officers, although the U.N. Special Rapporteur on the Question of Torture made representation to the Sri Lanka government [Paragraph no. 1583 in the Special Rapporteur's annual report, E/CN.4/2003/68/Add. 1].

De Silva was pursuing his torture complaint against Inspector of Police (IP) Lakpriya Niroshan Suriya Kumara. The other four officers involved in the

case are P.C. 10282 Sugath Jayantha Kumara, P.C. 38599 Tilakaratne Aarachchige Kumara, P.C. 37495 Deepti Saman Seneviratne, and P.C. 25961 Lansakkara Aarachchilage Siriwardane. Despite his case against the police pending in the Negombo High Court, De Silva went into hiding due to fears for his safety. Although the perpetrators of Perera's murder were arrested due to significant local and international pressure, and several of them confessed that they had killed him in fear of imprisonment, the non functioning National Police Commission may change things. Genuine inquiries into police criminality being almost impossible without an independent supervisory agency, the intimidation of witnesses will be institutionalized. The following recommendations by the Committee against Torture have hence already been negated by the present situation in Sri Lanka:

> 15. The Committee is concerned about alleged reprisals, intimidation and threats against persons reporting acts of torture and ill-treatment as well as the lack of effective witness and victim protection mechanisms (article 13).
>
> In accordance with article 13, the State party should take effective steps to ensure that all persons reporting acts of torture or ill-treatment are protected from intimidation and reprisals in making such a report. The State party should inquire into all reported cases of intimidation of witnesses and set up programmes for witness and victim protection [CAT/C/LKA/CO/1/CRP.2].

Lack of speedy and impartial disciplinary inquiries

Concerned by the lack of an effective procedure of inquiring into police abuse, the Committee against Torture made the following recommendations:

> 12. The Committee expresses its deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances mainly by the State's police forces. It is also concerned that such violations committed by law enforcement officials are not investigated promptly and impartially by the State party's competent authorities (article 12).
>
> The State party should: a) ensure prompt, impartial and exhaustive investigations into all allegations of violations of torture and ill-treatment and disappearances committed by law enforcement officials. Such violations should, in particular, not be undertaken by or under the authority of the

police, but by an independent body. In connection with prima facie cases of torture the accused should be subject to suspension or reassignment during the process of investigation, especially if there is a risk that he or she might impede the investigation; b) try and, as appropriate, convict the perpetrators and impose appropriate sentences on them, thus eliminating any ideas of impunity that might be entertained by perpetrators of torture [CAT/C/LKA/CO/1/CRP.2].

Far from implementing these recommendations, the Sri Lankan government is allowing even the limited existing procedure to be undermined through the inaction of the Special Investigation Unit, which was established under the attorney general's office in 2002 to deal specifically with cases of police torture and abuse.


Lalantha Fernando

At present, fewer cases are being referred to this unit and more cases are being investigated by the local police or the deputy inspector general of police. This is why the National Police Commission, Human Rights Commission and other civil groups have been receiving an increasing number of torture complaints, while the Special Investigation Unit has been receiving a dwindling number: in 2002, 95 cases were referred to the Unit, in 2003, 158 cases, in 2004, 89 cases and in 2005, 33 cases. Bypassing the Unit ensures a greater possibility of inefficient and ineffective inquiries. One such instance is the case of Lalantha Fernando, who was arrested instead of his uncle on October 10, 2005, within a few hours of which his severely injured body was handed over to his relatives by the police themselves. The victim died on October 19. Despite huge media coverage, the investigation was not handed over to the Unit but was left to the local police under the area deputy inspector general of police, who was the superior officer of the alleged perpetrators. Until now no one has been arrested.

The initial attempt to refer cases to the Unit as reflected in 2002 and 2003 gradually changed in 2004, with the situation worsening in 2005. The process of impartial and independent investigations is at present being subverted and the small developments of 2002 and 2003 are being lost. This is a direct attempt by the police to resist more serious forms of investigations into their conduct.

Deliberate failure to prosecute

Lalantha Fernando's case is also indicative of the lack of prosecution of police officers by the Sri Lankan state. As already mentioned, Fernando was abducted from his home, having been mistaken for his uncle, who had been making a series of complaints against Sub Inspector (SI) Nilanga Perera. Several family members were able to identify the abductor who came in a van bearing number plate 592158 as Perera**.** Another officer who took part in the abduction has been identified as Police Constable Jude. Both these officers belong to the Koswatte Police Station. Several neighbours and family members were also witnesses to SI Perera coming to the house once again to ask for the uncle who witnessed Lalantha's abduction. Despite significant media coverage, local protests and international lobbying for prompt and impartial investigations, until now SI Perera has not been arrested. In fact, serious attempts have been made to cover up this incident despite the eyewitnesses and other available evidence.

Delay in trials

Civil society groups within the country have repeatedly noted that the present delays in justice amount to a betrayal of justice, and expose victims and witnesses of abuse to mortal danger. Local human rights groups have severely criticised the delays in justice and have published articles, news items and advertisements in their attempts to deal with this key issue. The Committee against Torture has also made recommendations regarding such delays:

> 14. The Committee is concerned about the undue delay of trials, especially in the cases of trials of people accused of torture.
>
> The State party should take the necessary measures to ensure that justice is not delayed [CAT/C/LKA/CO/1/CRP.2].

Image of the judiciary – this is by the cartoonist of the Ravaya weekly paper, reprinted from the book 'An Unfinished Struggle' (536 pages), an investigative exposure of the Sri Lankan judiciary and the Chief Justice by Victor Ivan – courtesy of Ravaya.

Although the Sri Lankan delegation stated to the Committee in November 2005 that measures are being contemplated to address the issue of delays, there is no evidence to substantiate such a claim. There is no indication that the government is seriously attempting to deal with this fundamental flaw in the country's justice system, which has paralysed criminal justice in particular.

Lalith Rajapakse

The case of Lalith Rajapakse is a clear indication of this paralysis. Lalith was arrested on April 18, 2002 and was severely beaten at the Kandana Police Station. He was found unconscious on April 20 at the police station by his grandfather, and remained unconscious for 15 days at the National Hospital of Colombo.

Due to the interventions of the U.N. Special Rapporteur on the question of Torture as well as others, inquiries were conducted and indictments were finally filed at the Negombo High Court in July 2003, after more than a year since the incident occurred. Since then, the case has been pending before the court, and the hearing has now been postponed to May 2006. Lalith also filed a fundamental rights application in the Supreme Court on May 20, 2002. While the Sri Lankan constitution requires that such applications be dealt with promptly, Lalith's is still pending and will only be taken up after the High Court case is finally adjudicated. This case could go on for the next two or three years, as trials in Sri Lanka's high courts are not heard daily—at each date set by the court, only part of the evidence is recorded, and the trial is then postponed to another day, which could be several months later. The last hearing of the case was on November 28, 2005 and the next hearing has been scheduled for six months later.

Since making his complaint, Lalith has been living away from his home, in the care of a human rights group, due to fear of reprisals. This situation must continue now for several years, until both cases are over. Furthermore, a key witness in the case is Lalith's 75-year-old maternal grandfather, Elaris. Whether Elaris will survive until his testimony is recorded in court is currently in question. Several cases involving disappearances, which were delayed for more than ten years, were later withdrawn because eyewitnesses had died. However, neither the attorney general, who is prosecuting Lalith's case, nor the court seem to be taking such matters into consideration.

The reason for Lalith's fundamental rights application pending the High Court

verdict is a judgement made by the Supreme Court (Case no. SCFR483/ 2002), stating that hearing the fundamental rights petition at the Supreme Court while the case is pending at a high court may prejudice the high court trial. In all incidents where high court trials have been fixed, the Supreme Court hearings will therefore only occur after the case is over at the high court. In this way, the delays inherent in the high court process will inevitably affect the Supreme Court hearings.

Torture victim Chamila Bandara Jayaratne's case is indicative of such delays. Chamila filed a fundamental rights application in July 2003 and the case proceeded before the Supreme Court, with Chamila's lawyer making the initial submission. However, on November 30, 2005 when the case was to be heard again, the Supreme Court's attention was drawn to the case filed by the attorney general against the alleged perpetrators in the Kandy High Court. The fundamental rights case is now pending until the end of the high court trial, which has yet to even begin.

Chamila Bandara Jayaratne

These delays in prosecution render the considerable effort put into the filing and investigation of complaints futile. In a written submission to the U.N. Commission on Human Rights in 2005, the Asian Legal Resource Centre (ALRC), the sister organisation of the Asian Human Rights Commission (AHRC) noted how the efforts of rape victims—who are often very young—are frustrated by the delays in trials.

> 1. The incidence of rape against women in Sri Lanka has become incredibly high in recent years. While more women are now lodging complaints against rape than they did in the past, there are still significant numbers of rape cases that go unreported. There are many reasons for this but perhaps the most prevalent is the delay in finding justice in the courts, and thus the reluctance therefore to pursue it. The Asian Legal Resource Centre (ALRC) wishes to demonstrate four cases where delays in rape cases occurred.
>
> Case 1: Jesudasa Rita was allegedly raped at the age of 16 on 12 August 2001. No immediate investigation was carried out. An investigation only came about, after some time, due to the intervention of human rights groups. A case bearing No. 32151 Magistrate's Court, Nuwara Eliya, was filed and evidence was recorded. In October 2002 the case was committed to the High Court for trial and the file was sent to the Attorney General's department. To date, the victim has heard nothing further about the case.

The victim has made several complaints regarding this matter to the Attorney General and also the Human Rights Commission of Sri Lanka. However, to her knowledge, no case has yet been filed in the High Court. Generally, after indictments are filed in the High Court, it may take between three to five years before a judgement is given. Then the judgement can be appealed and this itself may take another three to five years. Thus, Jesudasa may have to wait up to twelve years from the date of her alleged rape to the date that she will get a final verdict from the court.

Case 2: Yamuna Sandamali was a mere 13 years old at the time of her alleged rape on 2 September 2002. After the police conducted an initial investigation a case was filed in the Magistrate's Court of Kandy bearing No. 25248. This case is still pending before the Magistrate's Court. It is not possible to predict when the Magistrate's Court Non-Summary proceeding will end. However, once it has ended it will be sent to the Attorney General's department for the filing of the indictments. Going by earlier cases, the victim can expect to wait at least three years before the indictment is prepared and sent to the High Court. At the High Court it will possibly take a further three to five years for judgement. If the case is appealed, which is most likely, there can be expected to be a further three to five years before the final judgement. During that time Yamuna may experience the same problems as mentioned above.

Case 3: S.S. Kumari Anushka was allegedly raped on 2 July 2003. Her case bears the number B 40152 at the Magistrate's Court. Having a 'B' number for a case means that the Non Summary Inquiry has not begun yet. Going by earlier cases, a Non Summary Inquiry often takes two to three years to finalise. The victim will then most likely face the same prolonged wait as mentioned above.

Case 4: Inoka Samanthi was 17 when she was allegedly raped on 7 April 2002. The case bears No. B 37112 at the Kandy Magistrate's Court. Again, bearing a 'B' number means that not even Non Summary proceedings have begun. Thus, Inoka can expect to wait many more years before any justice can be sought in her case.

2. Evident from these cases is the extreme lack of judicial remedy within the Sri Lankan court system. Though article 14 (3) of the International Covenant on Civil and Political Rights guarantees speedy trial for everyone, the women in these cases and many more rape victims across Sri Lanka have this right violated by the very system that is there to protect them. Women who wish to seek justice must prepare themselves for heightened

Below are some of the persons who were given the Citizens' Award for Justice on December 9, 2005, in Colombo, Sri Lanka, in recognition of their tremendous courage in fighting for justice. Such fights are conducted in the context of extraordinary delays and severe threats to those who are engaged in them.

A M Kusumawathi

Ranjani Rupika

Ramani Perera

K P Wimalasara

W M Sriyawathi

Sunil Fernando

Ajith Navaratne Bandara

Nandani Herath

R M P S Kumarihami Ekanayake

D Pushpakumara

K A Samarasinghe

Elaris Alvis

> stress, potential intimidation and even further violence for a period of time that may extend to more than ten years. Through such a flawed system, the state puts the lives and liberty of such victims at risk for the prolonged duration of their trial [ALRC, 'Rape and the failure to provide justice in Sri Lanka, E/CN.4/2005/NGO/116].

Unless the issue of delays in trials is addressed, it is not possible to avoid the increase of crimes and people taking the law into their own hands, both of which are already happening. By overlooking this situation, the Sri Lankan government has confined its involvement on this issue to mere rhetoric. In his opening address to the parliament, Sri Lanka's new president stated that reforms to the criminal justice system will be considered, however, no mention was made about delays in justice. In fact, among human rights groups there is a fear that these reforms may involve the enactment of more draconian laws, resulting in the further deterioration of the criminal justice system.

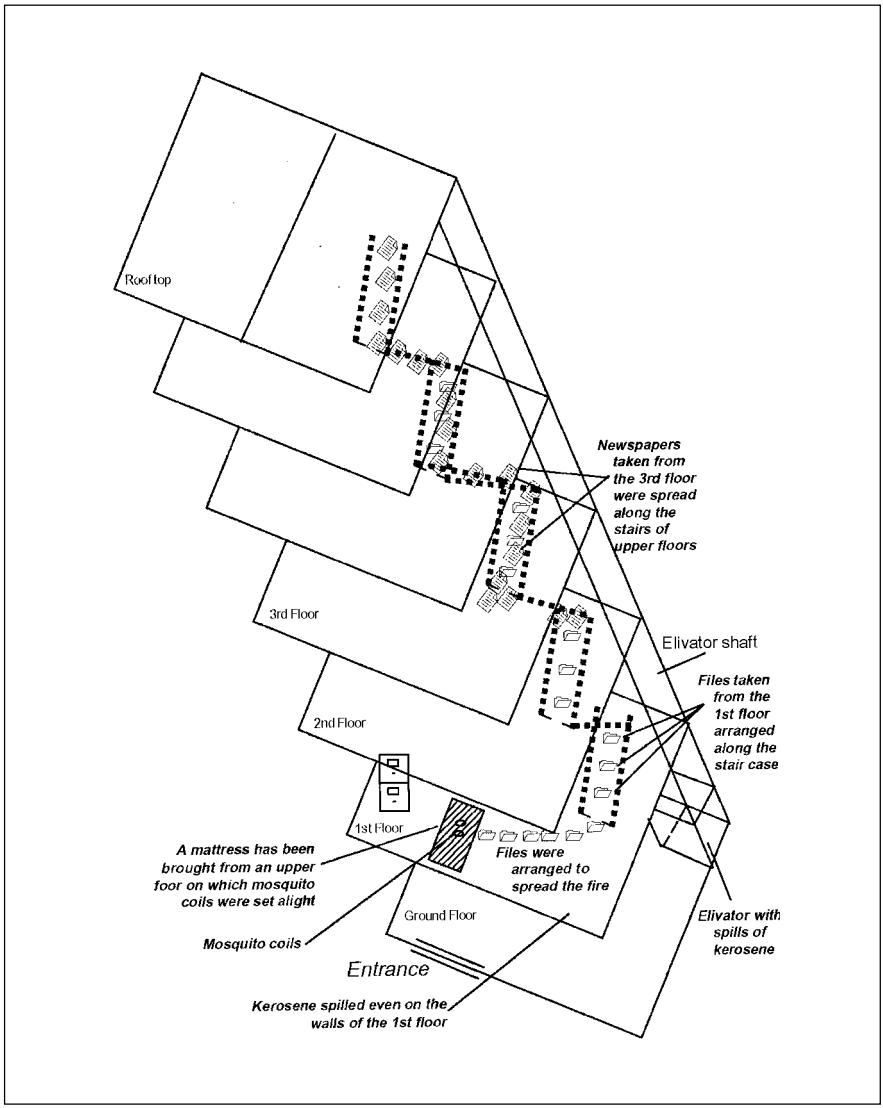
Neglect of the Human Rights Commission of Sri Lanka

Despite the public statements of support given by the Sri Lankan government to the Human Rights Commission, in reality the Commission remains a neglected institution. The Commission receives little support from the government: insufficient resources have been allocated for its functioning and the government does very little in way of implementing its recommendations.

Furthermore, it is increasingly facing threats from law enforcement officers whose abuses they attempt to investigate. The Commission's Chairperson, Dr Radhika Coomaraswamy, said to the London based REDRESS magazine that, "the police are hostile to us". In fact, the Inspector General of Police and many other senior officers have openly shown their hostility towards the Commission. Neither the government nor public authorities such as the attorney general have done much to foster police respect for the Commision. On several occasions, Commission officers have been assaulted during their attempts to visit police stations.

Public institutions such as the Human Rights Commission cannot function without an environment of cooperation, in which their role is legitimised. No such environment has been established in Sri Lanka. Rather, an environment of active hostility exists, reinforced by the violence instilled within the country's law enforcement agencies, which creates a threatening situation for Commission staff. Dr Coomraswarmy further made these remarks regarding police violence:

Human Rights Commission – the attempted arson of the HRC's premises took place on October 11, 2005. This diagram shows how the planners spread documents, which were coated in a flammable liquid, throughout the staircase in order to ensure that the fire would spread upwards to the offices on the higher floors. No-one has yet been prosecuted for this attack.



> I am very worried about extrajudicial killings; recently there have been eighteen cases of shootouts with the police. The challenges are really training the police force in a way that makes it a community police. We are not talking about isolated cases of rogue policemen: we are talking about the routine use of torture as a method of investigation. It requires fundamental structural changes to the police force to eradicate these practices [Interview with REDRESS magazine, May 2005].

On October 11, 2005 there was an attempted arson at the Commission's headquarters. Although the Sri Lankan delegation to the Committee against Torture attempted to dismiss this as an attempt of vandalism by some disgruntled drivers, in actual fact the complete destruction of the building was prevented by mere fortune. Despite investigations conducted by the Criminal Investigation Department, none of the culprits have yet been arrested or charged. Meanwhile Chairperson Dr Coomaraswarmy has said that "the police and Human Rights Commission are conducting investigations and it is proving to be a complex process".

Under these circumstances it is very unlikely that the Sri Lankan government will implement the following recommendations made by the Committee against Torture in November 2005:

> 11. The Committee is concerned about the lack of an effective systematic review of all places of detention, including regular and unannounced visits to such places (article 11), by the Human Rights Commission of Sri Lanka and other monitoring mechanisms.
>
> The State party should allow independent human rights monitors, including the Human Rights Commission of Sri Lanka, full access to all places of detention, including police barracks, without prior notice, and set up a national system to review and react to findings of the systematic review [CAT/C/LKA/CO/1/CRP.2].

Failure to implement the recommendations of the U.N. Human Rights Committee

The following table is an indication of Sri Lanka's blatant disregard for the recommendations of the Human Rights Committee even after the Committee has stressed the importance of these recommendations by requiring a report of progress within one year.

Section	**Recommendations (A summary from the concluding observations of the Human Rights Committee, December 1, 2003)**	**Implementation**
Article 7	To bring the Constitution into conformity with the International Covenant on Civil and Political Rights (ICCPR), including provisions relating to the right to life, judicial review, changing the time limitation on the filing of Fundamental Rights cases and to remove all laws incompatible with obligations undertaken under the ICCPR.	None of the recommendations under Article 7 have been implemented and there is no indication that any attempts were made at implementation. There is therefore no likelihood that the recommendations will be implemented in the near future.
Article 8	Bring Chapter 3 of the Constitution into conformity with articles 4 and 15 of the ICCPR.	Nothing has been done in this regard by Sri Lanka. No attempt was made to propose any law to this effect.
Article 9	To address the issue of torture, legislative measures in keeping with Articles 2, 7 and 9 of the ICCPR should be taken. Provisions to ensure prompt investigations and effective prosecution of perpetrators should be established and the complaint procedure (Article 155 (G)(2) should be implemented by the National Police Commission. Positive actions for victim protection, elimination of the climate of fear	Nothing of any significance has been done in these areas. In fact, at present the National Police Commission is not functioning due to the absence of commissioners, the Special Investigation Unit are taking up fewer cases and disciplinary inquiries have been handed over to internal authorities, which are partial towards the perpetrators. The Human Rights Commission was

	that plagues the investigation and prosecution, and increasing the Human Rights Commission's capacity in investigation and prosecution should be taken.	severely undermined by a recent arson attack, for which no one has yet been prosecuted.
Article 10	Regarding disappearances, Sri Lanka was asked to implement articles 6, 7, 9, and 10 of the ICCPR. The government was also asked to implement recommendations made by the U.N. Working Group on Enforced or Involuntary Disappearances and the recommendations of presidential commissions. The capacity of the Human Rights Commission to monitor investigations and prosecutions should also be improved.	Nothing has been done in this regard. The government has misled the international community regarding the enormous number of disappearances by promising to take various measures, none of which have materialised. The U.N. Working Group has not been monitoring the implementation of its recommendations.
Article 11	To eliminate corporal punishment in prisons and primary and secondary schools.	Nothing has been done to eliminate corporal punishment in prisons. All reports indicate that corporal punishment continues in prisons at many levels. Violence remains the method of control in prisons, although there is no official recognition of the use of corporal punishment. While there have been some educational activities in schools, there is no indication that the overall use of corporal punishment has been

		reduced. A law relating to corporal punishment has been passed, but there have been no serious efforts at implementation.
Article 13	To ensure that all legislation, including the Prevention of Terrorism Act (PTA) are compatible with the provisions of the ICCPR.	Since the cease fire agreement of February 2002, the use of the PTA has become minimal. However, the establishment of emergency rule in the aftermath of the December 2004 tsunami has placed restrictions on freedom of assembly and protest. Periods of detention have also been extended under the pretext of crime prevention.
Article 14	To combat the trafficking of children for exploitative employment and sexual exploitation through the implementation of the National Plan of Action.	Although the Child Rights Authority has been taking some action to address the issue, what is being done is nowhere near enough to deal with the magnitude of the problem. The conflict situation and tsunami devastation further aggravates the problem.
Article 15	To reduce the overcrowding in penitentiary institutions and grant sufficient resources for the monitoring of prison conditions by the Human Rights Commission.	Penitentiary institutions are now more overcrowded than in 2003, when the recommendation was made. While the Human Rights Commission carries out a few monitoring visits, it does not have the resources or the capacity to

		carry out effective monitoring on a regular basis.
Article 16	To strengthen the independence of the judiciary by providing for judicial rather than parliamentary supervision and discipline of judicial conduct.	This recommendation was not implemented. The present perception within the country is that the Supreme Court has been brought under political control. The Chief Justice has in particular been criticised as being an ally of the current and former presidents. The judicial disciplinary process relating to the suspension, dismissal and transfer of judges has been criticised as arbitrary. Many judges suspended for reasons other than misconduct are kept out of service for years due to delays in the completion of inquiries. There have been reports of threats received by judges who refuse to resign under pressure. Other judges have resigned in protest, while lawyers are bitterly critical of the suppression of judicial independence.
Article 17	To protect media pluralism and avoid state monopolization of media, which would undermine freedom of expression, as enshrined in article 19 of the ICCPR.	No positive developments have been noted regarding pluralism of the media. The state media is used by the present government for propaganda, particularly during elections. Impartial and objective journalists

	Measures should also be taken to ensure the impartiality of the Press Complaints Commission.	working in state media have been removed from editorial positions.
Article 18	Appropriate steps to prevent harassment of media personnel and journalists should be taken and such incidents must be investigated promptly, thoroughly and impartially, and those found responsible must be prosecuted.	In not a single instance have inquiries into the killing of journalists been completed, including recent killings. While constant requests for investigations are made, there are no arrests or prosecutions. Journalists make constant complaints of threats to their lives.
Article 19	To complete the ongoing process of legislative review and reform of all discriminatory laws, so as to bring them in conformity with articles 3, 23, 24 and 26 of the ICCPR.	No such legislative review has been undertaken, nor have any reforms been proposed.
Article 20	To enact appropriate legislation in conformity with ICCPR provisions relating to domestic violence. Marital rape should be criminalised in all circumstances. Awareness about violence against women should be initiated.	There have been no attempts to enact the relevant legislation in conformity with the provisions of the ICCPR and many cases of marital and custodial rape are not investigated or prosecuted.
Article 21	The present concluding observations should be published and widely disseminated.	No attempts have been made to publish or disseminate the concluding observations. In fact, the observations were not even officially presented to the parliament, judiciary and other government bodies.

Article 22	In accordance with rule 70, paragraph 5, of the Committee's rules of procedure, the government should make its responses regarding the committee's recommendations within one year.	There is nothing to indicate that the Sri Lankan government has complied with this recommendation.

Failure to implement decisions made by the U.N. Human Rights Committee on specific cases under the Optional Protocol to the ICCPR

The case of Tony Fernando – Communication No. 1189/2003

In this case the Human Rights Committee held on March 31, 2005, that the State party has violated article 9, paragraph 1 of the ICCPR. The Committee further held:

> In accordance with article 2, paragraph 3 (a), of the Covenant, the State Party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State Party is under an obligation to avoid similar violations in the future.

The Committee required from the State party within 90 days information about the measures taken to give effect to its views. The State Party was also requested to publish the Committee's views.

However, seven months after the incident, the Sri Lankan government has not taken any measures to this effect. Whether the State party made any communication to the Committee is not known to the author of the communication. The State party also did not make any attempt to publish the communication.

The case of Nallaratnam Singarasa – Communication No. 1033/2001

Regarding this case, the Committee made its decision on July 21, 2004. The Committee held that the author's rights under article 14 paragraph 1, 2, 3, (c), and 14, paragraph (g) read together with articles 2, paragraph 3 and 7 of the ICCPR had been violated. The State party was to inform the Committee within 90 days providing information about the measures taken to give effect to the Committee's views. The State party was also requested to publish the Committee's views.

On February 2, 2005 however, the State party informed the Committee that it has declined to take any measures on the grounds that "the State party does not have the legal authority to execute decisions of the Human Rights Committee to release the convict or grant a retrial".

The author of the communication subsequently sought intervention of the Supreme Court to compel the government to comply with the decision of the Committee. In response, the attorney general on December 5, 2005 was reported to have said on the BBC Sinhala service that to urge for the alteration of "a ruling by the Supreme Court is an intervention on the independence of the judiciary". In fact, such a position is a violation of Sri Lanka's international obligations under the ICCPR and its Optional Protocol, which require all branches of the government—the executive, legislative and judicial—as well as other public authorities to respect the enshrined rights.

The case of Lalith Rajapakse – Communication No. 1250/2004

In this case the decision was made on March 8, 2005, holding that the delay in the Supreme Court and criminal cases amounted to an unreasonable and prolonged delay within article 5, paragraph 2(b) of the Optional Protocol. The Committee also overruled the objection by the government to the admissibility of the communication of alleged violations of articles 7 and 10 of the ICCPR. The Committee stated that under article 99, paragraph 2 of the Optional Protocol, the State party should submit within six months of the transmittal of the present decision, a written explanation or statement clarifying the matter and indicating what measures have been taken, if any.

Though six months have lapsed from this decision, the State party has not made any response to the Committee on the implementation of its decision, nor has the decision been implemented.

The case of Jayalath Jayawardena – Communication No. 916/2000

In this case, on July 22, 2002 the Committee adopted that the author's rights under article 4, paragraph 4 of the Optional Protocol and article 9, paragraph 1 of the ICCPR had been violated. The State party was requested to inform the Committee within 90 days providing information about the measures taken to give effect to its views. The State party was also requested to publish the Committee's views. However, the author of the communication, who is also a member of parliament, has since repeatedly complained that he was not provided with adequate security and in fact his security has been reduced. He has further repeatedly complained that he receives death threats. The government also did not publish the decision of the Committee.

The case of Victor Ivan - Communication No. 909/2000

On July 27, 2004 the Committee held that article 14, paragraph 3 (c) and article 19, read with article 2 (3) of the ICCPR had been violated by the State Party. The Committee further held that the State party is under obligation to provide the author with an effective remedy, including appropriate compensation. The State party was also requested to publish the Committee's views. The AHRC is unaware of any compensation paid or anything done by the State to implement this decision. Furthermore, the State did not publish the views of the Committee.

Lawlessness affects all aspects of life in Sri Lanka

A key indicator of the anarchy prevailing throughout Sri Lanka is the state of healthcare within the country. Almost everyday, cases of medical negligence are reported. For instance, a woman who went to get her wound cleansed found her healthy leg amputated instead. An old man was given the wrong injection and subsequently had to have his arm amputated. In another instance, a nurse rushed a mother through childbirth so she would not miss her bus home. Many cases of meningitis have also been reported, due to the use of contaminated syringes.

The impossible task of obtaining a credible inquiry into such neglect worsens the situation. In the instance of the mistaken leg amputation, doctors and other medical staff went on strike, and threats were made of further strikes throughout the country if independent investigations were conducted. Statements were made publicly that the police should keep out of the inquiry as they did not have any medical knowledge.

Such incidents, all of which could be avoided in a society governed by the rule of law, are affecting ordinary citizens all over Sri Lanka. A passenger was raped inside the airport after passing through immigration and waiting to board her flight. Corruption is reported at all levels of society; a huge case of fraud was even reported recently at the Inland Revenue Department.

Effective rule of law is therefore essential for the enjoyment of people's rights. The new president has yet to put in action any strategies to reform the justice institutions. A start can be made by implementing the recommendations of the Human Rights Committee and the Committee against Torture. Furthermore, the members of the Constitutional Council must immediately be appointed, which will in turn enable commissioners for important public authorities to be appointed, especially the National Police Commission.

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND

Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: Sri Lanka's refusal to implement recommendations made by the Human Rights Committee and the Committee against Torture

The Asian Human Rights Commission (AHRC) wishes to bring to your notice the dire situation of human rights in Sri Lanka, as a result of the breakdown in the rule of law, the breakdown of discipline within the police force—leading to grave torture and extrajudicial killings—and the blatant refusal by the government to implement the significant recommendations made by the Human Rights Committee and the Committee against Torture.

The breakdown of the rule of law within Sri Lanka has been commonly noted; even former vice president of the International Court of Justice, Mr Weeramantry, said in a recent publication that the rule of law in the country is at its lowest ebb. The AHRC has been making representations about the country's exceptional collapse of the rule of law to the Sri Lankan government as well as international bodies for several years now. In this, we refer to the entire country: the South, the North and the East. Although there is no conflict situation in the South, the rule of law in that area also continues to suffer, due to law enforcement agencies having been used by political authorities in the past to commit large scale extrajudicial killings, illegal detentions as well as torture.

To stop this degeneration and politicisation of public institutions, an amendment was made to the Constitution in 2001, known as the 17th Amendment. Under this amendment, various bodies were established to supervise the functioning of institutions such as the police. The National Police Commission was established and given control over appointments, promotions, transfers and disciplinary control of the police, making limited progress in reforming the police force. The Commission's efforts, accompanied by a Special Investigation Unit to inquire into torture committed by police officers, brought over a hundred policemen under trial for committing torture. While their trials were pending in court, the Commission interdicted these officers, as required by law. These interdictions led to strong protests by certain

sections of the police, including the Inspector General of Police himself. The term of office of the existing Commissioners ended on November 24, 2005 however, and no new Commissioners were appointed, rendering the Commission currently dysfunctional.

The commissioners for all such public institutions established under the 17th Amendment are to be appointed on merit by a Constitutional Council, consisting of persons of moral integrity. Without this Constitutional Council, no appointments can be made. However, the term of office of the Council members ended several months ago, with no new appointments having been made. Despite expressions of public concern, no action has been taken to redress this situation. For this reason, other commissions created under the 17th Amendment are also in a similar limbo. This has created an impasse that will inevitably affect Sri Lanka's few achievements in the protection and promotion of human rights.

After reviewing Sri Lanka's compliance with the provisions of the International Covenant on Civil and Political Rights, the Human Rights Committee in November 2003 made several recommendations to the government, requiring a report on the implementation of these recommendations within a year. However, none of the recommendations were implemented and no report was submitted. In November 2005, the Committee against Torture also made recommendations, particularly regarding torture, the lack of protection for victims and witnesses, the need for prompt and impartial inquiries, the significant court delays that obstruct attempts to seek legal redress for human rights violations, and a need for the protection of institutions such as the Human Rights Commission and the National Police Commission. With the National Police Commission now defunct, there is no likelihood that any of the other recommendations will be respected by the Sri Lankan government.

Under these circumstances, the rights of all persons are under grave threat, particularly those who have had the courage to make complaints about human rights abuse. One such complainant, torture victim Gerald Perera, was killed in November 2004, one week before he was due to give evidence in court against several police officers. Other complainants have suffered further torture in retaliation for their complaints.

On the occasion of Human Rights Day, the AHRC requests you to look into these matters seriously and to explore all diplomatic and others means to ensure that the recommendations of the Human Rights Committee and other treaty bodies are enforced. We particularly request you to intervene with the government for the appointment of the Constitutional Council, which will enable the National Police Commission and other bodies to function.

Yours sincerely,

Basil Fernando
Executive Director

BANGLADESH

A society floundering in corruption, fear and arbitrary killings

For the ordinary citizen of Bangladesh, the realisation of basic human rights enshrined in the covenants and conventions and also, to some extent, embodied in the Constitution, remains very much a distant dream.

This is mostly due to the fact that the contradictions involved in the development of the state in Bangladesh. Furthermore, new factors such as political violence among the parties and religious fundamentalism have begun to seriously challenge the state through the use of violence and the psychological impact thereof. This is creating enormous stress and tension in society. The unresolved problems of discrimination against minorities, and against women in particular, run into all areas of life and maintain a state of violence, not only in the area of politics, but also in the community and domestic life. The increase of crime due to the weaknesses of the rule of law is often used as an excuse to create agencies with extraordinary powers and impunity such as the Rapid Action Battalion (RAB). These and other special units often engage in extra-judicial killings under the pretext of crossfire, meaning that the killings were done in retaliation to attacks on members of such agencies.

The state is unable to deal with any of these major issues, as the state apparatus has not been developed to be capable of carrying out its normal obligations towards its citizens. The increase of conflict and violence has pushed the state in the direction of further degeneration. The limited developments to the state apparatus are being reversed, and the rule of law, democracy and human rights are in a critical condition.

The following cross-cutting considerations should be taken into account in any discussion on human rights in Bangladesh.

Fundamental cross-cutting considerations

The conflict between democracy and the weak rule of law: by its constitution Bangladesh is a democracy. However, this democracy is not based

on well-founded institutions of the rule of law. The contradiction that exists in many countries outside the developed world between the constitutionally accepted democratic form of governance and the weak nature of rule of law institutions also exists in Bangladesh. In fact, it is this vast contradiction that creates all the problems that require preventive approaches from the community and civil society.

Political violence: the contradiction between democracy and the rule of law manifests itself in the sharpest way in the violent conflicts which exist between the ruling political party (whichever party may be in power at any given time) and the opposition. For several decades, it has been an acknowledged feature in Bangladesh that the ruling party uses its power to violently suppress the opposition. There is a constant climate of tension and conflict within the country. Sometimes, as part of these conflicts, the ruling parties and other parties exploit religious and ethnic factors for their benefit, leading to religiously-fuelled violence erupting.

The problem posed by weak institutions, notably the police and the judiciary: the weakness of the rule of law manifests itself through the basic institutions of justice, which are: the police, the prosecution and the judiciary. The policing system in Bangladesh is extremely corrupt. Police officers are, in all respects, incapable of performing the usual functions that a police service is supposed to provide within a rule of law system. As for the prosecution, it is replaced every time a new political regime comes into power. This means that a regular, stable system with a prosecutor's officer that benefits from a strong tradition of prosecutions does not exist in the country. There are also many weaknesses within the judicial system. The part of the judiciary that consists of magistrates remains a branch of the executive. Only the higher judiciary is not part of the executive. The independence of the judiciary is not possible as there is no basic separation of powers. The magistrates who are part of the executive are also often suspected of being corrupt. Furthermore, the country suffers from one of the most primitive medico-legal systems, which is a significant hurdle for victims trying to achieve justice. Despite Bangladesh's considerable population, there is no recognized forensic laboratory.

International obligations: Bangladesh has ratified several international human rights and humanitarian law, as follows: the Four Geneva Conventions of 1949 (1971) and Additional Protocol I and II to the 1949 Geneva Conventions (September 8, 1980); the International Convention on the Elimination of All Forms of Racial Discrimination (June 11, 1979); the Convention on the Elimination of All Forms of Discrimination against Women (November 6,

1984); the Convention on the Rights of the Child (August 3, 1990); the Convention on the Prevention and Punishment of the Crime of Genocide (October 5, 1998); the International Covenant on Economic and Social Rights (October 5, 1998); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (October 5, 1998); the International Covenant on Civil and Political Rights (September 6, 2000).

However, the implementation of all these treaty obligations is hampered by the extreme weaknesses that are inherent in the legal system and the rule of law in Bangladesh. Bangladesh provides the classic example of how people can be deprived of the most basic of human rights, often in an extreme manner, despite the state having ratified an important number of UN conventions.

Torture: as for torture, it is institutionalised within the Bangladeshi system. The prevalence of torture in the country has been constantly noted by international monitoring bodies. In recent times, particularly since October 2002, with the beginning of the notorious "Operation Clean Heart" that was followed by the establishment of the Rapid Action Battalion, the complaints of torture have significantly increased. Although Bangladesh ratified the Convention against Torture in 1998, it has not yet enacted legislation making torture a criminal offence. The absence of a law against torture is a tremendous impediment to those who wish to pursue the prevention of torture.

Near complete impunity: both local and international human rights monitors agree that near complete impunity exists for state officers who engage in torture. The lack of laws to deal with human rights abuses, weaknesses of implementation mechanisms (that is, mechanisms of investigation and prosecution), and the general tolerance for corruption within state institutions, as well as the psychology of a people who have been frightened by extreme abuses of power, combine with the experience of failures in obtaining redress to guarantee that state officers can engage in the abuse of rights without fear of consequences.

Torture

Torture is not a crime under national law: although the government of Bangladesh ratified the U.N. Convention against Torture in November 1998, no enabling legislation has been passed to make torture a crime under national law. Old British laws prevail - made when the colonial regime tortured supporters of national independence - prevail. The lack of a domestic law is an obstacle to developing local jurisprudence to eliminate torture, into which

international jurisprudence can be assimilated. There is also no immediate plan to introduce such a law.

No means exist to compensate and rehabilitate torture victims: no legal provisions exist to enable victims of torture to make claims for compensation or rehabilitation. The state does not provide medical facilities for physical and psychological injuries suffered due to torture. Again, there is no immediate plan to introduce such legal provisions.

Criminal justice remains very primitive: the criminal justice system has hardly changed since the British colonial times. Many laws go back over a hundred years. At no stage has there been a serious attempt to modernise the criminal justice system and to take advantage of significant developments happening elsewhere. The system for the implementation of laws is even worse, moving so slowly as to be completely out of touch with the rapid developments in communications, transportation and the sense of time among people in other parts of the world.

No specialised police officers exist for criminal investigations: police officers have a range of day-to-day duties on top of criminal investigations. For every 13,000 citizens there is one badly paid and poorly trained member of the police. The very idea of specialised police officers for criminal investigations does not yet exist. One of the most needed reforms is for a separate criminal investigation branch with the necessary training and equipment to fulfil its duties.

Public prosecutors are politically controlled: all public prosecutors are changed every time a new government comes to power. As a result, they do not accumulate experience or build an institutional legacy to pass from generation to generation. The skills needed for proper prosecuting do not develop, and instead political bias is the determining factor in prosecution of cases. The appointments of Public Prosecutors are, in particular, made as favours to the ruling political party leaders.

No link exists between the prosecuting and investigating branches: the prosecuting and investigating branches are completely detached. If the police do not investigate a crime, the prosecutor has no responsibility. The prosecuting branch needs to be informed when serious crimes are being investigated, so as to advise the investigators on basic legal issues. This would reduce the opportunities for police to fabricate cases against innocent persons. By collaborating, while preserving the independence of each branch, it is possible to avoid prosecutions that lack sufficient evidence and also ensure

successful cases, which are few at present. Most of the time, the Public Prosecutors, who are not legal experts in many places in the country, accept and agree with the Charge Sheets prepared by the police officers, solely as the result of bribes taken from different parties regarding the respective cases.

No independent branch exists to investigate police officers concering gross violations of human rights: at the moment, police investigate all crimes. Naturally, when police officers investigate their colleagues over alleged torture, extrajudicial killings and other grave violations, there is undue influence on the outcome. As the public lacks confidence in these investigations, many people may not even complain when suffering abuse at the hands of the police. On the other hand, complaints from victims or human rights organizations are only recorded but cannot be processed, due to the Section 197 of the Criminal Procedure Code (Cr.PC), which places barriers on filing cases against the police. Cases can only be filed with the consent of the accused policemen's superior hierarchical authority.

No witness protection programme exists: people do not want to complain or give evidence - especially in the growing number of serious crimes - as they fear serious repercussions and lack any form of protection from the perpetrators. This also applies to the victims of human rights violations complaining about law enforcement officers, who hold great power locally and can cause serious harm to the victims, their families and their property. This issue must be seriously addressed if the justice system is to obtain popular cooperation.

Torture is politically motivated: often torture results from deliberate attempts to harm political opponents. The party in power typically harasses the opposition in this manner. Despite torture and law enforcement being used for the purposes of political repression, no serious attempts have been made to address the problem.

Torture victims are disregarded because most of them are poor: the poor are badly treated in all areas of life, and this does not attract interest. Bad treatment of the poor at police stations is therefore no exception. The poor have little access to the law, and therefore, most torture cases do not come to the public attention. Constant reporting on all cases of torture is not yet being practised.

No human rights institution exists to monitor law enforcement agencies: despite years of discussion - and some drafting of legislation - towards establishing a national human rights commission, no practical steps

have been taken to this end. No reason has been given for the delay; no timetable has been set for its establishment. The government has not even committed itself to establishing such an institution, and opposition or civil society groups, have not taken up the issue with the urgency it requires.

Violence is prevalent across society, but the state remains inert: throughout Bangladesh, violence is committed daily in a wide range of social, political and religious institutions, particularly against women. It is often defended on ideological grounds, and a general ethos of intolerance permits daily acts of brutality to continue unabated. Such violence may constitute torture in cases where the state is cognisant of what is happening and does nothing to stop it.

Living in fear –violence permeates Bangladeshi Society, with little or no respect for human rights, life or security.

All these obstacles are commonly acknowledged, including by all the major political parties; nonetheless, no strong lobby exists to call for action. There is agreement that something is wrong, but no sense of the need to do anything about it. Civil society organisations must take a lead role in building public opinion capable of changing this situation. To do this requires imagination and creativity. By effective lobbying with specific demands for action, steps can be taken to see victims make complaints, police investigate torture, prosecutors win cases and to motivate other persons to act to eliminate torture.

Police and other law enforcement agencies

There are two expressions that give rise to abject fear among all sectors of society in Bangladesh. These terms are 'cross-fire' and 'Rapid Action Battalion'. The government uses 'cross-fire' to mean gun fights between any section of the armed forces and civilians, such as criminal gangs and terrorists. The popular understanding of the term is persons being extrajudicially killed by the armed forces, which is justified as being 'an unavoidable death by cross-fire'. Like the term 'encounter killings' used in Bangladesh and elsewhere, 'cross-fire' is a term that people refer to tongue in cheek. The sinister connotation associated with the word demonstrates the utter powerlessness of the general population

of Bangladesh in the face of the extra judicial killings that are taking place around them. As one senior lawyer expressed, 'cross-fire' is becoming a form of mental torture: "One is living with the fear all the time that he or she can be the next victim of cross-fire".

The Rapid Action Battalion (RAB), refers to a military force (comprising specially trained officials and soldiers from the Army, Air Force, the Navy, Police, Bangladesh Rifles and other paramilitary forces) that has been increasingly associated with 'cross-fire' incidents across the country. The RAB, introduced after the "Clean Heart" operation, which caused the extra-judicial killings of hundreds of persons, including forty in police custody, is generating enormous fear within the country. Operation Clean Heart came under severe local and international criticism and was withdrawn. The RAB, however, has taken its place, and is engaged in the same function of instilling fear in the population, albeit in a different manner. This battalion's legal function is merely to assist the police in arresting, detaining and handing over persons whom the police have difficulty in arresting. However, their actual functioning is very different and they operate as an independent unit operating above the law.

This is happening in a country where there is already little faith in the normal policing system. The popular view of the police is that they either use criminal investigations to make money for themselves or they conduct illegal services on behalf of politicians. That the police demand money from complainants, accept money from alleged perpetrators and take money from third parties, is a common belief shared at all levels of society. Whether it is the ordinary man in the street or lawyers, doctors or journalists, all state the same view on the policing system. In order to raise money, the police use torture as an instrument. To escape torture people have to pay. Those who are unable to pay are not only tortured, but later, cases are fabricated against them.

Along with this tragic situation, Bangladesh's citizens have no legal mechanisms through which they can make complaints. If they complain to the higher authorities within the police, the matter is not usually investigated, unless there is some form of public pressure to do so. Even when there is public pressure, all that is done is to release a person who is falsely charged, stop the abuses being performed on a person who is being tortured, or not object to bail being given to a citizen who is in remand on the basis of false police reports. A system of disciplinary inquiries barely exists. Under public pressure an errant officer, particularly of lower rank, may occasionally be transferred to another area. That is more or less where the disciplinary process ends. There is also the public view that when there are complaints regarding junior officers, some senior officers use the occasion to obtain money from the juniors. There

are no complaint avenues outside the police; for example there is no National Human Rights Commission. This is despite the two major political parties having spoken about such a commission, received assistance from international agencies regarding it and even having drafted a law concerning it. Evidently, despite almost unanimous public opinion calling for change to the present state of policing, those persons that hold powerful positions within the country are unwilling or unable to bring about such a change.

Although Bangladesh has ratified the Convention Against Torture (CAT), as well as the International Covenant on Civil and Political Rights (ICCPR), and thereby obtained some international respectability, the State has done nothing to bring about local legislation in terms of their international obligations to eliminate torture. In other words, torture has not been made a crime in Bangladesh. In neighbouring Sri Lanka ratification of the CAT was followed by local legislation, which imposed a seven-year mandatory sentence on anyone who is found guilty of the offence of torture. In Hong Kong torture carries the punishment of life imprisonment. In Bangladesh, however, torture is treated only as physical assault. Furthermore, while the police in Bangladesh are under obligation to investigate cases of torture in the country, there is no procedure to deal with investigations into alleged perpetrators that are members of the police. Because of this, and due to the general situation of policing in the country, people are too afraid of the repercussions in pursuing a complaint of torture, particularly when it involves the police.

In ratifying the CAT, the government has reserved Article 14 of the convention, which stipulates "that the state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including means of full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture his dependents shall be entitled to compensation."

The state party of Bangladesh has kept themselves outside the jurisdiction of the CAT by entering a reservation on this right. This means that the government of Bangladesh does not accept the legal responsibility to provide compensation to the victim or their families for torture, or to provide for rehabilitation to torture victims. In failing to accept this obligation, which is one of the core elements of the CAT and all the legal doctrines associated with the elimination of torture, the government has virtually made article 35 (5) of the Bangladesh constitution, which forbids torture, meaningless. Despite the provision of the constitution, the government imposed an Ordinance named 'Indemnity Ordinance' on January 10, 2003, which was passed in the parliament later on and ensures impunity is enjoyed by the perpetrators involved in the notorious

Operation Clean Heart. This situation helps the errant police institution and all other battalions, like the RAB and many other task forces, to operate above the law. Thus, impunity has been strongly endorsed.

Such is the institutional framework within which people live in Bangladesh. The boundaries of freedom are clearly demarcated and limited by the use of torture. This state of terror is not only a human rights issue, it is also a fundamental development problem. The widespread situation of loss of belief in rational behaviour is conditioned by the irrational that is allowed to exist within the law enforcement agencies. When money motivated or politically driven police officers interfere in the lives of people and institutions, it is not possible for successful ventures in development to take place. Fear kills all initiatives, including those for greater investment with clearly defined strategies to be developed and applied. All strategies are warped by the grand strategy of fear and corruption, which is the most important political and cultural factor of Bangladeshi life today. This situation also leads to an enormous 'brain drain' within the country. Qualified people who want to live free lives with their families, and don't want to be involved in corruption, find no prospects for prosperity in Bangladesh. Those who wish to be successful must learn to cohabitate with a corrupt police system, which in turn corrupts all other political and bureaucratic systems. The case of an industrialist who was implicated in a crime merely for the purpose of demanding one million Taka (nearly US $ 16,000), and was tortured when he refused to pay the money, is a glaring example. Under torture and the threat of being made a victim of 'cross-fire' he agreed to pay 300,000 Taka (US $ 5000). Although the threat of 'cross-fire' was removed by this, he was charged with a fabricated charge, for which he is still in remand.

The civil society of Bangladesh is unanimously opposed to the existing policing system, including the normal apparatus as well as other units, such as the RAB. However, the two major political parties have not yet arrived at any serious assessment or strategy to overcome the problem. Instead, anti-terrorist propaganda is being used to stifle any attempt to change the current situation. New units like the RAB are essentially used to reinforce terror among the population, through the use of extraordinary forms of violence such as extrajudicial killings. Such conduct has come under the criticism of the Supreme Court itself. The Chief Justice Muhammad Habibor Rahman stated at a public meeting held in January 2005 "we have belatedly decided to get a report on every death in cross-fire. We ought to have asked for a report when the first incidents of death occurred. That would make the law and order men more cautious." (Quoted in the Daily Star local newspaper on January 19, 2005) Other leading figures have condemned the closing of all doors for

inquiries by passing an indemnity bill with regards to extrajudicial killings during the operation "Clean Heart". The call for collective efforts or private entrepreneurs and civil society organisations to engage in assisting people distressed by this system is also very common.

Violence and intimidation arising from fundamentalist groups

The simultaneous bomb blasts which occurred on August 17, 2005, throughout many parts of Bangladesh are well known. Although the actual killings by these blasts were limited, the impact of these attacks, which were carried out in a number of cities and towns throughout the country, has further increased the climate of fear. The State agencies have not found much cooperation in identifying the perpetrators. The aspect of threats from fundamentalist elements is likely to remain a further destabilizing factor threatening the rule of law in the country.

Attacks on the Ahmadiyyas Minority

The threat of fundamentalist terror attacks also has a direct bearing on the issues of the minorities, both within the Muslims themselves, as well as with others. Among the Muslims, the Ahmadiyyas are a small minority which maintain their own interpretation of the history of Islam. The complaints of persecution of this minority date back to the very inception of the Bangladeshi State. There have been attacks on the Ahmadiyya community, including a bomb attack on its headquarters. Sometimes, thousands of opponents participate in such attacks on the homes and places of worship of this minority. The government has failed to take any effective action to eradicate such attacks. Sometimes the police themselves participate in the mob attacking the Ahmadiyyas. The international community has expressed their protest against the attacks on this minority, however, there have not been any effective measures taken to provide protection.

Hindu and Christian Minorities

There has been near-continuous mob violence carried out by fundamentalist elements against the Hindu and Christian minorities. Often, the aim is to get these minorities to leave Bangladesh and thereby allow their properties and their businesses to be transferred to others. As these attacks are of an overwhelming nature, they often have their intended result. Weaknesses in the rule of law, as mentioned above, deprive these minorities of any protection.

Severe violence against women

Despite Bangladesh's government's promises to eliminate all forms of violence against women, the actual enforcement of the laws and other measures remain extremely poor. There are numerous incidents of rape, and many complaints of rape and sexually related crimes, allegedly committed by law enforcement agencies.

The limited achievements women have made in the economic and social spheres have also been seriously undermined by the development of religious fundamentalism, which opposes the empowerment of women and their participation in social life. Dowry-related death and violence continue to be reported on a large scale.

Attacks on the freedom of expression and journalists

Bangladesh is one of the countries in which the killings of journalists are the highest in Asia. Other forms of intimidation of journalists are also constantly being reported. The investigations into such actions do not provide any successful prosecutions. The issue of the weaknesses of law enforcement agencies and justice institutions, as mentioned above, act to encourage such violence against journalists and others engaged in the freedom of expression. High levels of intimidation have spread among journalists, as well as those engaged in research on human rights related issues in every field, including civil rights, the rights of women and children, environmental and ecological concerns and all areas of economic, social and cultural rights. The attacks on the freedom of expression, combined with the extreme weaknesses in the enforcement of the rule of law, are likely to have a tremendously adverse effect, not only on the development of democracy in Bangladesh, but also on economic development.

Attacks on NGOs

Bangladesh depends for the most part on NGOs concerning work on development. However, in recent years NGOs have come under serious attack. There have been a number of fabricated cases made against NGO leaders and many other forms of attacks on those who promote development coupled with basic rights and democracy. The aim of these attacks is to control NGOs and to obstruct all attempts at development that emphasises the improvement to the situation of the poor and the marginalized, and those suffering from various forms of discrimination.

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND

Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: Bangladesh should criminalize torture and appoint independent investigation bodies to conduct prompt inquiries into torture, extrajudicial killings and other serious violations of human rights.

The simple fact is that there is no redress of any sort regarding gross violations of human rights in Bangladesh. There is no law recognising torture as a crime, despite the fact that the country acceded to the Convention Against Torture (CAT) in 1998. Accession without implementation does not serve any purpose in protecting the rights of people. The government should be urged to make torture a crime, in line with the terms of the CAT, and thereby take the most important initial step towards the protection and promotion of human rights.

The rule of law in Bangladesh is greatly flawed, and extreme corruption within the police force is a symbol of the denial of rights of the people. Human rights groups are of the view that over 50% of the people who are arrested and tortured are innocent persons belonging to the poorer sections of Bangladesh. The monetary gains that the police can make by way of arrest and detention, threats of torture and actual torture, are often the grounds for arrest. Often, persons actually implicated in crimes can buy their freedom, and innocents are arrested in their place, and tortured to force confessions of guilt.

The spread of crime and political violence have caused the establishment of new units such as the Rapid Action Battalion (RAB). From the inception of the RAB, the number of 'crossfire killings' - otherwise known as 'encounter killings' - has increased. The overwhelming perception is that many such deaths are in fact due to

extrajudicial killings after arrest. However, within the judicial system there are few possibilities to contest these issues, so such killings are not investigated and go unpunished.

While there is a long list of human rights abuses that can be mentioned - as for example the gross abuse of the rights of women and children, the rights of minorities such as the Ahmadiyyas, Hindus, Christians and indigenous people - the main cause of such violations are the defects in the justice system, which deny the possibility of having effective rule of law in the country.

AHRC has highlighted its concerns relating to Bangladesh in a special report produced for the International Human Rights Day, December 10, 2005.

The AHRC kindly requests that you intervene with the authorities in Bangladesh, in order to urge them to make torture a crime, in line with the Convention Against Torture. AHRC also requests that you intervene with UN and other international agencies to push for a policy of improvement of the rule of law, through the strengthening of basic institutions of justice, as the key way to improve the protection and promotion of human rights.

Thank you for the kind consideration you will give these matters.

Yours sincerely,

Basil Fernando
Executive Director

B U R M A

Sinking deeper into the un-rule of law

The conviction of courage: Ma Su Su Nwe is currently being detained in ill-health, having challenged the use of forced labour.

With the jailing of Ma Su Su Nwe this October human rights in Burma reached a new low-point. Indeed, Ma Su Su Nwe symbolises all that is tragically wrong in Burma. An ordinary villager, 34-year-old Ma Su Su Nwe lodged a complaint in 2004 against local government officials over their use of forced labour on a road construction project, under new regulations introduced by the government to appease the International Labour Organisation (ILO). In early 2005, with pressure on the authorities from the ILO, she won her case: the first successful prosecution for use of forced labour in Burma. What happened next was instructive. The new local authorities accused Ma Su Su Nwe of criminal intimidation, and lodged charges against her: a pattern already seen in earlier cases that complainants had anyhow lost, or where complaints have been lodged but rejected. On October 13 she was found guilty and sentenced to twenty months in jail. She was immediately transported to the notorious central Insein Prison, where she has been kept in special quarters to this day. Visitors have alleged that she has been denied medicines for a chronic heart illness, and is suffering from worsening symptoms that may ultimately cause her death.

The role of the courts in Ma Su Su Nwe's case speaks to what has been rightly called the "un-rule of law" in Burma. During the trial in the township court, the judge was replaced with a judge who has been used in the past to secure convictions in cases stemming from allegations of forced labour. Successive appeals against the sentence given by her, which is bailable, have been summarily thrown out of court, with the judges reportedly not even listening to the arguments of the defence lawyer. Similarly, the case of 40-year-old U Aung Pe has been thrown out of the courts without a second thought, after he was jailed for three years for leading his English class students in paying their respects to an image of national independence hero General Aung San,

the father of democracy leader Daw Aung San Suu Kyi. U Aung Pe has reportedly been beaten up inside the prison by a gang that works together with the authorities which consists of former members and associates of the regime, jailed during political turmoil in 2004.

Thuggery and coercion by local authorities and police are part of life for people throughout Burma, whether inside prisons or out. In September, for instance, Ma Aye Aye Aung, a betel nut seller, was reportedly surrounded and beaten up in public together with her husband by a group led by the local ward chairman in Mandalay division. Ma Aye Aye Aung courageously lodged a complaint in the local court. Although the case is still to be opened, she has since said that the court has harassed her constantly, calling her in nine times. Each time she has gone expecting to give her account of how she was beaten, and has instead been sent home without explanation. Her meagre livelihood has been undermined by constant interruptions, and she has had to sell household possessions to survive. Thus the role of the court has been to intimidate rather than hear the complainant. In May, the Asian Human Rights Commission reported on the case of two cousins who were beaten by the police in the capital after one of them unwittingly exposed a pro-democracy tattoo. After the two victims lodged a complaint about the assault, they themselves were detained. Although a court later released one of the perpetrators, one victim remained imprisoned, allegedly for having broken a restraining order on his movement.

Anecdotal evidence suggests that torture is a routine part of investigation and imprisonment in Burma, although conditions in the country make it impossible to monitor effectively. Increasingly, where it results in a death in custody there are reports that the authorities have immediately destroyed the body of the deceased. One prominent case in May 2005 was that of Aung Hlaing Win, who was dead by the time he was delivered to a hospital by military intelligence officers. Doctors found that his body had at least 24 external bruises, three broken ribs and a bruised heart. The officers took the body away and cremated it. In June the local township court concluded that Aung Hlaing Win had died of chronic illness, although the doctors testified to the injuries they had seen. It reportedly refused to entertain questions from his wife as to why the body was cremated and not returned to the family, and refused her the right to appoint an advocate of her choice. It also allegedly refused to give copies of the judgment and other court records to the family. Appeals to higher courts over the case were also unsuccessful. In a similar case, the corpse of Min Tun Wai, who died within a day of being sent to Moulmein Prison after a summary trial during May, was disappeared by the authorities there. In November, the authorities at Insein Prison allowed the family of Ko Aung

Myint Thein to view his corpse, but insisted on cremating him without delay, raising doubts among family members that he had not died of stomach cancer as they were told.

There are also numerous reported cases of violence against women in Burma by state agents, which are consistently followed by attempts to conceal the crimes. After two police allegedly raped 30-year-old Ma Soe Soe in June, they arrested a witness and took other steps to silence the matter. After a police officer in Taunggut Township reportedly raped a local woman in May the village chairman refused to take up the parents' complaint because the perpetrator was a police officer. After they took it directly to the police station, the superintendent reportedly ordered the rapist and victim to marry and then divorce. When the victim refused to cooperate, she was reportedly assaulted inside the station. In mid-2004, an officer from the Meikhtila Training Airbase allegedly beat a 15-year-old girl to death after she was careless in her work as a housekeeper. Although doctors examining the body again found numerous injuries, the perpetrator had allegedly poured poison into her mouth in a clumsy attempt at making her death look like suicide. The local battalion commander arranged to prevent the case from going to court by paying and threatening the family and other persons. In 2004 the Asian Human Rights Commission reported on how Ma San San Aye and Ma Aye Mi San were allegedly raped by a local government official in Pyapon Township. At least one of the two was a child at the time of the alleged rape. Although the AHRC has obtained documentation regarding the allegation in that case, after the matter was dropped by the local authorities and the victims attempted to take it higher up, they themselves were convicted of defamation and sentenced to four years' rigorous imprisonment. Despite raising the details of the case repeatedly with government authorities and concerned UN and international agencies, no further information has been made known to the AHRC regarding the fate of the two young victims or the alleged rapist.

Together these cases speak to the lack of possibilities for obtaining redress for rights violations anywhere in Burma today. The purpose of its institutions is to support the interests and authority of the army and subsidiary state agencies. Although Burma is a party to the U.N. Convention on the Elimination of Discrimination against Women and U.N. Convention on the Rights of the Child, there is no means by which to protect the rights of victims in accordance with these treaties. Although it has committed itself to the elimination of forced labour and instituted regulations with a view to the same, an ILO presence in the country has ultimately failed to make any significant progress towards this goal, and small victories have been soured by retributive actions against complainants that together send a clear message to others who may think of objecting when they are sent to work without pay. Although it re-

mains a member of the U.N. Human Rights Commission, it has exhausted one Special Rapporteur on the situation of human rights in Myanmar after the next without any signs of meaningful progress.

The same denials of fundamental civil and political rights in Burma are reflected in denials of basic economic and social rights. Since 1998 the AHRC has pointed to the connections between the un-rule of law in Burma and the hunger, sickness and growing deprivation suffered by its people. This assessment was validated in August when the executive director of the World Food Programme (WFP) said after a visit to Burma that its food shortages and malnutrition are serious, and drew a direct line between them and the policies and practices of its government. He underlined his concerns by pointing out that Burma is the only country in the world where the WFP is obliged to pay a tax on food bought within the country for local distribution.

No doubt Burma is sunk in a deep mire. The challenge for human rights defenders in the country and abroad is how to understand this situation, and what to do about it. With a paranoid and introspective military government and an armed forces internationally renowned for rampant and gross human rights abuses—including systematic extrajudicial killing, torture, rape, forced labour and destruction of villages, crops and livestock—in the country's hinterlands where civil conflicts persist and both the concept and presence of the state is all but non-existent, it is easy to reduce the problems there to simplistic rhetoric about dictatorship versus democracy, slavery versus freedom. However, the far more insidious symptoms of the country's persistent decline are in the corrosion of institutions for the rule of law and social administration, and organizations through which parts of civil society might find some opportunity for expression. The majority of people in Burma must daily endure an abrasive fear of police and government officials with powers to abuse and axes to grind, and against whom there is no possibility of effective redress or recourse.

This is what the un-rule of law signifies for the ordinary person in Burma. The long-term consequences of this condition are not yet well-understood. However, it can be said that as the country's institutions are further compromised and distorted its society becomes more harsh, its people more desperate. While we extend our hopes and energies towards Ma Su Su Nwe and others who are struggling in their own ways to find some space in which to bring about change in Burma, we can expect that there shall be many more like her before meaningful change is realised. The strongest hope for Burma is that there do appear to be many more like her, in every part of the country and in every walk of life, and if their actions coalesce today's faint hope for change may yet become a real possibility.

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms Arbour,

Re: Suspend Myanmar From The Human Rights Commission

On this international Human Rights Day, December 10, 2005, the Asian Human Rights Commission (AHRC) calls upon you to initiate action to suspend Myanmar from participating in the UN Commission on Human Rights in 2006.

It is public knowledge that the situation of human rights in Myanmar is among the worst in the world. Virtually all human rights are routinely, systemically and flagrantly violated by the authorities in Myanmar. Many pages would be needed to list them all. The AHRC has in particular received detailed reports that speak to the "unrule of law" in every part of the country. It has also for many years asserted that state policies contrive to deny the right to food to millions there, an assertion recently backed by the World Food Programme director.

The situation of human rights in Myanmar has been amply documented by the Special Rapporteurs of the Commission on Human Rights appointed for this purpose. The Government of Myanmar has shown no sincerity in its dealings with any of the Special Rapporteurs. It has played charades. It has treated one after the next with polite contempt.

The current Special Rapporteur is due to complete his term in office. The Asian Human Rights Commission urges you today to take steps so that the post is not renewed. Instead, we call upon you to take see that Myanmar is suspended from participating in the Commission on Human Rights, and any subsequent Human Rights Council, until its government is prepared to take seriously its obligations under international human rights law. The presence of the Government of Myanmar at the Commission is nothing more than a cruel joke on the global community, and most of all, on its own people. It serves no good purpose. The government deserves less respect; its people deserve more.

Yours sincerely,

Basil Fernando
Executive Director

PHILIPPINES

Human rights defenders being killed in droves; the victims of a failing system

The failure of the policing and prosecution system in the Philippines is completely undermining the protection of human rights in the country. Cases of extrajudicial killings, in particular those involving human rights defenders, have continued unabated. The government has not responded adequately to this situation. Thus, it has impaired its own ability to deliver justice. There is no serious implementation of policing or judicial reforms, which are essential for the protection of human rights.

There is also a completely ineffective protection mechanism for victims, families of the dead and witnesses. The victims have been deprived of state-sponsored security and protection when attempting to seek justice and redress. Even the existence of the state human rights commissions has not guaranteed them security and protection. Those victims who have suffered from hunger and starvation have been threatened, intimidated and harassed, especially when they lodged complaints to the authorities and took steps to expose their grievances. This reflects the lack of an effective complaints mechanism for human rights violations in general.

The government's failure to introduce domestic legislation on torture has deprived the victims of the ability to prosecute state agents. Despite being a state party to the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), no legislation has been enacted in full conformity with the Convention.

Extra-judicial killings and violence against human rights activists; witness protection

There have been a number of extrajudicial killings in the Philippines by state officials and non-state armed groups in 2005. No perpetrators have been punished in relation to the separate killings of 20 human rights defenders and

political activists[1] across the country.[2] This is also true for those who attempted to take the lives of two activist couples, Fr. Allan Caparro and his wife Aileen,[3] and Daniel Brylle Cruz and his wife Emmylou Buñi-Cruz.[4] Though an investigation was conducted in the latter case, the police refused to include vital pieces of evidence and information provided by the victims. The investigation was, therefore, superficial and biased. The charges against the police and the military allegedly responsible in the death of seven protesters in Hacienda Luisita, Tarlac[5] were dismissed as a result of the police investigators' inadequate evidence gathering. In this case, the police failed to employ effective forensic and scientific expertise in the investigations. Despite killings and violence against activists, the Government's response has been entirely inadequate and ineffective. The investigations by the Government institutions into some cases have led to no conclusive findings. For example, in some of the cases mentioned above, the perpetrators were not identified after the investigation, thus charges were never filed against them.

Even if charges are or could be filed in a court of law, there is no effective or functioning mechanism for the protection of families of the dead or for witnesses. The cases of Ernesto Bang and Joel Reyes;[6] Felidito Dacut, Rev. Edison Lapuz and Alfredo Malinao[7] are clear examples of this. The lone witness in the Bang and Reyes' killing was killed just prior to his testifying in the case. The Philippine Commission on Human Rights (CHR) admits that the Republic Act No. 6981 and the Witness Protection, Security and Benefit programme are not known to the populace. However, under no circumstances is this a justification for the security forces to intimidate, harass or kill witnesses. Owing to this situation and the real fear that exists amongst witnesses as a result of this, many are reluctant to cooperate. Naturally, without witnesses coming forward to give evidence, there cannot be effective prosecution of perpetrators. The blatant disregard for the Republic Act by state officials, and the Government's unwillingness or inability to effectively enforce it, are seriously jeopardising the entire justice process.

Judicial delays; inadequate judicial reforms

Prolonged adjudication of cases in local courts is widespread and a serious problem. The lack of competent judges, prosecutors and adequate resources has affected the judiciary's ability to effectively administer justice. For example, one judge usually presides over several courts, because in certain courts no judges have been assigned. There are also inadequate communication facilities

in the Courts, such as fax machines and sufficient paper, which hinders the receiving of documents. In the cases of victims, Jejhon Macalinsal, Aron Salah and Abubakar Amilhasan of General Santos City;[8] Pegie Boquecosa of Alabel, Sarangani;[9] and the killing of Bacar Japalali and his wife Carmen by soldiers in Tagum City,[10] courts have failed to commence trials, despite a lapse of two to three years.

The case of torture victim, Boquecosa, further demonstrates the public prosecutor's failure to complete documentary requirements of the case within the prescribed period, and therefore the case did not proceed. Such failure saw Boquecosa suffer for two years in jail without trial. Additionally, the case of torture victims, Macalinsal, Salah and Amilhasan[11] was delayed for years due to frequent postponements arising from the absence and lack of judges, competent prosecutors and due to public holidays. On one occasion, the absence of a court stenographer led to the cancellation of a hearing. Had it not been for the constant pressure applied by the Asian Human Rights Commission (AHRC), the concerned local court may not have commenced the trial at all.[12]

The provisions of the Republic Act No. 8493, which is an Act designed to ensure a speedy trial of all criminal cases pending before the courts, have not been effectively implemented. The detention of suspects without trial and prolonged delays in the adjudication of cases in courts could have been deterred had there been effective implementation of this Act. The AHRC reported on the prolonged detention of Tohamie Ulong (minor), Ting Idar (minor), Jimmy Balulao, To Akmad and Esmael Mamalangkas of Cotabato City[13] in absence of a trial.

When charges were filed before the public prosecutor, such as in the case of the killing of Bacar Japalali and his wife Carmen by the military, the immediate prosecution of the perpetrators could not be guaranteed. The families of the dead had to endure risk and threats in seeking justice in the absence of protection as the prosecutor delayed the indictment due to administrative procedures.[14] Even after compiling information on the case, the prosecutor refused to file the indictment or to furnish the complainant copies of his findings, due to the delay in getting approval by the Ombudsman for the Military for the release of such information.

In the Philippines, torture is not a crime

Acts of torture have not been criminalised in the Philippines. Even though the 1987 Consitution of the Philippines clearly prohibits torture, as stipulated in Article III, Section 12 (2), and the government has ratified the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), no domestic implementing legislation has been enacted to make torture a crime, in full conformity with the Convention.

Since February 2004, the AHRC has reported on 16 cases of severe torture across the Philippines. These are merely cases reported to the AHRC and no doubt represent only a fraction of the problem. Even though torture is widespread throughout the country, the lack of proper and efficient documentation of cases, even by human rights NGOs, remains an issue. Not a single perpetrator has been punished for torture, despite the alarming and increasing number of torture cases. One of the main reasons for this lies in the Government's failure to enact effective legislation on torture.

Prolonged trauma for torture victims – a continuing abuse. These farmers in Sultan Kudarat, among others, receive no treatment or rehabilitation from the government following severe torture.

Further, there is a complete absence of state-sponsored rehabilitation programmes for torture victims. Almost all torture victims have not received any physical or psychological treatment. These victims include, Omar Ramalan of Cotabato City;[15] the farmers in Colombio, Sultan Kudarat;[16] the three torture victims, including a woman in Comspostela Valley;[17] 60-year-old Angelina Ipong of Misamis Occidental;[18] Jejhon Macalinsal, Aron Salah and Abubakar Amilhasan of General Santos City;[19] Tohamie Ulong (minor), Ting Idar (minor), Jimmy Balulao, Akmad and Esmael Mamalangkas of Cotabato City;[20] four farmers in Sultan Kudarat;[21] and several others. All of them have suffered severe forms of physical and mental torture. Prolonged trauma of torture victims is a serious issue and prevents them from living a healthy life. The failure to acknowledge the vital need for rehabilitation for torture victims is a blight on the Government.

The use of torture is routinely practiced by the police and military when conducting investigations. Even though most victims within the country are political detainees, suspected terrorists and other persons considered as a threat to "national security," many are not, and these people often come from poor backgrounds. In General Santos City, two laborers named Michael Bautista and Benjamin Agustines were tortured by the military merely for being drunk and having an argument with military personnel.[22] This, and many other examples, exemplifies the arbitrary use of power by state agents within the country. There is complete disregard for a person's dignity, which is further highlighted by the violation of the principle of innocent until proven guilty, as the government allows suspects to be presented to the media and public prior to court trials.

The absence of effective legislation on torture has meant that investigations have not reached their desirable aim, which is to punish the perpetrators and compensate and rehabilitate the victims. Even the CHR regularly fails to investigate complaints of torture, particularly where victims have been charged for crimes in court. These charges, however, are often either fabricated or based on forced confessions resulting from torture. Although the government is aware of this problem, no effective measures have been taken to properly resolve this.

Leonilo Baldecantos prepares a curry of poisonous frogs. Baldecantos is a member of one of seven farmer families forced to eat poisonous frogs and corncobs, due to hunger and lack of food in Alabel, Sarangani, Mindanao. They were sacked from a banana plantation after holding protests to reclaim their land.

The lack of an effective complaint mechanism for victims of violations; hunger and starvation

There is a lack of an effective and functioning complaints mechanism, in which victims of violations are assured of their protection, security and freedom from any forms of harassment and intimidation. It is a fact in many cases, that the victims would rather keep silent than endure the consequences of seeking justice. Despite the existence of state human rights commissions, there has been no guarantee that the complaints would be dealt with effectively

and efficiently. For example, there are no performance pledges by these commissions regarding how quickly a case will be resolved.

Fear has entirely overwhelmed ordinary Filipinos, to the point that it has not been possible for them to even express grievances of hunger and starvation without being ridiculed, threatened, intimidated, reprimanded and/or harassed. Government officials, politicians and local executives instead have tried to silence the victims rather than act on their legitimate grievances. The AHRC has previously reported that the families of farmers in Alabel, Sarangani suffering hunger and starvation were reprimanded by village officials and the officials of the Municipal Department of Social Welfare and Development after they voiced their desperate situation.[23]

There is also evidence pointing to the complete denial and cover-up of the Government's negligence on social services. The employees working with the State Department of Social Welfare and Development have a poor understanding of the right to food and food security issues. Hunger victims have been questioned by the officials of the Department as to why they should be given assistance by the state.[24]

Conclusion and recommendations

There is an obvious failure on the part of the Government of the Philippines to prosecute alleged perpetrators of torture, extrajudicial killings and violence against human rights and political activists. While the police investigators and public prosecutors have failed to bring the above-mentioned cases to court effectively and efficiently, there has also been no guarantee that victims and families of the dead would find justice within the domestic legal system.

This is the case not only because there is a lack of an effective mechanism to ensure security and protection for victims and witnesses, but the judiciary's competence to deliver justice has also been hampered by serious delays in the adjudication of cases. The combination of the lack of witness protection and judicial delays has completely undermined the rule of law. The absence of adequate resolutions or redress for human rights violations has created a culture of impunity and violence. It is also evident that the deteriorating policing system in the country is a fundamental hindrance to the protection of human rights for all Filipinos.

The Government's failure to take adequate action into this ever-worsening situation reflects its complete disregard for human rights. To remedy this and to ensure that the situation is addressed properly, the Government should closely coordinate with victims and families of the dead. It must ensure security and protection for victims and families seeking justice. The Government should effectively implement the Republic Act No. 6981 or the Witness Protection, Security and Benefit programme, and relevant procedures and institutions need to be urgently created for witness and victim protection.

One of the key obstacles is the Government's failure to enact effective laws against torture, despite having ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 4 (1) of the CAT Convention states that "Each State Party shall ensure that all acts of torture are offences under its criminal law" under which the Government of the Philippines has a clear obligation to enact effective domestic legislation on torture. Failure to do so is inexcusable given the prevalence of torture that is currently occurring in the country. Lack of effective domestic legislation against torture has deprived victims of torture of the ability to seek justice and redress, and guaranteed impunity for the perpetrators, who are mostly military and police personnel. Domestic legislation on torture must be enacted without further delay. Unless the Government ensures the passage of the proposed law on torture as a priority, human rights violations across the country will continue unabated.

The government of the Philippines must urgently implement reforms in the policing system and the judiciary. Police reform must include an effective method of scientific and forensic investigation, and the creation of an independent body to investigate cases of human rights violations committed by state agents, free from manipulation and political influence.

The government should further take measures to urgently implement recommendations in the Action Program for Judicial Reform (APJR), especially addressing court delays and related issues such as human resources, administration flaws, the lack of prosecutors and judges, and the speedy disposition of cases.

Only when the government of the Philippines takes these recommendations seriously, will human rights begin to receive the respect that they so urgently require.

1 The 20 cases refer to the cases covered by AHRC only. It is highly likely that many more occurred.
2 UP-143-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1364/
3 UA-30-2005: http://www.ahrchk.net/ua/mainfile.php/2005/963/
4 UP-146-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1374/
5 UA-34-2005: http://www.ahrchk.net/ua/mainfile.php/2005/978/
6 UP-75-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1140/
7 UP-70-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1118/
8 UA-74-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1070/
9 UA-66-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1059/
10 UA-72-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1066/
11 UP-78-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1153/ and UP-92-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1191/
12 UP-108-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1246/
13 UA-69-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1063/
14 UA-72-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1066/
15 FA-11-2004: http://www.ahrchk.net/ua/mainfile.php/2004/667/
16 FA-11-2004: http://www.ahrchk.net/ua/mainfile.php/2004/667/
17 FA-11-2004: http://www.ahrchk.net/ua/mainfile.php/2004/667/
18 FA-12-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1043/
19 UA-74-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1070/
20 UA-69-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1063/
21 UA-167-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1267/
22 UA-198-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1332/
23 HA-25-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1273/
24 HU-10-2005: http://www.ahrchk.net/ua/mainfile.php/2005/1346/

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: The urgent need for effective laws against torture, witness protection, and an end to the increasing occurrence of extrajudicial killings in the Philippines

On the occasion of the December 10 Human Rights Day, the Asian Human Rights Commission (AHRC) takes this opportunity to raise serious concerns regarding the human rights situation in the Philippines. Although there are many concerns we have regarding this topic, we choose here to restrict our focus to the urgent need for effective laws against torture, the current state of witness protection, and the increasing occurrence of extrajudicial killings, notably of human rights defenders.

It is the AHRC's strong belief that the enactment of an enabling law to punish the perpetrators of acts of torture in the Philippines is long overdue. The government's failure to enact a law has deprived its citizens of their right to be free from the most abhorrent and barbaric of acts - torture. It is also in complete disregard of the government's international obligations as a State Party to the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). By ratifying the Convention, the government is required to implement the provisions therein, including by enacting domestic legislation.

By failing to take action to ensure the passage of an anti-torture law, the members of the Philippine Senate and the House of Representatives have not protected their citizens against attacks and abuses by state agents. The provision of the 1987 Philippine Constitution, which prohibits torture, has been betrayed by the lack of an enabling law, in particular for torture victims seeking justice and redress. It constitutes a failure of the legislature when it cannot protect the very people it represents. There is therefore, an urgent need to have the law on torture enacted. This is a necessary precondition for and achievable means of enabling the protection against torture in the country.

A review of the country's witness protection mechanism is also essential for the protection of human rights to the Philippines. It is becoming increasingly obvious that getting away with murder in the Philippines is made easy by the absence of any functioning witness protection scheme. The lack of witnesses also becomes a convenient excuse for investigators to say that they have done their jobs but have no further avenues for action.

Although provisions exist for witness protection in the Philippines, they are clearly not working. Despite the numerous reports of victims' families refusing to press complaints or witnesses going into hiding out of fear after the unrestrained killings of human rights defenders, peasant leaders, lawyers and others, there does not seem to be any serious effort by the authorities to address this issue.

While the government of the Philippines has given assurances at the highest levels that the perpetrators of extrajudicial killings will not go unpunished, without a proper scheme for witness protection such assurances are meaningless. The government should immediately review the management and handling of witness protection by the Department of Justice, with a view to greatly enhancing and expanding the scheme, so that security can be given immediately and for as long as necessary to those who need it. This requires a sense of urgency: the unrestrained killings occurring in the Philippines at present will be neither solved nor abated until the government recognises that immediate and effective witness protection is the missing element. Until witness protection is taken seriously, the prospects for protection of human rights, criminal justice and the rule of law in the Philippines remain dim.

This leads us to the final point, which regards the unrestrained killings themselves, notably of activists in the Philippines. The AHRC is aware of twenty human rights defenders and political activists having been killed since January 2005 - and these are only the cases that have come to our attention. Common among all the victims is that they were persons that have been critical of the government. In response, government and army officials have labelled the victims as being communist sympathisers, as if to excuse themselves of responsibility or involvement. The effect of this branding has been to excuse the authorities of responsibility in dealing with the cases: by implication, killing an alleged communist is not a crime in the Philippines. A further conclusion is that killing members of legitimate opposition parties or human rights activists is also permitted.

The apparent unwillingness of the current administration to do anything to address this trend is bitterly disappointing. The combined effect of its inaction and unhelpful public statements is to suggest that the killing of political opponents and human rights activists is of no concern, and may even be beneficial to the country's internal security and social order.

To prevent further killings of activists and to avert a new social crisis in the country, the government must take immediate action regarding this matter. First, and most obviously, full investigations and judicial inquiries must follow without delay, with a view to holding the perpetrators fully accountable for their crimes and making clear that this pattern of killings will not be allowed to continue. Secondly, and as stated above, witness protection must be given to all persons attached to these cases. Thirdly, the Commission on Human Rights of the Philippines must play an active role by coordinating its work with the National Bureau of Investigation, rather than waiting for other agencies to take the initiative, and by considering recommendations to indemnify the families of the dead. Fourthly, the government must condemn and demand the retraction of statements by the armed forces listing groups as 'communist sympathisers'. Until these measures are taken, little will be achieved in stemming this wave of extrajudicial killings.

The government of the Philippines' response to these and other grave issues concerning human rights in the country, has so far been characterised by inaction and a lack of proper direction. It is now time for the government to send a strong message to its own people and those abroad that issues such as witness protection, extrajudicial killings and torture will no longer be ignored. However, it can not do this only with words. The government must take genuine and effective measures to implement laws that will help prevent the blatant violations of human rights that are currently sweeping the country.

We trust that you will share in our concern for the human rights situation in the Philippines and act accordingly to pressure the government for change.

Yours sincerely,

Basil Fernando
Executive Director

CAMBODIA

Twelve years after the peace process, Cambodia in human rights limbo

During recent years the Cambodian government has taken many steps pushing the country backwards, away from the limited developments that took place with the intervention of the United Nations Transitional Authority for Cambodia and the adoption of a constitution based on the principles of liberal democracy.

The comprehensive human rights concepts encompassed within Cambodia's 1993 Constitution are unable to be realised. This is because the attempt to introduce principles of human rights, while with great UN and international support, was not accompanied by attempts to improve the basic institutions of justice—the police, prosecution and judiciary. These institutions continue to function in a similar way to that during 1980-1992, when large parts of the country were controlled by the Vietnam backed State of Cambodia (SOC). At that time, under a framework of socialist law, all three institutions were subordinate to the ruling party, with no institutional independence.

This situation continues to exist today, despite the rhetoric of the rule of law and liberalism used by the Ministry of Justice as well as other state agencies. Cambodia's police force is a direct instrument of the party in power. Its officers are little educated, and the force is highly unorganised, unable to coordinate as a single unit. The majority of the country's police stations are primitive and often do not have the necessary paper and other materials to record complaints. Furthermore, there is no code or mechanism by which disciplinary inquiries can be made. Corruption exists at all levels of policing and Cambodian citizens distrust and fear police officers. Under these circumstances, little coercion or intimidation is needed to obtain confessions. If it can be proved that a confession was obtained through the use of torture or other illegal means, it cannot be used in court. However, the lack of forensic and other facilities make it impossible to prove that a victim was tortured.

Moreover, the nexus between the Cambodian courts and police will ensure that no attempt to prove police torture or abuse will succeed.

To ensure the independence of the judiciary, the UN Special Representative of the Secretary General on the situation of human rights in Cambodia has made numerous recommendations to the government since 1993. Observations have also been made regarding the total subordination of the judiciary to the executive. Far from taking note of these observations and recommendations however, the Cambodian government has instead pursued a policy of severe intimidation of judges. For instance, when judges have released detainees on the grounds of insufficient evidence, they are accused of taking bribes. Such allegations are often publicly made by the prime minister himself. Other judges have been removed from office for giving judgments adverse to the executive. There is hence a general observation by human rights groups that the courts are unable to protect due process and the rights of those seeking justice.

Cheam Channy

Attempts to suppress pluralism are a hindrance to the development of Cambodia's basic institutions. The country's well known dissident politician, Sam Rainsy had to flee the country when attempts were made to arrest him and some of his party members after removing their parliamentary immunity. Another party member, Cheam Channy, who was also a member of parliament, was arrested and sentenced to seven years rigorous imprisonment on charges of criminal defamation for making comments deemed defamatory by the government. These acts are an attempt to create fear and dismantle political opposition.

Chea Vichea

Similar attempts have been made by the government to suppress the increasing number of trade unions being formed. Workers in recently established factories suffer from low wages and poor working conditions. Prominent trade unionist, Chea Vichea was killed in 2004 and until now no proper inquiries have been conducted. Two persons were later arrested, but claimed the allegations against them were fabricated. Human rights groups concur, and have suggested that the arrest was a response to international criticism. After carefully examining the evidence, the instructing judge concluded that the allegations were fabricated and released the suspects. The judge was then accused of corruption and later suspended

from office. Thereafter, the two suspects were immediately arrested again and sentenced to 20 years imprisonment. Despite the doubt and suspicion surrounding the case, there is no possibility of review within the Cambodian legal framework. In cases of political interest therefore, a clear message is sent that no independence on the part of the judiciary will be tolerated.

Within the human rights community as well, there is widespread scepticism and fear. Many activists have been subjected to intimidation, while others have been assaulted and warned to give up their activities. Death threats via computers and telephones are also common. The situation has resulted in many activists leaving the country.

In Cambodia we find the contradiction between the principles of democracy and human rights and the reality. In reality, Cambodia lacks even an elementary foundation for the rule of law. Numerous countries and development agencies have poured large sums of money into Cambodia to encourage its development of democracy and human rights. However, no such development is taking place. This is hardly surprising, given Cambodia's lack of elementary rule of law and its defective policing, prosecution and judicial mechanisms. For all those concerned with Cambodia's democracy and human rights, both locally and internationally, it is time to review this situation seriously. Not only is the current limbo a waste of vast resources, but it is prolonging the suffering of the Cambodian people, who are commonly acknowledged to have suffered a terrible catastrophe. Until an effective strategy to improve the basic social and legal framework of the country is worked out, their suffering will not end.

The present international discussion about a tribunal for surviving Khmer Rouge leaders will not evoke much response amongst the ordinary Cambodians who are unable to obtain basic justice for the violations they suffer now. Until they are able to see developments in their current justice system, they will have little faith in the possibility of obtaining justice for crimes against humanity suffered in the past. Removing the current justice system from the control of the executive and allowing it to develop into a system able to protect the rights of the people is the only way that justice will have any meaning for Cambodians, now and in the future.

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: the bleak human rights situation in Cambodia, twelve years after the peace process

The Asian Human Rights Commission (AHRC) directs your attention to the bleak human rights situation in Cambodia, twelve years after the peace process. The massive UN and international intervention of that time accomplished little in the way of improving the rights of ordinary Cambodian citizens. The last two years has worsened the situation and increased citizens' fear through state propaganda and suppression. Political imprisonment has begun with the arrest and sentencing of Cheam Channy, a member of parliament from the opposition party, whose leader Sam Rainsy has fled the country in fear of his life.

It is time to courageously admit that over ten years of trying to assist the Cambodian people to rebuild their lives within the framework of law and justice has not taken root within the country. Fear, tyranny and dictatorship continue despite the government's rhetoric of the rule of law and liberalism. The UN Special Representative of the Secretary General on the situation of human rights in Cambodia has made numerous recommendations to the government on the rule of law and human rights since 1993. However, none of these recommendations have been implemented. Under these circumstances, it is time for the UN and international community to question whether further recommendations should continue to be futilely made, or whether it would be more useful to examine where things have gone wrong and what can be done to remedy the situation.

One area where some progress was made after the work of the United Nations Transitional Authority for Cambodia, was the growth of civil society movements, including human rights organisations. In this area as well, continued tyranny and repression are having an adverse impact. Many human rights activists have been assaulted or threatened, resulting in some fleeing the country. Demonstrators have

been warned through state media that serious repercussions will follow their participation in such activities.

In consideration of the above factors, the AHRC requests you to review all the recommendations made by UN authorities since 1993 and to pursue more fruitful ways to improve the human rights of the Cambodian people. The international community should also be encouraged to take a more proactive role in establishing the rule of law in the country, by providing the necessary assistance to the police, prosecution and judicial institutions.

Yours sincerely,

Basil Fernando
Executive Director

SOUTH KOREA

Human rights trailing democracy – the violent repression of demonstrations, and legislation and labour rights issues remain problematic

Although the Republic of Korea is regarded as a country with protected democracy and human rights, the people continue to suffer serious setbacks. Police brutality, especially by riot police, has become a serious concern in recent years. Other issues include violations of the freedoms of expression and assembly, criminal defamation of workers, the rights of migrant and irregular workers, excessive delays to court cases, the absence of legal provisions to outlaw torture, the rights of conscientious objectors to military service and the legal provisions allowing for the prolonged detention of suspects without trial.

Police brutality

This year, police brutality has caused serious injuries to protesting citizens and, in at least one reported case, death. A farmer died of serious injuries: 43-year-old Jeon Yong-Cheol died on November 24, 2005 after being beaten by the riot police during a rally in Seoul on November 15. Jeon's death and police brutality towards protesters comes as a shock from a democratic nation like the Republic of Korea, which has made significant headway towards respecting and realizing human rights in the last decade. Riot police hit another farmer, Hong Deok-pyo, who was protesting in the same rally on November 15, on his back-bone and neck-bone, injuring his spinal cord and paralysing him from the chest down. Another protestor, Kim Deok-yoon, remains in hospital after suffering severe beatings. At least two of Mr.

Protestor's death a setback to democracy and human rights in South Korea. A young girl mourning the death of Jeon Yong-Cheol.

Kim's ribs and an arm were fractured; as a result he suffered haemorrhaging in the lungs. On the same occasion, around 150 persons were injured, eight of whom were injured severely.

Such riot police brutality is not an isolated incident. During the protests at the new U.S. army site in Peongtaek in July 2005, many protesters were injured. A senior police commander, Lee Jong-woo, reportedly shouted to the riot police, "beat, kick and kill the demonstrators." At that time about 150 demonstrators were injured, but no legal or disciplinary action was taken against Lee. Believed to be an "expert police commander," Lee also supervised the riot police in the rally where Jeon was beaten.

Furthermore, about 350 members of the Ulsan Construction Plant Union were injured during their strikes from March to May in 2005 due to a violent police crackdown. The workers went on a strike against the company's dismissal of union leaders and the repression of their union activities, and called for improvement to their working conditions.

International observers have noted with concern increasing riot police brutality in the last three years. For instance, riot police brutally attacked protesters in Buan County who held demonstrations against the government's plan to construct a nuclear waste storage facility in the country in 2003. An estimated 100 people were injured. In March 2005, the National Human Rights Commission (NHRC) of Korea issued recommendations regarding this matter. It concluded that the police's excessive repression violated the rights of the Buan protesters and urged the Korean National Police Agency to compensate the victims. The NHRC of Korea also opined that the prohibition of demonstrations at night has no legal justification. The police have maintained that demonstrations at night are illegal and have attempted to punish protesters who participated in such demonstrations. The Korean National Police Agency has shown reluctance to implement the NHRC's recommendations.

Riot police using purposefully sharpened shields as weapons. South Korea still violently represses demonstrations – a problem common throughout Asia.

AHRC has learned that riot police have a practice of removing the protective rubber hems from their metal shields and sharpening their edges, which are used to attack protestors. Such shields are not used to protect the police, but are lethal weapons used to attack protestors. Although this practice has been caught on film, there has been no discipline or other action taken against riot police who resort to such brutal methods. Such inaction against this violent conduct by the riot police and their commanders proves the Korean government's complicity in police violence.

Legislative restrictions

The Republic of Korea continues to maintain laws restricting the freedom of assembly. Besides increasing police brutality in recent times, the government's revision bill for the Law on Assembly and Demonstration of South Korea on December 29, 2003 severely restricts the Korean people's right to the freedoms of assembly and expression.

The main contents of the revision bill include:

1. Allowing police agency supervisors to ban street marches that may cause major traffic congestion on 95 roads in key cities across the nation, including Sejongro, Daehakgno and Gwanghwamun in downtown Seoul, three locations that have historically been used for public assembly. Human rights groups argue that banning street marches at these places violates the rights of assembly and demonstration, even if these may cause major traffic congestion.
2. Authorizing the police to ban future rallies of an organization and all other rallies protesting the same issue, if a civic group stages a protest that obstructs public order or becomes violent. Human rights groups worry that a group's protests can be completely banned with just one precedent of public disorder.
3. Allowing the police to ban a rally believed to substantially damage facilities such as public schools, foreign embassies and military compounds at the request of nearby resident(s). This measure will apply to U.S. military compounds as well as Korean ones.
4. Providing for the punishment of an organization and the six-month imprisonment of its speaker if the level of noise at any given demonstration exceeds a certain volume prescribed by an executive order. However, human rights groups have said that this maximum is below the level required to use a loudspeaker, and therefore this regulation limits demonstrations to small gatherings.

Human rights groups strongly condemned the move as an attempt to stifle their right to hold rallies. One activist has said, "The revisions exclusively represent the position of the police. Although rallies may bring inconvenience to some, it is much more important to protect the people's right to rally and assemble, as the weak have no other way to express their opinions other than through those actions."

There was reportedly no discussion with the NHRC on this revision bill, nor was there a legislation announcement. There was also no public hearing by the government until the Home Affairs Committee of the National Assembly approved the revision bill of the Law on Assembly and Demonstration on November 19 2003.

Freedom of expression and the National Security Law

Under the National Security Law, citizens continue to suffer from human rights violations, especially in terms of freedom of expression and freedom of assembly. An example is the case of Lee Jeong-Eun, the former vice president of the Korea Federation of Student Councils (Hanchongnyeon), who was arrested on August 8, 2001 and was subsequently sentenced to one year's imprisonment for violating article 7 of the National Security Law, by being a member of an "enemy-benefiting group" by the Seoul District Court. His subsequent appeals did not succeed. When he filed an individual communication to the UN Human Rights Committee, it decided that the state had violated Mr. Lee's rights, especially his freedom of association, and has asked the government to pay adequate compensation to Mr. Lee for the imprisonment he has suffered.

The Human Rights Committee also stated that the Republic of Korea has not demonstrated how membership in organizations such as Hanchongnyeon pose a real threat to national security, but rather acted upon hypothetical grounds.[1] The Human Rights Committee has also requested that the Republic of Korea amend the National Security Law and ensure that similar violations do not occur in the future. Despite this, Hanchongnyeon remains outlawed by the government of the Republic of Korea, forcing its members to go underground. A number of its members remain imprisoned despite about 200 of them having been given amnesties in August 2005.

In 1999, the UN Committee also urged the Korean government to abolish the "law-abidance oath" imposed on prisoners who are convicted under the National Security Law before they are released.[2] Six years after these recommendations, these provisions still exist. This demonstrates the

government's complete disregard for citizens' civil and political rights relating to the National Security Law. The root cause of the problem is the existence of the National Security Law itself. There have been continuous calls for the Korean government to repeal its National Security Law by a wide spectrum of civil society groups, as well as the country's NHRC. However, there has been no significant attempt to abolish this draconian law, paving the way for continued human rights violations.

Delays to cases and fair and speedy trials

Prolonged delay in adjudication of cases in the Republic of Korea undermines the right to fair and speedy trial. Such delays adversely affect the litigants, especially those who are workers illegally dismissed and sued by their employers.

In the case of Kim Seok-jin, who was laid off from his job at Hyundai Mipo Shipyard in 1997 while a union official at the company, the whole case took five years and five months to conclude after the case was filed in the court and over eight years after his dismissal. Such delays affect litigants, not only financially but also psychologically. This is especially unacceptable as many victims of court delays hail from the poorer sections of society. Kim won the first and second trial, and the courts ordered that he be reinstated. Each case proceeding was finished within a year. However, the Supreme Court delayed a judgment in his case for 41 months before it made a final decision, ordering Mr. Kim's reinstatement on July 21, 2005. According to civil code provisions, appeals for civil lawsuits should conclude within five months from the day the higher court receives case records. Considering that the Supreme Court customarily takes around 13 months to consider layoff annulment cases, the delay in Kim's case seems unbelievable.

Kim Seok-jin stands in front of the South Korean Supreme Court, calling for trial delays to be reduced. Such delays are a significant barrier to justice throughout Asia. (photo courtesy of ohmynews.com).

According to statistics recently presented by a judge from the Supreme Court, 85.7 percent of the cases filed in Supreme Court were concluded within a year in 2004. However, the problem is that most victims of prolonged cases come from the most economically and socially vulnerable sectors of the society. It is therefore necessary to address issues or procedures causing delays in cases and take steps to remove them.

Criminal defamation of workers

Another serious issue is the common practice of affluent and large companies' attempts to restrict the rights of their workers, when the workers criticise labour practices, by suing them for defamation. In such cases where the court has found workers guilt, it has asked the worker to pay large sums of compensation to the company, and due to the workers' inability to pay such enormous amounts, they have been sent to jail. The Korean Criminal Code's articles 307-312 deal with criminal defamation and prescribe a maximum penalty of three years' imprisonment for failing to pay compensation in a case like defamation.

A good example is the case of Kim Seong-Hwan, the President of Samsung General Trade Union, whose members are contract workers and dismissed workers of Samsung Corp. He was dismissed in 1996 from Yicheon Electrical Equipment (Ltd.), which is affiliated to Samsung SDI, due to his involvement in the establishment of a democratic workers' union. Since then he has done much to reveal Samsung's illegal practices against its employees and union activists. Due to his activities, he has faced various libel cases filed by Samsung. The Supreme Court sentenced Kim to imprisonment for two months for committing libel against Samsung SDI this October. Kim was sentenced to three years in prison with a four-year stay of execution for obstruction of business in July 2003.

This is not an isolated incident. According to the Korean Confederation of Trade Unions, until 2004, about 100 union members were sued for damages by a number of companies and institutes, for a total of 6.9 billion won (about 6.8 million USD). The UN Committee on Economic, Social and Cultural Rights noted concerning the Republic of Korea, in 2001, that it is 'entirely unacceptable the approach taken to criminalize strike activities [and it was] deeply disturbed by the excessive force used by the police against labour demonstrations.'[3] In addition, although the International Labour Organisation has repeatedly recommended that the Korean government refrain from using "obstruction of business" charges to hand out criminal punishment to workers for their trade union activities, the Korean Confederation of Trade Unions reported that two-thirds of all the workers arrested and imprisoned in 2001 were charged and convicted for "obstruction of business"; this practice is continuing until this day. The UN Committee also urged the Republic of Korea 'to desist from using criminal proceedings against striking trade unions.'[4]

In many places in Asia, including Hong Kong and India, criminal defamation has been abolished. The trend is to do away with such provisions in criminal law. However, the Republic of Korea, which is regarded as a progressive democracy, still holds onto these backward provisions, which are used by financially powerful companies to their advantage to victimize their own workers. Allowing the existence of legal provisions that curtail workers' free expression and demands for better conditions is entirely unacceptable.

The existence of provisions allowing prolonged pre-trial detention and the lack of a law criminalising torture

Provisions of criminal law in the Republic of Korea still allow for prolonged detention of suspects before trial — 30 days in ordinary cases and 50 days in cases involving the National Security Law. In 1999, the UN Human Rights Committee noted the excessive length of permissible pre-trial detention and the lack of defined grounds for such detention, and urged the government to amend related laws in accordance with the rights of detained persons under article 9 of the International Covenant on Civil and Political Rights.[5] Although six years have passed since this recommendation as well as continuous requests from local NGOs, the Republic of Korea still maintains these legal provisions. The existence of such procedures in the Republic of Korea is appalling.

Torture is not a crime in the Republic of Korea. Torture and inhuman or degrading treatment or punishment reportedly continues in prisons of the Republic of Korea. The UN Committee against Torture urged the government to 'enact a law defining the crime of torture' in 1996.[6] Ten years have passed since these recommendations, but torture is still not a crime in Korean law. Prescription of punishments for state officials found guilty of torture, inhuman or degrading treatment or punishment must accompany the criminalisation of torture. There has been no progress in the Republic of Korea in this regard.

Rights of Migrant Workers

The Korean government's crackdown on migrant workers has continued since November 2003, after it passed a new migrant worker management system, entitled the Employment Permit System, which took effect in August 2004. This Employment Permit System, along with the Industrial Trainee System, fails to allow migrant workers to change employers freely, and enables the lack of renewable visas (the current limit is two-years), and the prohibition of migrant workers from joining labour unions. Furthermore, workers must obtain annual permission from their employers to stay in the country, as they

are on one-year contracts. The employer therefore essentially has complete control over the wages and working conditions of migrant workers.

While implementing the Employment Permit System, the Government began to deport migrant workers who had been in South Korea for more than four years. It is estimated that more than 110,000 migrants remain as undocumented workers in Korea. Since then, many other migrants have fled their jobs and homes in fear of the immigration police and many cases of harassment and arbitrary arrest of migrants have been reported. We are also highly concerned about the condition of arrested migrant workers in detention facilities.

On May 14, 2005, Bangladeshi national Anwar Hossain, the leader of the Migrant worker Trade Union, was arrested by immigration officers when he was returning home after a union meeting. The MTU, which was founded in April 2005, grew out of the Equality Trade Union, Migrant's Branch (ETU-MB), founded May 2001. It is wholly organized and led by migrants. We anticipate that the Korean government will ask Bangladesh's Ministry of Home Affairs for permission to deport Anwar Hossain. To date, eight leaders of the migrant worker's union have been deported even though they may face arrest and prosecution upon returning to their countries of origin. Of serious concern is the fact that among this group are Bangladeshi and Burmese nationals, who face a significant risk of being subjected to torture once deported, which represent violations of the principle of non-refoulement as contained in the UN Convention Against Torture, under Article 3.

In May 2005, the National Human Rights Commission of the Republic of Korea recommended that the Ministry of Justice revise the Immigration Administration Act to clearly define legal provisions and conditions regarding the arrest of undocumented migrant workers, in order to prevent arbitrary and illegal actions by state officials. However, the Ministry of Justice has ignored these recommendations. There has been a continuous crackdown on undocumented migrant workers to date.

Rights of Irregular workers

The Irregular Workers Bill pending in the National Assembly is another concern in the country. The government of the Republic of Korea said that the Bill was devised to provide improved protection to irregular workers, as well as to ensure labour market flexibility to help employers. However, labour rights groups argue that expanding the industries in which irregular workers can be hired would allow companies to manipulate the system by increasing the number of irregular workers.

Regarding this, the National Human Rights Commission of Korea stated that the Bill is not likely to help reduce the nation's burgeoning ranks of irregular workers or rectify the unreasonable discrimination against them. The National Human Rights Commission also said that the bill should be re-drafted and irregular forms of employment should be adopted only exceptionally and in a limited way. The Commission further said that the principle of equal pay for equal jobs should be implemented in order to root out widespread discrimination against irregular workers.

However, the Government, which wants to make the nation's traditionally rigid labour market more flexible, disregards suggestions from labour groups as well as from the National Human Rights Commission, and is constantly pushing for the enactment of bills into legislation. If the bill is introduced, it will worse the situation of irregular workers and will also threaten the stability of employment of regular workers.

In Korea, the number of irregular workers has rapidly increased in recent years and now accounts for over 50 percent of the nation's total workers. Irregular workers only receive 60 percent of regular workers' wages on average, and can easily be dismissed, as most of them are short-term contractors. They are also isolated from the social welfare system. In 2005, there were several mass demonstrations by irregular workers calling for the improvement of their working status and it has become one of main human rights issues in Korea.

Other concerns

Another significant concern is the continued imprisonment of conscientious objectors to military service. To date, there are over 1,100 conscientious objectors serving jail terms. Although there have been proposals, mainly by the civic groups, to allow alternative services other than military service, the Ministry of Defence has blatantly disregarded such proposals.

Conclusion

There are serious concerns with regard to the human rights situation in the Republic of Korea, especially in relation to police brutality, labour rights, the National Security Law and other criminal law provisions allowing violations of human rights to continue. Although the Republic of Korea has achieved democracy, mainly due to the suffering and sacrifices of its own citizens, it has a long way to go in improving its human rights standards in practice.

There are a number of issues of concern relating to the rule of law in the country. Law enforcement agencies, such as the police and especially the riot

police, continue to employ brutal and violent practices towards the public, causing severe injuries and even death. It is apparent that although there have been many changes in the country in terms of democracy and human rights, there have been no serious, timely or effective efforts for police reform. The Government of the Republic of Korea should take police reform seriously and bring an immediate end to police violence. Government measures should also include proper punishment for police officers who have carried out violent acts, and their commanders, as well as a public apology and adequate compensation to victims and/or their family members.

The Republic of Korea should repeal the legislation allowing criminal defamation suits to be lodged, as this results in many labour activists being sent to jail as a consequence of legal attacks by their employers. Allowing such provisions to remain in criminal law displays complicity on the part of the government in limiting and suppressing the rights of workers.

The Republic of Korea continues to restrict the rights of its workers, including the right to join trade unions and the right to demonstrate, and the police is used to violently repress these workers. In an emerging democracy, brutal suppression of the rights of workers is entirely unacceptable.

The problem of the rising number of irregular workers and the lack of legal protection for their rights, including fair wages and protection from arbitrary dismissal, seriously need to be addressed. Despite the problems facing irregular workers, the government is trying to bring legislation into force allowing further manipulation of these workers by employers, and preventing them from finding redress for violations of their rights. The AHRC urges the government of Republic of Korea to abandon the planned Irregular Workers Bill and to follow the recommendations of the National Human Rights Commission of Korea, that the bill be re-drafted and irregular forms of employment should be adopted only as exceptional and limited measures.

One of the main components of legislation affecting many rights, including the freedom of expression and association, is the National Security Law. Many civic groups and the country's national human rights institution have called for the abolition of this law. The continued existence of such a law is bound to lead to the violation of the rights of many citizens. AHRC therefore joins in the popular call to abolish the National Security Law.

The absence of a law criminalizing torture is another major hurdle to the enjoyment of human rights and the protection from abuses thereof. There is no such law despite recommendations made by the UN Committee against Torture for a law to be enacted. This allows torture or acts of inhuman or

degrading treatment or punishment to be carried out by the state officials without fear of criminal punishment. The Republic of Korea should take urgent steps to criminalise torture and to bring such a law into full conformity with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Despite continuous calls by NGOs as well as human rights treaty bodies, such as the UN Human Rights Committee, the Republic of Korea still continues to have provisions in criminal law allowing for the prolonged detention of suspects before being trial. Such provisions need to be abolished, and the country's laws need to be brought into full compliance with article 14.3 (c) of the International Covenant on Civil and Political Rights, which states that suspects must be tried without undue delay.

This report is not exhaustive in covering all the human rights issues in the Republic of Korea, but highlights some issues which cause serious concern within and outside the country. The Republic of Korea has overcome a dark past comprising massive human rights violations, especially under military dictatorships. Today's democracy in the country has been achieved at the expense of the lives of many Korean citizens. No one wishes the country to return to its dark past. Instead, everyone hopes that Korea will move forward progressively, especially in terms of democracy, human rights and the respect for the rule of law. However, unfortunately, events mentioned in this report are still holding Korea back from moving along that progressive path. Development at the expense of rights and democracy will not last long and will surely falter, producing catastrophic results. The Republic of Korea should not only be a successful economic model in the Asian region, it should more importantly be a successful model of democracy and human rights. Therefore, the Government of the Republic of Korea is urged to attend to the issues raised in this report, as well as other issues raised by the vibrant civil society organizations engaged in the promotion and protection of rights in the country.

---

1 UN Human Rights Committee, Communication No. 1119/2002: Republic of Korea, 23/08/2005 (CCPR/C/84/D/1119/2002 (Jurisprudence)

2 Concluding observations of the Human Rights Committee: Republic of Korea, 01/11/99 (CCPR/C/79/Add.114)

3 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, 21/05/2001 (E/C.12/1/Add.59)

4 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, 21/05/2001 (E/C.12/1/Add.59)

5 Concluding observations of the Human Rights Committee: Republic of Korea, 01/11/99 (CCPR/C/79/Add.114)

6 Concluding observations of the Committee against Torture: Republic of Korea, 13/11/96 (A/52/44, Paras, 44-69)

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: Human rights trailing democracy in the Republic of Korea – legislation and labour rights concerns and the violent repression of demonstrations

On the occasion of the December 10, 2005 International Human Rights Day, the Asian Human Rights Commission (AHRC) wishes to raise some serious concerns regarding the human rights situation in the Republic of Korea. Concerning this, we have selected to draw your urgent attention to a limited set of issues concerning violations of rights, including: increasing police brutality and repression of demonstrations; the deteriorating labour rights situation; and Korea's National Security Law.

In 2005, police brutality has caused serious injuries to citizens engaged in demonstrations, and notably one death. A farmer, 43-year-old Jeon Yong-Cheol, died as a result of his injuries on November 24, 2005 after being beaten by riot police during a rally in Seoul on November 15. The Republic of Korea has made significant headway towards respecting and realizing human rights and democracy in the last decade. However, Mr Jeon's death and the police brutality towards protesters indicate that significant improvements are still required.

During the same rally, another protesting farmer, Hong Deok-pyo, was hit by riot police on his back-bone and neck-bone injuring his spinal cord and paralysing him from the chest down. Another protestor, Kim Deok-yoon, remains in hospital after suffering severe beatings. At least two of Mr. Kim's ribs and an arm were fractured; as a result he suffered haemorrhaging in the lungs. On the same occasion, around 150 persons were injured, eight of whom were injured severely. This was not an isolated incident in 2005 and there are various occasions where the police have brutally assaulted protestors in recent years.

The Republic of Korea continues to maintain restrictive provisions on the freedom of assembly. The worsening of police brutality in recent times has followed the government's revision bill concerning the Law on Assembly and Demonstration of South Korea on 29 December 2003, which severely restricts the Korean people's right to peaceful demonstration. Despite public outrage against such laws and police brutality, the government of Republic of Korea has not taken any effective steps towards improving the enjoyment of the rights to the freedoms of assembly and expression. There has also been **NO** effort by the Government to compensate victims of police assaults.

Another serious concern is the deteriorating labour rights situation in the country. The Republic of Korea's rapid economic development has come at the expense of rights of millions of its workers. Attempts by workers to protests against violations of their rights have been met with violent repression by the police, and with other actions such as dismissals. The existence of criminal defamation provisions in the country's criminal law works mainly to the advantage of large companies, which often resort to law suits against workers who are involved in trade unions. Up to 2004, there have been about 100 union leaders sued for an amount totalling about 6.8 million US Dollars by large companies. As the result of the workers' inability to pay such large sums, most of them are sent to jail under the criminal defamation provisions in the law. One good example is the case of Mr. Kim Seong-Hwan, the President of Samsung General Trade Union who is currently serving a jail term due to criminal defamation. A Samsung company sued Mr. Kim after he revealed Samsung's illegal practices against its employees. Although UN treaty bodies and the International Labour Organization have urged the government of Republic of Korea to allow greater rights for its workers and for the protection of theirs right to join trade unions and demonstrate, these calls have fallen on deaf ears. Therefore, there is an urgent need for greater international support, including from UN agencies, for the protection of workers' rights in the Republic of Korea.

Another major concern is Republic's National Security Law, which ensures the continued violation of many rights, including the freedom of expression and freedom of association. In its jurisprudence dated 23 August 2005 (Communication No. 1119/2002: Republic of Korea), the UN Human Rights Committee has asked the Government to pay compensation to a student leader who was imprisoned for being a member of an "enemy-benefiting group" according to the National Security Law. The Human Rights Committee has recommended that the government amend its National Security Law, and the country's National Human Rights Commission and many civil society groups have called for its abolition. The Human Rights Committee has also noted the broad interpretation and application of the provisions of the National Security Law, which often result in violations of human rights. However, this draconian law continues to cause fear for the South Korean people, bringing back dark memories of blatant human rights violations perpetrated under such laws in the country's military dictatorial past. There is a need for greater

international support for the abolishing of the Republic of Korea's National Security Law.

AHRC has highlighted a number of human rights issues relating to South Korea, including, prolonged detention before trial, the absence of a law prohibiting and criminalising torture, the question of irregular workers, the rights of migrant workers and prolonged delay in adjudication of cases in the courts, as part of its special report on the occasion of the International Human Rights Day, which is available online at http://www.ahrchk.net/hrday2005.

We trust that you will share in our concern for the human rights situation in the Republic of Korea and act accordingly to pressure the government for change.

Yours sincerely,

Basil Fernando
Executive Director

INDONESIA

Trial of human rights defender exposes absence of justice and rule of law in Indonesia

The investigation into the death of human rights defender Munir Said Thalib and the subsequent trial, which began in August 2005, is a significant and telling indicator of the dire human rights and rule of law situation within Indonesia.

Munir Said Thalib

At present, the trial into Munir's death is ongoing at the Central Jakarta court, with defendant Pollycarpus Budihari Priyanto, a Garuda Indonesia pilot. The hearing of witnesses in Pollycarpus' trial has finished and the trial is set to end in mid-December 2005. While summing up on December 1, the prosecution recommended a life sentence for Pollycarpus for premeditated murder and the use of false documents. As the sole suspect, Pollycarpus is clearly a scapegoat, while those ultimately responsible for Munir's death have yet to be apprehended. The work of the prosecution has been shoddy, which largely stems from the ineffective investigation conducted by the police. Neither the prosecution nor the police have taken into account the findings of the presidential fact-finding team, appointed to investigate Munir's death due to concerns regarding the poor work done by the police. The team submitted its report in June 2005, but it has yet to be made public. Furthermore, during its work, the team was hindered by a lack of cooperation by the state intelligence agency; some senior officers were key suspects but refused to meet with the team. The complete disregard towards the team's report shown by the police as well as the lack of cooperation by the state intelligence agency in meeting with team members show the lack of respect these institutions have for the law and for any commitment made by the Indonesian government towards human rights.

Indonesian civil society calling for Munir's all those responsible for Munir's death to be brought to justice – will their government betray them?

There was a recent attack on Munir's supporters outside the court, prior to the scheduled hearing of a state intelligence agent who had been called twice before but had yet to show up. More than 50 unidentified people attacked those demanding justice for Munir's case. This is not the first attack on Munir's supporters; his family and colleagues have been subjected to threats and intimidation since they began to call for proper investigations into his death last year. The police have investigated none of these attacks and have provided no protection to the victims. While Munir's death has received much publicity in Indonesia and internationally, it has made little difference in obtaining justice for Munir's family. President Susilo Bambang Yudhoyono had made numerous promises regarding Munir's case as well as Indonesia's human rights situation in general after becoming the first directly elected president, but there have been few results. Since the mandate of the fact-finding team expired and they submitted the report, President Yudhoyono has taken no action regarding the case. If this is the redress available for such a prominent case, what is available to the ordinary Indonesian citizen can be imagined.

The reason for such a situation can be found in the country's ineffective justice institutions and poor legal system. The police, prosecution and judiciary are defective and largely incapable of either protecting or promoting the rule of law within the country. A key reason for this is the lack of legal structures that allow for the establishment of the rule of law.

The Indonesian legal system is such that torture, disappearances and other grave human rights abuses are not considered crimes and hence are not punishable by the penal code. This is the case even though Indonesia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1998. While torture is considered a crime against humanity under Law No. 26 of 2000 in the Human Rights Court Act, the penal code does not define the act of torture and has no specific provisions for the prosecution of torture. At present, torture is treated in the same way

as ordinary maltreatment between civilians. Furthermore, there are no provisions for the compensation of victims and no complaint mechanisms through which abuses can be reported.

Apart from torture, Indonesia has no laws to deal with disappearances and other grave human rights abuses, which has led to many past abuses not being redressed. The 1965-66 massacres are one such set of atrocities, when some half a million to a million unarmed civilians were killed for alleged communist sympathies, which have yet to be dealt with by the Indonesian government and society. In addition to those killed, hundreds of thousands more were tortured and imprisoned, including political opponents of the ruling regime. The families of those killed or imprisoned were also victimized through a programme of institutional ostracism that denied them the opportunity to engage in normal economic and social life. They have been imprisoned, dismissed from their jobs, denied access to education and ostracised by having ex-tapol (ex-political prisoner) put on their identification documents. This situation continues today, 40 years after the incident.

The Truth and Reconciliation Commission bill, passed by the government in September 2004, is yet another act of injustice delivered to these victims. The bill omits any definition of who is a perpetrator and further forces the victims to forgive their perpetrators if they want compensation; according to the bill's provisions, only when the perpetrators are given amnesty by the government can the victims be given compensation, and amnesty is given after the victims grant forgiveness. While the Commission is at present in the process of being established, it has understandably little support from victims and other concerned groups. A list of commission members is currently pending with the President for final nominations. Without provisions for genuine justice—which would include legal remedies for the prosecution and punishment of the perpetrators as well as compensation for the victims—the Commission is a tool to whitewash the massacre, rather than an attempt at reconciliation.

Furthermore, for this Commission to be effective, the Witness and Victims' Protection Bill pending discussion in the Justice and Human Rights Ministry must be enacted urgently. Without adequate protection to victims of human rights violations, it is not likely that they will come forward with their complaints. All these legal loopholes ensure that perpetrators of the grave human rights violations that have occurred in the last decade have not been prosecuted. The police, prosecution and judiciary all work to grant impunity rather than punish

the perpetrators, thereby obstructing the course of justice. The Indonesian government ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on September 30, 2005 and thus has an obligation to ensure that its domestic justice institutions and legal system protect the rights enshrined in these treaties, as well as afford remedies to persons whose rights are violated. The government's reservation on self determination and failure to ratify the ICCPR's two optional protocols on the death penalty and individual complaints, do not detract from this responsibility.

Until recently, the Indonesian police worked under the military and served to repress dissent. Although the two agencies are now separate, the police continue to use militaristic methods in their work, while the military continues to play a significant role in civilian affairs. To illustrate, 51-year-old Bagus Hariyanto was arrested by army officers in Jakarta on October 15, 2005 for stealing the bicycle of an officer. According to eyewitness reports, Bagus was then forced to strip, run and do push ups. He was also tied to a pillar. When Bagus was released the next day—after his family paid USD 27 for the bicycle—he had numerous injuries, including a broken hand. On October 17, Bagus died. An autopsy found that the victim had been attacked by a hard object to his head and had his bones broken.

Immediately after his death, senior army officers attempted to cover up the incident and pay off Bagus' family; while the head of public relations at the Jakarta Military Regional Command told the press that Bagus had died of a drug overdose, another officer gave USD 120 to the family and demanded they sign a letter stating they would not sue the army. Needless to say, no action has been taken to punish the perpetrators or inquire as to why military officers were doing the job of the police in arresting persons suspected of theft.

The Indonesian police are no better when it comes to the investigation of crimes. On September 12, 2005, 28-year-old Sanep was arbitrarily detained and tortured by the Resort Police of Belitung Timur, in an attempt to force him to confess to a theft. Sanep was later released when the officers realized they had the wrong person. These officers have also not been held responsible.

In another instance, the police opened fire on a peasant gathering in Lombok, West Nusa Tenggara Province on September 18, 2005, injuring 37 peasants. The police apparently fired at the crowd without warning after a peasant

representative tried to read a public declaration. The group of peasants had gathered to meet with an international delegation of 15 La Via Campesina leaders and representatives from several international NGOs to discuss violations of their rights. However, the license received by the delegation was unexpectedly withdrawn the night before the scheduled visit. On the morning of September 18, local police attempted to dismiss the 700 to 1000 peasants waiting for the La Via Campesina delegation, and then shot without warning.

After meeting with representatives from La Via Campesina and other NGOs, the Indonesian National Police promised to investigate the incident properly. Subsequently, the Indonesian National Police sent a team to Lombok for the investigation. However, instead of investigating the shooting, the police announced that they were searching for 10 suspects who allegedly attacked the police during the gathering. They have not given any information about these suspects to the public as yet. This has increased fear amongst people in the area as they believe they might be arrested at any time.

The Indonesian prosecution system also has many problems. It takes little initiative to investigate cases of human rights abuse and other crimes on its own, instead waiting for political motivation. For this reason, the attorney general of Indonesia has done nothing to deliver redress to the victims and survivors of the May 1998 riots and the Trisakti and Semanggi killings. Due to the lack of effective investigation by the prosecution agency into these abuses, concerned groups, including the National Human Rights Commission—Komnas HAM, conducted their own investigations and submitted reports to the attorney general's office. These were overlooked, allegedly due to petty technicalities. The latest reports were submitted early in 2005, also with no result. While President Yudhoyono presented a 'heroes' award' to the student victims of the Trisakti and Semanggi killings on the occasion of Indonesia's national day in August 2005, no justice has been served by way of investigation and prosecution.

Without effective investigation into crimes, it is not possible to prosecute the perpetrators, which is the responsibility of the prosecution department. The prosecuting agency must therefore ensure that effective investigations occur, sufficient evidence is collected and a fair trial ensues. One of the reasons the attorney general refuses to act upon the Trisakti and Semanggi killings is that the Indonesian parliament concluded in 2000 that no violations of human rights had taken place. While this conclusion has been challenged and the parliament is set to reopen investigation of these incidents, the attorney general's

office cannot conclusively accept or infer to such political proceedings. Only judicial bodies have the authority to decide whether human rights violations have occurred or not, and it is the attorney general's responsibility to carry out investigations to this effect. One of the key roles of the prosecution and judicial institutions is to provide an effective remedy to victims whose rights have been violated. This is done through prosecuting the perpetrators and punishing them in accordance with international legal principles, as well as awarding suitable compensation to the victims. Not only do these actions serve to redress the wrong done to the victims, but in punishing the perpetrators, a clear message is sent to society that such abuses will not be tolerated. The attorney general of Indonesia however, seems to be sending the message that perpetrators of crimes can walk free, and thereby encouraging future violations.

Similarly, the Indonesian judiciary is also weak and ineffective. In the last few years numerous human rights courts have been set up, purportedly to address the human rights abuses within the country. In practice however, these courts have little authority or effectiveness. To illustrate, nearly all the military and police officers charged with committing human rights violations in East Timor, the Tanjung Priok case and Abepura were acquitted either in the human rights courts, or during appeals in the high court and supreme court. These acquittals occur not only due to a lack of effective investigation and prosecution, but also because judges and other judicial officers are not qualified in international law or human rights principles. A class-action lawsuit against the current and former presidents of Indonesia by a group of individuals imprisoned after the 1965-66 massacres was recently dismissed by the court; the judge decided the case purely on jurisdictional technicalities, not on merits; the court can apparently only hear cases that are filed within a certain period of time after the incident. In this way, the judicial system grants impunity to the perpetrators, while offering nothing to the victims. Even the compensation, restitution and rehabilitation provisions under domestic law are not enforced, as the verdict is always appealed by the perpetrators.

According to Indonesia's domestic legal system, gross human rights violations to be addressed in human rights courts can also be investigated by the National Commission of Human Rights—Komnas HAM. Although the Commission has investigated certain cases of violations, there has been no progress in other cases, such as the 1989 Talangsari case, where several hundred Muslims were attacked and shot at by the military. In other instances the Commission's inquiries are not made public, particularly when senior military officials are involved, such as the 1998 disappearance of students. The Commission's mandate is

limited and does not include the investigation of individual cases of human rights abuse. Furthermore, even when the Commission conducts investigations and makes relevant recommendations to government agencies, their findings are usually ignored. It is thus necessary to expand its mandate. The Commission should also promote international laws and mechanisms and encourage state agencies to work within these frameworks.

Lack of action and law enforcement also means that discrimination and violence against civilians as well as minority groups continues within the country. There has been a recent increase in the killing of civilians in Poso, as well as attacks on religious minorities, including Christians and the Ahmadiyyahs (a minority Muslim group). In response to this spate of violence, the state intelligence and military are attempting to revive a system of infiltration within villages, which will further worsen the situation. This response also indicates the state's total failure to deliver justice.

While the Memorandum of Understanding between the Indonesian government and the Free Aceh Movement of August 15, 2005 is seen as a chance for lessening violence in Aceh, unless the proposed human rights court and truth and reconciliation commission are more effective than those already existing in the country, there will be no justice.

It is thus essential for civil society in Indonesia to vigorously campaign for the reform of justice mechanisms—the police, prosecution and judiciary—as well as other public institutions such as the National Commission of Human Rights. The ratification of international covenants must be used as a basis for such reform, particularly the amending of domestic law to include international provisions. In particular, the domestic law against torture must be immediately revised so that victims get justice and the perpetrators are punished. If the state takes punitive action against its own criminals, the society will begin to trust the national justice system and it will pave the way for the establishment of the rule of law.

December 7, 2005

Ms Louise Arbour

High Commissioner for Human Rights
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
SWITZERLAND
Fax: +41 22 917-9012

Open letter to the UN High Commissioner for Human Rights to mark International Human Rights Day 2005

Dear Ms. Arbour,

Re: Indonesia - the sham trial of human rights defender Munir Said Thalib highlights the need for judicial and legal system reform

On this Human Rights Day, the Asian Human Rights Commission (AHRC) would like to direct your attention to the state of the Indonesian justice system. Since the country's first democratic presidential election of 2004, ordinary Indonesian citizens have not seen an improvement in the protection of their rights and violence continues to plague Indonesian society. The AHRC believes that this has much to do with the country's inept judicial and legal system.

The Indonesian legal system is such that torture, disappearances and other grave human rights abuses are not considered crimes and are not punishable by the penal code. This is the case even though Indonesia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1998. While torture is considered a crime against humanity under Law No. 26 of 2000 in the Human Rights Court Act, the penal code does not define the act of torture and has no specific provisions for the prosecution of torture. At present, torture is treated in the same way as ordinary maltreatment between civilians. Furthermore, there are no provisions for the compensation of victims and no complaint mechanisms through which abuses can be reported.

Without relevant laws against human rights violations as well as the effective enforcement of these laws, it is not possible for grave human rights abuses to be addressed or for victims to be served justice. Instead, the perpetrators are granted impunity and encouraged to commit further abuses. The numerous gross abuses that continue to haunt Indonesia after so many years include the 1965-66 massacres, the 1998 May riots, the Trisakti and Semanggi killings, the Tanjung Priok and Abepura cases. In the latter two cases, the police and military officers charged with committing violations were recently acquitted by the human rights court. A recent class-action lawsuit filed against the government by victims of the 1965-66 massacres was dismissed by the court on jurisdictional technicalities without taking note of

the case merits. While President Yudhoyono presented a 'heroes' award' to the student victims of the Trisakti and Semanggi killings in August 2005, there is no justice for their families. Similarly, the attorney general refuses to prosecute the perpetrators of the May riots. In this way, the Indonesian legal system offers nothing in the way of redress to victims of human rights abuses.

Most recently, this is visible in the sham trial of human rights defender Munir Said Thalib. At present, the trial into Munir's death is ongoing at the Central Jakarta court, with defendant Pollycarpus Budihari Priyanto, a Garuda Indonesia pilot. While summing up on December 1, the prosecution recommended a life sentence for Pollycarpus for premeditated murder and the use of false documents. As the sole suspect, Pollycarpus is clearly a scapegoat, while those ultimately responsible for Munir's death have yet to be apprehended. The shoddy prosecution stems largely from ineffective police investigation. While Munir's death has received much publicity in Indonesia as well as internationally, this has made little difference in obtaining justice for Munir's family.

Indonesia must therefore be urged to immediately reform its justice system, beginning with the amendment to its torture legislation in accordance with the provisions of the Convention against Torture. The Committee against Torture's recommendations of 2002 require the government to:

Amend the penal legislation so that torture and other cruel, inhuman or degrading treatment or punishment are offences strictly prohibited under criminal law, in terms fully consistent with the definition contained in article 1 of the Convention. Adequate penalties, reflecting the seriousness of the crime, should be adopted so that victims get justice and the perpetrators are punished [A/57/44, paras. 36-46, E. 10].

Indonesia's recent ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights obligates the government to ensure that its laws and institutions protect the rights of its people and provide effective redress. On the occasion of Human Rights Day, it is time for the Indonesian government to demonstrate its commitment to the principles and spirit of the international covenants it is party to.

The Asian Human Rights Commission therefore urges you to exert the authority of your office and pressure the Indonesian government to take concrete measures to this effect. We reiterate that a first step in this direction would be to take action against the perpetrators of human rights abuse in accordance with legal provisions. Until this is done, there can be no effective justice system and no rule of law in the country.

Yours sincerely,

Basil Fernando
Executive Director

This publication is a collection of reports launched by the Asian Human Rights Commission regarding the human rights situation in ten Asian countries on the occasion of international human rights day, December 10, 2005.

These country reports have been made from the perspective of human rights implementation, as mentioned in article 2 of the International Covenant on Civil and Political Rights (ICCPR). While the ratification of international covenants have improved in the region, the situation of human rights is continuing to deteriorate. This is due in large part to the failure of state parties to take steps required by article 2 of the ICCPR.

Torture remains endemic in the region, and rule of law has seen serious setbacks. The reports collected here record the manner in which the lives of people are affected by limitations in the rule of law and the incapacity of states to ensure people's enjoyment of rights.

Asian Human Rights Commission (AHRC) and
Asian Legal Resource Centre (ALRC)
19th floor, Go-Up Commercial Building,
998 Canton Road, Kowloon, Hong Kong
Tel: +(852) 2698 6339 Fax: +(852) 2698 6367
Email: books@ahrchk.net
Websites: www.ahrchk.net / www.alrc.net

ISBN 962-8314-26-2
9 789628 314263