# The State of Human Rights in Eleven Asian Nations - 2008





**Bangladesh • Burma • Cambodia**

**India • Indonesia • Nepal • Pakistan**

**Philippines • South Korea**

**Sri Lanka • Thailand**

ASIAN HUMAN RIGHTS COMMISSION

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**Cover photo:**
These are the faces of the so-called "Abadilla Five" who are the victims of arbitrary detention, injustice and torture in a notorious case in the Philippines. The "Abadilla Five" were sentenced to death for the murder of an influential police colonel, Rolando Abadilla, in June 1996, in a flawed trial that produced a travesty of justice. This case is symbolic of the many struggles for justice and against brutality and arbitrariness that the AHRC encounters in its work throughout Asia. Further details about this case can be found in the chapter on the Philippines and at http://campaigns.ahrchk.net/abadilla5/.

# Human Rights Report - 2008

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# Foreword

The Asian Human Rights Commission (AHRC) is a regional non-governmental organisation dedicated to the protection and promotion of human rights across Asia. Based in Hong Kong, the AHRC seeks to address the barriers to the enjoyment of human rights throughout this populous and diverse region by understanding the causes and circumstances of individual cases of human rights violations and the systemic failings that either encourage such violations or ensure that those responsible avoid punishment and instead enjoy impunity, engendering further violations.

2008 marked the 60th anniversary of the Universal Declaration on Human Rights. In many Asian nations, human rights remain elusive despite being enshrined in this key instrument of international human rights law, as well as those subsequently enshrined in detail in instruments such as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, or the Conventions Against Torture, Violence Against Women or the Rights of the Child, for example. This is the case even though these instruments resulted from a consensual process at the international level, and therefore represent the values of all the members of the United Nations, not just those of developed countries, as is sometimes argued by countries trying to extricate themselves from their obligations under international human rights laws and standards.

Furthermore, Asia holds 13 of the UN Human Rights Council's 47 seats. Despite their involvement in the drafting of norms and discussions at the international level, several Asian countries are amongst the world's worst violators of rights and, in general, the human rights situations in many Asian nations remain deplorable. In addition, in 2008, the situation in South Korea, which has been heralded as being a leader in human rights in the region, has suffered some serious setbacks following the election of a right-wing government. This loss of leadership may have a negative impact on other countries around the region, as the respect for human rights is highly dependent on leadership and political will.

The AHRC works to understand and address the gulf that exists between the international human rights laws and standards on the one hand and the reality of human rights within Asia's many countries on the other.

Across Asia, the predominant underlying factors that give rise to a plethora of human rights violations, are the failings in the institutions of the rule of law that are supposed

to uphold such rights. While, in a developed State, the police and judiciary contribute to the establishment of the rule of law, the protection of rights, and the creation of stability and predictability in society, in developing nations, such as many in Asia, the police, prosecution and judiciary play a key role in protecting the ruling elites and conducting the repression against these countries' citizens, sacrificing human rights in the process. Systems of justice are prevented from functioning in such situations, as those that control these systems of State are those responsible for breaking the law and committing violations.

It must be noted that in Asia at present, many of the civilian organs of State and the institutions of the rule of law are subservient to the dominant military forces that exist within the region's countries. Militarisation, which while well known in countries such as Burma, has also been rising elsewhere, such as in Bangladesh. Throughout the region, the military forces remain major players within the State and continue to ensure that their members are protected from being held accountable for past and current violations, as seen in Sri Lanka, Nepal, Pakistan, Indonesia or the Philippines, for example. Under such circumstances, human rights are evidently seriously undermined, as the power of arms ensures that justice is out of reach for the poor or powerless. The power of the military forces in the region and their ability to act above the law, with impunity, is compounded by the powers granted to them under the auspices of counter-terrorism measures. Many governments and military forces in Asia are making use of the so-called war on terror to increase their hold on power and their ability to threaten, detain or even dispose of those who oppose them and their actions, including the media and human rights defenders.

This publication details the violations of human rights that the AHRC encountered through it work in 2008 and the ways in which justice and human rights were undermined through the failings in the institutions of the rule of law, in the following countries: Bangladesh, Burma, Cambodia, India, Indonesia, Nepal, Pakistan, the Philippines, the Republic of Korea, Sri Lanka and Thailand.

The violations and human rights problems that the AHRC has encountered in 2008, include, inter alia: endemic torture and ill-treatment; widespread forced disappearances and extra-judicial killings; land-grabbing and violations of the rights to food and adequate housing; discrimination, including gender-based or caste-based discrimination that results in violent abuses; deeply entrenched corruption; and the lack of independence of Asia's judiciaries and institutions of the rule of law, which perpetuates these violations.

This report comprises an in-depth look at several of the key human rights situations

in Asia in 2008, including: the sacrificing of human rights under an illegal state of emergency in Bangladesh; the increased repression in Burma following the uprisings in 2007 and Cyclone Nargis; the increasingly authoritarian system in Cambodia; systemic failings in the rule of law in India; attacks on human rights defenders and failures to reforms in Indonesia; ongoing violations, disappearances and impunity since the elections in Nepal; the deepening human rights and security crisis in Pakistan; vigilantism and impunity in the Philippines; mass protests, repression and the retreat of human rights in South Korea under the country's new government; the intensification of violence and violations in Sri Lanka; and political upheaval, conflict and ongoing disappearances in Thailand.

The AHRC's annual human rights report does not purport to be exhaustive in its treatment of the vast array of human rights violations and situations that occurred in 2008 in Asia, but rather reflects the issues that the organisation has encountered through its work in countries in which it has a network of sources and partners.

# BANGLADESH

## RIGHTS VOID RESULTING FROM INSIDIOUS MILITARISATION AND AN ILLEGAL EMERGENCY

### INTRODUCTION

Bangladesh has struggled with poverty, environmental disasters, deeply entrenched corruption and a range of grave human rights violations since its independence in 1971. The lack of an independent judiciary has engendered a culture of impunity, which in turn increases the demoralization and fear in which those without power live. Furthermore, there is little interest at the international level for the plight of Bangladesh's population, with the United Nations Human Rights Council, in which Bangladesh holds membership, remaining all too silent in the face of grave and widespread abuses.

Illegal arrests, arbitrary detention, ill-treatment and torture in police custody are commonplace and constitute the means through which the authorities exert their control. Torture and ill-treatment are a core component of interrogation and criminal investigation. The police routinely abuse their power to extract money and "confessions" from detainees by using force while a person is in their custody. The fabrication of charges against detained persons is also used to threaten and punish persons. This is enabled by the lack of institutional checks and balances, notably as concerns the judiciary. Colonial-legacy laws and institutions are at the root of many problems, but the failure by the authorities to reform these, compounded by their willingness to abuse the powers granted as a result, make for an incendiary combination.

The country is party to six major international human rights instruments,[1] but its implementation of the rights enshrined therein remains superficial and the victims of violations of these rights have virtually no access to remedies at the domestic level. For example, the country is party to the ICCPR, but has extra-judicially violated the right to life of hundreds of persons in recent years, with impunity. It has arbitrarily deprived

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1 *Bangladesh is party to the ICCPR the: International Convention on Civil and Political Rights (ICCPR), Convention Against Torture (CAT), Convention on the Elimination of Discrimination Against Women (CEDAW), Convention on the Elimination of Racial Discrimination (CERD), the Convention on Economic, Social and Cultural Rights (CESCR), the Convention on the Rights of the Child (CRC), and the latter's two option protocols.*

hundreds of thousands of persons of their right to liberty. It is party to the Convention Against Torture, but torture remains endemic and perpetrators go unpunished.

The country has never had an independent judiciary; it has had a disposable prosecution, with many members of the judiciary being replaced each time of one of the two main competing political parties comes to power. The justice system, as is the case with the police and other State institutions, is used as a weapon by the group in power against the other, with the people of Bangladesh caught in the crossfire. In September 2008, the authorities announced the establishment of a National Human Rights Commission (NHRC). In reality, the top three appointments of the NHRC, including its Chairperson and two members, were only made in late November. The institution lacks staff, other than a few bureaucrats who have been assigned to it, and, in addition, the law establishing the commission does not allow the body to function effectively and competently. Ultimately, there is no competent institution in the country that is functioning to provide redress to the victims of human rights abuses.

The country began its three-year membership as a founding member of the UN's Human Rights Council (HRC) in June 2006. However, during this period, human rights have been seriously undermined in the country. In 2008, the human rights situation in the country has degraded to a new low due to an ongoing unjustifiable and unconstitutional state of emergency, which has enabled the military to gain a strangle-hold on power and to engender the further subjugation of individuals' rights. Under the state of emergency, fundamental rights have been suspended; mass arrests have taken place, with thousands having been subjected to ill-treatment or torture; and the pervasive militarization of State institutions leaves Bangladesh on the verge of absolute military control. The state of emergency was actually imposed on January 11, 2007, and has caused a significant decline in the human rights situation throughout 2007 and 2008.

Prior to its election to the HRC, Bangladesh pledged to protect and promote fundamental rights, but has since suspended many of these rights and violated many more.[2] It pledged to separate the judiciary from the executive, but it has, in reality, consolidated the executive's control. To promote its election bid, it cited constitutional guarantees, among them equality before the law, protection of life and liberty, and the freedoms of speech, assembly and association, but has since violated all of these rights on a grand scale and has severely undermined the constitution through the unjustifiable state of emergency, accompanied by illegal laws and actions.

The emergency has provided an opportunity for the military to consolidate its power and control in the country. For example, the National Coordinating Committee (NCC) was

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*2 Please see Bangladesh's pledges at: http://www.un.org/ga/60/elect/hrc/bangladesh.pdf*

formed comprising senior generals of the army and several top officials. This included of a retired general occupying the position of adviser to the government. In this role, the retired general in question decides which allegations of corruption against politicians and businessmen will be filed and who will be charged. The NCC, which exercises supreme authority over all other institutions of the country regarding corruption cases, was established without any legal provisions enabling it to take up this role. In this way, the NCC illegally superseded the Anti Corruption Commission (ACC), which is the legally-mandated body concerned with fighting corruption in the country.

Military officers have insidiously taken up roles in the civil administration, diplomatic offices and at the local level. The whole nation, from the local operational administration to the national policy-making levels, is now under the grip of the armed forces. The development activities of all sectors of public administration have been hindered through this period. The justice delivery system has effectively collapsed, notably concerning any illegal actions perpetrated by the armed forces during their crackdown on the population.

The police and paramilitary forces such as the Rapid Action Battalion have also been responsible for abusing human rights on a grand scale. Illegal arrests, arbitrary detention, fabrication of charges against detainees being held under emergency laws, denial of judicial remedy, torture, ill-treatment and extra-judicial killings of persons while in custody have increased during the state of emergency. The long-standing problem of overcrowding in prisons has also worsened.

The Ministry of Home Affairs, the Anti-Corruption Commission and the National Coordination Committee, have ordered massive arbitrary arrests and detentions. Criminal charges have been lodged against many of these persons, including around 200 politicians and heads of business institutions. Special Tribunals have been set up to prosecute persons targeted by the authorities, which are evidently incapable of providing public access and fair trials.

Conversely, extra-constitutional bodies, such as the Truth and Accountability Commission, have been established to provide clemency to persons that the government is seeking to protect from prosecution.

Furthermore, in 2008 the higher judiciary created controversy by abdicating its inherent constitutional power to provide legal remedies concerning cases lodged by the State under the emergency instruments. Judicial standards and the rule of law have repeatedly been undermined as the result of the releases of high-profile political persons through executive order that bypass the courts.

The freedoms of expression and opinion have repeatedly been denied, notably

for journalists and human rights defenders. The media has been monitored by the intelligence agencies and the armed forces, censoring any news and opinions critical of the actions of the government.

As 2008 drew to a close, the emergency finally came to an end, as a general election was held on December 29. The election was overdue by 26 months. It is a mandatory constitutional obligation to hold elections within 90 days after a parliament is dissolved, but it was only held many months later in reality. The elections were contested by the country's two major political parties – the Bangladesh Awami League and the Bangladesh Nationalist Party, with the former claiming victory by a significant margin. International observers claimed that the election was "free, fair and acceptable" as the nation experienced a nationwide voter list with photographs giving identity cards to the voters. However, both the identity cards and voter list, which was prepared by the armed forces, contained large scale errors or discrepancies that barred many people from casting their votes. There are allegations of manipulations by members of the election staff as well as the law-enforcement agencies. The Election Commission was also accused of making unfair approaches towards the political groups.

While the emergency was finally lifted prior to the elections, on December 18, 2008, the infiltration by the military into the country's civilian institutions and the undermining of the institutions of the rule of law that occurred under the emergency have created barriers to the enjoyment of human rights that will have a lasting effect in an already troubled country.

## THE FAILURE OF THE INSTITUTIONS OF THE RULE OF LAW

The chronic human rights problems that are encountered in Bangladesh stem from the failings in the institutions that are meant to protect the country's citizens and instead contribute to their repression. On the front line between the State and the people is the police force, which in Bangladesh is corrupt, violent and undermines rather than enables the rule of law.

## THE POLICE

The members of Bangladesh's police force are notorious for abusing their power in order to earn money. At the local level, the police regularly illegally arrest individuals without any specific complaint, justification or legal basis. The motive is to extract money from the detained persons or their relatives, who often, ironically, belong to the poorest sectors of society. Such persons are subjected to threats and ill-treatment during arrest. At the police station the police officers demand bribes, which are typically beyond the capacity of the arrested persons. Failure to pay typically results in severe ill-treatment or torture. Such abuses are not the exception but the rule.

Ill-treatment and torture are not the end of the victims' suffering, but rather can be the beginning of a process of abuse. Beyond physical abuse, the police use intimidation and threaten to implicate arrested persons in pending cases or under fabricated charges concerning serious crimes, if the bribes are not paid. In case of partial payment, the police use torture to compel the person to pay more. If the person survives this and his relatives manage to get more money to the police as well as the intervention of persons in a position of power, the police may produce the person before a Magistrate's Court on the basis of a minor offence, such as theft.

In many incidents, however, the police implicate innocent persons in pending serious cases, including robbery, murder, and possession of illegal arms or drugs. If there is considerable and irresistible pressure exerted by influential political groups or members of locally well-known rich families, the arrested person may be produced before a Magistrate's Court under Section 54 of the Code of Criminal Procedure-1898, which allows the police to arrest people on suspicion. This can enable the arrested person to secure release more easily than if charged directly with a serious offence. At best, the person may be released from the police station without any valid records being kept concerning the incident, with the victims having been forced sign blank papers ensuring impunity for those responsible.

The police abuse the powers to arrest granted to them under Section 54 of the Code of Criminal Procedure-1898. In most cases, the police officers appeal to the Magistrate's Court seeking a person's remand under Section 167 of the Code, with the intention of detaining people to extract bribes by applying torture, ill-treatment and intimidation. The same police that conduct criminal investigations handle the prosecution in the Magistrates' Courts. Magistrates generally grant the remand applications.

The police investigators interrogate the alleged accused persons under Section 161 of the Code of Criminal Procedure-1898. This is one of the most abused clauses of the law, under which the police routinely pressurize the detainees to give confessional statements. The police also intimidate suspects to force them to deliver a prescribed statement before the Magistrate, when the Magistrate officially records statements under Section 164 of the Code. In such prescribed statements the police implicate various persons, often arbitrarily and at the behest of those whose interests they serve.

At each step in the criminal investigation the police officers compel those involved to pay bribes. A police Sub Inspector, who was assigned as an Investigation Officer in Narsingdi district told the Asian Human Rights Commission, "I was asked to recover a dead body from some submerged land at around 10 o'clock in the night. The place was around 10 kilometres away from the police station. I went to the scene of crime on my personal motorbike. I found the decomposed body floating on the water. Nobody

could go close to the body due to the bad smell. I called some local people to help me to recover the body. Everyone was avoiding me. Then, I shouted at the villagers that if they do not come to help me, I would fabricate cases against all of them. After the threat a few people came and I was able to send the dead body to the Narsingdi district hospital for a post-mortem by rickshaw. All together I had to spend around Taka 1200.00 for transportation and other related costs like buying a mat to cover the dead body." When the police officer was asked who paid the money? He replied, "The complainant of the case!" The policeman added, "I cannot pay money from my pocket. The government does not pay us sufficiently for accomplishing our official works. The authorities do not allocate an adequate budget for the fuel of our official car let alone my personal motorbike. The investigation officer has to buy paper and pen with his own money. So, we extract money from the parties involved in the cases. That's the way!"

Recently, the police have increased the use of extra-judicial killings and threats of such killings as an extreme form of extracting money from citizens. The hundreds of extra-judicial killings carried out with impunity by the Rapid Action Battalion have likely inspired this practice. An example of how this works is as follows: a man is arrested and accused of alleged involvement in a criminal gang or underground political party. The police threaten to kill him and cover it up by making it look like he was killed in a crossfire incident unless a significant bribe is paid. Insufficient payment leads to the man being killed.

Members of the police at a Dhaka court detention facility, where the AHRC witnessed police taking bribes from the relatives of under-trial detainees.

By forcing victims to sign blank papers, the perpetrators of these abuses ensure they are protected from any legal proceedings initiated by the detainee. In many cases, especially in those involving the RAB, impressions of fingers and palms are taken in order to manipulate evidence against the detainees. Such methods are also used to ensure the continuing intimidation of victims of abuse, leading to very few complaints being registered.

Corruption in the police is multi-facetted. For example, a young man (whose identity shall not be disclosed here for security reasons) told the AHRC that his family had become worried about the security of his niece following sexual harassment that she had been subjected to on a regular basis. He went to the local police station to lodge a complaint out of concern for the security of his niece. At the police station he met a Sub Inspector and wished to lodge a complaint against the alleged perpetrators. In response, the police officer discouraged him from recording a complaint and offered to help him personally saying: "Just give me 20,000 Taka and the name, address of the culprit with

photo, if possible; removing my uniform I'll wear a plain cloth, take a gun and finish (kill) the bastard within few days!" - 20,000 Taka is equivalent to around US$ 290.

Local feudal leaders can effectively use the police as hired guns to do their bidding, further their business interests or settle conflicts with rival persons or communities. The police can also withdraw their support from a particular person or group if they receive a larger amount of money from elsewhere, ensuring that law-enforcement in the country is nothing more than a mercenary force, working for the interests of the richest and most powerful. These arrangements particularly penalize groups from ethnic or religious minorities. There are numerous examples of the police intervening in land dispute cases upon receiving bribes from locally influential groups, and suppressing the poor or minority groups involved, despite the fact that there have been cases pending before local civil courts concerning which there had been orders for the maintenance of the status quo.

**Example 1**

For example, a local revenue office in Khulna district leased land to Mr. Mokbul Hawladar in the Paikgachha Upazilla in 2007. Mokbul started a shrimp farm there. His neighbor Mr. Al-Amin, an owner of similar farm, wanted the land. As part of the plan to oust Mokbul from the land, Al-Amin and his associates caused damage to Mokbul's farm. Arbitration, involving the representatives of the local government officials, did not solve the problem. Mokbul lodged complaint (case number: CR318/07) to the Magistrate's Cognizance Court of Paikgachha. When Al-Amin refused to appear before the Court, the Magistrate ordered his arrest. He was detained in Khulna District Jail. Al-Amin threatened to solve the problem through arbitration involving the local elites and public representatives when he was bailed out.

Following his release on bail, Al-Amin reportedly paid bribes to the Paikgachha police and they jointly prepared a draft complaint against Mokbul. This was used to intimidate Mokbul to hand over the land. Sub Inspector (SI) Mr. Manjurul Alam signed a notice using the official rubber stamp of the Paikgachha police station summoning Mokbul along with his family to appear at the station at 4pm on February 17, 2008. Mokbul complied, along with his wife Mrs. Abirun Nesa, son Mr. Robiul Hawladar and a Member of the local Union Council, Mr. Ahendra. When they arrived at the police station, SI Manjurul changed the date to 24 February and told Mokbul to come back then.

When he returned, as requested, along with his daughter Ms. Rawshan Ara, who had also been summoned by SI Manjurul and a friend, Mr. Shahed Ali Mollik, SI

Manjurul instructed him to measure the land and report to him before 5pm on March 29. On that day Mokbul provided the details of the land to SI Manjurul, who insisted that he surrender possession of the land to Mr. Al-Amin and take Taka 4,000 (around USD 59) from him. Mokbul and his relatives refused SI Manjurul's instruction as there was no lawful ground for doing so and left the police station.

On March 31, Mokbul, along with his family, went to the Paikgachha Surgical Clinic in order to visit one of their relatives who was undergoing treatment there. Hearing this from Al-Amin, SI Manjurul along with other police constables arbitrarily arrested Mokbul at about 11am from the clinic. The police detained Mokbul in their custody until midnight. SI Manjurul intimidated him during detention and told him that he would be implicated in fabricated cases of robbery and extortion unless he gave the land to Al-Amin. A number of the local professionals, who went to the police station, urged SI Manjurul to release Mokbul as there was no charge against him; however, the police officer refused to release Mokbul unless the land issue was settled with Al-Amin. At around 11pm Mokbul's friend Shahed Ali brought the matter to the notice of the Officer-in-Charge (OC) Mr. Ali Hashem Khan. Following pressure from the local elites, he ordered SI Manjurul to release Mokbul. SI Manjurul did so after taking his signature on a blank sheet of paper.

Since these events, SI Manjurul has continued to intimidate Mokbul's family, insisting that they follow his instructions and give the land to Al-Amin. No action has been taken against those responsible.

**Example 2**

In another case, the same members of police favoured another group of influential people against the members of a Hindu community in a land dispute in Salubunia village, despite the fact that a Court had declared an injunction to maintain the status quo. On receiving bribes from one Mr. Abdul Hamid Sardar the Paikgachha police arrested Mr. Dilip Kumar Dhali and Mr. Sujan Kumar Dhali, when they participated in a protest against the partisan role of the police regarding the disputed land. After their arrest, the police threatened to implicate them in cases of robbery and extortion unless they paid bribes to the police. Due to the intimidation, their relatives borrowed money from different people and paid Taka 17,000.00 (USD 250) to the police. The arrestees claim that the police released them without recording their arrest but forced them to sign blank papers

and warned them not to make any trouble for Mr. Abdul Hamid Sardar, who leads the other party to the dispute.

The police repeatedly intimidated the members of the Hindu community, who had been taking legal action against Mr. Abdul Hamid Sardar and his allies in the land dispute. As a result, the community's men were forced into hiding to avoid arbitrary arrest and detention. On February 22, 2008, the police sent SI Mr. Manjurul along with constables to the disputed land in order to construct a building. A group of women who objected to the police, reminding the officer about the court injunction, were beaten by the police. Three women - Mrs. Arati Rani Dhali, Ms. Devi Rani Dhali and Ms. Tripti Rani Dhali - were seriously injured as a result.

Political interference in the work of the police is another factor that prevents it from functioning as envisioned. In an official workshop held in late 2007, the Commissioner of the Dhaka Metropolitan Police (DMP) accused politicians of exerting unwarranted influence and pressure on the police administration, jeopardizing its freedom. He also stated that the main cause of harassment by the police is the decades-old absence of rules, for which the police is not responsible. The officer also observed that one of the main causes of public harassment by the police results from the appointment of inefficient persons as police officers. The Commissioner further admitted that professional inefficiency and lack of knowledge within the police department made things worse and that the police sometimes arrest people without reason, and they intimidate innocent persons with arrest and abuse of law, particularly Section 54 of the Code of Criminal Procedure 1898 and the DMP Ordinance 1976. [3]

Such interference is indeed a major contributing factor to the breakdown of policing in the country, and is not limited to high profile cases. In fact, the police force makes use of this interference as an additional source for corruption and is therefore open to it being used in even petty cases.

In 2004, the United Nations Development Programme, in collaboration with UK Department for International Development and the Government of Bangladesh, initiated a US$ 13,380,953 project called the "Police Reforms Programme" (PRP). The PRP "aims at improving the efficiency and effectiveness of the Bangladesh Police by supporting key areas of access to justice; including crime prevention, investigations,

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3 *Please see further details concerning this in an AHRC statement on January 3, 2008: http://www.ahrchk.net/statements/mainfile.php/2008statements/1316/*

police operations and prosecutions; human resource management and training; and future directions, strategic capacity and oversight".

According to the reported information on the programme's website, it "complements other initiatives for reform in the broader justice sector and is designed to assist Bangladesh Police to improve performance and professionalism consistent with broader government objectives. Support to a functioning, accessible and transparent criminal justice system, institutions and services (including legal aid) means that poor people and other disadvantaged groups have protection, representation and recourse to hold the resource-rich accountable for commitments services included in the MDGs and their targets".

In the rationale of the PRP, it was mentioned that "an accountable, transparent and efficient policing service in Bangladesh is essential for the safety and well being of all citizens, national stability and longer-term growth and development, particularly the creation of a secure environment which is conducive to consumer and investor confidence. The Needs Assessment Report clearly outlines the rationale for a PRP to support the Bangladesh Police. In summary:

- Significant problems exist with law and order, corruption, rule of law and access to justice in Bangladesh, and these issues adversely impact on the poor and vulnerable especially women and young people;
- The problems are so profound that they have serious implications for the social and economic well being of Bangladesh; and
- The police alone cannot solve these problems and need to work in close collaboration with the Ministry of Home Affairs, Government of Bangladesh, relevant Ministries, other agencies in the broader criminal justice sector, civil society and NGO and media, development partners and the community".

The Ministry of Home Affairs has proposed a bill to address the problems in policing in Bangladesh and there are concerns that the powers provided to the police under Sections 104 to 111 and the punishments proposed in Sections 129 and 130 could easily be abused. In spite of the provision of a Police Complaints Authority under Section 71 headed by a retired appellate division judge or a person having a high standing, and comprising four more persons, two of whom are to be retired police and civil officers, this system is unlikely to improve the situation concerning grave violations of rights. Complaints are to be dealt with as general complaints or serious complaints, but there is no definition concerning what these categories mean, which will leave room for the police officers to manipulate the complaints system.

Under the PRP, the authorities declared a number of police stations as "Model Thana

(police stations)" with the aim of "*demonstrating how pro-people policing can benefit the community and ensure their needs and expectations can be met. Personnel of this model Thanas will be gender inclusive and trained to enhance skill levels and prepare them to implement a more pro-people policing approach in their engagements with the local community. Standard Operation Procedure (SOP) would be developed for the model Thanas through workshops that are being held at each model Thana. People from various walks of life, government officers, representatives from various NGOs and local government department have been participating in the Model Thana workshop and contributing in preparation of SOP. Usually all model Thanas would be conducted following the SOP.*

*To run the model Thanas effectively and efficiently logistic support such as vehicles, Motor Cycles, walkie-talkies, fax, computer systems, investigation kits, camera etc. are being provided. As per SOP regular training programme would be conducted to the model Thana officials".*

*In reality, the people's expectations have not been met. Abuses of power, the use of torture in custody, and the fabrication of charges have not diminished as a result of the PRP. The Boalia Model Police Station in Rajshahi city is an example amongst many. The officers of the Boalia Model Police Station recorded a fabricated charge against Mr. Jahanagir Alam Akash, who is a journalist and human rights defender based in Rajshahi, following instructions by the Rapid Action Battalion (RAB) paramilitary force, which illegally arrested, detained and tortured Akash in 2007.*

The Metropolitan Magistrate's Court in Dhaka.

## THE JUDICIARY

The above methods of abuse perpetrated by the law-enforcement agencies are enabled by the failure of checks on their powers and activities, notably as the result of a lack of an independent and functioning judiciary. Bangladesh has never had an independent judiciary. The judiciary, from the Supreme Court down, has been weakened through politically-motivated appointments made by successive regimes, in order to ensure that the judiciary acts in the interest of those in power. In its pledges to the HRC in 2006, Bangladesh promised to "separate the judiciary and the executive as soon as is feasible."[4]

4 *Please see Bangladesh's pledges at: http://www.un.org/ga/60/elect/hrc/bangladesh.pdf*

Despite the directions of the Appellate Division of the Supreme Court on December 2, 1999, this has still not happened. Since the above pledge was made, the judiciary has instead been placed under greater control by the government, despite promises that it would separate the lower judiciary from the executive on November 1, 2007. The separation has been made officially on paper, but the effect of this cannot be felt in reality.

After the afore-mentioned official separation of the Subordinate Judiciary from the executive it was expected that the judiciary would be better able to uphold the rule of law and to maintain equality amongst justice-seekers. However, since the official separation of the judiciary the reality has been disappointing, as exemplified by the following case.

**Example 3**

Following a protest demanding the withdrawal of army camps from Dhaka University's campus after military brutality on students in August 2007, the government arrested four teachers and detained them in prison. The teachers were detained until January 22, 2008. The government spontaneously arranged a presidential mercy for the teachers, who were released on the same day, even though none of the convicted persons appealed for mercy to the President.

A judgment of the Speedy Tribunal No. 3 of Dhaka declared by Metropolitan Magistrate Mr. Md. Golam Rabbani on January 22, 2008, however, convicted three of the teachers from the University of Dhaka: Dr. Sadrul Amin, a Professor of English and President of Dhaka University Teachers' Association (DUTA); Dr. Md. Anwar Hossain, Professor and Dean of the Faculty of Biological Science as well as General Secretary of DUTA; and Dr. Harun-or-Rashid, Professor of Political Science and Dean of the Faculty of Social Science. These three teachers were imprisoned for two years for breaching Rule 3(1) and 3(4) of the Emergency Power Rules-2007, which prohibit meetings, processions and protests and assign punishment for these acts.

There were several glaring problems with this case. Firstly, the prosecution witnesses were all either public servants that had been forced by the military-controlled government to give depositions before the court or individuals influenced or intimidated by the government during the trial.

Secondly, the students and teachers involved in these incidents were prosecuted in three separate concurrent cases concerning the same event. However, under in Article 35(2) of the Constitution of Bangladesh, "No person shall be prosecuted

and punished for the same offence more than once". In the first case, the police investigation report found that the allegation was not proven. In the second case, the teachers were acquitted by the Court after the trial. In the third case {No. 54, dated 23 August 2007} the teachers were sentenced to two years of rigorous imprisonment for breaching Rule 3(4) of the Emergency Power Rules-2007.

Furthermore, amongst a total of 26 prosecution witnesses only 12 persons made their depositions. Despite several inconsistencies amongst the depositions of different prosecution witnesses relating to the particular case, the Magistrate's Court convicted the academics.

The verdict was widely accused of being directed by the armed forces rather than being reached on the merit of the case. It is believed that this verdict was sought by the armed forces in order to create a deterrent against further action by students and teachers from Dhaka University, as it was feared that they may initiate a protest movement against the military-controlled government.

On February 25, 2008, the verdict of Magistrate Golam Rabbani was challenged by the Metropolitan Sessions Judge's Court of Dhaka who filed Criminal Appeal Case No. 106/2008, citing 16 specific grounds that required the Sessions Judge's Court to re-adjudicate the case. The appeal was still pending before the Metropolitan Sessions Judges Court of Dhaka at the time of writing in late 2008.

Successive governments in Bangladesh have manipulated and rendered ineffective the criminal justice system by politicising its institutions, notably through appointments of judges and magistrates. Selection and promotions of judicial officers depend on the interests of ministers and parliament members and the loyalty of the candidates to the incumbent regimes. This system undermines the establishment of justice and favours those who pander to the wishes of those in power in the executive. In particular, judges and magistrates take care of the interests of lawyers belonging to the ruling parties as well as police officers working for them. This makes the prospect for victims

The Supreme Court of Bangladesh – which has been both a source of hope and frustration during the State of Emergency.

seeking redress as the result of violations perpetrated by the police or those in power virtually impossible.

Bangladesh has three tiers of courts – the Supreme Court, Judge's Courts and Magistrate's Courts – with a long heritage of control by the executive branch over the judiciary. In October 2007, the government made a gazette notification that the Subordinate Judiciary – the Magistrate's Courts and the Courts of Sessions and District Judges – would be separated from November 1, 2007. The Supreme Court of Bangladesh, which is established according to the provisions of Articles 94 to 113 in Chapter I, Part VI of the country's Constitution, has retained some independence from the executive since the inception of the country. Chapter II of the Constitution describes the Subordinate Judiciary.

The Supreme Court of Bangladesh, the apex judiciary of the country, has two branches – the Appellate Division and the High Court Division. The High Court Division currently comprises around 72 judges, who serve in around 40 benches, including about 30 Division Benches comprising two judges and ten chaired by single judges. The Appellate Division comprises the Chief Justice, as the head of the whole judiciary of the nation, and six other judges. The Appellate Division Judges are elevated from the High Court Division. The Appellate Division comprises seven judges including the Chief Justice; however, there were two positions vacant in this branch during the second half of 2008.

In practice, prior to the separation of the judiciary on November 1, 2007, the Ministry of Law, Justice and Parliamentary Affairs had been recruiting judges to form a Judicial Cadre, through the Public Service Commission. All matters relating to judges, including their promotion, transfer, training and retirement, were under the control of the ministry. Working experience of ten years as a District and Sessions Judge makes a person eligible for a promotion to the High Court Division of the Supreme Court.

Magistrates have been recruited directly by the government and controlled by the Ministry of Establishment. The Magistrates' Courts have been operated under the Ministry of Home Affairs. Recruitment to the Supreme Court has been performed by the government through the Ministry of Law, Justice and Parliamentary Affairs. In practice, appointing or confirming judges in the High Court Division have been a political choice made by the incumbent regime. Following the separation of the judiciary from 1 November 2007, the Judicial Magistracy has officially been separated from the Ministry of Home. However, the same magistrates have been deputed or assistant judges have been transferred as judicial magistrates to fill up magisterial vacancies. There has been a fresh recruitment of around 200 magistrates since the separation.

There are frequent instances of arbitrary supersession concerning the appointment of

Supreme Court judges in the Appellate Division and concerning the selection of a Chief Justice. The most recent instance was on May 25, 2008, regarding the appointment of Mr. M M Ruhul Amin as Chief Justice, superseding Justice Mohammad Fazlul Karim, who was the senior judge in the Appellate Division during this period and should therefore have been appointed Chief Justice. The Supreme Court Bar Association (SCBA) protested the supersession and abstained from its customary welcome to the new Chief Justice on the occasion of his assuming office.

The Supreme Court of Bangladesh has been divided in its rulings during the state of emergency, with the High Court Division ruling in line with the constitution and fundamental rights of persons detained under emergency powers, while the Appellate Division has stayed many of these orders upon requests by the Attorney General, thus violating individuals' rights.

Furthermore, there are allegations of military intervention in the proceedings of the Supreme Court. Senior Barrister, Mr. Rafique-ul Haque, publicly stated that an army major had been occupying a room on the second floor of the Supreme Court and had been deciding which case was to be heard by which judge. There has been no response to this allegation from the government or the armed forces.

## THE PROSECUTION

Bangladesh effectively has a disposable prosecution service. Whenever a new government has taken over power, all prosecutors have been removed from their offices, and new ones have replaced them.

The prosecution system in every district consists of the posts of Public Prosecutor (PP), Government Pleader (GP) and Special Public Prosecutor (SPP). These law officers are accompanied by assistants, whose numbers vary depending on the number of courts they must cover and the size and population of the district.

There are no particular rules concerning the appointment of prosecutors in Bangladesh. The recruitment process is based on the political choice of the ruling political party of the day. Local parliamentarians, influential political leaders associated with the ruling party or bar association leaders with political affiliations, or perhaps all of these, make lists of lawyers to serve as prosecutors. They send these lists to the Ministry of Law, Justice and Parliamentary Affairs through the office of the local deputy commissioner, who is the ex-officio district magistrate, or directly to the ministry by 'selectors', depending on the extent of their power and influence. The government appoints prosecutors from among those recommended.

Younger and less-experienced lawyers seek appointment as prosecutors through personal and political channels. Those persons with the right connections can get one for free, but otherwise a down-payment, or at least a guarantee of suitable payments at a later date, is needed to secure a post. Prosecutors often have inadequate knowledge of law and experience in legal practice as a result, but have clear political affiliations. On the other hand, senior lawyers are reluctant to serve as prosecutors because of the lack of facilities and remuneration.

However, under the military-backed interim government under the emergency that was in place for most of 2008, a slightly different type of procedure had been followed. In some cases, interested lawyers sent applications to the offices of deputy commissioners to seek positions and the government made its choices after inquiries conducted through the intelligence agencies as well as in view of the relationships between the applicants and officials in those agencies. The political affiliations of some prosecutors were less pronounced than they had been previously, although they were still screened in order to ensure a level of reliability concerning the government's purposes.

The president appoints the attorney general under article 64 of the Constitution and sections 492 to 495 of the Code of Criminal Procedure. The appointee must have the same qualifications as a judge of the Supreme Court, and serves the president. However, in reality the president has no power to select the appointee but merely formally approves the government nominee, who is selected for the same sorts of political reasons as ordinary prosecutors.

The additional attorney general, assistant attorney general and a number of deputies serve the attorney general. As in other cases, there are few criteria for their selection and little screening. The only real condition is that they be lawyers capable of pleading cases individually. There is also not any specific recruitment process, like the holding of an examination for interested applicants.

**Example 4**

The case of Khodad Khan Pitu: the absence of special procedures to screen and appoint prosecutors became all too evident in the case of Khodad Khan Pitu, a lawyer of the Naogaon District Bar Association who was appointed as Public Prosecutor of Naogaon on June 13, 2007. The District Magistrate of Naogaon appointed him without any official permission from the Ministry of Law, Justice and Parliamentary Affairs.

It subsequently came to light that Khan was an accused in a criminal case relating the assassination of a leader of a pro-Islamic student organization, Azgor Ali, at the Rajshahi University, in a trial in the Rajshahi Session Judge's Court. Khan claimed that he was not aware of the murder case against him, although he admitted that he had been discharged from another murder case. Moreover, at time of appointment Khan was also an accused in another criminal case regarding the violation of electoral rules, under trial in the Magistrate's Cognizance Court of Naogaon.

In defence of his boss, Sajal Samaddar, the Additional District Magistrate of Naogaon, claimed that the district magistrate is able to appoint temporary public prosecutors according to his ex-officio power under section 17 of the Law Report Manual. He maintained that they had been unaware of the cases against Khan at the time of his appointment and only learned about them through the news reports. A probe committee later found the reports to be true.

Public prosecutors use their positions to advance their private practices, which results in unseemly events in court such as the appearance of a group of witnesses without any prosecutor on hand to examine them or prosecutors who have not prepared for a hearing and who confuse and intimidate their own witnesses. Unsurprisingly, such cases result in acquittals. There are also frequent complaints of prosecutors (especially SPPs) who having won a hearing in the lower court where they have pleaded for the State reappearing in the appellate court representing the other party as a private lawyer.

The most common preliminary step in seeking criminal justice in Bangladesh is to lodge a complaint with a police station in the jurisdiction where the offence allegedly occurred. Thereafter, the police must investigate, collect evidence, obtain warrants, arrest the alleged criminals and produce them before the relevant court. Such cases are referred to as GR cases: those on the Government Register.

However, lodging complaints with police stations is oftentimes difficult for the poor and politically weak, especially if the complaints relate to wealthy and politically connected persons. The offenders or persons in league with them will invariably make arrangements with the police, even before a complaint is made, to block the victim.

In such cases, the other option is to lodge a complaint directly to a magistrate's court. The court can then order the officer-in-charge of the relevant police station to "take necessary steps" or "take legal steps followed by inquiry" or "register as a complaint following inquiry". Such cases are identified as CR cases: those on the Complainant Register.

CR cases are fraught with difficulties, as the police will usually thwart the investigation unless they have no personal interests in the outcome and the victim is now prepared to pay more than the other party to succeed. They may issue a final report, closing the inquiry without trial, or issue a report that will not stand up in court.

**Example 5**

The case of Shafikul Islam: the conviction rate in Bangladesh's courts is only around 10 per cent. The reasons for this include the political and transitory nature of the prosecutors' work and postings and the obstacles set up by the police.

The case of Shafikul Islam exemplifies this. Shafikul was a schoolboy who on 25 August 2000 was allegedly murdered by his stepbrothers and sisters and their relatives in Bhagalpur village in Narayanganj district. According to Shafikul's relatives, his paternal aunt had left her ancestral lands to him since she did not have any children of her own, leading to him being killed by his relatives.

Shafikul's mother, Sakerun Nesa, lodged a murder case against the alleged perpetrators with the Sonargaon police station. Sub Inspector Nazrul Islam was assigned to investigate. However, according to Sakerun, the investigating officer was bribed and did not record the witness statements correctly, instead preparing a report that would allow the suspects to walk free. The magistrate of the Cognizance Court of Narayanganj also allegedly framed the charge in a faulty manner, thereby weakening the case.

During the trial, the public prosecutors of the Narayanganj Session Judge's Court changed several times. They were absent from the court when evidence was taken from witnesses and were indifferent to the trial process. Judges also took leave and showed no interest in the case. Meanwhile, the accused had been released on bail and had threatened to also kill Sakerun.

It was suggested to her to apply to the Ministry of Home Affairs for the case to be transferred from the Narayanganj Session Judge's Court to the Speedy Tribunal of Dhaka, which has been appointed to try 'sensational criminal cases' in a speedy manner. The ministry approved her application and the case was transferred to Speedy Tribunal-4. On April 16, 2007, the tribunal refused bail for one of the accused while the others remained free and again went to threaten the victim's mother.

According to a prosecutor handling the case at the tribunal, the investigating police and prosecutor in Narayanganj had clearly collaborated to fix the case and

get the accused off the hook. He concurred with the assertion of the victim's mother that the police had not recorded witness statements correctly and had framed the charges in a defective manner, recording them under both section 302 and 364 of the Penal Code (murder and kidnapping), when as the dead body had been recovered the charge should have been under section 302 alone. However, he noted that the court had already recorded the depositions of 12 witnesses for the prosecution without either judges or prosecutors pointing to the defects of the charges.

The prosecutor in Narayanganj also caused undue delays in processing the case before the Speedy Tribunal, as he failed to send the case diary to the SPP's office for more than a month. As the tribunal must complete its work within 135 working days, the tribunal prosecutor had to call the prosecutor of the Narayanganj Session Judge's Court to receive the case diary, and was told that the prosecutor had not received a copy of the gazette notification for transfer of the case to the Speedy Tribunal-4 of Dhaka. The tribunal prosecutor had to make a photocopy of the notification, which he had received, and send it by courier to Narayanganj.

As regards the role of the police, persons who should have been included in the investigation report as accused were in fact made witnesses for the prosecution, while many persons who should have been listed as witnesses were ignored completely. The police investigation report did not properly record the full sequence of events, and the information given in the report is below the standards set by the Evidence Act, 1872.

After more than seven years, Sakerun's struggle for justice ended on November 4, 2007, with the acquittal of all the alleged perpetrators except her stepson, who was given life imprisonment: i.e. 14 years in jail. However, her lawyers are afraid that he may also be acquitted by the High Court Division as soon as the appeal is adjudicated, due to the inconsistencies in the investigation reports and prosecution process.

**Police as prosecutors in magistrate's courts**: under sections 492(2) and 495 of the Code of Criminal Procedure, the government assigns the police to conduct the prosecution in the magistrate's courts, which deal with around 70 per cent of all cases in the country:

Section 492 (2). The Chief Metropolitan Magistrate or the District Magistrate, or subject to the control of the District Magistrate, the Sub divisional Magistrate, may, in the

absence of the Public Prosecutors, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case.

Section 495. Permission to conduct prosecution: (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below the rank to be prescribed by the Government in this behalf but no person, other the Attorney General, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Government in this behalf, shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing the prosecution as is provided by section 494 and the provision of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he taken any part in the investigation into the offence with respect to which the accused is being prosecuted.
A police officer at the rank of sub inspector normally deals with the prosecution of cases before the court, although these officers do not have law degrees or training in prosecution; they are just transferred from a police station to the job, sometimes as punishment.

In cases that are tried with police as prosecutors, the battle is imbalanced because the prosecution either fails to prove the charges or the accused are convicted on faulty evidence and reasoning and are acquitted on appeal.

**Example 6**

The case of Abul Kalam Azad: the problems associated with having the police also serve as prosecutors can be seen clearly in the case of Md. Abul Kalam Azad. Azad, a 33-year-old small businessman with two shops selling household aluminium goods in Khalishpur, Khulna city, was tempted by the field officers of an NGO-based bank, BRAC Bank, to take a loan to improve his business. Following frequent offers by the officials of the BRAC Bank, Azad agreed to mortgage the deed of his home, which had an approximate value of 600,000 Taka (USD 8500), for which he received a 300,000 Taka loan on 10 April 2005 under a

'Medium-Term Loan' programme. Before granting the loan the bank insisted that Azad put his signature on two blank cheques, despite having the deed of his house as security.

After receiving the loan, Azad was asked to repay it in monthly instalments of 17,700 Taka. He calculated that the money to be repaid to the bank would be at an interest rate of nearly 38 per cent and insisted that the bank limit the interest rate to the agreed rate of 15 per cent.

In response, the BRAC Bank lodged charges of deception and breach of trust against him under sections 406 and 420 of the Penal Code on 13 December 2005, at the Gulshan police station in Dhaka, although the loan dealings were under the jurisdiction of Khulna city, more than 300 kilometers away. In the complaint, Md. Mizanur Rahman, an officer of the bank, alleged that Azad received money from the Head Branch of the BRAC Bank situated under the Gulshan police station in Dhaka and was refusing to repay. Sub Inspector Anisur Rahman submitted an investigation report with the Chief Metropolitan Magistrate's (CMM) Court (now Chief Metropolitan Judicial Magistrate's Court) on 28 January 2006, bringing the charges against Azad, who had meanwhile been paying money to the bank without knowing about the case against him and in 19 instalments had repaid 336,300 Taka.

On 25 September 2006, the Khalishpur police arrested Azad at his shop, following an arrest warrant issued by the CMM Court of Dhaka. He was detained in the Khulna District Jail for 23 days and then transferred to the Dhaka Central Jail where he was detained for five days. During the period of 28 days in detention he submitted a petition for bail; however, the court did not grant it. Only on October 23 did the CMM Court of Dhaka grant bail.

Having been released from jail, Azad paid a further 85,736 Taka to the bank. According to his lawyer, this should have discharged him from the charge; however, the police who were serving as the prosecution did not understand the legal points. The magistrate was also ignorant about the application.

Neither the police investigation report nor prosecution police has at any point suggested that it may not have been Azad who had lied but rather that it may have been the BRAC Bank, nor have they raised any questions about the fact that the incident occurred far outside the jurisdiction of the Gulshan police station. Azad has had to sell one of his shops in order to pay the expenses associated with the trial. The case is still pending before the court.

## NATIONAL HUMAN RIGHTS COMMISSION ESTABLISHED

Calls for the establishment of an institution to address the human rights problems and provide effective remedies to the victims led to the establishment of the National Human Rights Commission of Bangladesh. The military-controlled government promulgated an ordinance on December 23, 2007, announcing the establishment of a national human rights body. On September 1, 2008, the government made an official announcement that the National Human Rights Commission had been in effect since that date.

Mr. Amirul Kabir Chowdhury, a retired judge of the Supreme Court of Bangladesh was made Chairperson and Prof Niru Kumar Chakma, a teacher of the Department of Philosophy of Dhaka University, and Ms. Munira Khan, former chairperson of Fair Election Monitoring Alliance (FEMA), a local NGO, were appointed as Members of the National Human Rights Commission (NHRC). The government asked the newly appointed officials to begin their terms in office on December 1, 2008.

The National Human Rights Commission Ordinance-2007, which enables the government to establish the NHRC rights body, allows the Commission (under Section 13) to give its recommendations to the government to file cases, if mediation or arbitration attempts fail. Many aspects on the methods of work and powers of this body give rise to serious doubt as to whether it will be effective, however.

Section 14 of the Ordinance allows the Commission to recruit a mediator who will play a role to solve the problems of human rights abuses through arbitration between the perpetrators and the victims of abuses. Section 15 authorizes the Commission to investigate allegations of human rights abuses through issuing summons to the respondents, without any obligation for the relevant authorities to provide evidence and information. There is also no clarity about what happens when the summons are ignored.

The Commission, under Section 16, can make recommendations to the government based on its findings of the investigation; however, it is expected that these will be ignored, as there are hundreds of examples available in Bangladesh in which the authorities did not carry out the orders of even the Supreme Court. Furthermore, under Section 16(4), the government and relevant authorities can deny or express their inability to implement the recommendations of the Commission in a reply letter.

Under Section 17 (2), any statement to the Commission confessing the crime of human rights abuses cannot be used as evidence in any criminal or civil court against the person who confesses the crime.

Under Section 27, the Commission can formulate its own rules in order to perform its duties after getting approval from the President. This means that executive will dominate what should be included or excluded in the rules.

Under Section 20 (3), the government will determine the salaries and benefits of the staff of the Commission until the Rules of the Commission are finalized. This situation will likely compel the Commission to make or agree to a weak set of rules instead of those that would enable independent functioning.

While a national human rights institution had been demanded by rights groups and victims for decades, this has now been established by a military-controlled government working beyond its legal jurisdiction under a state of emergency. The ALRC is of the opinion that the military-backed government, which was responsible for gross violations of human rights, was using the establishment of a toothless rights body as a shield to protect itself from criticism.

## THE STATE OF EMERGENCY – THE BIGGEST ELEPHANT IN THE ROOM

Although Bangladesh faces chronic human rights problems, an evaluation of the situation of rights in 2008 has to focus primarily on the state of emergency, as it and the ordinances and powers it provides to the authorities, have been the main causes of abuses and impunity in 2008. At the international level, the government has repeatedly denied committing abuses, and has even attempted to threaten and harass non-governmental organizations that attempt to bring up these matters. Despite being a member of the Human Rights Council and a party to six major international human rights instruments, the government of Bangladesh not only failed to live up to its obligations under these instruments, but actively flouted them.

The state of emergency was proclaimed on January 11, 2007, ostensibly due to violence prior to elections scheduled for January 22, 2007. Elections were to take place six months later. Under the Constitution of Bangladesh, an emergency may last for a maximum of 120 days. However, until early December 2008, it remained in force and was creating a human rights and constitutional crisis in the country. It was lifted on December 18, 2008, just before the elections that were held on December 29, 2008. Any elections held under the emergency were not likely to be free and fair. Local elections held on August 4, 2008, provided prior evidence of this, as many politicians from the past ruling party were held in detention for several months, where a number remain to date, and there are numerous reports of vote manipulation by the authorities. Such reports again surfaced following the elections held at the end of 2008.

Prior to these elections, the political parties demanded the complete withdrawal of the state of emergency as of December 11, 2008, as, according to the election schedule, the candidates and parties could officially start election campaigning on December 12.

Under Article 141A (1) of the constitution, a state of emergency can only be imposed under certain conditions by the President, and it requires the counter-signature of the Prime Minister. This signature was not obtained for the recent emergency, making it unconstitutional from the outset. Furthermore, an emergency may only last for 120 days, under Section 141A (2) (c) of the constitution. However, due to a loophole requiring action on the part of the parliament (which was dissolved on October 24, 2006), this illegal emergency was in force until December 18, 2008.

Human rights violations have resulted primarily from draconian powers provided by the Emergency Powers Ordinance-2007, supplemented by the Emergency Powers Rules-2007, and the Special Powers Act-1974. On June 11, 2008, the military-controlled government also imposed the Anti-Terror Ordinance-2008, supposedly to combat terrorism, under which further abuses are taking place.

The High Court Division of the Supreme Court of Bangladesh on July 13, 2008, ruled that the President of an un-elected government, such as that in power at the time, does not have the constitutional power to promulgate ordinances, unless such ordinances regard general elections. The same court also declared all ordinances made by the then-government to be ultra vires and unconstitutional. However, the Appellate Division of the Supreme Court on July 21, 2008, stayed this order for one month. At the time of writing, the appeal was still pending before the Supreme Court.

During the state emergency all State-actors that are perpetrators of human rights abuses were given impunity under Section 6 of the Emergency Powers Ordinance-2007, which reads:

> ***[6. Indemnity-*** *(1) no action, done by a person in good faith, according to this ordinance or any rule under this ordinance or any provision under such rule, may be challenged in civil or criminal court.*
> *(2) no action, done in good faith by the government, according to this ordinance or any rule under this ordinance or any provision under such rule, and any resultant damage due to the action, may be challenged in civil or criminal court.]*

The AHRC was informed that the military-controlled government of Bangladesh had been negotiating with the political parties prior to the general election, to ensure that any future elected government validates through the parliament the actions taken by the pro-military regime under the state of emergency. The military-government promulgated at

least 120 ordinances, most of which run contrary to the constitution. Despite this, some of these ordinances have already been enacted through the newly-elected parliament with some amendments, while others are still in the process of being amended.

Bargaining with the major political groups vying for election also reportedly centred on seeing who will ensure complete impunity to them following the elections. In the past, successive governments of Bangladesh have provided impunity to the perpetrators of human rights abuses by enacting laws in parliament. The reports of the prior military regime's pressure upon politicians raises serious concerns that impunity for recent abuses will be secured under the newly-elected government.

## THE MILITARISATION OF BANGLADESH'S CIVILIAN INSTITUTIONS

The emergency was used by the military to permeate the State and its civil administration. This encroachment will likely have a significantly detrimental effect on democracy, security and human rights in the country for years to come. Current and retired officers have been appointed to top public service positions and autonomous institutions. Even sporting bodies have not been spared, as will be seen below. The militarisation of law-enforcement has taken place through new joint forces being established, comprising military intelligence agents alongside the police. The courts have suffered from military surveillance and interference. High profile individuals, including former Prime Ministers, ministers and legislators have been detained for months for alleged corruption, often without specific charges against them. Some have been released through executive orders, bypassing judicial processes.

**Example 7 – three cases**

**Mr. Abdul Jalil**, the General Secretary of the Bangladesh Awami League was arrested on 28 May 2007 in the afternoon from his office and was released on parole on 2 March 2008. Jalil was reportedly released on parole for 30 days but the authorities imposed a number of conditions on him if he goes abroad for treatment. He has to communicate the Bangladesh mission every three days after his arrival in a country for treatment and must not be involved in political activities or business there.

**Mrs. Sheikh Hasina**, former Prime Minister and President of the Bangladesh Awami League, was arrested on 16 July 2007, early in the morning from her house in Dhaka and detained in the official residence of the Chief Whip of the Parliament declaring it a "sub jail". She was released on June 11, 2008, on parole lasting eight weeks.

**Mr. Arafat Rahman Koko**, the younger son of former Prime Minister Khaleda Zia, was arrested along with his mother on 3 September 2007. The government released him on 17 July 2008 on parole. Local press reports claim that "The government has ordered the temporary release from prison purely on humanitarian considerations," said Home Affairs Adviser M. A. Matin after the military-backed regime decided to give the son limited reprieve from detention.

These releases resulted not from court decisions but rather from political negotiations. If courts release persons that the military government did not want released, they were usually re-arrested, often under fabricated charges.

All the national-level policy decisions were made, changed and influenced by the armed forces' top officials. As previously mentioned, the National Coordinating Committee, which oversaw corruption cases, held supreme authority over all administrative bodies during the emergency, and was riddled with members of the military. The body made recommendations to the Anti Corruption Commission concerning who would and would not be charged for corruption. Following the general election on December 29, 2008, this body ceased to exist.

Despite public statements underlining Article 7 (1) of the Constitution that declares the people as the source of all power of the State, politicians and civil servants, including judges, are clearly subservient to the military in Bangladesh. For many, the armed forces are beyond the judicial process, notably politicians for whom support of the army is a prerequisite for gaining power. The emergency has provided the military with powers to do as they please and there are no components of the State that are able to hold them accountable for their actions. In the run-up to elections in 2008, in particular, politicians and others seeking public office within the branches of State, positioned themselves in order to show their loyalty not to the country, its people or the rule of law, but to the military.

Prior to the proclamation of the state of emergency, the armed forces were only deployed to aid the civil administration in dealing with political violence between rival groups. After the emergency was declared, the "State of Emergency Ordinance-2007" was promulgated and supplemented by the "Emergency Power Rules-2007" with effect from the date of imposing the emergency. Under these new instruments, the armed forces were redefined as a "law and order maintaining force" equivalent to the police. These laws empowered soldiers to arrest whomever they wish, without a warrant from a competent court. The emergency laws also ensured blanket impunity to the armed forces for all of their actions. None of the country's police stations have recorded any case against the officers of the armed forces for abusing power; and nobody has dared

to lodge a case against them due to the climate of fear and distrust in the legal system resulting from the emergency. The government has not taken any initiative to provide redress to the victims of abuses (other than decisions to withdrawing certain politically-motivated cases, which only benefit those close to the ruling).

According to the government, around 60,000 soldiers were deployed around the country, in all headquarters of the country's 64 districts, since the beginning of the emergency. The deployed military frequently intervened in areas in which they have no competency and should have no power, including in the activities of the media and NGOs, leading to fear and demoralization amongst these sectors' professionals. As a consequence of regular interventions by the armed forces in their work, they could not contribute to society and in their respective fields.

Initially, the government deployed the armed forces down to the Upazillas (sub-district unit) level. This adds to the long-standing militarisation of three districts in the Chittagong Hill Tracts. The civilian government was severely undermined as a result, with one Deputy Commissioner, who did not wish to be identified, commenting that, "People should no longer have patience and resist the audacity of these uncivilized Majors."

The national deployment of the military was in place until November 4, 2008, prior to a Presidential order to withdraw the military, which came as part of the government's negotiation with political parties in the run-up to elections as well as from international pressure, notably a joint motion for resolution on the situation in Bangladesh in the EU parliament in Brussels on July 9. However, the military was re-deployed on December 22, 2008, prior to the general election, and remained so for at least two weeks.

A military patrol during the emergency.
Photo courtesy of Amin Rasul

In addition, the Rapid Action Battalion paramilitary force known for being responsible for hundreds of extra-judicial killings in recent years, was reinforced by officers from the armed forces and deployed extensively at the district and Upazilla levels during the emergency. In this way, the police, who are supposed to be responsible for maintaining law and order in the country, were being supported and supplanted by the armed forces and paramilitary forces that should not be engaged in policing, during the state of emergency. This resulted in a large number of human rights violations.

For example, concerning the massive arbitrary arrests that took place since the beginning of the emergency, common people only had access the police stations when enquiring about the whereabouts of arrested and detained persons. They rarely received responses. When the armed forces and RAB arrest, detain and torture people, the police remain out of the picture and the police stations do not record information concerning such cases.

Given the climate of military supremacy and consequent fear, lawyers rarely agreed to assist victims by drafting and lodging complaints with Magistrate Courts, which is the only other resort for people seeking redress following a denial of assistance by the police. According to reports, armed forces officers frequently made phone calls to magistrates and judges regarding pending cases, to influence them in favour of the military's interests. Magistrates feared for their security and that of their relatives, and as a result only disclosed such threats off the record. The situation of prosecutors has been even worse than that of the judges and magistrates. Members of the intelligence agencies and, in special cases, officers of the armed forces, wereed placed in the offices of prosecutors and attorneys, and direct them to lead proceedings in line with theses agencies' wishes.

Under the emergency, a so-called Task Force comprising military officerswas also placed in the country's courtrooms and relevant offices of the courts before, during and after trials, in order to monitor and direct the cases to suit their interests. There can hardly be a more blatant indicator of a lack of an independent judiciary than this. The provisions in the emergency ordinances and the control of the judiciary combined to ensure complete impunity for the military and those that serve its interests.

While civil servants found it difficult to enter into political roles, military officers of a similar rank were near-systematically included in the mainstream political parties following retirement. A retired general would typically be included in the cabinet of the ruling party or in the policy making forum when the party is out of power.

The military-controlled interim caretaker government went further and increased the placement of members of the armed forces in the civil administration. Following the elections, those holding ministerial roles were removed, but others occupying various government departments have remained in place. For example, under the military-controlled government, the Ministry of Home Affairs was headed by Major General (Retired) M A Matin. Major General (retired) Ghulam Quader, former director general of National Security Intelligence, was made adviser to the Ministry of Communications. Brigadier General (retired) M A Malek was the Special Assistant to the Chief Adviser for Ministries of Social Welfare and Telecommunications.

The founding Director General of the Rapid Action Battalion and former head of the Bangladesh Police, Mr. Anwarul Iqbal, who is allegedly responsible for hundreds of

extra-judicial killings, took the position of adviser to the Ministry of Local Government, Rural Development and Cooperatives. Major General (retired), ASM Matiur Rahman, who previously occupied the Ministry of Health, was later asked to resign from his position for poor performance, although this should be seen as an exception, especially for someone from the military. The previous Army Chief, Lt. Gen. (Retired) Hassan Mashud Chowdhury, became the chairperson of the Anti Corruption Commission, while Colonel Mr. Hanif Iqbal occupied the position of Director General (Administration). Out of 18 directorship positions in the Anti Corruption Commission, 13 were taken by the military officers, where several remain to date.

Brigadier General (Retired) Muhammad Sakhawat Hussain remains in a key constitutional position as Commissioner of the Election Commission. The Bangladesh Army was therefore given official responsibility to prepare the voter list for the whole country. The armed forces therefore knew who was voting and where and were allegedly able to use this knowledge to hinder or help the process of voting to suit their interests. If they wanted to intimidate any group or community to vote for someone or not to vote, they could do so easily. During the election, members of the military were authorised to arrest any person they suspect of "anti-election activities" without a warrant of arrest issued by a court. The police were allegedly instructed by the military to intimidate voters in certain areas.

The army assigned its Principal Staff Officer (PSO) of the Armed Forces Division, Lieutenant General Masud Uddin Chowdhury, to the Ministry of Foreign Affairs where he had been serving as the Chief Coordinator of the National Coordination Committee and deciding on corruption cases. Following this, he has been appointed as High Commissioner of Bangladesh in Australia. On June 2, 2008, Lieutenant General Abu Tayeb Mohammad Zahirul Alams was assigned to the Ministry of Foreign Affairs and was to be appointed as an ambassador. However, before this could take place, he was also assigned to the position of Force Commander in the UN Peacekeeping Mission in Liberia, and returned to the service of the armed forces on October 7, 2008. Brigadier General Fazlul Bari was made Defence Attaché in the Bangladesh Embassy in Washington DC in the United States of America in October 2008.

Major General (retired) Manzurul Alam chaired the Bangladesh Telecommunication Regulatory Commission (BTRC), while Colonel Md. Saiful Islam took the position of Director General and Lieutenant Colonel Shahidul Alam became the Director of the BTRC's Spectrum Management Department. Lieutenant Colonel Shahidul Alam was appointed as the Project Director of a World Bank-funded project under the BTRC, while Major Rakibul Hassan was made a Deputy Director of the BTRC's Systems & Services Department.

Bangladesh Navy Captain A.K.M Shafiqullah was appointed as Director General of the Department of Shipping, while Commodore A.K.M Alauddin occupied the position of the department's Chief Engineer and Ship Supervisor.

Navy Captain Yeaheya Sayeed became Director of Chittagong Dry Dock Limited, an enterprise of the Bangladesh Steel & Engineering Corporation and also a Member of the Chittagong Port Authority. Captain SY Kamal was a Member (operations) and Captain Ramjan Ali was Deputy Conservator of the Chittagong Port Authority. Captain Zahir Mahmood was Deputy Conservator of the Port of Chalna Authority in Khulna.

Brigadier General Md. Rafiqul Islam became the Director (signals) of the Bangladesh Telecommunications Company Limited. Colonel Mr. Farukh Ashfaq served as the Chief Engineer of the Dhaka City Corporation. Major Gen (retired) Manzur Rashid Chowdhury was made a member of the newly formed Truth and Accountability Commission.

An alarming indicator of how deep this military encroachment became can be seen in the sporting authorities. The current Army Chief, General Moeen U Ahmed, has taken the positions of Chairman of the National Sports Council and President of the Bangladesh Olympic Association. The Chief of the Air Force, Vice-Marshal Ziaur Rahman Khan, heads the Bangladesh Hockey Federation, while Naval Chief Admiral Sarwar Jahan Nizam headed the Swimming Federation until the end of the year. Major General Ahsab Uddin, who has now been replaced the General Officer Commanding of the 9th Infantry Division, is the President of the National Shooting Federation. The Chief of General Staff of Bangladesh Army, Lieutenant General Seena Ibn Jamali, is the President of the Bangladesh Cricket Board, with Lieutenant Colonel (Retired) Md. Abdul Latif Khan as Vice President. Lieutenant Commodore A K Sirker is General Secretary of the Basketball Federation. Colonel (retired) M A Latif was made Vice President of the Squash Federation, while now-retired Major General Mr. Sadik Hassan Rumi was "elected" uncontested as President of the Archery Federation.

These are but a few examples recorded by the Asian Human Rights Commission (AHRC) of the many such military appointments that were made under the aegis of the military-backed government and its unconstitutional state of emergency. Information about these appointments was being suppressed as much as possible by the authorities to avoid international criticism.

## INCREASING VIOLATIONS UNDER THE EMERGENCY

Rather than countering a threat or ensuring stability, the state of emergency led to greater insecurity and human rights violations. Fundamental rights, including the freedom of

association and expression, were suspended; a significantly greater number of serious violations were perpetrated; total impunity was guaranteed for perpetrators; and avenues for victims seeking remedies were virtually obliterated. All discussions of human rights that do not take into account the state of emergency, the critical undermining of the civilian, democratic systems of the State, and the constitutional crisis in Bangladesh, would be meaningless concerning 2008.

The government forced the closure of at least 160 newspapers, and television news channel CSB News, during the state of emergency. Any criticism of the actions of the government was stymied in this way.

NGO activists and journalists were harassed, threatened, and detained by law-enforcement and the military, and faced fabricated charges, in order to discourage any criticism of the arbitrary actions and violations of rights and the constitution by the authorities under the emergency.

## ARBITRARY ARRESTS AND DETENTION

It is estimated that since January 11, 2007, a staggering 500,000 individuals are thought to have been arbitrarily arrested and detained for differing periods under the emergency. When questioned during the official proceedings of the Human Rights Council by a member of the AHRC's sister-organisation, the Asian Legal Resource Centre (ALRC), the representative of Bangladesh could only state that Bangladesh did not have enough space in its prisons to accommodate this many persons. However, the Inspector General of the Bangladesh Police (IGP), on June 9, 2008, publicly admitted that the police had been arresting an average of 1,667 persons every day. This contradicts the attempt at a denial made by Bangladesh's representative at the Council and raises serious questions about further over-crowding in the country's detention facilities, which was already a serious problem before the mass arrests under the emergency. In addition, the IGP admitted that the authorities was arresting persons under Rule 16(2) of the Emergency Powers Rules 2007, instead of under Section 54 of the Code of Criminal Procedure, as under the former, suspects cannot be granted bail. Arbitrary detention without bail was therefore being enabled on a large scale by powers granted under the illegal, prolonged emergency.

Bangladesh's law-enforcement agencies did not follow due process when arresting and detaining persons. Arrest warrants and information regarding the charge against the person were rarely, if ever, produced at the time of arrest. Persons rarely had access to legal counsel following their arrest. Under Article 33 (2) of the Constitution, arrested persons must be brought before a Magistrate within 24 hours of their arrest. However, during 2008, individuals were being detained in police stations or military camp for days,

weeks or even months, without any official records being kept or having any access to courts. This resulting in endemic torture that, in turn, frequently led to extra-judicial killings.

A High Court Division comprising Justice Nozrul Islam Chowdhury and S. M. Emdadul Hoque, on April 22, 2007, declared that the High Court Division of the Supreme Court had the constitutional power to grant bail to the persons implicated and detained under the Emergency Power Rules-2007. The Court declared it following a writ petition filed by Mr. Moyezuddin Shikdar, a businessman of Khulna, who was arrested by the armed forces and detained in prison.


The authorities transporting arrested persons during the emergency – an unfortunately common sight.

The Appellate Division then abdicated the Supreme Court's own power to entertain the bail petitions under the emergency rules. On May 23, 2008, the full bench of the Appellate Division of the Supreme Court, presided over by Chief Justice Mr. Mohammad Ruhul Amin, overturned the verdict of the High Court Division, declaring that the highest court of the country had no jurisdiction to entertain bail petitions concerning charges under the Emergency Power Rules-2007. This verdict created controversy amongst legal professionals and human rights defenders of Bangladesh. The Supreme Court Bar Association and its senior members protested against the verdict and urged the Appellate Division to review its verdict. As a mark of protest the SCBA decided not to arrange any farewell ceremony for the outgoing Chief Justice, Mr. Mohammad Ruhul Amin, who retired at the end of May.

## TORTURE

The use of ill-treatment and torture by the law-enforcement agencies is endemic in Bangladesh. This is perpetuated by the impunity that accompanies these violations. Torture is a tool of political and governmental repression and an inseparable part of methods of law-enforcement in the country. Torture is used in order to extract money, to force persons to sign false confessions, to repress the poor, and against persons in opposition to those in power, or their allies. All law-enforcement and intelligence agencies operate torture cells, where people are tortured as part of so-called interrogations. Exact numbers of victims are impossible to ascertain, notably as very few organisations risk working on torture in the country. The AHRC, however, has documented numerous cases of torture in the country that illustrate the above.

Bangladesh is evidently failing to respect its obligations under the ICCPR and as a State Party to CAT. This is shown both by the prevalence of the practice of torture and the reservation made to Article 14 (2) of CAT upon ratification, which has underlined the authorities' unwillingness to have any avenues available for victims of torture seeking reparation. The system in Bangladesh ensures impunity and bars redress. There is no law criminalizing torture, and as with other rights violations, the police refuse to conduct investigations, denying victims justice from the outset. There is no witness protection system and the Supreme Court remains financially out of reach for all but the rich. The government of Bangladesh is urged to immediately remove its reservation under CAT, criminalizes torture, and remove all legislation enabling impunity for torture and other grave abuses. This will require new legislation, the enabling of avenues for complaints to be made by victims, the creation of independent investigation units and an independent judiciary.

The AHRC has also recorded numerous cases of torture, either by the armed forces, the police, paramilitary forces, or a combination of these actors, since the beginning of the state of emergency.

Methods typically include: beating a person that has first been hung from the ceiling or a tree; electrocution; pouring hot and cold water into the mouth and nostrils (in the summer or winter seasons respectively); inserting nails or needles under the fingernails or toenails or other sensitive parts of the body. Persons are also typically subjected to humiliating and abusive treatment during arrest.

The authorities have justified their use of torture through various arguments. The officers of the Bangladesh Police claim that because there is only one policeman for every 1200 citizens, torture is acceptable. They argue that the police force is very poorly financed and has inadequate logistical capabilities and is therefore required to work tirelessly. Under such circumstances, they claim that the police's performance cannot be faulted, justifying torture. The officers of the Rapid Action Battalion (RAB) and the armed forces argue with human rights defenders that law-enforcement and maintenance of peace and security in the society requires the use of torture.

The country's politicians, legislators and civil servants have repeated the position of the law-enforcement agencies and security forces concerning torture. The claim has also been made by them during discussions with civil society that torture is a useful tool for maintaining law and order in the context of Bangladesh. Defending the arguments of the police, they have even added that as criminals are well-equipped and innovative, the only option for the police is to use torture.

When, during discussions, the need to follow due process of law was mentioned, notably concerning the police's duty to inform persons being arrested about the reason for the arrest and to show them a warrant of arrest as per Section 80 of the Code of Criminal Procedure, the politicians commented that "It is too ambitious in Bangladesh to expect the police to follow the due process of law". This is symptomatic of beliefs held more widely in the ruling elite.

Additionally, there are instances of the perpetrators of torture being promoted within the system in Bangladesh. The use of torture does not engender any prosecutions against or punishment of those who perpetrate it. Torture is not a crime in national legislation in Bangladesh. Any persons serving in the law-enforcement forces are not prevented, and therefore are tacitly encouraged, to use torture as part of their professional responsibilities.

One of most infamous instances of patronization of torture by the country's policymakers is the enactment of the Joint Drive Indemnity Act-2003 by the parliament after a military crackdown in the country, which resulted in the illegal arrest and detention of around 11,000 persons in a period of 86 days, and the death of around 58 of these persons in custody. During the state of emergency, impunity was handed to the "law and order maintaining forces" and the government for their actions, under Section 6 of the Emergency Power Ordinance- 2007. The perpetrators of torture and other forms of human rights abuses were supported by their superior officers within their respective departments.

**Example 8**

As an example, take the case of Mr. Farukh Hossain, a businessman of Rajshahi city, was attempting to seduce a woman that lived in Rajshahi with her mother and a six-year-old daughter, whose husband was stationed in another city for his work. The woman refused the proposals and warned him off. Mr. Farukh reportedly then hired Assistant Sub Inspector (ASI) Mr. Abdul Hamid of the Boalia Model Police Station of Rajshahi Metropolitan Police (RMP) to rape the woman. On October 7, 2008 at around 3:34pm, the police officer came to the woman's house along with Farukh. Farukh confined the woman's mother and child in a room and ASI Hamid raped the woman in another room of the house. A relative of the victim took her to the One-Stop Crisis Centre (OCC) of the Rajshahi Medical College Hospital (RMCH) on the same evening for treatment and to initiate legal action. The staff of the OCC, which comprises a medical doctor, police officer and lawyer for combined support to female victims of violence, and the Forensic Medicine Department of the RMCH examined her.

Based on the findings of the medical examination, a complaint of rape was forwarded to the Boalia police, which recorded the complaint one day later. During the period, ASI Abdul Hamid had fled. The Boalia police has apparently intentionally delayed the recording of the case for more than 26 hours. After recording the case, the RMP authority temporarily suspended ASI Abdul Hamid. Mr. Abdus Sattar, a Sub Inspector (SI) of the Boalia police station and a colleague of the alleged perpetrator, was assigned as the Investigation Officer (IO) of the case. After going into hiding, ASI Hamid started threatening the victim. The senior police officers of the RMP allegedly directed the medical doctors of the OCC and the Forensic Medicine Department of the RMCH, who were involved in the examination of the rape case, to manipulate the medical examination report in order to save the police officer. Following continuous threats from the police the woman moved from her rented house, where the incident of rape took place.

The police did not want the victim to meet the media and human rights defenders after the rape. They instructed the officials of the OCC to keep her at the OCC until 18 October.

There is a specific provision in the Constitution of Bangladesh prohibiting torture and degrading treatment and punishment. Unfortunately, the laws that are in effect only provide remedies to victims in relation to physical abuses or assaults rather than as torture, which is a different category of crime and violation of the person, with a range of different additional physical and psychological effects and stigma. The practice of torture leaves thousands of victims with temporary or permanent disabilities and in some cases results in death, yet there is no specific legislation criminalizing torture as a punishable crime. This is one of the key barriers preventing victims from seeking appropriate redress, guaranteeing impunity and ensuring the continuation of the prevalence of this grave practice.

At the international level, the country's representatives have learnt to make utterances that hide this fact. Bangladesh announced its voluntary pledges prior to the election of the UN Human Rights Council in 2006. In the voluntary pledges it promised that "If elected to the Human Rights Council, Bangladesh would: I. Extend its fullest cooperation to the Council in its work of the promotion and protection of all human rights and fundamental freedoms for all without distinction of any kind and in a fair and equal manner. . . IX. Strengthen its efforts to meet its obligations under the treaty bodies to which she is a party. X. Contemplate adhering to the remaining international and regional human rights instruments . . . XIV. Continue to work towards further strengthening and consolidating the institutional structures that promote good governance, democracy, human rights and rule of law. . . XVI. Establish the National Human Rights Commission

as soon as possible. XVII. Separate the judiciary and the executive as soon as feasible." The country has not begun to fulfil many of its key pledges in reality. As a party to the International Covenant on Civil and Political Rights (ICCPR) Bangladesh has the obligation under Article 2 of the Covenant to recognize the rights of the citizens and provide effective remedies to persons whose rights are violated. The remedy should be determined by competent judicial, administrative or legislative authorities. As a party to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the country has responsibility to protect its citizens from custodial torture and ill-treatment.

**Example 9 – Five cases**

**Case No. 1**

Mr. Altaf Hossain is a rickshaw-puller from Nalta village under Tala upazilla in Satkhira district. On 5 February 2008, Altaf went to Kopilmuni Bazar, transporting goods and passengers. At around 10 a.m., Altaf was pulling his rickshaw through the main road of the rural commercial hub. Due to traffic congestion and Altaf was late in giving way to an army vehicle. Soldiers got out of their car and proceeded to beat Altaf indiscriminately with a stick. He sustained serious injuries to his neck, back, hands and legs. Bystanders assisted Altaf to a local hospital, where he received treatment for months but has failed to recover from the injuries. To pay for the treatment, Altaf sold his rickshawn and he and his wife have borrowed Taka 40,000.00 from a rural micro-credit association with 20% interest.

**Case No. 2.**

On 5 February 2008, in the morning, Mr. Kamrul Islam, a 38-years-old man from Masiara village of Tala upazilla in Satkhira district, went to the Kopilmuni Bazar to buy groceries for his family. He was caught up in the incident detailed in Case No. 1 above and was also beaten despite being an innocent bystander, as a result of which he lost consciousness. He was taken to Kopilmuni hospital where he stayed for around a week to receive treatment for the injuries he sustained, notably to his spine.

**Case No. 3.**

On January 19, 2008, at around 10 a.m., an army team led by Major Mizan came to the Rahmania Offset Press at Paikgachha upazilla town in Khulna district. Major Mizan looked for the owner of the press. Md. Bayezid Hossain, a 32-year-old press

staff-member, who was operating a machine inside, came out and told the army officer that his boss was out of the office at that time. The Major asked Bayezid to remove the signboard of the press. Bayezid told the officer that as an employee it was not possible for him to remove the signboard without the permission from his employer. He assured Major Mizan that he would inform his boss first and the owner's consent would enable him to remove the signboard. As soon as Bayezid said this, Major Mizan and his colleague Warrant Officer Tajul Islam and several other solders started beating Bayezid with sticks and fists. Bystanders removed the signboard. Before leaving, Major Mizan told Bayezid to go to the Army Camp along with his boss. Locals then took Bayezid to the Paikgachha Upazilla Health Complex for treatment. Bayezid received serious injuries to his right hand, which had still not healed at the end of 2008.

**Case No. 4.**

On 15 February 2008, at about 8 a.m., army personnel visited two farmers Mr. Depak Nath (48) and Mr. Deleep Nath (45), who are brothers, in Kashimnagar village in the Paikgachha upazilla in Khulna district. The soldiers abruptly started beating Depak and Deleep in front of their wives and children, and then arrested them and took them to the Army Camp at Shovna in the Dumuria upazilla. The soldiers detained the two brothers for the night and tortured them. They were beaten with sticks and boots in several occasions. On the following day, the army officers handed them over to the Dumuria police. The police falsely implicated Depak and Deleep in a pending robbery case, resulting in them being detained in Khulna prison for 6 months, where they received no medical treatment. The Dumuria police had forced the brothers to pay Taka 25,000.00 as a bribe to have them removed from the investigation report. Despite receiving the money, the police submitted a Charge Sheet (an investigation report bringing charges) to the Court, accusing the two brothers in the alleged robbery. Their family mortgaged 3 parcels of land to collect money for their release. In August 2008, they managed to get bail from Court.

**Case No.5.**

Day labourer Mr. Bazlu Gazi, a 34-year-old resident of Kalidashpur village in the Paikgachha upazilla, Khulna district, was working as a labourer at a fish wholesaler owned by Mr. Kaisar in Chandkhali Bazar. A Joint Force team comprising the army and the police went to that Bazar and beat people arbitrarily for unknown reasons on February 13, 2008. The army men beat Bazlu with sticks and kicked him, causing him to sustain serious injuries to the knees and lower legs. The Joint Force then handed Bazlu over to the Paikgachha police, who forced him to give

them money on threat of false implication in a criminal case. Bazlu paid 5,000.00 Taka to the police, who produced him before court under Section 54 of the Code of Criminal Procedure-1898. Later, the police extracted further money from him for submitting a Final Report (discharging him from any kind of offence) to the court. After 16 days of detention Bazlu was bailed out from prison.

## FABRICATION OF CHARGES

The state of emergency opened a new window of opportunity for the police to fabricate charges against arrested persons in order to forcibly extract money from them, both due to the vast numbers of persons being arrested and the increased climate of impunity prevailing during this period.

**Example 10**

For example, Mr. Abdul Matin Shikdar, a businessman, lodged a complaint with the Kanaighat Police Station of Sylhet district regarding an assault on his mother, Mrs. Fatema Begum. Sub Inspector (SI) Mr. Hillul Roy was assigned as Investigating Officer (IO) to the case (No. 8, dated 9 June 2008).

As no investigation had been conducted a month after he made the complaint, Matin went back to the police station to check the on status of the investigation. Following his enquiry, Assistant Superintendent of Police (ASP) of the Kanaighat Circle Mr. Farid Uddin, in the presence of the IO asked for a bribe of Taka 50,000.00 (USD 744).The police officer promised that the payment of the bribe would ensure a positive investigative report in bringing charges against the people who assaulted Matin's mother. When Matin refuse to pay the money and urged the officers to visit the scene in person to learn the facts from eyewitnesses, the officers started using abusive language against him.

On July 24, the ASP accompanied by the IO visited the scene of the incident where they obtained statements from those who reportedly committed the assault. When they met the witnesses, they also used abusive language against them and intimidated them. They said that charges would be brought against them for being false-witnesses in the case. They then scolded Matin, rebuking him for filing a 'false case'.

After the intimidation Matin became afraid of further police harassment and a false investigation report by the police regarding the case of assault of his mother.

On 28 July, he submitted a written petition to the Deputy Inspector General (DIG) of Police of the Sylhet Range regarding the bribery claim, police intimidation and biased investigation. He also requested the DIG to change the IO. On July 31, the IO secretly submitted his investigation report to the Court saying that Matin had brought a false charge.

During the same period, Matin had been involved in leading a protest by local people against the 'Palli Biddut Unnayan Samity' (Rural Electricity Development Association) demanding that their electricity be connected, as the villagers had already paid all the required fees; however, the authority connected a different area using these resources. Following the protest the officials of the local electricity office got annoyed with its leaders. The police took this opportunity to abuse their power. Two complaints (No. 14 and 16 respectively) were recorded with the Kanaighat Police Station against Matin and others on September 23 and 24.

In the morning on September 28, in collaboration with officials of the electricity office, police officers in plain clothes arrested Matin on charges of assaulting the staff of the electricity office and stealing electric transformers from the locality. When produced before the Chief Judicial Magistrate, Mr. M H Mahbubur Rahman Bhuyan, on the same day the Magistrate ordered him to be remanded for two days. After Matin's detention in the Sylhet Central Jail, ASP Farid went to his prison cell and threatened to kill him saying, "You have complained against me to the DIG. Now you will bear the consequences. Whatever you want to eat and drink as your last wish, do it before you go to police remand; there will be nothing left for you after the remand. We will take care of your final departure."

On October 15, the police took Matin in remand from the prison for two days in police custody. During the remand the Officer-in-Charge (OC) of the Kanaighat Police Station Mr. Iqbal Hossain and the IO SI Shyamol allegedly extorted bribes of Taka 20,000.00 from Matin's relatives for him not to be tortured in custody. Matin was bailed out from the prison in the two cases on October 16 and 19 and was released from prison in the evening of October 20.

## EXTRA-JUDICIAL KILLINGS

The number of extra-judicial killings increased in Bangladesh during the state of emergency. In the 23 month-long the state of emergency around 315 persons were killed extra-judicially, out of which the deaths of more than 250 persons were blamed on "crossfire" incidents by the law-enforcement agencies, notably the Rapid Action Battalion, the police and the armed forces.

Article 32 of the Constitution of Bangladesh guarantees the right to life and personal liberty. However, under the state of emergency, the grave problem of extra-judicial killings rose further. Reliable reports indicate that over 300 persons were extra-judicially killed since the state of emergency was imposed. Previously, during so-called Operation Clean Heart, from October 16, 2002 to January 9, 2003, around 58 deaths in custody took place, following mass arrests and numerous allegations of torture. The operation was conducted by the law-enforcement agencies dominated by the armed forces, in a way that was repeated under the emergency. All these deaths were unconvincingly blamed on heart attacks. Impunity for the alleged perpetrators of torture and killings was then granted under the Joint Drive Indemnity Act-2003.

The Rapid Action Battalion (RAB), which is dominated by the military but also comprises the police and border security agency, was created in 2004. It has perpetrated an estimated 500 extra-judicial killings since its creation. It attempts to justify these killings by claiming there were accidental deaths that occurred as the result of the victims being caught in the "crossfire" although the AHRC has documented numerous cases that instead show these deaths result from torture and extra-judicial killing.

Shockingly, the authorities have shown their support for these killings by awarding the country's Independence Day Award to the RAB on March 23, 2006, for "outstanding performance in maintaining law and order." In 2007, the government awarded 28 RAB officers with "Police Medals." All of these officers have allegedly been involved in grave human rights abuses, including extra-judicial killings. The RAB has continued to act with complete impunity as a result. Inter-agency rivalry has led to the police seeking to compete with the RAB, and they have allegedly perpetrated several hundred arbitrary, extra-judicially killings. They also claim these result from crossfire, encounter, gunfight, in the line of fire, or shootout incidents.

The problems arising from this hierarchical structure are well illustrated in the following case. During the state of emergency, the police, RAB and the armed forces were deployed across the country, ostensibly to "aid the civil administration" with maintaining the law and order. In this hierarchy, the military was the dominant force, the RAB was next and enjoyed privileges over the regular police force, the latter of which is supposed to be responsible for the law and order officially.

**Example 11**

On 1 December 2007 at 8:15pm, Mr. Md. Shafik Ullah Monayem was talking with a friend Mr. Muzibur Rahman in front of Amdia House at the Kaunya Main Road in Barisal city when he was approached by two plain clothed persons who arrived on a motorbike. They walked towards Monayem and asked whether his name

was Monayem before identifying themselves as coming from the Rapid Action Battalion (RAB) and insisted he accompany them. He resisted, saying that he was on bail for all of the cases he had against him up until that day.

During this conversation two of Monayem's friends, namely Mr. Mamun and Mr. Monir, had approached the scene where Monayem was seen arguing with two persons. Three more plain clothed persons, allies or colleagues of the two so-called RAB persons, then blocked Mamun and Monir from proceeding further. Monayem was forced to sit in the middle of the bike, and was taken toward the western part of the city (where the office of the RAB-8 was situated).

Monayem's friends and members of the family went to the office of the RAB-8 where two on-duty sentries did not allow them to enter the gate and denied knowledge of any such incident. Then they went to the Criminal Investigation Department (CID) Office and the Kotowali Model Police Station of Barisal to learn about Monayem's whereabouts. The on-duty police officers asked the relatives to wait, saying they could confirm it only after their patrol teams had returned to the office. At around midnight, the police officer said that as the RAB was involved in the arrest, the police had nothing to do with the case.

On 2 December 2007, Mainul, brother of Monayem, along with relatives and friends went to the Kotowali Police Station to record a General Diary (GD) in connection with the arrest of Monayem by the plain clothed members of RAB, and his subsequent disappearance. Sub Inspector Mr. Moazzem, referring to the accusation against RAB, refused to record the GD saying that the police had nothing to do with allegations against members of RAB. He also suggested Mainul lodge a 'regular case' regarding the incident.

Mainul went to Mr. Yunus Talukdar, a senior lawyer of the Barisal District Bar Association, who was of the opinion that lodging a case against any member of the RAB may lead to further deterioration of Monayem's condition while in their custody; the RAB may kill the man secretly. He suggested pursuing the officials, requesting security and information of the victim. Following the reluctance of Mr. Yunus to file a complaint against members of the RAB regarding Monayem's disappearance, Mainul went to another senior lawyer. Mr. Enayet Peer Khan, who is a political leader, also discouraged Mainul from lodging a complaint for similar reasons.

Mainul and his relatives continued visiting senior officials of the district, including the Police Commissioner of the Barisal Metropolitan Police (BMP), the local

office of the Directorate General of Forces Intelligence (DGFI) and Deputy Director of RAB-8, requesting their urgent intervention into the matter. The family also submitted written applications to the all relevant offices of the city with the same request.

On 14 February 2008, Mainul prepared a draft of General Dairy removing the word "RAB" and finally it was recorded with the Kotowalit Model Police Station (GD Number 821). In the GD, Mainul alleged that his brother Monayem had disappeared since 8:15pm on 1 December 2007, after he was picked up by a group of plain clothed officers of an intelligence agency; from the Kaunya Main Raod's Amdia House, in the presence of Mr. Muzibur Rahman, an inhabitant of the same area. Sub Inspector Mr. Ershad Ali was assigned as the Investigating Officer for the GD. However, no investigation was conducted and no updated information was available about Monayem.

Monayem's brother Mr. Mainul told the Asian Human Rights Commission (AHRC) that following continuous denial, refusal and reluctance by the local law-enforcing agencies about Monayem's whereabouts, his 96-year-old father Mr. Mohammad Harun-ur-Rashid, Monayem's wife Mrs. Fatema Beagum and Mainul himself wrote a series of letters to the top officials of the government, and chiefs of the army, RAB and the police.

An Assistant Commissioner (AC) of Police of the Barisal Metropolitan Police, Mr. A K M Makfarul Islam, in a one page enquiry report, which was revealed on 17 April 2008, claims that there had been a dispute with a Commissioner of the local Ward of the Barisal City Corporation, Mr. A K M Mortuza Abedin. The AC Makfarul suspected that Mr. Mortuza might have influenced the RAB members or used his private force to pick up Monayem, as Monayem is seen as a rival for the following city corporation election. However, the police officers did not mention the whereabouts of Monayem or any information about his current condition in the report.

Major A K M Mamunur Rashid Mamun of RAB-8 delayed the process of locating Monayem following the complaint of his disappearance after an arrest by a group of RAB officers. Major Mamun warned the relatives of Monayem not to contact him any more on this issue of disappearance.

On 21 October 2008, Mainul made an appointment with the Inspector General of the Bangladesh Police Mr. Nur Mohammad in his office at the Police Headquarters. The police chief received his written complaint and orally assured

Mainul that the police would take action on this regard. However, until the time of writing of this report in December 2008, the family had not received any updated information about the whereabouts of Monayem. No action whatsoever was being taken concerning his disappearance.

## VIOLATIONS RESULTING FROM THE COUNTER-TERRORISM ORDINANCE

Further to the already significant list of arbitrary powers granted to the authorities in 2007 under ordinances issued by the authorities under the state of emergency, on June 11, 2008, the military-controlled government imposed Anti-Terror Ordinance-2008, supposedly to combat terrorism. Section 6 of the ordinance, includes provisions for rigorous imprisonment of a minimum of three years to a maximum 20 years life-term, as well as the death penalty, for various crimes including: killings; serious attacks; abductions or kidnapping; causing damage to property; and possession of explosives, listed dangerous chemicals or firearms, with the "intention to harm the unity, harmony, security or sovereignty of Bangladesh and create panic among its people or any segment of the population."

Persons could be charged under Section 7 with providing financial or other forms of support for loosely-defined "terrorist activities" on the basis of mere "reasonable suspicion." Section 39 asserts that the crimes under this ordinance are non-bailable. Section 54 of the Code of Criminal Procedure-1898 and Section 86 of the Dhaka Metropolitan Police Ordinance-1976, already allowed the police to arrest any person on suspicion. These powers have previously been abused to arrest people en masse. Under the new ordinance, the penalties and sentences for the various crimes are higher, however.

The police could hold persons in remand for interrogation for ten consecutive days, which could be extended for a further five days by magistrates, under Section 26. Magistrates typically followed the instructions of the government and other influential groups. Furthermore, multiple fabricated charges produced sequentially were used to ensure lengthier remand periods.

As with corruption charges that were being tried in special, military-government-appointed tribunals, charges under the Anti-Terror Ordinance were tried by Anti-Terror Special Tribunals. There were serious concerns about such tribunals' ability to deliver fair trials, as they were held in camera, without the presence of the public even the accused persons' relatives. The ordinance has since been enacted as a law by the newly-elected parliament, entrenching its dangerous provisions into Bangladesh's system.

Under Section 32, a magistrate or judge could not grant bail "unless satisfied with reasonable grounds that the accused person might not be convicted." This suggests that the judge had to pre-judge the case before it was heard in full, which evidently goes against the fundamental principles of justice as accepted in international norms and standards.

According to Section 41, the government could transfer, on "reasonable grounds," any case relating to crimes under this ordinance, from any sessions court or tribunal to any special tribunal, or from any special tribunal to any sessions court, at any stage prior to the completion of depositions. This power allowed the government to interfere in any case it wishes and completely eroded any notion of the independence of the judiciary. In a criminal proceeding, the government is a party to the dispute. If such a party is given statutory power to transfer cases at a whim, it is likely that it will exploit this power, resulting in delays and/or travesties of justice. This was seen in Bangladesh under the state of emergency.

Despite the Special Power Act-1974, the Emergency Power Ordinance-2007 and the Emergency Power Rules-2007, which already gave the government wide powers to arbitrarily arrest and detain people, the government armed itself further with the Anti Terror Ordinance-2008 to increase its crackdown, with further abuses resulting. The fact that this has now been enacted as a law raises serious concerns that such violations will continue to plague Bangladesh's citizens. Despite the withdrawal of the emergency the far-reaching consequences of action taken under it remain in the country. The fabricated charges against a large number of people, arbitrary laws and rules that were applied to those implicated in cases, and the torture and ill-treatment of arrested persons, have been continuing without any prospects for legal remedies. Many people remain in detention. This situation requires the attention and action of the authorities and local and international rights groups, notably the UN Human Rights Council, in which Bangladesh is a member, which has remained eerily silent concerning these issues.

## ARBITRARINESS AND IMPUNITY PROVIDED BY THE UNCONSTITUTIONAL TRUTH AND ACCOUNTABILITY COMMISSION

During the state emergency the government initiated a "fight against corruption," detaining at least 170 politicians and businessmen under new powers, notably the Emergency Rules-2007. The government prosecuted them in closed Special Sessions Judges' Courts, to which public and media access was denied.

The government formed the Truth and Accountability Commission on July 30, 2008, headed by former High Court Judge Mr. Habibur Rahman Khan as its Chairman,

retired Comptroller General Mr. Asif Ali and retired Major General of the Bangladesh Army Mr. Manzur Rashid Chowdhury as members. Suspects were supposed to disclose information to the Commission about any corruption they committed and declare the amount of assets and money earned through illegal means. These assets were then handed over to the State and the Commission issued a certificate which acts as an exemption from any future criminal prosecution or punishment for these acts. Such persons were barred from contesting elections and holding public or corporate offices for five years. However, the whole process was confidential, apparently to preserve the persons' social dignity. The Truth and Accountability Commission was established for five months, which started on 30 July 2008 and closed in January 2009.

The lack of transparency of this system has been a serious concern, notably as the authorities detained a number of politicians and businessmen during the state of emergency on charges of corruption, many of whom were convicted for a minimum of three years by special tribunals, in secretive trials, which were monitored by the military and did not meet international standards of fair trial. The Constitution of Bangladesh clearly asserts in Article 27 that every citizen has right to enjoy equality before the law, but the military-controlled government manipulated the system with laws ultra vires to the country's constitution.

These Commissions were designed in order to ensure impunity for then-government officials and those connected to them for past corruption, ensuring they cannot be held responsible for any of their actions, while opponents of the regime continued to be pursued for similar offences.

On 13 November, 2008, a High Court Division Bench comprising Justice Mir Hashmat Ali and Shamim Hasnain passed a verdict declaring the Truth and Accountability Commission under the Voluntary Disclosure Ordinance-2008 "unconstitutional and void in its entirety". After hearing a writ petition filed by local rights groups the Court declared this verdict. The Court did not give any legitimacy to the activities of the quasi-judicial body.

However, on 16 November, Justice M A Matin, Appellate Division Chamber Judge, stayed the High Court's verdict for one month after hearing a provisional petition filed by the government. The case remained pending before the Appellate Division at the end of 2008.

Prior to the High Court's verdict the Truth and Accountability Commission had received 389 applications for leniency regarding crimes of corruption – 192 applications were forwarded by the Anti Corruption Commission, 167 by the National Coordination Committee, 20 applied directly and 10 were forwarded by courts.

Human rights defenders and relevant professional groups have been concerned about the fate of the decisions to come from the Appellate Division on this case. At the end of 2008, debates were ongoing regarding the fate of 452 persons, who were given clemency by the Commission, as well as the public resources spent on Commission, if it is finally declared illegal by the Appellate Division.

## GENERAL ELECTION HALTS EMERGENCY AT YEAR'S END

The military-backed government finally allowed much-delayed general elections to be held on December 29, 2008. The state of emergency was lifted on December 18, allowing a brief period for the contesting political parties to conduct election campaigns. The Bangladesh Awami League won a landslide victory securing 262 seats out of the 300 constituencies of the parliament, in an election that was declared "free, fair and acceptable" by international observers, despite the fact that there have been many claims of vote-rigging and manipulation.

Hundreds of voters reportedly did not have chance to enjoy their voting rights as a result of mistaken voter lists and mismanagement by officials at the polling centres, for which the Election Commission later apologized. In several instances, ballot papers were found discarded in several parts of the country. Instead of initiating any credible investigation into the loss of ballot papers, the Election Commission allegedly ordered the police to implicate the persons, including school-children, who found the ballots in their playgrounds and ponds. Despite the allegations of manipulation in the general election, the major opposition parties have accepted its result.

In Bangladesh, the two big political parties have battled it out for many years and elections have always been a race to grab power by whatever means are available, typically resulting in intimidation tactics, violent clashes between opposing groups of supporters and even the deaths of numerous persons in broad day light across the country. Strikes, commonly known as hartal, by the political parties have been a way of life, in which all public and private offices and establishments are forced to close down due to violent political programmes. Election victories are not typically met with the victors behaving responsibly, in accordance with a democratic mandate provided by the people. Instead, winning an election is used as a license by the victorious party to do whatever it wants to do during its period in office.

It is hoped that the newly-elected government will break this cycle and begin addressing the country's many-facetted human rights problems, although the party's past record does little to breed confidence. It is imperative that the damage done to the country's civilian institutions of the rule of law and through illegal and anti-constitutional measures be reversed if human rights are to become a reality in the country for all but the rich and

powerful. The government should take immediate and effective steps, inter alia, to investigate and hold responsible all allegations of illegal arrest, torture and extra-judicial killings under the state of emergency, as a priority.

The emergency government, which likely feared facing the wrath of the upcoming political governments, had negotiations with major political parties prior to holding the election. As part of the dialogues the key officials of the military-controlled government held meetings with two former prime ministers, Begum Khaleda Zia and Sheikh Hasina, whom the government attempted to expel from the political arena having been held in detention on alleged corruption charges.

## RECOMMENDATIONS

1. The state of emergency, which was lifted by the end of the year of 2008, has resulted in significant erosion of the institutions and legal systems' capacity to protect and promote human rights in Bangladesh. The newly-elected government is urged to ensure the swift restoration of fundamental rights, including by releasing all persons illegally and arbitrarily arrested and detained, drop all fabricated charges including those that have resulted in convictions, investigate all allegations of torture and extra-judicial killings and ensure that all provisions in the ordinances issued by the previous government that run contrary to the Constitutions and international human rights law and standards are removed and not allowed to pass into law.

2. The newly elected government should investigate all allegations of vote manipulation and rigging in order to reform the electoral process and the role of the army and police therein, in order to guarantee free and fair elections are possible in the future.

3. Militarisation in the civil institutions and the intervention by the armed forces directly or through its intelligence agencies in the institutions that engender the rule of law must be stopped. All military officers should be removed from the civilian offices they have been occupying in the country's various institutions.

4. The arbitrary abuse of power by law-enforcement agencies through illegal arrest, arbitrary detention, fabricating charges, intimidation and extortion from ordinary citizens, as well as the use of torture and ill-treatment in custody, in the name of maintaining law and order in Bangladesh, must be stopped immediately. A transparent and accountable monitoring system should be launched in order to stop any kind of manipulation by the law-enforcement agencies, with a mandatory provision for prosecuting the alleged perpetrators of the abuses.

5. Torture should be criminalized in domestic legislation in compliance with the Convention Against Torture (CAT), to which Bangladesh is a party.

6. The practice of all forms of extra-judicial executions must be stopped. The agencies and the individual personnel who are responsible for extra-judicial executions should be prosecuted in public, transparent trials before civilian courts.

7. Reforms to the criminal justice system should be launched. Existing laws such as Sections 54 of the Code of Criminal Procedure, the clauses enabling preventive detention under the Special Power Act-1974 and all other laws that are enabling rights abuses should be repealed immediately.

8. Criminal investigations should be conducted by a separate department, not the same police as are being accused of perpetrating violations.

9. An independent and capable prosecution system should be established to assist courts to dispense justice. A competent judiciary – from the bottom to the top – should be established by: recruiting magistrates and judges through an independent Judicial Service Commission beyond any intervention by the politicians and bureaucrats; training judges and magistrates with adequate ethical and practical knowledge about the necessity of effective judicial remedy; providing the required logistics; and ensuring accountability within the institutions.

10. Make the newly formed National Human Rights Commission an effective body by providing it with the authority to prosecute alleged perpetrators of human rights abuses.

11. There should be a clearly proven commitment to establishing the rule of law and human rights, by legislating laws in compliance with the provisions of the international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and Other Cruel, Inhuman and Degrading Punishment and Treatment (CAT) and all other international instruments to which Bangladesh is party. The political parties must make clear commitments in their election manifestos prior to general elections in future, and in public, to guarantee that their policies promote human rights, in line with international human rights norms and standards.

12. Civil society, relevant professional bodies and human rights groups in Bangladesh should consider focussing on the necessity for reforms to the country's criminal justice system as well as initiatives to prepare separate bills on the following issues: i) the criminalization of torture and ill-treatment, ii) removing corruption and delays

in the criminal justice system, iii) making criminal investigation, prosecution and the judiciary competent and accountable, iv) launching a witness protection mechanism that can effectively provide protection to those that require it, v) repealing existing laws that are contradictory to the international human rights instruments.

# B U R M A

## A DOUBLE-DISASTER IN THE 2007 PROTESTS' AFTERMATH

Perhaps the two most significant features of the human rights landscape in Burma during 2008 were the morally bankrupt and blatantly repressive response of the country's military regime to the Cyclone Nargis disaster in May, and the continued detaining, charging and sentencing of persons involved in last September's nationwide protests far beyond the standards of not only international but also domestic law.

### WORLD'S WORST RESPONSE TO A NATURAL DISASTER

The world was stunned when in the weeks after Cyclone Nargis swept through lower Burma on 2 and 3 May 2008, bringing in its wake a tidal wave that submerged vast areas of the delta region and took with it what will ultimately be an untold number of lives, the country's military regime responded in the only way that it knows fit, with further gross repression and violence. The effect of this response was to duplicate the massive tragedy: in the first instance came the natural disaster, which could have been mitigated had the people of Burma been better-informed and prepared; what followed was a manmade disaster, through the unconscionable denial of large-scale aid and persecution of local people who tried to help.

Not only did the generals deliberately avoid contact with world leaders and international organisations desperate to offer assistance to the millions left in dire need of water, basic food and health care, not to mention longer-term relief, but they also forged ahead with the charade of a referendum on a new constitution designed to extend their grip on power indefinitely. Government officials were instructed specifically to neglect the plight of the storm victims and continue their work to prepare for a constitutional referendum, which was merely postponed by two weeks in some townships. The situation even became so absurd that the Secretary General of the United Nations was making phone calls to head of state Senior General Than Shwe but he was refusing to receive them.

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*This report consists of extracts from a special study on Burma published by the sister organisation of the Asian Human Rights Commission, the Asian Legal Resource Centre, in the September 2008 edition of its quarterly periodical, article 2 (vol. 6, no. 3). That study, 'Saffron Revolution imprisoned, law demented', can be downloaded in full from: www.article2.org.*

Realising that the government was not going to do anything to assist, local people, and then those from further away the worst affected areas, began organising themselves. In Rangoon residents and monks cleared roads and shared water and other essentials. In the delta, thousands of homeless people gathered at monasteries and received assistance from monks, many of whom also took on impromptu relief coordinating roles. Convoys of vehicles crammed with items donated by local well-wishers soon began running the gauntlet of military and police checkpoints in order to make up for the shortfall of supplies in the absence of official aid.

The regime went beyond being obstinate to outright criminality when on May 9 it seized the World Food Programme's supplies in Rangoon and forced a planeload of supplies from Qatar to be returned to the country of origin. The taking of the supplies came as such as shock to a WFP spokesman that he rightly described it as "unprecedented in modern humanitarian relief efforts".

Emissaries who visited the country, like the prime minister of Thailand, demonstrated that some small gains could be made, and some concessions were obtained and a degree of international assistance was allowed. However, the amounts of support that got through were paltry by comparison to the scale of the disaster and were accompanied by persistent needless obstacles. For the most part, the response of the Association of Southeast Asian Nations, China and India was belated and inconsistent, despite the enormity of the tragedy unfolding right on their doorsteps. Collectively, they failed the people of Burma. Had the association and these two presumptive superpowers shown strong leadership and a determination from the start then things could have been different. But their inadequate and uncoordinated reactions belittled the disaster as well as its victims and left everything in the hands of the generals.

Persons involved in promoting the domestic relief effort, taking up the slack left by the lack of either international or government aid, have themselves since been charged. Among them have been young men who assisted in cremating and burying the bodies of deceased persons, a nationally renowned comedian, Zarganar, and the leader of the Human Rights Defenders and Promoters Group, U Myint Aye.

Zarganar

Zarganar (a.k.a. Ko Thura), a famous comedian in Burma who took the lead in relief efforts among members of the arts and entertainment industry, had his house searched and was taken away at the start of June. According to information that the Asian Human Rights Commission (AHRC) pieced together from a number of sources, around seven police led by the Rangoon Western District police chief and with the local council chairman

came to comedian Zarganar's house in Rangoon just before 8pm on June 4 and went inside saying that they just wanted to search it. After they recovered a computer, some VCDs of the cyclone damage as well as the new Rambo movie (the story is situated in Burma) and the wedding video of the junta leader's daughter, they said that they would also take Zarganar with them "for a short while", meaning "around a couple of days". They also took around USD 1000 of money for the cyclone relief effort.

Zarganar had been working constantly on cyclone relief since May 7, and had given numerous interviews to overseas-based radio stations and other media about his work and the needs of the people. He had also ridiculed state media reports about the cyclone aftermath and in an interview with the Thailand-based Irrawaddy News service published on May 21, Zarganar said that many cyclone survivors didn't want the UN Secretary General to visit for fear that security would be tightened and that they might get sent away in order to make the temporary resettlement camps look good for the VIPs.

According to Zarganar's sister, he had used all his own money for the cyclone victims and had sold his and his wife's mobile phones (which are expensive in Burma) to fund the work. He had organised over 400 volunteers to work in some 42 villages that had been neglected since the cyclone struck. Following Zarganar's arrest, the group's relief efforts also were halted.

At the end of July, Zarganar and former sports magazine editor Zaw Thet Htwe, who had also been working hard for cyclone victims, were brought into the closed court within the Insein Prison for the first time and like so many of the people accused over the September 2007 protests, charged with violating section 505(b) of the Penal Code for causing public alarm. The families of the two were not informed that they would be brought on that date and charged. Zarganar has in total been charged with seven offences under section 505(b), 295 (defiling a place of worship with intent to insult religion), and under the Illegal Associations Law, Video Law and Electronic Transactions Law.

Similarly, 57-year-old U Myint Aye and two other members of the Human Rights Defenders and Promoters (HRDP) group were in early August taken away as a consequence of their cyclone relief work. A group of police and officials came to Myint Aye's house at around 4pm on 8 August 2008 and after searching it for over two hours and taking some documents and other items they told Myint Aye to go with them for a short while. The group included Police Captain Kyaw Sein of Rangoon Division Police (intelligence), Special Branch personnel, the chairman of the ward council and another council official.

Myint Aye did not come back that night as promised. The next afternoon, another team led by the chief of police in Kyimyindaing Township came to the house and asked for

some sets of clothes for Myint Aye, indicating that he would be detained for some time. They told his family not to worry and to ask for any help if they need it; however, as in other cases like this they did not give any details about where they had taken Myint Aye or why.

U Myint Aye

Although Myint Aye's house was itself damaged in the storm he instead had gone promptly to the worst-affected areas and was by May 6 among the first people to haver reached the delta and begun reporting to overseas-based media about the lack of any assistance. After a few days he told one Thailand-based group that

The refugees' suffering here is great. We have bought and distributed as much rice grain as we can. HRDP Bogalay residents have taken charge. We can't distribute it to one (victim) by one. We'd get trampled by the crowds. We give three bags of rice to a monastery to cook, the next day, another three bags. So far we've distributed over 70 bags a little at a time like that.

Myint Aye's detention followed that of another two members of the HRDP group. Myo Min, who lives nearby, was taken on August 6 and Ko Thant Zaw Myint was taken on August 7. The arrests coincided with the visit to the country of the new United Nations special expert on human rights in Burma.

In September, it was reported in the state-run media that Myint Aye is to be charged with allegedly organising bombings in Rangoon and for receiving money from abroad for that purpose. These charges appear aimed at destroying the work of the HRDP, many of whose members have already been arrested and imprisoned in the last two to three years. They include Ko Thiha, who has been convicted of sedition (Penal Code section 124A) and upsetting public tranquility, sn. 505(b), sentenced to 22 years in prison; Ko Myint Naing, 40, Ko Kyaw Lwin, 40, U Hla Shein, 62, U Mya Sein, 50, U Win, 50, and U Myint, 59, the "Hinthada 6", sentenced to four to eight years for upsetting public tranquility [Penal Code section 505(b)(c)] and Ko Min Min, 30, residing in Pyi Township, sentenced to three years' imprisonment for illegal tuition.

## SAFFRON REVOLUTION IMPRISONED

In the year since the nationwide monk-led protests that shook Burma in response to a dramatic and sudden increase in fuel price rises on 15 August 2007, which became known around the world as the Saffron Revolution, the cases of hundreds of people and forcibly disrobed nuns and monks who are accused of having had key involvement in

the rallies have been winding their way through the country's courts. The cases are, as in the manner of the crackdown itself, characterised by patent illegality and often are little more than an exercise in nonsense, where the courts are being forced to participate in their own debasement and caricature. The trials are being held behind closed doors, with charges brought under one section of law and changed to another, without investigating officers being able to bring any evidence or even say when or where an alleged offence occurred, police witnesses admitting that they know nothing about the cases that they are presenting other than that they have been ordered to come and present them, and judges sitting as spectators to the absurd charade.

The handling and movement of the cases through the courts is consistent with the handling of the protests themselves. As the AHRC described in its 2007 human rights report, the defining characteristic of the crackdown was its patent illegality by all standards of law, including Burma's own law. State-run newspapers did not even describe arrests as such, instead referring to people being "brought, investigated and questioned". Accused persons were abducted and held in unofficial sites, from a technical training institute, to an old racetrack, to the military dog pens. The one place where they were not held was a police station, even though no declaration of emergency or any other extraordinary law was introduced to authorise the authorities to behave outside of the ordinary law, which requires that the police be custodians of criminal detainees, and that anyone be brought before a judge within 24 hours. Nor have prisoners had access to the International Committee of the Red Cross, which has been unable to obtain access to facilities in Burma since the government insisted on having its representatives attend interviews between ICRC staff and its charges, which is in breach of the committee's charter.

Khin Sanda Win

For instance, a group of men in plain clothes, apparently members of a government gang and a government-organised mass group, allegedly stopped Khin Sanda Win, a 23-year-old university student, in Rangoon at around 10am on 29 September 2007 during the military-led crackdown on protestors. They searched her and although she only had her ID cards, a small amount of money and some personal items, they tied her hands behind her back and took her to the town hall. There she was put together with ten men who were unknown to her and then they were each photographed with various weapons, including knives, slingshots and pellets. Then they were allegedly forced to sign confessions that the weapons had been found in their bags. When Khin Sanda Win refused to sign, one of the men in plain clothes hit her on the head with a bamboo rod. That night, she was sent to a special interrogation centre and she was kept there without charge, warrant or otherwise until October 7, when she

was transferred to the central prison and held there, again without charge, warrant or any other legal order until October 25, when she was sent to the Hlaing Township Peace and Development Council office where in the presence of the council chairman and her parents she was told to sign a pledge that she would not take part in any anti-state activities, after which she was released.

Although it seemed like Khin Sanda Win's ordeal was over, it was not. On November 1 two police officers came to her house and informed her that she would be charged with having illegal arms, although the "arms" they claimed to have found were a slingshot and some pellets, which do not violate the law. When Khin Sanda Win went to court the next day, the charge that was put against her was not as the police had indicated but instead acting "to endanger human life or the personal safety of others" (Penal Code sn. 336). This is a charge for which the accused can get bail. But when her lawyer applied, the judge set bail at five million kyat (USD 4000) from two separate bailors. In fact, this amount was far more than the amount that they judge could legally set, which is three million kyat (USD 2400) from a single bailor. Then, on November 12 the judge, without any request from the police, unilaterally revoked the bail on the absurd grounds of Khin Sanda Win being a threat to security forces personnel because the charge against her relates to the "disturbances" of September. Khin Sanda Win's lawyer unsuccessfully appealed at the subdivisional and divisional courts to have her released on bail on health and legal grounds.

Then there is the case of Ma Honey Oo, who is accused of having had contact with overseas radio stations to give out information at the time of the protests, and having been involved in making a student union. She was taken into custody on 9 October 2007 but was not brought before a court until December 20; during those more than two months she was held illegally without charge at the central prison. The police accused Honey Oo of having been involved in a student union, having talked to foreign media by telephone and of having participated in protests at the Yuzana Plaza and on the road from Mingalar Market to Natmauk on 25-6 September 2007.


Ma Honey Oo

In court the police could not produce any evidence to support any of their claims against Ma Honey Oo and on the contrary showed ignorance and confusion about the laws under which she had been brought. The investigating detective, Sub-Inspector Soe Moe Aung, in cross-examination said that the information they had that Honey Oo was part of the group accused of having contact with overseas media was from a reliable source, but he could not divulge the source to the court and the source was not included among the list of witnesses in the case. He had no evidence to present to the court other than

the supposed confession of the accused. Nor could he produce any photographs or other evidence that Honey Oo was in the protests as he had claimed in the charges against her, saying only that eyewitnesses had seen her, although he acknowledged that it was the responsibility of the police to take photographs and bring enough evidence with which to support the case. On the other hand, among the "evidence" presented against Honey Oo was that she had gone for English lessons at the American Center library, about which the defence lawyer asked if it was a crime to learn English; the officer replied that he just collected and gave information about her and it wasn't for him to decide if it was relevant or not. Finally, on the charge of sedition, the defence lawyer pointed out to the policeman that there was nothing in the case brought against his client that could meet the elements of this charge and at most she could be charged with obstructing a public thoroughfare. Sub-Inspector Soe Moe Aung replied that the protests included seditious behaviour but when asked to explain the section to the court he admitted that he could not.

The chief of the Tamwe Township police, Inspector Hla Thein (Police No. La/155953) said that on December 10 he received four interrogation records of Honey Oo from Sub-Inspector Hla Htun, SB, which he submitted to the court as evidence. When the defence lawyer asked him if he knew that the accused had been interrogated "under duress" the police chief denied it, but when the lawyer challenged him, he admitted that he didn't actually know how she had been interrogated. The lawyer also asked the officer if he didn't know that Honey Oo was taking an exam on September 25 and couldn't have been on the road waving a flag as the eyewitnesses had purportedly said, Inspector Hla Thein replied that he didn't know this but maybe she had gone before she went to the exam, although he also didn't know what time she might have had the exam. When told by the lawyer that the time of the exam was the same as she was supposed to have been on the road and therefore the eyewitnesses must be lying, the police chief denied it and said that it must just be a matter of not being able to identify the time of her involvement in the protests exactly. The chief also claimed fantastic ignorance of basic criminal procedure, denying knowledge that the Evidence Act prohibits forced confession and also that he is supposed to keep a record of any investigation in his station's Daily Diary, not in a personal book as he said he did. Finally, coming back to the submitting of the confessions to the court, the defence lawyer asked the police chief if he knew that they were inadmissible, to which the inspector replied that "in some cases they [are]" but asked to explain to the court which cases these would be he admitted that he was unable to do so.

Importantly, Honey Oo was first detained on 9 October 2007; however, she was not put in remand until December 20, during which time she was held in Building 3 of Insein Prison without charge. When the defence lawyer asked the police chief about this, he simply said that he was not involved in the case for the period of alleged illegal

detention, but denied anyhow that it had been illegal. The lawyer observed though, and the policeman agreed, that she had not been charged until December 17, so that when the lawyer asked the officer to confirm that Honey Oo was arrested and held for over two months before the case was opened, he replied, "I don't know."

At the same time that the case was brought against Honey Oo another under section 124A was brought against a 20-year-old man named Aung Min Naing, who was detained on September 7 and accused of joining around 50 persons on August 23 and going to Tamwe Plaza and the road in front of the Tamwe Temporary Market and Kyaukmyaung Market and marching in protest at the fuel price hikes, for which he was also held for over three months without remand and charged with sedition by the same police as in Honey Oo's case. Again the police laid the charge apparently without properly understanding it, Sub-Inspector Soe Moe Aung admitting that the decision to do so had nothing to do with him and that he was working was "under instructions" from somewhere and someone else. He also acknowledged that he didn't know whether or not there is even a law for obtaining a permit to rally on the road. Again, neither he nor Inspector Hla Thein had any evidence to present to the court at all, and the inspector inadvertently denied having made an illegal arrest without the defence lawyer even asking him about this. Again, the police had presented an inadmissible confession to the court, allegedly obtained through torture, which they denied. Finally, in response to the lawyer's question about whether the policeman understood or not that in the absence of other evidence witness testimonies alone do not constitute a strong case, the officer replied, "That's not so."

**Win Maw**

Then there is the case of Win Maw, who was arrested and charged by Special Branch police with having upset public tranquility because during the August and September protests he sent news by phone and email and took photographs for the Norway-based Democratic Voice of Burma (DVB) radio, together with an assistant. Win Maw, who was imprisoned previously for seven years under emergency regulations from 1996 to 2002 for performing as lead guitarist in a rock group, has been accused of sending false news abroad in order to damage the public well-being. The reason that the police have accused him of this offence is that it is not illegal for a person in Burma to have contact with overseas media, so by Win Maw sending the news to DVB he was not doing anything wrong: only if the police accuse him of sending false news with intent to harm the public can they try to make a case out of nothing.

The case opened against Win Maw on 28 March 2008 in a closed court, like other cases

from the protests of last year, which is against the normal procedure of courts in Burma. Again as in other cases of its type from last year, the police couldn't present anything to show that Win Maw had been sending the news in order to do what they said he had done. The police gave a list of "evidence" to the court that includes legally-published books owned by Win Maw's father and bearing his signature, some photos of democracy leader Daw Aung San Suu Kyi, which also are not illegal, and a computer hard disk. If Win Maw had prepared anything against the law as accused the police should have been able to find it on the hard disk and present it as evidence, but they have not. Only the disk itself has been submitted as evidence. Also, what they recorded on the evidence list as 18 "political" texts they admitted in the court are actually just English learners from the American Center, where Win Maw had gone to study.

Another thing about the case against Win Maw is that of the eight witnesses listed for the prosecution, six are all Special Branch police, including Police Major Ye Nyunt. The other two are civilians identified as Maung Maung Than Htay and U Zaw Thura, who were witnesses to the search as required by the Criminal Procedure Code (section 103). The purpose of having the two witnesses is so that there are independent observers to the actions of the police, so that later if there were any confusion about what had occurred then they could be called to testify and verify facts to a court. However, in the perverted legal setting of Burma this purpose has been completely lost. Instead, Police Major Ye Nyunt has been using the same two "witnesses" for repeated cases.

Similarly, Police Major Ye Nyunt has also charged 39-year-old Zaw Min (a.k.a. Paung Paung) under section 505(b) with having had contact with Win Maw and sent 'false news' abroad (Felony Case No. 112/2008 Sanchaung Township Court, Judge Daw Than Htay, Assistant Township Judge, No. Ta/2043 presiding). The list of prosecution witnesses in his case consists only of four Special Branch officers, including the officer bringing the case. As in Win Maw's case there is no evidence to match the elements of the charge against the accused, and in fact no evidence at all: the police allege that they had arrested Zaw Min in possession of a memory stick with photographs on it but they could not produce the said memory stick in court. Nor could they produce documents in court to show that he had produced any false news. The absence of evidence can be partly explained by the fact that as in other cases of its sort, the police were not actually the ones to have made the arrest of the accused. Rather, it was the MAS who took him and then gave the case to the police with instructions on how to prosecute it. The army also held and interrogated Zaw Min before transferring him to the police, which is against the law. The police also presented a confession to the court obtained from Zaw Min while he was in custody, probably through the use of torture, and read it to the court in order to "refresh his memory" which violates the Evidence Act not only as such confessions are not allowed but also because material brought to refresh the memory of a witness must be that which the witness wrote him or herself (sections 26, 159).

One of the cases that the same police officer has lodged using the same two witnesses as in the case of Win Maw is against blogger Nay Phone Latt. Like Win Maw, Nay Phone Latt has been charged with section 505(b) after he was arrested at the end of January 2008 and accused of having defaced images of national leaders, writing and cartoons in his email inbox and having distributed these to upset the public tranquility. According to the police, in December 2007 when he went to Singapore he also met political activists and went to see the "Four Fruits" (Thi Lay Thi) entertainment troupe, whose CDs of performances he copied and passed to others, among other things.

Nay Phone Latt

There is as in other cases arising from last year's protests a range of problems with the cases against Nay Phone Latt. First, the police have not presented any evidence that he had himself been responsible for distributing any of the contents that they found in his email inbox, which he had received from elsewhere, not made himself. Secondly, the information given by the police on events in Singapore are irrelevant to the cases that have been lodged against him. Thirdly, the entertainment troupe had up to the time that it went to Singapore had its CDs freely sold in Rangoon. Fourthly, Nay Phone Latt was interrogated and detained at an army camp, a fact acknowledged by the investigating officer in his testimony, which is a flagrant violation of the law on evidence. And finally, fifthly, the case was yet again heard in a closed court inside the Insein Prison, rather than in an open court as should usually be done by law.

Another person who has been charged together with Nay Phone Latt under section 505(b) (Felony Case No. 70/2008) is Thin July Kyaw, a young woman accused of having taken items for persons in hiding after the protests. According to the police, Thin July Kyaw received items of clothing and CDs from Nay Phone Latt one time at the American Center and one time at a teashop in the Yuzana Garden that were for another person named Ma Ni Moe Hlaing. Furthermore, Thin July Kyaw was accused of having contact with one of the young women who led the first protests in August, Nilar Thein, through a school friend, and of having sent money and other things to her after she went into hiding in August.

Thin July Kyaw

Lastly, how the ordinary criminal law is used to target anyone in Burma for any purpose that the state sees fit is exemplified in the case of Khin Moe Aye and Kyaw Soe. As Police Major Ye Nyunt apparently had no case that could be brought against

them under the Penal Code he has instead charged them with illegally buying and hoarding foreign exchange.

As in Burma authorised exchange outlets give very low rates it is common for people, like in all other areas of life, to buy and sell foreign exchange through the black market. Unauthorised traders in money can be found everywhere in Rangoon, and the police and local authorities also engage in this trade and turn a blind eye to those buying and selling cash under their watch. However, the police officer bringing this case has accused Khin Moe Aye of having been in illegal possession of about USD 1300 and 100 Euros and Kyaw Soe of having kept the money because of their suspected connection to other people involved in the protests of last year.


Khin Moe Aye

There are as in other cases many flagrant breaches of ordinary law in the charges against the two. First, the items of evidence were purportedly kept at the special court inside the Insein Prison rather than at a police station as required by law, although there are serious doubts about the existence of any such evidence at all: the "witnesses" that this evidence was collected and stored at the prison facility are prison guards, rather than ordinary citizens as is normally required. Secondly, as this is an ordinary criminal case it should have been handled under the Sanchaung police station, which covers the area where the offence is alleged to have occurred, not through Special Branch. Thirdly, although the case is under the jurisdiction of the Sanchaung Township Court, the hearings are being conducted inside the prison, which not only violates the law on holding an open inquiry, but also breaches the ordinary criminal procedure that the case should be heard in the court of the locality where the offence was allegedly committed. There are neither grounds nor authority for this case to have been transferred for hearings inside the prison, not in accordance with the law on procedure or any orders given. Fourthly, the two accused were illegally held in prison from December 16 until 26 March 2008 when they were finally brought to the court, without any remand, a fact admitted by the investigating officer in his cross-examination before the court.

It also emerged from the details of the case as given by Police Major Ye Nyunt in court that as in other cases of this type the police did not arrest the defendants at all but MAS personnel did at Kyaik Htoe town and sent them to the central prison, and transferred the case to the police for prosecution. When the two were originally brought to the prison also, the officers had not uncovered the foreign exchange, and it was only as they were going through the baggage of the couple that in the presence of prisons' officials they supposedly found the money upon which the charges were laid. In other words, the

two accused were first detained and brought to the central prison without any specific charge or suspicion having been levelled against them at all and only once there was the case made. However, the officer who brought the case to the court was not involved in any of this and had no specific knowledge to offer other than what he had been told to present by his superiors.

## GOING BEYOND "REGIME CHANGE"

Over forty years of militarism has destroyed the livelihoods of the majority of people in Burma. Only a handful that are close to the military regime and others who participate in keeping the machinery of repression alive obtain some benefit from the situation. Together with destitution, destruction of livelihoods and widespread poverty there has also been the destruction of the entire political system and the administration of justice. There are no credible means of public representation through political leaders or parties. There is no free media and the system of the administration of justice after years of suppression has disappeared. The policing system is basically a surveillance system; independent investigation of crime does not exist.

Even under these circumstances people have tried to organise and express themselves, only to be met with repeated uncompromising brutality. After last September, among the small amount of support hoped for from abroad was an investigation by the United Nations, but even this little was defeated by players in the international community, including the government of India, which argued that since the military regime promised to conduct inquiries then no external ones were necessary. If a murderer promised to conduct an inquiry into the alleged murder, or for that matter any alleged criminal gave an undertaking to conduct the inquiry into the criminal act, anyone would see the ridiculousness of such a situation. The government of India, the country that calls itself the largest democracy in the world and which also got the largest number of votes to sit in the UN Human Rights Council either does not see this as ludicrous or does not care. Its cynical manipulating of international agencies for some perceived small economic advantages defies description. That the rest of the international community was not able to do anything in the face of such a ludicrous situation only compounds the absurdity of the whole thing.

That despite many decades of talk about democracy in Burma things have further degenerated comes as little surprise. That the global democratic movement and human rights movement have failed to make an impact is not a matter of bad luck. There are some fundamental flaws within these movements that are contributing to failure. Those of us concerned with these movements need to look at them and ourselves self-critically if improved strategies are to be found to address the problems of Burma.

The biggest flaw is the failure of democratic and human rights movements to understand and articulate the linkages between justice and politics, and how strategies can be developed to address the two simultaneously.

Various forms of pressure on a political front may eventually force a military regime to give in to demands for democratic reforms, but these may also fail to account for the consequences to mechanisms of justice in a country that has been under military rule, which in Burma's case is now effectively into its 50th year. Many years of neglect and deliberate abuse of justice institutions results in them withering and becoming all but dead, even if still housed within the body. No amount of simple political pressure can revive them. In fact, the justice system of Burma is in an even worse situation. It is like a living-dead organ, existing for the purpose of supporting military rule. It is a system of injustice that has become organically linked to the equally unjust political system of the country, and one that if pressured can but work harder to support the diseased body with which it has become fully integrated.

Globally, the demands placed on military regimes are articulated in very simple terms. They often come down to the holding of an election so that a government of popular choice can be installed. There is nothing objectionable in that. However, a political system that has destroyed a country's justice mechanism cannot be changed by a mere election, for at least two reasons.

First, often elections are not honoured, as was the case in Burma when the National League for Democracy overwhelmingly won the vote but was not allowed to take office. The same thing happened in Cambodia when the FUNCINPEC party won the May 1993 UN-sponsored ballot but was forced to share power with the Cambodian People's Party of Hun Sen, which later consolidated control and has effectively brought about a one-party system of the sort that preceded international intervention. There too the ruling group has used the courts to ensure firm control of parts of government not directly under the executive.

Second, the political and judicial system may be so perverted by military control that it may bring into power unlikely and unsuitable candidates and it may anyhow be impossible for whoever takes power to do anything about the institutional arrangements. This is the problem faced in Thailand, where the courts have become complicit with the armed forces and other powerful groups in the country in defeating the political party process itself. That the country is increasingly treated as ungovernable by anyone apart from an authoritarian-type leader is not a consequence of the behaviour of its people or anything innate in the workings of its institutions but a consequence of a deliberate agenda towards that end by these groups who are hostile to people having a genuine say in what goes on in their lives.

So although the political response to Burma is invariably reduced to "regime change", experience shows that even a short term and oversimplified goal like this often remains beyond reach, and in places where it has succeeded, such as the Philippines and Indonesia, although conditions may in certain respects improve, the forced collapse of institutions under the old regimes have lasting and intense consequences for the new ones. Over time people in some such places begin to doubt that there was actually any change at all, apart from a reduction in overt violence for a while. And the violence too gets back in under the new regime after a brief interval, in the absence of mechanisms to deal with it.

If more people in democratic and human rights movements locally and globally adopt a dual approach of combining struggle for regime change with struggle for legal reforms then new opportunities may open up in places like Burma rather than simply by putting pressure on a military regime to hold an election and admit some superficial political reforms. This can be done in many places and at many levels. For instance, despite all the United Nations experts, diplomats and officials coming and going and talking about Burma, how much effort has been paid to documenting and monitoring the work of its judicial system in terms of international standards and putting forward proposals on specific items that need to be addressed, items on which the government will feel some obligation to respond and on which local lawyers, human rights defenders and activists also can work in their respective ways? The answer to this question is shorter than the question itself. No such work has been done, even with the presence of country offices like the UN Office on Drugs and Crime. Monitoring and reporting on the policing system similarly has so far amounted to nothing. The human rights movement has remained stuck at the point of documenting individual violations and incidents without steps to bring that work into bigger and more meaningful studies on systemic issues. Serious work in these areas could be more effective than the types of two-dimensional back and forth about political party issues that goes on at the moment. It is in this respect that we now need to develop our thinking and planning and hone our expertise if better strategies for the protection and the promotion of human rights of people in Burma are to figure in the global democratic and human rights agendas.

# CAMBODIA

## A TURNING POINT FOR THE WORSE?

*The human rights situation was conditioned by several significant developments in Cambodia in 2008. The first development was the parliamentary election held in July whose outcome was a "landslide victory" for the ruling Cambodian People's Party and the continuation of the same government with increased power and size. The second development was the planned enactment of a long-feared law to restrict the activities of NGOs. The third was the conclusion of the conflict over the assessment of the human situation between the Cambodian government and the UN Secretary-General's Special Envoy, a resolution which lead to the resignation of the Special Envoy and his replacement by a Special Rapporteur.*

### 1. THE ELECTION AND THE NEW GOVERNMENT

In July 2008, Cambodia held a parliamentary election, the third after the UN-organised election in 1993. Eleven political parties were competing for the 123 seats in the National Assembly in 24 municipal and provincial constituencies. This election has portrayed the country as a multi-party democracy.

There was less violence than in the previous elections, and the National Election Committee has won appreciation for its technical ability to organize the July election.

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*This report details briefly all these developments before covering in more detail the underlying situation of human rights.*

Despite this appreciation, this election nevertheless fell short of key international standards. Reports by election monitors have highlighted the lack of respect for and the violations of many human rights that had been going during and outside the electoral process.

There was no particular complaint about denial of the right to stand for election. Yet, through its control of all state institutions, its control of the media and its overwhelming resources, the ruling party had a firm grip on the electorate and limited their freedom of choice.

The other contesting parties could not campaign in freedom and peace. They faced various obstructions from public authorities, including violence, threats and intimidation, and unequal treatment before the law.

The electoral process not only highlighted the lack of respect for and violations of the rights of the electorate and contesting parties, but it also served as an opportunity for abuses of other rights, namely land grabbing, corruption and the absence of the rule of law, to come to the forefront.

The July election had many features of a democratic election. Yet one party, the Cambodian People's Party (CPP), dominated the whole electoral process: the registration of voters, the activities of contestant parties, the media, the influence on the electorate, and the adjudication of election conflicts.

The National Election Committee (NEC), Cambodia's election management board, is dominated by the CPP. NEC members were appointed by the CPP-dominated National Assembly. The CPP has a majority on the NEC and an overwhelming majority of NEC operatives are CPP members or supporters. The registration of voters is carried out by the CPP-dominated local authorities.

The NEC is also an election dispute adjudicating mechanism. Appeals against its judgments are heard by the Constitutional Council on which the CPP also has an overwhelming majority.

The CPP has effective control of the media, especially radio and TV, which were running news on the activities of CPP leaders and very little, if at all, on those of the other party's leaders. Three leading parties other than the CPP were able to hire the airtime of a private radio station with a limited coverage radius.

The CPP has control over all state institutions from the three branches of government down to the village chiefs and almost all positions in the civil service, the army and the

police are staffed by its trusted members. At the grassroots level, almost all commune officials and village chiefs are its members and agents. All these officials and agents have exercised control over the electorate and limited the activities and influence of other parties.

In the July election, the CPP introduced a new strategy to win popular support by assigning senior government officials to assist those commune and village officials to get the support of the electorate with actual or promised construction of various infrastructure or social projects, humanitarian relief handouts and money, and all these expenses were funded by those officials themselves. Although there is no computation of all parties' election expenses, some have privately estimated that these expenses could run into hundreds of millions of US dollars for an electorate of just over eight million in a country where the estimated GDP per capita was US$571 in 2007 (US government source, http://www.state.gov/r/pa/ei/bgn/2732.htm ).

Furthermore, the CPP gained more popular support when the government had succeeded in getting UNESCO to list an ancient temple called Preah Vihear on the Thai border as a World Heritage site, right in the middle of the election campaign. The news was greeted with festive ceremonies across the country, and aroused strong Cambodian nationalism and enhanced strong popular support for the ruling party, when Thai troops had entered and occupied the area around the temple following the listing announcement.

The CPP had "a landside victory" winning 93 out of 123 seats in the National Assembly. It was followed by Sam Rainsy Party with 26 seats, Human Rights Party with three seats, and FUNCINEC and Norodom Ranariddh Parties with two seats each. However, two contestant parties, Sam Rainsy and Human Rights, have rejected these results on the grounds that nearly one million legitimate voters reportedly had their names deleted from the electoral rolls, while many illegitimate voters were allegedly issued papers to cast their votes for the CPP.

According to the procedure provided for in Cambodia's Constitution of 1993, the new Parliament should convene within 60 days after the election. It should begin with the adoption of its standing orders and elect its speaker or chairman and two deputy speakers or vice-chairmen. Based on the same constitution, Cambodia is supposed to be a Westminster-modelled parliamentary democracy under a constitutional monarchy. But, in practice, unlike its Westminster-modelled counterparts, the Cambodian Parliament pays no regard to the impartiality of its speaker and deputy-speakers. It elects them among leaders of parties who have already been pre-selected by the dominant party. This party may allow the leader of another party to be one of these house speakers.

Once its leadership has been elected, the same Parliament should proceed to elect the chair and vice-chairs of its nine committees. Again, in practice, these leaders of committee have also been pre-selected by the dominant party. This party may allow leaders or members of other parties to chair several committees. The next stage is for the Parliament's chairman, in consultation with his deputies, to select a leader of the party with a majority to propose for the King to appoint as Prime Minister. This Prime Minister then presents his cabinet to the Parliament to get its vote of confidence.

In the aftermath of the 2003, there was a stalemate in the composition of the leadership of the Parliament and of its committees as well as that of the new government, when the dominant party could not secure the two-thirds majority of seats required for the election of those leaders and for the vote of confidence in the government. After a protracted stalemate for many months, the dominant party, the Cambodian People's Party (CPP), which was already in the government, introduced an Additional Constitutional Law to institute voting in bloc for the pre-selected composition of the leadership of the National Assembly as well as for the pre-selected composition of the government. This bloc voting is to be carried out without any debates, by a show of hands.

Through a coalition deal with the second party, FUNCINPEC, the ruling party forced the new National Assembly to adopt this law before this assembly had properly been convened.

The objective of this law was to address the "necessity" to overcome the impasse that the dominant party in government had encountered at that time in having the government's composition of its liking. There were protests against this law, claiming it was unconstitutional when the then new National Assembly had not properly convened, adopted its standing orders and elected its leadership and chairs of its committees in accordance with the 1993 Constitution. But the CPP-dominated Constitutional Council declared the law was constitutional.

The dominant CPP then prepared beforehand the composition of the leadership of the National Assembly and its committees and also the composition of the new government, and submitted the whole package to the assembly to cast its vote by a show of hands to approve it without any debate.

In 2006, the two-third majority requirement provided for in the 1993 Constitution for the vote of confidence in any new government, for the election of the parliament's and its committees' leaderships, and for the adoption of any law was amended and changed into an absolute majority. But when the new National Assembly convened on 24 September 2008, the CPP, which had secured over a two-third majority in the July election, still resorted to the same bloc voting when there was no "necessity" for it at all.

However, by resorting to this bloc voting procedure, the CPP has denied the rights and freedoms of Members of Parliament as representatives of their respective constituents and the whole nation as provided for in the 1993 Constitution. Furthermore, the CPP, through the same package vote, has denied the other parties an active role in the leadership of the National Assembly, as CPP members have assumed all the chairmanships and vice-chairmanships of the National Assembly and its various committees. The legislature in effect represents the CCP voters and not the entire nation. The National Assembly has effectively lost its status as a separate branch of government. It is subservient to the government it has created, and through it, to the CPP. This branch of government has lost the power to provide checks and balances at the outset. As the other branch of government, the judiciary, is also already under political control, all checks and balances in the system are gone. Power will further concentrate in the hands of the executive, meaning in those of Prime Minister Hun Sen, the strongman of Cambodia, with unknown but feared consequences on the human rights and freedoms of the Cambodian people.

Through bloc voting and through the use of his power as Prime Minister, Hun Sen has now formed a government comprising 463 members, one third bigger that his previous government, to run 26 ministries and two government departments in a country which has 13.4 million inhabitants (March 2008 census). These members comprise:

Prime Minister - 1
Deputy-Prime Minister - 9
Senior Minister - 16
Minister - 34
Secretary of State - 198
Under-Secretary of State (non-cabinet members) - 205

Hun Sen has not only bypassed the constitutional procedure for the election of the leadership of the National Assembly and its committees and for the vote of confidence in his government, but also overlooked the legality of action of his government. Article 3 of the Law on the Organisation and Functioning of the Council of Ministers (1994) says that "The Royal Government shall manage the general affairs of the State in compliance with the policies and plans of the State as adopted by the National Assembly."

Hun Sen had not made any policy address announcing the policies and plans of his government or had the National Assembly adopt them, after securing its vote of confidence on 25 September, which is needed before his government can implement them. Instead he made this policy address to his Cabinet at its first meeting on 26 September and announced that his government was going to implement those policies and plans without securing the National Assembly's prior approval.

## 2. THE NGO LAW

After securing an overwhelming majority in the Parliament, Prime Minister Hun Sen has reactivated the government's plan to regulate the activities of NGOs. The reactivation of the plan by the Prime Minister seems to reflect his frustration with continued criticisms of his government's records on human rights and civil society's continued advocacy concerning the observance of and respect for human rights, which is a key component of the government's international obligations. These obligations have issued from the Paris Peace Agreements of 1991 that put an end to the war in Cambodia.

Under these agreements, Cambodia has undertaken, inter alia, "to ensure respect for and observance of human rights and fundamental freedoms in Cambodia; to support the right of all Cambodian citizens to undertake activities that would promote and protect human rights and fundamental freedoms;" to establish "an independent judiciary … empowered to enforce the rights provided under the constitution."

Many in the government have shown their dislike of human rights defenders who have been vocal in their criticisms of corruption, logging and deforestation, land grabbing, political control of the judiciary, the lack of freedom of expression and assembly, wide income disparity, high unemployment, and a whole host of other social ills.

Two days after the approval of his government, on 26 September, Hun Sen announced at his first cabinet meeting his plan to enact a law to regulate NGOs, citing his concern that their funding could come from terrorist groups. He said: "We have a concern that sometimes under so and so NGO, financial assistance has been provided for terrorist activities, take for instance the Al Um Quran under which Ham Bali hid himself in Cambodia."

The government has made this law one of the three laws it is going to enact as a matter of priority, the other two being the penal code and the anti-corruption law. This is a strategic package to dampen any criticism when both the civil society and the donor community alike have been pressing the government for a long time concerning the adoption of the two latter laws, especially the anti-corruption law.

The previous government had floated on and off the idea of an NGO law for many years, and this idea has hung over the heads of members of civil society like a sword of Damocles throughout this time. In 2006 the government put out a draft for debate with civil society. After several consultations this draft was shelved.

Many in civil society are sceptical about the purpose of this law when virtually no NGO has caused any noticeable scandal. The NGO law may not be just another measure to

fight terrorism in Cambodia. The fears of NGOs being funded by terrorist organizations are hardly founded, when financial activities of such organizations are adequately addressed by the anti-terrorism law that the government had already enacted in 2007.

Since the idea of an NGO law was floated, it has been suspected that this law would be used to control the activities of human rights NGOs whose freedom of action has been already much curtailed by different executive orders. A remark made in 2006 by Heng Samrin, the President of the National Assembly and Honorary President of the ruling party, the Cambodian People's Party (CPP), when the first draft law was issue, is still haunting them. Heng said: "Today, so many NGOs are speaking too freely and do things without a framework. When we have a law, we will direct them." After the July election Heng is still holding the two positions.

Actually, the constitutional rights and activities of NGOs have already been much restricted by guidelines the Ministry of the Interior issued in 2005. These guidelines instruct all commune authorities (grassroots authorities), among other things, that all activities of non-governmental organisations, associations and civil society organisations, "must have cooperation from provincial or municipal governors" and "all invitations to provincial, district and commune officials to attend any seminar or training sessions must have the approval" of these governors as well.

These guidelines in effect restrict the activities of NGOs as their members have to travel potentially long distances to the offices of provincial or municipal governors and get through lengthy bureaucracies to get such approvals.

Cambodian local authorities have rigorously enforced the guidelines of the Ministry of Interior and have banned or interrupted many NGO activities, especially the holding of public forums for the public to debate issues affecting their livelihood. Thanks to public pressure from inside and outside the country the enforcement has been relaxed. However, not all local authorities have relaxed their control and bans (see the section of this report entitled Freedom of expression and assembly).

When the government has such an overwhelming majority in the Parliament, when the opposition is marginalized (see The election and the new government), and when the international monitoring of the human rights situation in Cambodia by the UN are downgraded (see The resignation of the UN Special Envoy for human rights), there is practically nothing that can hinder the enactment of whatever NGO law the government might desire.

With the anti-human rights NGO sentiment prevailing in the government at present, it is unlikely that this law is going to adequately guarantee the rights and freedoms of

Cambodian people to engage themselves in the promotion of human rights, as stipulated by the Paris Peace Agreements. It is likely that this law will restrict further the activities of NGOs. These NGOs will be muzzled and will not be able to serve, as they have been doing so far, as one of the main bulwarks for the protection of human rights. This NGO law could be yet another step in Cambodia's journey down the road to serfdom from which the international community had helped it be extricated in the early 1990s.

There is little the international community can do to stem this trend, as this community has lent little support to a UN Special Representative for human rights in Cambodia and raised no eyebrows when he offered his resignation.

## 3. THE RESIGNATION OF THE UN SPECIAL ENVOY FOR HUMAN RIGHTS

On 1 November 2005, Prof. Yash Ghai, from Kenya, was appointed Special Representative of the UN Secretary General for Human Rights in Cambodia, the fourth since the post was created in 1993. This post was created by virtue of the Paris Peace Agreements mentioned above. These agreements stipulate, among other things, that, after the end of the UN's peacekeeping operation and transitional administration of Cambodia, "The United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly..

Based on his meetings with a wide range of people in the government, civil society, and victims of human rights violations, his visits to the scene of violations of human rights, and recommendations made by his predecessors, Ghai has since made remarks about the human rights situation in Cambodia together with his own recommendations for its improvement. Among other things, he has made remarks about the lack of judicial independence, its control by the executive, and its service for the rich and powerful at the expenses of the poor and the weak, especially in land grabbing cases. He has gone further than his predecessor to make a remark on the concentration of power in the hands of one man, the Prime Minister, which he further added was not conducive to the respect for human rights.

All these truthful findings have very much irritated Prime Minister Hun Sen and his government. Instead of addressing the problems Ghai had raised, Hun Sen has mounted continued attacks on his personality. Hun Sen called Ghai "short-tempered", "deranged", and "lazy". At one time, in 2006, Hun Sen called on the UN Secretary-General to dismiss Ghai. He also threatened to close down the field office of the UN High Commissioner

for Human Rights created by virtue of the same Paris Peace Agreements, calling its staff "long-term tourists". Hun Sen has also made disparaging remarks about his country, Kenya, calling it, among other things, "a killing field" when it was hit by ethnic violence after the 2007 presidential election there.

The Cambodian government's Spokesman and Minister of Information, Khieu Kanharith, has added further insults, calling Ghai, "uncivilized" and "lacking Aryan culture". He has also made disparaging remarks about the Kenyan people, calling them "rude" and "servants". The Cambodian leadership's dislike of Ghai at the end has reached a point where they denied all meetings he had sought to raise human rights issue with them in compliance with his mandate.

This personality assassination through such insults is a hallmark of the Cambodian leadership when they cannot not face the truth and seek ways of addressing the problems people call on them to solve. They simply use this assassination to dissolve them instead. The Human Rights Council, the international community and Cambodia's donors themselves have done little to support Ghai and his work, which has then encouraged the Cambodian leadership to be more arrogant towards this senior UN official. Ghai offered his resignation on 16 September 2008, which the Cambodian leadership welcomed with glee, expressing their triumph over a senior UN official who had the temerity of criticizing and telling the truth about human rights in Cambodia. With Ghai's resignation, the post of the Special Envoy of the UN Secretary-General for Human Rights in Cambodia was also abolished. It has been replaced instead by a Special Rapporteur, as have other similar mandates, under the reforms to the UN's human rights system that created the Human rights Council.

Those who are working for human rights in Cambodia have felt Ghai's resignation as a setback. It is harder for them to expect better respect for human rights in Cambodia when the Cambodian government can defy its international human rights obligations and defeat the work of a senior UN official of high integrity who had the courage to speak the truth and call on the Cambodian government to address the human rights issues for the benefit of the Cambodian people. Some hope that the Special Rapporteur would be a person of Ghai's personality and having the same honesty and courage to speak the truth about human rights in Cambodia.

## 4. LAND GRABBING

Land grabbing has remained a hot issue, as the rich and powerful continue to acquire land belonging to weaker and poorer people, through illicit means. It has affected and continues to affect the livelihood of hundreds of thousands of people in urban and

rural areas alike, the ethnic majority and minorities alike. These people have been evicted or are likely to be evicted, most often by force, from their homes and lands without the just compensation the country's constitution has prescribed. Amnesty International has estimated in its report published in February 2008, that "at least 150,000 Cambodians across the country are known to live at risk of being evicted in the wake of development projects, land disputes and land grabbing".

In 2008, land grabbing affected people in many localities in Cambodia. The latest and most notorious case was the lease of a lake called Boeung Kak Lake and its surroundings and the ensuing eviction of some 4600 families resident in Phnom Penh. The lake and its surroundings are public state property whose sale or lease is prohibited by law. But in 2007, the Municipality of Phnom Penh leased it to a development company, Sukaku, and in 2008 the government made the lake a private state property which, in law, can be sold or leased. The lake was lease for 99 years for US$79 million.

The Municipality of Phnom Penh offered various forms of compensation which many residents found "inadequate" to sustain their livelihood and rejected this compensation, resisted their eviction, and demanded compensation commensurate with the market price of their homes and lands. Meanwhile the company started to fill the lake.

The government has not ignored the issue of land grabbing. In fact it has feared that there might be a "peasant revolution" as a result of it. An incident that happened in early January 2008 could be seen as symptomatic of this feared revolution. A young man brutally beat an old parliamentarian from the ruling party on the head with a steel pipe. In his statement to the police, Ros said he had had no personal grudges against that man. His attack was his revenge against the powerful officials who had grabbed his land in Russey Sros village and deprived him of the only means that would have allowed his mother to pay for his wedding.

The other victims have not resorted to such violence as yet. They have preferred a peaceful means to end the grabbing their land, to repossess it or to be paid just compensation as prescribed by the country's constitution. In 2008 they were more daring in their endeavours. They raised the issue with the top leadership of the country through various means including a march for land from a distant province to the capital. They have forced those leaders to address it head on. However, forced evictions have continued, but they have been suspended in some localities.

## *Action by the Authorities*

In March 2007, a month before the local elections, Prime Minister Hun Sen declared a war against land grabbing. Immediately, several land grabbers were arrested or forced to

give back the lands they had taken. This war soon lost momentum and Hun Sen remained basically quiet about the issue until almost exactly a year later when, at the approach of the July parliamentary election, he became active again and took a flurry of decisions in succession to address the issue.

In March 2008, he went in person to a disputed land in the seaport town of Sihanoukville on the Gulf of Thailand to take 16 hectares of land from a grabbing company to give back the 125 families who had lost it. He offered them his apologies for the police action to evict them that caused injury to some and led to the arrest of three of their number. He also ordered the immediate release of these three accused.

The next day, back in Phnom Penh, he ordered the governor of Banteay Meanchey province and his colleagues to resolve a dispute over a 20 hectare plot of land "within a week" or they would be sacked.

In the same address he criticized the National Authority for the Resolution of Land Disputes (NARLD) for its "sluggishness" in resolving land disputes and threatened to close it down. He then noted that land grabbing had the "character of a hot issue" when disputes had not been speedily resolved. He also noted that some plots of land had up to four different title deeds on each of them, and he warned the Ministry to avoid the issuing of such multiple titles. He threatened to send NARLD officials to jail if found to be dishonest.

Despite its name, NARLD is not a specialized court of justice or administrative tribunal for land disputes. It was created in early 2006 by

Recent eviction in Phnom Penh: Police, company's workers and tractors sent in to demolish evictees' homes

Same eviction: Buldozer raising evictees' homes to the ground amid protest by owners

Same eviction: Company's workers demolishing evictees' homes.

a sub-decree (an executive order signed by the Prime Minister), and was composed of political appointees from different relevant government ministries. According to a former member, Eng Chhay Eang, an MP from the opposition party who had resigned from it, NARLD has no power. It is more like a coordinating body entrusted with the tasks of receiving complaints and conducting investigation with the cooperation of relevant authorities. It mostly entrusts the task of settling the disputes to these authorities.

The creation of NARLD has undermined the jurisdictions of the cadastral commissions created under the 2001 land law for resolving disputes over unregistered land, and the courts of law for disputes over registered land. However, Hun Sen has preferred, as he put it when meeting with those 125 families in Sihanoukville on 24 March, resolution of land disputes "outside the justice system." In his address to the meeting of the Ministry of Land Management the next day, Hun Sen was reported to be "accusing courts of law of being corrupt."

The following month, Hun Sen displayed in public his anger with the rulings of two courts of first instance. The first one was the court of Banteay Meanchey province which ruled in favour of a company in its dispute with the government over its construction on public land. The second was the court of Kandal province which ignored his "notification letter" ( See Rule by decree) ordering the return of disputed land to its occupants and the findings of an investigation by the provincial authorities, which ruled in favour of a company that had claimed to have bought the land from those occupants.

Although he chose to be silent again at the approach of the election and after, his spurt of action together with the election itself stoked up more action by victims and prodded the concerned authorities into more action too.

## *Victims' Action and Responses from the Authorities*

In the month of May 2008 the issue of land grabbing came to the forefront. In that month alone, a radio station ran over 40 stories of land grabbing or related issues. These stories showed that land grabbing victims have become more resourceful and have pressed harder to repossess their land. For their part, the authorities have shown more concern and responded more positively, providing momentum for addressing land grabbing.

In general, land grabbing victims have no confidence at all in the adjudicating authorities and have now appealed to their powerful Prime Minister, Hun Sen, for his personal intervention to get their land back. They have been further encouraged to seek his personal intervention after his appearance in March 2008 at a contested area in the seaport town of Sihanoukville, in which he seized the land from the grabbing company

and gave it back to its rightful owners (see above). A group of land grabbing victims, who had marched from Battambang province to Phnom Penh, said they had no confidence in the courts of law and the provincial authorities, but only in their Prime Minister, in adjudicating their land disputes in their favour.

This group was a part of the resourceful villagers who, in May, set off on a march from their province to Phnom Penh, a distance of 291 km, for the purpose of meeting with Hun Sen and requesting his help to get their land back. Their march attracted a lot of publicity.

They were halfway into their march when senior officials from the Ministry of Interior and from Battambang province hurriedly went to meet with them and offered to adjudicate the case in their favour. Having received such assurances, half of the marchers agreed to return home and abandoned the march. The rest were disappointed with the promise, continued their journey by car to Phnom Penh. Joined by groups from other localities, they went to petition the Prime Minister at his residence on the outskirts of Phnom Penh for his intervention. Other groups of victims of land grabbing had gone before or after them to seek the same intervention.

Land grabbing victims have also banded together as communities to organize protests or resistance to their eviction and to garner support for their causes. In June 2008, representatives of 12 such communities from 24 municipalities and provinces met with the director of the Cambodia Office of the High Commissioner for Human Rights in Cambodia to hand over a petition containing some 40'000 thumb prints, requesting him to intervene with Prime Minister Hun Sen to seek his personal intervention to address the grabbing of their land

Victims have also used their ballot papers as leverage to get the authorities to end the grabbing of their land. In the middle of May, villagers of the Phnong indigenous minority in Mondolkiri province, frustrated by broken promises from the provincial authorities, said that if these authorities could not keep their promises, they would take their complaints against the grabbing of their communal land by two development companies to Phnom Penh, and would not cast their votes at the forthcoming election. The provincial authorities ended the grabbing and returned the land to them.

Around the same time a group of villagers in Kratie province, with the same frustrations, said they would lose all motivation to cast their votes if the provincial authorities did not end the grabbing of their land by an army unit posted in their locality. The governor of the district then diligently investigated their case for settlement in their favour.

In May, the governor of Siemreap province began to conduct investigations into a land

grabbing case involving 363 families, some three months after receiving an order to that effect from the Ministry of Interior and four months after those families had filed their complaint with the Ministry. On the same day a deputy governor of Battambang province decided to conduct investigations the day after 60 villagers representing 105 families had protested in front of the provincial government office.

Officials of the ruling Cambodian People's Party (CPP) have also showed concern over the negative impact of land grabbing on their party at the election. In the land grabbing case by an army unit in Kompong Speu province, a CPP commune councillor publicly voiced, in May, his worries that villagers would not vote for his party when they lost their paddy fields to the Army Tank Unit and faced resultant hardships.

A land grabbing case in Kampot province compelled the CPP provincial task force to also intervene in May and request Hun Sen to rescind an order, giving to four persons 72 hectares of land belonging to a community of 680 families, thereby returning it to that community.

In the same month of May, Sar Kheng, a Deputy Prime Minister and Minister of the Interior, also reacted publicly to land grabbing. He expressed his unhappiness with the National Authority for the Resolution of Land Disputes (NARLD) and the other adjudicating authorities. He then proposed the empowerment of provincial authorities, which are under his authority, so that they can resolve land disputes in their respective provinces. Legislation is however needed for the provincial authorities to have any adjudicating power.

Sar Kheng did not have his way, as, in October, the Prime Minister appointed new membership to the NARLD. Meanwhile, evictees have continued to stage protests in front of the Prime Minister's residence and in front of the National Assembly to seek their respective help to back their demand for just compensation or official title deeds on the lands they have occupied for many years.

## *Continued Pressure on Victims*

The actions taken concerning land grabbing prior to the July election had an electioneering character and served more as safety valve to avoid that the "peasant revolution" that the government has feared. It was not at all a result of the due process of law that the country's Land Law (2001) and other laws have stipulated. Nor has it done much to put a halt to land grabbing and the use of various forms of pressure on those who have resisted it.

In 2008 there were less brutal forced evictions. They resorted to a more subtle means

such as blockade to deny food supplies to recalcitrant evictees or even floods to pressurise evictees to leave their homes and lands. But the authorities still resorted to arrests and physical threats as a means to repress any resistance to eviction.

In January, as part of their eviction of the residents of the Dey Kraham community in Tonle Bassac commune, Chamcar Mon district, Phnom Penh, in favour of 7NG company, the authorities of the area notified stallholders of the "garden" market inside the Dey Kroham zone, on which the livelihood of the evictees depends, to dismantle their stalls and clear out of the garden. The authorities claimed their trade affected the environment, hygiene, health and public order, and they were going to rebuild the garden. Their decision at this particular juncture of on-going evictions was not a mere coincidence as the market has been there for years.

On top of this dismantling of stalls, 7NG company set up a blockade to the zone by sending its workers to place oil drums to be filled with water to block all access roads to the zone and supplies to the market. A mixed group of 30 to 40 armed police officers were posted at the edge of the zone to protect the workers. The evictees again resisted the blockade by pushing the oil drums out of the way and preventing the workers from filling them with water. A confrontation between the two sides ensued, in which a truck belonging to the local authorities parked at the blockade was set on fire.

The authorities had already filed lawsuits against a dozen of Dey Kraham residents following previous resistance to successive attempts to evict them since 2005. They were charged with damage to property, battery, defamation and frauds. One of these accused was convicted in September. The others were summoned to appear in court at the end of October and early November. However, thanks to pressure from inside and outside the country, the authorities suspended their eviction, and the court granted bail to the rest following their arrest and imprisonment upon their appearance in court, which is a positive development.

Also in January, the authorities set up a blockade of food supplies to force 180 families of disabled war veterans, widows and orphans out of their homes and lands at Kro-Year commune, Santuk district, Kompong province, in a forced eviction to hand over the land to a rubber company, as these vulnerable people had protested against their eviction.

In August, in their attempt to evict recalcitrant Boeung Kak Lake residents in Phnom Penh, the development company and the Phnom Penh Municipality resorted to a set of draconian measures: they began filling the lake, which raised the level of the water and flooded their homes, destroyed their floating vegetable farms, turned off the fresh water supply and threatened to cut off the power supply as well. Unable to continue to live in

flooded homes, some residents have "voluntarily" accepted was is considered inadequate compensation.

In April, an army unit began to build a development zone for handicapped veterans in Chhouk district, Kampot province. In subsequent months it began to evict over 400 families from one end of a village and move them to another end. In this process it forced over 700 families to reduce their living space to accommodate the displaced families. In June, some 30 villagers protested and over 100 soldiers and military police officers beat the protesters and arrested four of them on charges of the robbery of a mobile phone and wrongful damage to property.

In August about 40 soldiers, many of them armed, attempted to evict 19 families from their homes on more than two hectares of land in Steng Treng provincial town, to be relocated in rural areas. The army had begun to evict these residents in 2005.

### *Recommendations:*

The Cambodian government should abandon the rule by decree and embrace the rule of law, by resorting to the due process of law, to eradicate land grabbing. It should protect the property rights of the Cambodian people and enact a law on confiscations of land for the purpose of public interests with an independent and impartial committee for fair and just compensation for people affected by such confiscations.

The Cambodian government should ensure that the cadastral commissions for the adjudication of conflicts related to unregistered land have functional independence and adequate resources, including expertise, to perform their respective duties. It should ensure that, before making any land concessions, people likely to be affected are consulted, and fair and just compensation is offered to them. Furthermore, adequate land should be made available to the poor and the landless for their housing and cultivation.

## 5. CORRUPTION

Corruption has long been a big issue in Cambodia, and has been continuously raised at least since the mid-1990s. Successive governments have pledged to combat all forms of corruption when taking oaths of office. They have even included the enactment of an anti-corruption law in policy addresses and in their promises to donors.

However, these pledges have not translated into any concrete action and corruption has worsened. A survey by Transparency International (TI) released in February 2008 showed that 72% of Cambodians reported paying a bribe to receive a public service during 2007.

TI said that this percentage was the highest in the Asia-Pacific region and second to only Cameroon (79%) internationally. The majority of respondents had expected no decrease in corruption in the three years to come.

In 2008, Cambodia ranked 166 out of 180 countries in the TI Corruption Perception Index. Corruption is pervasive across the entire public sector and, to a lesser extent, in the private sector as well. A bribe is expected for the delivery of any public service.

Right from the early 1990s there has been a persistent demand on the Cambodian government to enact the long-awaited anti-corruption law, a draft of which has been written and rewritten over a dozen times. In 2008, an anti-corruption movement across the country was formed to mobilize public opinion to combat corruption and press the government to enact the long-awaited anti-corruption law. Just prior to the July parliamentary election, this movement succeeded in collecting signatures of around one million people out of the population of 14 million to a petition to hand to the Parliament, requesting it to enact that law. It also received pledges from all competing parties, except the ruling party, to enact it within six months after the election.

The government issued from the election felt the pressure and, in his announcement to his cabinet's meeting in September, Prime Minister Hun Sen said that the anti-corruption law had already been approved by his government and would be sent to the Parliament for adoption after the penal code had been adopted. He said that the anti-corruption law was one of the three laws to be enacted as a matter of priority, the others being the penal code and the NGO law.

However, this anti-corruption law is not likely to meet the standards set by the UN Convention against Corruption and have much effectiveness in tackling the issue, when Hun Sen has already discarded comments from civil society concerning this, saying: "The [anti-corruption law] will come out no matter what comment some NGOs would make."

## *Recommendations:*

There is a dire need to enact the long-awaited anti-corruption law. This law should meet all the standards set by the UN Convention against Corruption. The body that is assigned to enforce this law should be independent and have sufficient powers and resources to effectively carry out its work. It should be made easily accessible to the public for filing complaints against corruption.

There is an urgent need for the government to pay at least living wages to its employees. It also needs to introduce a code of ethics for public servants and set up an independent public service oversight body such as an ombudsman to receive and act upon complaints from the public.

## 6. PRESS FREEDOM

Press freedom is a constitutional right in Cambodia. Yet over the years, journalists have been facing threats and intimidation, confiscation of their newspapers, cameras and note books, and lawsuits for criminal defamation and/or disinformation. However, over recent years, Cambodian media has seemed to enjoy a degree of freedom compared with its counterparts in other countries in the region.

In 2007, Freedom House classified the Cambodian press as "partly free" and ranked Cambodia 122 out of 195 in its Freedom of the Press World Ranking. In the same year Reporters Without Borders ranked Cambodia 85 out of 169 countries in its World Press Freedom Index (71 out of 139 in 2002; 81 out of 166 in 2003; 109 out of 167 in 2004; 90 out of 167 in 2005; 108 out of 168 in 2006). With this degree of press freedom, Cambodian journalists have been able to relax their self-censorship and write "high-risk stories" concerning corruption, injustice, illegal logging and land grabbing committed by powerful officials and rich businessmen.

However, in 2008, press freedom was severely undermined by several events affecting journalists and the media as a whole. Cambodia's rank dramatically dropped, down to 126 out of 173 countries. In early July, Khim Sambor, a journalist for Monasikar Khmer (Khmer Conscience) newspaper known to have affiliations with the opposition, was gunned down in broad daylight together with his son in Phnom Penh. This murder has rattled many members of the media. No perpetrator has been apprehended as yet, despite assistance from the US Federal Bureau of Investigation.

This slaying followed the arrest of the same newspaper's editor a couple of weeks earlier for defamation and disinformation for reporting the opposition leader's remarks that two senior government ministers had been affiliated with the Khmer Rouge regime in the past, one of whom was head of one of its prisons. Both the slain journalist and his newspaper had been writing high risk issues.

Following the slaying of the journalist and the arrest of his newspaper's editor a local English newspaper wrote that "Cambodian journalists feel that they are not safe."

A journalist for Radio Free Asia, Lem Pichpisey, known by his on-air pseudonym Lem Piseth, received repeated threats from January to April, through: text messages, phone calls from unknown people to fix rendezvous at dubious places, the throwing of assault rifle AK47 bullets at night in the yard of his house in Battambang province and also threatening gestures from a group of motorcyclists while he was riding his own motorcycle in a street in Phnom Penh. He received these threats after his return from a short self-exile abroad because of previous threats and after he had investigated a drug

trafficking case. In May, unable to put up with these threats anymore, Lem decided to again flee the country, this time for good.

In the same month of May, the Ministry of Information revoked the licence it had granted to a radio station called Angkor Ratha Radio located in the capital of Kratie province for selling its airtime to four political parties that were to compete in the parliamentary election to be held in July. The ban on this radio station was inconsistent with the ministry's permission to its affiliate radio station in Siemreap province and to Phnom Penh-based Radio Beehive to sell their respective airtime to those same political parties.

### *Recommendations:*

Press freedom is fundamental right, and Cambodian authorities should consider them as such and give this priority over inconveniences the exercising of this freedom might cause. Easily understood and accessible legal procedures should be put in place for people to challenge any ban on the exercising of this right.

## 7. FREEDOM OF EXPRESSION AND ASSEMBLY

The Cambodian authorities have not lifted the ban on peaceful public demonstrations, despite the fact that this represents a violation of the right to freedom of expression and assembly. This right is contained in the set of rights that Cambodia has undertaken to observe and respect as part of its obligations under the Paris Peace Agreements of 1991. These human rights obligations are binding on Cambodia as its Constitution of 1993 has recognized and as its Constitutional Council has confirmed in its ruling dated July 2007.

The police have enforced this ban with the use of force. In December 2007, the riot police forces, armed with shields and batons, chased and assaulted a group of Buddhist monks who went to hand a petition to the Vietnamese embassy in Phnom Penh demanding the release of their fellow monks of the same indigenous origin from prison in Vietnam. In the same month, the police in Rattanakiri province used force and water cannon to disperse a procession of indigenous people protesting against illegal logging and deforestation in the province.

The police have not relaxed the enforcement of the ban, but they have seemed to resort less to violence. In January, they banned the holding of a genocide memorial ceremony in front of the Khmer Rouge Torture Centre in Phnom Penh to raise awareness of the situation in Darfur, Sudan. The ceremony was organised by several Cambodian NGOs as well as the Dream for Darfur organisation, with the participation of many local NGOs as

well as from an international delegation led by the famous American actress Mia Farrow. They charged that Farrow had planned to use the ceremony to press China, which was one of Sudan's major trading partners and was to host the Olympic Games, to use its influence with the Sudanese government to end abuses in Darfur. The Cambodian government called the whole ceremony a political stunt to smear China, which is one of its great supporters.

In February, in Svay Loeu district, Siemreap province, a village chief named Kim San of the ruling Cambodian People's Party used physical threats to prevent a Member of Parliament of the opposition Sam Rainsy Party from holding a meeting with villagers. The MP, Ms. Ke Sovannaroth, organised the meeting to listen to the villager's complaints regarding land grabbing cases, but the village head allegedly forcibly dispersed the villagers and threatened the MP, who has filed a complaint, but no action has been taken against Kim San.

In May, the authorities in the north-eastern province of Rattanakiri denied 15 indigenous minority associations permission to organize a procession in the provincial capital, Banlung. Their purpose was to urge the provincial authorities to enforce laws and execute Prime Minister Hun Sen's orders to take action against deforestation and illegal acquisition of woodlands for private ownership.

In the same month, on the border with Thailand, the immigration police in O Chroeu district in the north-western province of Banteay Meanchey, arrested and held a man named Morng Puthy, the head of the Independent and Democratic Informal Economy Association (IDEA), for several hours for distributing leaflets to enlist people's support for and participation in a planned peaceful demonstration. According to the organizers, the public demonstration was aimed at demanding the lowering of prices, a pay increase for public officials, clear customs duty rates, and an end to border public officials' extortion of people crossing the border or working around the border post.

IDEA went ahead with its planned demonstration. Despite fears of police action, some 100 people including goods cart pushers, taxi-motorcyclists, motorised-rickshaw drivers and petty traders joined in. But the authorities posted a mixed, civilian and military police force of some 65 men armed with assault rifles some 100 meters away from the beginning of the procession route to block the procession and prevent the demonstrators from marching to the centre of Poipet town.

In August, the authorities banned a public demonstration organised by the Free Trade Union of Workers of the Kingdom of Cambodia (FTU) and the Cambodian Independent Teachers' Association (CITA) at the head office of FTU. They deployed a riot police force armed with batons, shields, and tear gas to crackdown on hundreds of

people who joined the demonstration to demand the withdrawal of Thai troops from Cambodian territory along the border that they had occupied since June 2008. The next day, FTU President Chea Miny received a death threat email, which is believed to be linked to the demonstration.

The police said that "this riot, or demonstration, could cause disorder and bigger problems because in the past, illegal demonstrators burned down the Thai embassy [in January 2003], making the government pay tens of millions of dollars back to Thailand." The police and local authorities have seemed to be more tolerant towards the holding of public forums held in different provinces and have not used force when enforcing their ban. For instance, the Cambodian Centre for Human Rights, an NGO, organized from January to October 48 forums for ordinary people to talk about the issues of their concern. For seven of these forums, held separately in Siemreap, Prey Veng, Koh Kong, Kampot and Kompong Chhnang, it encountered threats and obstructions, but it succeeded in holding them. Two of the forums, held separately in Kompong Chhanang and Kampot, were completely banned.

In October, human rights NGO ADHOC succeeded in securing "permission" from the Ministry of the Interior to hold a demonstration in the capital of Rattanakiri province after failing to secure it from the authorities of this province. Hundreds of indigenous people took part in the demonstration to request the provincial authorities to enforce the government measures to ban illegal logging and deforestation. This illegal logging and deforestation has badly affected the livelihood of these indigenous people. They practice slash and burn cultivation and need large areas of land to enable such cultivation. Their livelihood also depends very much on forest products.

The Cambodian authorities have also shown restraint in the use of force against many demonstrations against land grabbing. They have resorted to less violent means, such as blockades and flooding in their attempts to evict people from their homes and lands (see Land grabbing).

## *Recommendations:*

The freedoms of expression and assembly are fundamental rights, and the Cambodian authorities should consider them as such and give them priority over inconveniences the exercise of these rights might cause. The police should consider serving and protecting people as their core value, and, instead of banning peaceful demonstrations and protests, they should secure law and order for demonstrators or protesters wishing to exercise their rights.

Easily understood and accessible legal procedures should be put in place for people to challenge any ban on the exercising of these rights.

## 8. TORTURE

Torture: Cambodia is a party to the UN Convention against Torture (CAT) since 1992 and the Optional Protocol to this convention (OPCAT) since 2007. However, over a year after the ratification of OPCAT, Cambodia has not created any national mechanism for the prevention of torture through visits to places of detention, as required. Nor has it adopted any specific anti-torture law as yet. However, torture has been made a crime in the current draft penal code, and the government has committed to creating the preventive mechanism to visit places of detention as soon as possible.

Part of the concern for the prevention of torture has already been addressed in the code of criminal procedure enacted in 2007. This code gives power to the prosecutor general and public prosecutors to inspect prisons and judicial police units. However, these judicial officers have not been given enough resources to conduct such inspections.

In reality, torture and ill treatment of suspects and accused persons are still practiced, but a senior lawyer has observed that they "are on the decline". For instance the police in Kirisakor district, Koh Kong province, allegedly beat a young man, Taing Thavy, with a rifle when they arrested him in February 2008. The police beat him again in the detention cell. In both occasions Taing was badly injured and also lost consciousness, but the police denied him any immediate medical treatment. Taing sued the police officers who were his attackers, but they have not been apprehended since.

In the same month, a police officer named Pring Pov was arrested and allegedly tortured and ill treated in police custody in Kep seaside town. He was later confined to a windowless cell and shackled at night. Despite having wounds on his body, he has been denied access to medical treatment. While in detention he has been consistently pressurised to vacate the land on which his house stands and give it up to a senior government minister. Thanks to public pressure, Pring Pov was later released and went back to his job.

Ill-treatment: The civilian and military police have also abused their power. In May, 62 victims of land grabbing who had come from the village of O Voalpreng, Khnay Romeas commune, Bovel district, Battambang province were attempting to hand over a petition to Prime Minister Hun Sen to seek his intervention to get their land back. The police ordered them to move to another place which they refused to do. A police officer then used his portable radio set to beat six of the demonstrators on the head, injuring them.

In July, military police officer Nget Vutha alias Kin, slapped journalist Ros Phina in the face for reporting on his facilitation of the transportation of protected timber. This

incident happened in the district military police headquarters in Stung Hav district, in the seaport town of Sihanoukville. Nget was later disciplined for his assault on Ros.

In October, the same police force in Battambang district, Battambang province, assaulted vendors respectively in Sar Kheng Garden and near Hun Sen Bridge in Rumchek IV village, Rattanak commune, Battambang distict. One victim suffered a fractured rib and another one severe injuries to the forehead.

The rich and powerful have abused their position to ill-treat the poorer and weaker people. In January 2008, the bodyguards of some unknown high-ranking personality beat the driver of a truck in the middle of the road on the outskirts of Phnom Penh for obstructing the traffic and holding up the passage of their boss's car.

In May, Noeu Noeuy, who is chief of Banteay Chhmar South village, Banteay Chhmar commune, Thmar Puok district, Banteay Meanchey province and also the CPP village committee chairman, kicked and beat Hem Poeu, who is the chief of a group of houses in the village, when Hem refused to join CPP.

In July, Prime Minister Hun Sen's nephew, Hun To, ordered his bodyguards to physically attack a Member of Parliament named Nuon Vuthy in an overtaking incident at the ferry pier of Prek Kdam in Ponhea Leu district, Kandal Province. Nuon filed a lawsuit against Hun To for battery, while Hun To filed a counter-lawsuit against Nuon for defamation.

**Prison conditions:** An improvement in the conditions of certain prisons has been noticed, especially the ones on the outskirts of Phnom Penh and newly built ones. Shackling prisoners is still practiced, though, as in the prison of Kompong Thom province, and overcrowding, squalid conditions, inadequate food and lack of medical care are still endemic problems in all prisons.

In March 2008, a woman named Chan Heu held in pre-trial detention in the prison of Battambang province fell seriously ill and was taken to hospital in Batttambang city for treatment. There she was chained to her bed. She could not move, which worsened her condition. Thanks to public pressure, she was given bail and had proper medical treatment.

In April 2008, a young man named Yan Sok Kea died due to a lack of medical treatment both in pre-trial detention in Prey Sor Prison on the outskirts of Phnom Penh and at a hospital where he was admitted when seriously ill.

In August, an unnamed pre-trial detainee in the prison of Kampot province suffered from beriberi for lack of adequate food. He could not walk and had to be carried by fellow inmates into the courtroom to stand trial. That prison had just five rooms to house 250 inmates of which 12 are women. Like all other prisons across the country, the food ration there is 1500 riels (US$0.37) per inmate.

Conditions in "Social Centres": Periodically the authorities have rounded up the homeless, beggars and sex workers in the capital Phnom Penh and sent them to "social centres" run by the Ministry of Social Affairs. It is known that there are two such centres: one is Koh Rumduol Social Centre on Koh Kor island in the Bassack River, in Sa-ang district, Kandal province; the other is Prey Speu Social Centre in Chom Chao commune, Dankor district on the outskirts of Phnom Penh.

Officially, these centres are rehabilitation centres for homeless and other poor people. However, in 2008, human rights NGO LICADHO discovered that there were being "used for the systematic unlawful detention of sex workers, homeless people, beggars and others arbitrarily arrested on Phnom Penh streets." They were unlawfully detained in "appalling conditions." At Prey Speu, there were some 50 detainees. These detainees suffered from physical and sexual abuse, including alleged beatings to death of at least one of them and gang-rapes of women. At Rumduol, there were 20 persons detained together in the same room. They suffered from various diseases.

Despite criticisms of unlawfulness and appalling conditions in those centres, the authorities have continued to round up homeless people, beggars and sex workers. As the Water Festival held in Phnom Penh in November was approaching, the Municipality of Phnom Penh began rounding up such people to be sent to these centres. In the first day it arrested at least 40 homeless people, including two children. The reason given for this roundup was the "beautification" of the city. A municipal official said: "We arrest them only for big national celebrations to keep order and create a good atmosphere during the celebrations, especially the Water Festival."

It was feared that those people would suffer the same abuse and ill-treatment as LICADHO had discovered in the "social centres."

## *Recommendations:*

Action should be taken without delay against those officials who have allegedly

committed torture or other forms of ill-treatment. An independent police oversight body should be set up and made easily accessible to the public to address complaints against the police and take action against officials responsible for torture or ill-treatment.

Prosecutors should discharge their duty and make visits to police stations and prisons, and should conduct investigations and take action whenever they find any indication of torture or other ill-treatment.

There should be respect for the fundamental rights of people deprived of their liberty and detained in such places as police stations, prisons and other detention centres. These people should be able to communicate with their close relatives and receive their visits. They should have adequate food and access to medical treatment and legal counsel. Independent groups working for the welfare of people deprived of their liberty should be able to have access to them, and the recommendations these groups might propose should be seriously considered and acted upon.

There is also an urgent need to create the national mechanism for the prevention of torture as prescribed by the Optional Protocol to the UN Convention against Torture, to which Cambodia is a party.

## 9. THE RULE OF LAW

According to its Constitution, Cambodia is supposed to be a liberal democracy governed by the rule of law with separation of powers and an independent judiciary. Yet in reality, 15 years after its promulgation, not only has this Constitution has not been fully implemented, but a number of its provisions have been gravely violated, and the establishment of the rule of law has made little progress.

## A. CONSTITUTION IGNORED

In September and October, the constitution suffered serious battering on several successive occasions. First, after its July election victory, the winning party proceeded to form the new government in breach of the procedures prescribed by the country's constitution (see the election and the new government).

The new government has also violated the constitution. After receiving a vote of confidence, Prime Minister Hun Sen did not make any policy address to the National Assembly as he should have, to announce the political programme of his government and seek the Assembly's approval. Instead, the next day, he made such a policy address to his cabinet at its first meeting, announcing his government's continued implementation

of the political programme of his previous government.

Such implementation is in breach of the Law on the Organisation and Functioning of the Government (1994) in accordance with which the government should implement policies and plans that have received prior approval by the National Assembly.

The third and most serious violation of the constitution was the ultimatum Prime Minister Hun gave to Thailand on 14 October to withdraw its troops by the next day from a piece of Cambodian territory near a temple called Preah Vihear on the Cambodian border, an area which Thai troops had occupied since 15 July 2008. Hun Sen told reporters, that he had told the visiting Thai Foreign Minister and had also instructed Cambodian army leaders, including commanders at the frontline, that "this place is a life and death battlefield."

Hun Sen's warning to Thailand and instructions to the Cambodian army commanders amounted to nothing short of a declaration of war, which it was when, the next day, 15 October, both Cambodian and Thai troops engaged in a brief battle causing death and injuries on both sides.

Hun Sen's action violated the Cambodian constitution according to which only the King of Cambodia, the supreme commander of the Cambodian armed forces, can make a declaration of war after both Houses of the Parliament have approved it. Hun Sen usurped the King's power.

There is no remedy for the unconstitutionality of the government's action when the country's Constitutional Council is under political control and the ruling party has an overwhelming majority in this nine-member council. It has not been known to declare any of the government's actions as unconstitutional since its creation in 1998.

## B. THE JUDICIARY AS A TOOL FOR THE RICH AND POWERFUL

There has been little progress on the adoption of the law on the status of judges and prosecutors, a law which is specifically prescribed by the constitution and whose enactment has been promised by successive governments. This law should ensure at least some degree of the independence of those judges and prosecutors.

The continued delay in enacting this particular law is a prolonged violation of the principle of separation of powers and judicial independence as the constitution has prescribed, and also the maintenance of de facto political control over the judiciary. As a consequence of this omission and violation, the courts have not been able to discharge the constitutional duty to protect the rights and freedoms of the Cambodian people.

Political control over judges and prosecutors starts right from their training. Their school, the Academy of Judicial Profession, is placed directly under the Office of the Council of Ministers. Its leaders are members of the ruling party. In the July election, judge and prosecutor trainees were taken out to a dinner party to be told to support and vote for that party.

Over the years there has been increasing evidence showing that the courts are used by rulers, the rich and powerful, to protect and promote their own interests. In a report on the judiciary, LICADHO said that "the primary functions of the courts continue to be: [1] To prosecute political opponents and other critics of the Government; [2] To perpetuate impunity for State actors and their associates; [3] To promote the economic interests of the rich and powerful."

These observations made in December 2007 remained true in 2008. In April, Hor Nam Hong, Cambodian Deputy Prime Minister and Foreign Minister filed a defamation lawsuit against Dam Sith, the editor of a local newspaper, for reporting a remark by Sam Rainsy, a Member of Parliament and opposition leader. Sam said that Hor had been the chief of a Khmer Rouge prison in the past. Since defamation is not punishable by jailing, Hor additionally charged Dam with disinformation, for which he could be imprisoned.

In June, Dam was jailed for his reporting. However, due to intense national and international pressure for his release, Hun Sen acted to release Dam on bail.

Hor also filed the same lawsuit against Sam Rainsy for defamation and disinformation. While the parliamentary election was approaching, the court acted promptly on this lawsuit and summoned Sam to appear before it on May 22 - while it has not acted with the same promptness on cases of violence against opposition parties and their activists. This has prompted further doubts about not only this particular court's but also all Cambodian courts' lack of independence and impartiality. If convicted, Sam could be sentenced to between six months and three years in prison for disinformation, and also fined for each count. Any such imprisonment would cripple his party, which is the second largest after the CPP.

Soon after Dam was freed on bail, the court in Phnom Penh sought to lift Sam's parliamentary immunity in order to put him in jail. Because of national and international pressure not to mar the ongoing electoral process, this attempt to lift his immunity was deferred, however.

Another court case involved Prince Norodom Ranariddh, the former leader of the FUNCINPEC party, the CPP's current coalition partner in the government, and leader of a newly formed party, self-named the Norodom Ranariddh Party. He is one of Prime

Minister Hun Sen's arch political rivals. He was sued for breach of trust, a criminal offence, by his former party in the handling of that party's assets.

Fearing a negative outcome, Ranariddh fled the country. He was convicted and his chance to lead his new party in the parliamentary election was ruined. In the aftermath of the election, through a political deal with the winning Cambodian People's Party, he was granted a royal pardon and was able to return to Cambodia. Ranariddh has since abandoned his political career.

The courts are being used by rich and powerful individuals and groups involved in land grabbing to silence and evict people from their homes and lands without paying just compensation. The common way of silencing protesters or recalcitrant evictees is to arrest and throw them in jail on false charges.

It is widely known that laws in Cambodia are working against the poor and weak and in favour of the rich and the powerful. Alluding to this development, in March 2008 a western diplomat quoted for his Cambodian audience the ancient Greek, Anacharsis, who said: "Written laws are like the web of a spider, and will like a spider web only entangle and hold the poor and weak, while the rich and powerful will easily break through them."

During 2008, many villagers were arrested in different cases of land grabbing across the country. Most of them were charged with damage to property during their protests against land grabbing or their eviction. A human rights NGO has reported that in the first half of the year 36 villagers were arrested and 24 of them remained in custody in prison for pre-trial detention.

In June, four villagers, including one elderly woman, were arrested in Kampot province when they resisted the grabbing of their land by an army unit. In October, six villagers were arrested in Kompong Thom province following a land dispute with a company. In the same month, two community representatives were arrested in Svay Rieng province following a prolonged land dispute with a local official. In the same month, six villagers were arrested in Siemreap province in a land dispute between 40 families and an army commander.

Invariably, after their arrests the accused are held in prison to await trial, as the police, prosecutors and judges ignore the possibility for bail and the principle of detention only in justified special cases as provided for in the code of criminal procedure. The court has also ignored the need to determine the preliminary question of ownership of the land in civil proceedings, before it can lay any criminal charges relating to dispute over its ownership, as provided for under Article 343 of the same code.

In a land grabbing case, the court of Phnom Penh ignored the rights of the residents of Boeung Kak Lake in Phnom Penh when they sought an injunction to stop the company involved in the dispute from filling that lake, which was flooding the whole area and making their life increasingly difficult. In September, this court ruled against issuing such an injunction, saying that it had jurisdiction only over registered lands. Their lands were not registered. Their case was under the jurisdiction of the Cadastral Committee. The flooding continued and, unable to put up with such difficulties, some residents gave up the resistance to their eviction and accepted the "inadequate" compensation offered by the authorities.

## C. PROTESTS AGAINST PRE-TRIAL DETENTION

The arrest and the ensuing imprisonment of suspects together with the rarity of releases on bail have created immediate fears among suspects who are summoned to appeal in court either for trial or for investigation. Following the arrest in June of four villagers in Kampot province in a land grabbing case, some 20 fellow villagers went into hiding fearing the similar arrest and imprisonment. More recently, nine residents of Dey Kraham in Phnom Penh, and fellow residents, had the same fears after receiving summonses to appear in court for trial and for investigation.

Relatives and sympathizers also have such fears, but some have joined forces to express their solidarity with the accused and gone to court to protest against any eventual arrest and imprisonment of the accused. In July, nine villagers in Battambang province were summoned to appear in court following a land dispute. Fearing that they would face arrest and imprisonment, some 40 of their fellow villagers banded together and went with them to court to protect them from such an eventuality. The court just took their statements and let them go back home.

In the case of arrest in October of the villagers in Siemreap province following a land dispute with a senior army officer, some 200 villagers also banded together and, some two weeks after that arrest, they went to protest against their arrest and imprisonment, and also demanded their release at the office of the provincial governor.

Their collective protest had an effect: the provincial governor allegedly offered the protesters help to solve the land dispute and get the release of their fellow villagers. Allegedly due to this help, the court seemed to be willing to release the accused on the condition they would agree to vacate the land.

## D. CORRUPTION

As mentioned above under the heading Corruption, the judiciary, in tandem with the

police, is the most corrupt institution in Cambodia, according to a survey conducted by Transparency International. The results of this survey have only confirmed what is commonly known already. Court clerks are known to pocket a bigger share of bribes intended for judges or prosecutors to secure the release on bail or judgments in favour of the bribe giver's side.

Bribery is known to start right at the training stage of judges, prosecutors and court clerks. There is a Royal Academy for Judicial Professions which has two schools, one for training judges and prosecutors and the other for training court clerks. It is known that candidates have offered bribes of US$25,000 to be able to pass the entrance examinations to enter the magistrate training school to become either a judge or a prosecutor. Offering of bribes of US$5,000 is also known for candidates to be able to pass examinations to enter the lawyer training school to become lawyers.

As a junior judge's or prosecutor's salary is some US$350 per month, it should not be difficult to imagine the extent of corruption they would get involved in after the bribe-giving candidates have graduated and secured their appointment.

## E. RULE BY DECREE

Over the last 15 years Cambodia's successive parliaments have passed many laws, but these parliaments have not exercised their oversight authority to ensure that all these laws are effectively enforced and the government has issued regulations in accordance with them or with any policies and plans they have adopted or approved.

For its part, the government does not seem to be inhibited by the country's constitution, laws, policies and plans that the successive parliaments have adopted. It seems to be at liberty to arbitrarily issue executive orders or regulations. One particular order is a "notification letter" issued by the Prime Minister himself or a senior official at the Office of the Prime Minister.

This notification letter serves as a simple notice to concerned persons of the decisions made by the Prime Minister or his office over cases submitted to the Prime Minister for adjudication. It has no official status as an executive order or a regulation – such as a royal decree signed by the King, a sub-decree signed by the Prime Minister or a ministerial order signed by ministers – and is not subject to parliamentary oversight or judicial review.

Widely known in Cambodia by its Khmer language acronym "Sor Chor Noh", this notification letter has the majesty of a law with authority to even overrule a court judgment. In October 2008, the largest newspaper Reaksmei Kampuchea used this

Khmer acronym as the title of one of its commentaries, "God Indra's Notification Letter" (in Khmer "Sor Chor Noh Roboh Preah Ind"), to propose the sending of mischievous members of Cambodian society to the frontline to fight the Thai troops occupying Cambodian territory around Preah Vihear temple.

In April, this year the Office of the Prime Minister issued a notification order to award 72 hectares of land to four private individuals. The land belonged to a fishing community of 64 families in a coastal area of Kampot province, and its ownership was transferred without reference to the country's Land Law (2001).

The affected families protested against the award. To counter any negative impact on the popularity of the ruling party as the parliamentary election was approaching, in early June, some six weeks before the election, the Office of the Prime Minister annulled the letter and the affected families got back their community land.

However, in their efforts to have their community land back, more than 200 families living in a village on the outskirts of Phnom Penh were not that fortunate. In July 2005, the Supreme Court awarded their land to them, but in November 2006, a fellow villager who had lost the case secured a notification letter from the Office of the Prime Minister. This letter has since stalled the execution of the Supreme Court's judgment that had awarded the community land.

The villagers have since protested against the continued possession of their community land by the fellow villager. In September 2008, hundreds of villagers gathered and put their thumbprints on a petition to Hun Sen, requesting him to do justice to get their communal land back.

This form of rule by decree is unconstitutional, as institutions other than the courts have the power to adjudicate disputes. Furthermore, it is an offence of interference in the judicial functions of courts and appears in the current draft of the Cambodian penal code. Further it has bred corruption and contributed to the centralization of power in the hands of the Prime Minister.

## F. REMEDIES

The Cambodian government with support from donor countries has developed a set of reform programmes including a legal and judicial reform programme. However, the government is not serious about the latter reform programme and has been dragging its feet over it.

Successive governments have pledged, for instance, to enact a law on the status of judges

and prosecutors to determine their function and independence and another law on the organization of the judiciary. They have also pledged to reform the supreme judicial body called the Supreme Council of the Magistracy, to make it more functional and more effective in disciplining judges and prosecutors and in insuring judicial independence. In 2008, all of these did not see the light of day.

Successive governments have not allocated adequate resources to the courts and the prosecution offices to do their jobs properly. As an example to illustrate how these institutions are deprived of resources, it must be noted that the Court of Appeal has no fax machine and no e-mail address.

The judiciary still lacks independence as almost all of its members are members of the ruling party. The chief justice of the Supreme Court, who is an ex officio member of the Supreme Council of the Magistracy, is still a member of its standing and central committees, and all but two of the members of the same Council are also its members.

As mentioned above, the notification letter of the Office of the Prime Minister still prevails over court judgments. Also as mentioned above, in March 2008, the Prime Minister personally adjudicated a land dispute case and ordered the release of the accused involved in this case without any resort to due process of law. He also gave instructions to avoid the court in resolving land grabbing cases.

However, thanks to continued training, informal and formal, under or outside the legal and judicial reform programme, the adoption of several codes (civil code, civil procedure code and criminal procedure code), and monitoring and criticisms, the competency of judicial officials has noticeably improved since the communist days.

Judges and prosecutors are generally more competent; have more knowledge and understanding of laws and procedure; are more articulate, more open to debates, keener to learn more; are more insistent with regard to evidence; are for compliance with the criminal procedure; show less submission to and more assertiveness in their relations with the police; and trial judges increasingly inform the accused of their rights.

There are efforts to enforce the code of criminal procedure, including the Prosecutor General's instructions to prosecutors to investigate torture when finding indication of it on suspects, and the police's increasing submission to the authority of the prosecution offices.

The government and the United Nations Development Programme have established justice centres, or mobile courts, in an increasing number of provinces to enable people to have more access to justice. It remains debatable, though, whether they will

be sustainable when the UNDP ceases its cooperation and funding, and whether all these are simply expediencies and divert the attention and resources away from the establishment of a functional and independent judiciary.

In October 2008, as criticisms concerning the lack of judicial independence had been increasing, the government announced plans to reform the court system. A Deputy Prime Minister, Sok An, announced that the government "will be preparing a workshop for the law and courts," saying that the government had heard "bad rumours about courts in Cambodia" and it was going "to work very hard to change that." He added that the government "needed to enforce discipline and make sure that the courts are independent."

This statement is in itself a violation of the principle of separation of powers and the independence of the judiciary as stipulated in Cambodia's constitution. The discipline of judges and prosecutors and the independence of the judiciary are the jurisdiction of the King of Cambodia with assistance from the Supreme Council of the Magistracy, which he chairs. Furthermore, such a statement has now become familiar as it has been made again and again since the government introduced the set of reform programmes some ten years ago.

## *Recommendations:*

There is a dire need to respect the constitution, the principle of separation of powers and the independence of the judiciary as stipulated in it, and to establish the rule of law in Cambodia and to build strong, functional institutions for it. The Constitutional Council should be composed of members with qualifications required by the constitution and with no affiliation to any political party. Judges and prosecutors should be independent and should not be affiliated to any political party.

The Supreme Council of the Magistracy should be composed of members with no affiliation to any political party. It should exercise tighter discipline on judges and prosecutors to ensure their professionalism, independence, impartiality and probity. It should put in place a complaint mechanism with procedure that are very accessible to the public.

The Cambodian government should end its control over the judiciary and judges' affiliation to political parties. It should enact the laws on the status of judges and on the organisation of the judiciary. It should ensure that courts are not deprived of necessary resources for their proper functioning and it should enforce their judgments regardless whether the affected persons are "people in power" or not.

Access to justice should be made easy and the recourse to courts of law should be facilitated rather than depending on the political will of leaders for those seeking justice.

## CONCLUSION

More than two years ago, in March 2006, in a press conference in Phnom Penh to wrap up his second mission in Cambodia, Yash Ghai, the UN Secretary General for Human Rights in Cambodia, said he was "quite struck with the enormous centralization of power, not only in the government but in the one individual [Hun Sen]."

In 2008, power in Cambodia was further centralised in the ruling Cambodian People's Party through a parliamentary election it had very much controlled. There has been concern that Cambodia was being ruled by a single party, the Cambodian People's Party, which has become a State party. Since Prime Minister Hun Sen has a firm grip on his party, this power was in effect centralized in him.

This development was a turning point for democracy, human rights and the rule of law in Cambodia. Two remarks, one specific on Cambodia, and the other general could help visualize which direction this development might take. In the same press conference mentioned above Ghai made another comment: "Everything depends on an individual and this is not really a precondition under which human rights can flourish." Greek philosopher Aristotle said in his Politics that "it is long possession of office which leads to the rise of tyrannies in oligarchies and democracies. Those who make a bid for tyranny, in both types of constitutions, are either the most powerful people (….), or else the holders of the main offices who have held them for a long period."

Hun Sen's ruling party is a former communist party and has control over the institutions for parliamentary democracy and for the rule of law and the media since the communist days. It has been able to effectively squeeze out the rival parties emerging in the early 1990s. It has marginalized the opposition that has remained.

With his victorious confrontation with Ghai leading to the latter's resignation and the subsequent downgrading of the UN mandate in the country, Hun Sen has also been able to marginalize the UN with regard to human rights. He has further moved to use a law to control and subdue further the civil society, the local bulwark of human rights, which, due to its human rights work, advocacy and criticism, he and many in his party have found irritating.

The human rights situation described above is not comprehensive, but it shows no strong indications of any "real precondition under which human rights can flourish" in the future. The rule of law that is essential for the protection of human rights, as recognized

by the Universal Declaration of Human Rights, is simply not there as Cambodia is essentially ruled by decree.

The concept of equality before the law and equal protection by the law has not taken root in Cambodia yet. Courts have yet to gain independence, to be infused with impartiality and to discharge their constitutional duty to protect human rights. They have yet to assert themselves as state institutions and not serve as a tool for the rich and powerful to promote and protect their interests at the expense of the opposition to the government, and the poor and weak.

The Cambodian authorities, the Cambodian Bar Association, Cambodian civil society, the field Office of the High Commissioner for Human Rights, the Special Rapporteur on Human Rights in Cambodia, and donor countries should make more efforts and concentrate these efforts first and foremost on establishing the rule of law and building strong, functional institutions for it in Cambodia.

The Special Rapporteur should be given more support than Ghai had received, and donor countries should renew their efforts to effect change for the better for human rights in Cambodia.

# I N D I A

## EXPECTATION, PROMISE AND PERFORMANCE - HUMAN RIGHTS REPORT 2008

*If particular countries are viewed from the standpoint of what their citizens are promised or offered by the system, a basis exists for evaluating that country's treatment of human rights. If the promise is reality, then human rights are not being violated. If the promise does not match the actual situation, then human rights are being violated.* [1]

## 1. INTRODUCTION

Evaluating the human rights record of a country like India, with its varied culture, population and diverse demography is a challenging task. A thorough analysis of the human rights situation of any country requires more than peripheral knowledge about the country. The essence of a country is the sum total of its people, culture, justice mechanisms and polity. Within the limited scope presented by the knowledge gained through the work of a regional human rights organisation, an analysis that evaluates the entire spectrum of human rights issues concerning India is not possible.

The Asian Human Rights Commission (AHRC) through its continuous engagement in India has however gained considerable insight into specific human rights concerns in India. The issues taken up by the AHRC in India are largely concerning civil and political rights, some aspects of the economic social and cultural rights like land rights and the right to food and rights against discrimination, particularly concerning the caste based discrimination. It is obvious thus that in the following chapters it is these specific aspects of human rights issues in India that are highlighted, discussed and debated.

Throughout the discussion, emphasis is given to international norms and standards, as a yardstick to measure 'the promise and the performance'. India is one of the founder members of the United Nations. A country where equal status to women is still a

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1 *Conformity, Compliance and Human Rights: Nicholas P. Pollis; Human Rights Quarterly, Vol. 3, No. 1 (Feb.,1981), pp. 93-105 – John Hopkins University*

concern was led by Mrs. Hansa Mehta in the UN during the drafting process of the Universal Declaration of Human Rights. [2]

It is a fact that India's initial energy and enthusiasm in promoting a global perspective of protection, promotion and fulfilment of human rights and human values has faded considerably. In tackling the shifting currents of national, regional and international polity, India too reduced itself to a nation that is primarily concerned about its international image. [3] Human rights norms and values that India once stood for, especially during the period soon after independence, have been reduced to be nothing more than an eyesore that the government has to deal with.

In applying cosmetics to cover-up its smear India has increasingly resorted to defensive positions at the UN and has literally bluffed its way through in international review sessions sponsored by the UN and its treaty mechanisms.[4] Those who tried to put the records straight through alternate means like shadow reports were targeted by the Indian authorities. This domestic response was intense particularly concerning human rights groups operating in the Northeastern states like Manipur and the Jammu and Kashmir.[5] Of late, human rights work is perceived by the government of India as a domestic smear campaign, than acknowledging and promoting human rights activism as a necessary debate in establishing a democratic framework.

A country with a basic law that guarantees freedom of opinion and expression increasingly found ways to curtail this freedom domestically.[6] So much so, regulatory standards enforced in some parts of India have literally brought parts of the nation like the Northeastern states and Kashmir under an iron curtain. This isolated the ordinary Indian citizen living in these areas from the rest of the country. [7] The mainstream media

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2 *Mrs. Hansa Mehta is a Gandhian and a Muslim woman. A Muslim woman leading the Indian delegation during the drafting process of the UDHR, when India was still a British colony showcases the vision of the mainstreamIndian leaders of the time. Mrs. Mehta's leadership is definitely an exception considering the fact that in 1945,Muslim women the world over were yet to begin their movement for gender equality within the Muslimcommunity. In the current Indian context where Muslim women are increasingly forced to follow a middle-eastern dress-code for women like wearing Burkhas and are encouraged to study in Islamic religious schools rather than mainstream institutions, Mrs. Mehta's leadership and her advocacy for a universal brotherhood based on the recognition of equality in rights is unique.*

3 *India's Changing Role in the United Nations: Stanley A. Kochanek; Pacific Affairs, Vol. 53, No. 1 (Spring, 1980), pp. 48-68 – University of British Columbia.*

4 *Id.*

5 *Kashmir Conflict: Secessionist Movement, Mobilization and Political Institutions (Review): Reeta Chowdhari Tremblay; Pacific Affairs, Vol. 74, No. 4 (Winter, 2001-2002), pp. 569-577 – University of British Columbia.*

6 *Opposition to the Entry of the Foreign Press in India, 1991-1995: The Hidden Agenda: Prasun Sonwalkar; Modern Asian Studies, Vol. 35, No. 3 (Jul., 2001), pp. 743-763 – Cambridge University .*

7 *The State and the Use of Coercive Power in India: Kuldeep Mathur; Asian Survey, Vol. 32, No. 4 (Apr., 1992), pp. 337-349 – University of California*

in India, driven by political, religious and business interests, did nothing much to fight against or even to expose this impasse.

Had it not been for the relentless efforts of civic organisations and public-spirited individuals who were eagerly received by the Indian courts, India would have easily become a desert for basic human rights. Whenever the government tried to curtail individual freedom, the justice institutions, particularly the courts, have come to the rescue of the people. By this process not only was the basic structure of the Indian Constitution preserved, but also provided the courts the opportunity to interpret the Constitution to expand its scope to include rights that were not otherwise considered as justiciable.[8]

On a theoretical stage the Indian Constitution is a masterpiece, balancing rights, duties and expectations. The Constitutional text from what it was in 1950 has considerably changed in the past 62 years. Most of them, progressive in nature, were initiated by the courts. Whenever the government shied away from implementing international human rights norms within the country, the courts took the initiative to read these norms into the basic text of the Indian Constitution.

The concept of 'right to life', from its original construction in Article 21 of the Constitution, was expanded to include environment, housing and health. On certain occasions the courts have also instructed the government to make appropriate domestic legislations or amendments into the Constitution to incorporate such rights.[9]

While several countries that follow the dualist system to incorporate international human rights obligations and treaty law are yet to incorporate the treaty obligations into their domestic law, India had several core international human rights norms contained in conventions like the ICCPR in its already existing domestic legal framework.[10] Some of these laws like the Code of Criminal Procedure, 1974 and the Code of Civil Procedure, 1809 have its bedrock in the British common-law. After independence, these legislations were adopted and continued in practice in India.

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*8 Judicial Response to Socio-economic and Cultural Rights: An Indian Perspective: Bijo Francis; LST Review, Vol. 15, No.203 & 204 Sep. - Oct. 2004.*

*9 Ibid. see discussion on the right to education, food and housing.*

*10 For example India acceded to the ICCPR on 10 April 1979. Even before this, the Code of Criminal Procedure, 1974 in India has provisions synonymous to the Articles in the ICCPR concerning arrest, detention, trials, presumption of innocence, burden of proof and provisions regarding bail.*

## 1.1. ISSUES COVERED IN THIS REPORT

This report tries to analyse certain aspects of India's human rights record as documented in the year 2008 by the AHRC. Where India failed and continues to fail in meeting the 'promise and performance' is in preventing the legal framework provided by the existing laws and procedures to meet the development in international human rights jurisprudence. India also fails in providing equal access and opportunity to its citizen to make use of its justice mechanisms. This is not only a breach in the fundamental guarantees enshrined in the Constitution, but is also a non-compliance of the common Article 2 of the international treaties India has ratified and Article 8 of the UDHR. To complicate matters further there are legislations pressed into use in India that contravenes Constitutional guarantees.[11]

In this report, emphasis is given to human rights promises and performance in India concerning the following issues:

a) ICCPR: (International Covenant on Civil and Political Rights) Acceded on 10 April 1979

| | | |
|---|---|---|
| 1. Article 7 | ~ | concerning torture |
| 2. Article 8 | ~ | concerning bonded labour |
| 3. Article 14 (3) c | ~ | concerning right to fair trial without delay |
| 4. Article 18 | ~ | concerning freedom of religion |

b) ICESCR: (International Covenant on Economic, Social and Cultural Rights) Acceded on 10 April 1979

| | | |
|---|---|---|
| 1. Article 11 | ~ | concerning the right to food and housing |
| 2. Article 12 | ~ | concerning right to health |
| 3. Article 13 | ~ | concerning right to education |

c) ICERD: (International Convention on the Elimination of All Forms of Racial Discrimination) Ratified on 3 December 1968

| | | |
|---|---|---|
| 1. Article 5 | ~ | concerning racial discrimination in all forms |
| 2. Article 6 | ~ | concerning effective remedies against discrimination |

For the sake of convenience and coherence some issues are discussed independently, whereas some are discussed jointly. In addition to the thrust areas mentioned above, reference will be made to international human rights norms binding India arising out

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*11 For example the Armed Forces (Special Powers) Act, 1958*

of its treaty obligations. Reference will be also drawn from the observations made by international human rights bodies like the special procedure mechanisms and its mandate holders, treaty bodies and the former Commission on Human Rights and its successor, the Human Rights Council.

The purpose of this report is not to compile the recommendations made by international human rights bodies on India since such an exercise does not call for the expertise of a regional human rights group. Moreover, such information is freely available from other sources, for example the UN itself. Additionally, some of the recommendations have become redundant or obsolete owing to the change in the domestic circumstances and the lack of understanding of some of these bodies about the issues in India.

This report is expected to contribute to the debate concerning key human rights issues emerging in India, from the point of view of the knowledge gained by the AHRC about the country. Similar reports on the same issues from different view points and on other diverse issues not touched upon in this report could provide an adequate platform for the improvement of the overall human rights situation in India.

## 2. 1. CUSTODIAL TORTURE

Custodial torture is the most commonly used investigative tool by the law enforcement agencies in India. Often the entire criminal investigation depends upon the confession statement extracted from a suspect. In the process of extracting confession, the law enforcement agencies employ different forms of torture. The practice is so widespread often even the presence of a lawyer or a person interested in the suspect who turns up at a police station inquiring about the suspect does not serve as a deterrent for the law enforcement agencies from torturing a suspect.

On 14 October 2008, police officers stationed at Varapuzha Police Station in Ernakulam district took 20-year-old Hithin into custody.[12] The officers suspected Hithin was involved in a theft case. At the police station, Hithin was tortured severely. Later Hithin's relatives arrived at the police station inquiring about him. A local politician had also accompanied them to the police station.[13] The Sub Inspector summoned Hithin from the room where he was kept at the police station and started caning him in front of his relatives and the politician. Later, the officer allowed Hithin to leave.

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*12 For further information please see AHRC-UAC-244-2008 <http://www.ahrchk.net/ua/mainfile.php/2008/3055/>*

*13 It is common in Kerala for the ordinary people to request politicians to accompany them if they have to go to the police station. The police treat politicians, particularly those from the ruling party, with courtesy. A politician is a guarantee that the person will not be hurt inside a police station.*

Torture is not a crime in India. The only provision in law that could be used to charge a law enforcement officer for resorting to torture are Sections 330 and 331 of the Indian Penal Code, 1860.[14] Contrary to the gravity of the crime, the crime being committed by a law enforcement officer, the Penal Code does not attach any additional gravity to the crime of torture. In addition, the fact that the crime of torture is often committed within a police station which effectively rules out the possibility of an independent witness, the absence of an independent investigating agency makes it almost impossible to successfully prosecute a crime of torture. [15]

The absence of successful prosecution and the relative difficulty of even lodging a complaint against a law enforcement officer have provided the law enforcement agencies with a high degree of impunity. This has resulted in an alarming increase in the cases of custodial torture and other crimes committed by law enforcement agencies in India. A cursory glance at newspapers published in India is good enough to substantiate this argument.[16]

Torture is practised mostly against the poor.[17] The widespread use of custodial torture has isolated the ordinary people from the law enforcement agencies. Torture is used as a tool for social control in India.[18] The government indirectly endorses the use of torture.[19] In most of the states in India where feudalism continues in its full vigour, torture and the fear created by the use of torture by the law enforcement agencies are used to suppress peasant uprisings.

Landlords to thwart any attempts by the peasants to claim proper wages or exercise their right to own land connive with the local police. Landlords bribe police officers to raid

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14 *Section 330: Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, ... shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine Section 331: This section relates to causing grievous hurt and the punishment is enhanced to ten years imprisonment.*

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

16 *Custodial torture often figures in the news these days. It is a serious violation of human dignity which can destroy the personality of any individual. Press Release by Justice A. S. Anand, as the Chief Justice of India: October 2001; Press Information Bureau – Government of India.*

17 *Feudal Forces: Democratic Nations – Police Accountability in Commonwealth South Asia; Commonwealth Human Rights Initiative, 2007 p. 14*

18 *Punishment and Social Control: Thomas G Blomberg and Stanley Cohen, ed. Aldine de Gruyter (New York), August 2003 p. 483.*

19 *In June 2008 the Speaker of the Kerala Legislative Assembly while addressing a gathering of police officers during the annual meeting of the State Police Association said that the state government does not agree with the argument that police officers must refrain from the use of force while investigating crimes. The minister further said that often use of force is the only way to 'make suspects tell the truth' which gives a headway for criminal investigation. For further information please see 'India Still Tolerate Torture', Bijo Francis, United Press International, 23 June 2008.*

peasant houses to pick up their leaders and register false cases against them. It is not rare in such raids for the police to molest or even rape peasant women. This situation in many parts of the country has become a catalyst to anti-state armed movements, which in India is commonly known as Naxal movements/resistance.[20]

The feudal lords and the police target human rights defenders who speak up against such practices.[21] Even the officials within the local administration, outside the police force abet to such falsifications and misuse of authority. This also showcases the government's antagonistic attitude towards human rights defenders.

The practice of torture indicates the weakness of the rule of law in the country. The widespread use of custodial torture in any state reflects a wilting justice system. Torture is an external manifestation of an internal cancer that destroys the fabric of justice. A healthy justice system is a prerequisite for development. A simple glance at the states that do not practice torture, in theory or in practice, proves this.[22]

In addition to the absence of a legislative framework, there is no institutional framework in the country to prevent the practice of torture. For example, if a person needs to file a complaint against a police officer, the only remedy for the person is to file a complaint against the officer with the officer's superior. Superior officers, who directly and openly endorse the subordinate officer's action, often discourage such complaints. Such an attitude results in the complaint not being investigated at all. The next option available for the complainant is to approach the court. Though the court can direct an investigation, none other than a police officer conducts the investigation. This is because there are are no other independent agencies within the country that could accept complaints against police officers. Even agencies like the Central Bureau of Investigation (CBI) have a large number of police officers on secondment posted at the Bureau.

Often investigations against police officers end in a farce. Even in crimes like murder that attract relatively a higher degree of media interest, the police in the country are infamous

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20 *Naxal Movement in India : A Profile : Rajat Kujur Institute of Peace and Conflict Studies, New Delhi September 2008 p. 4*

21 *See for example UP-163-2007, issued by the AHRC on 11 December 2007 <http://www.ahrchk.net/ua/mainfile.php/2007/2693/>*

22 *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation : Craig Scott; Hart Publishing, 2001 p.157*

for suppressing the evidence to protect the accused.[23] Owing to the fear generated by the law enforcement agencies and the impunity they enjoy, these agencies have become synonymous with corruption.

In fact the police force in India is perceived as the second most corrupt government agency in the country.[24] Corruption within the police is so widespread and deep rooted that an investigation conducted in October this year about the terrorist recruitment cells operating in Kerala state, revealed that several state police officers deliberately failed to take action, when they came to know about these recruitment cells. It was reported that these officers had accepted huge amounts as bribes to facilitate the stay of foreign mercenaries who visited the state to recruit their cadres to be trained to fight in Kashmir and other parts of India.

In the northeastern states of India and in the state of Jammu and Kashmir, where a draconian law like the Armed Forces Special Powers Act, 1958 is pressed into use, the law enforcement agencies operating in these areas are shielded with the additional protection of the law from being prosecuted for acts of violence, particularly of torture and murder.[25] Even journalists, lower court judges and human rights defenders face abuse from the law enforcement agencies due to the overwhelming misuse of this law.[26] However each attempt to declare this law as unconstitutional was rejected by the Supreme Court of India. The UN Committee on Elimination of Racial Discrimination (CERD) has repeatedly recommended that the government repeal this law.[27] However the government has not only failed to repeal the law, but has consequently extended its operation in the northeastern states and in the state of Jammu and Kashmir.

Law enforcement agencies use torture as a means for corruption. Due to fear, persons

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*23 Abhaya Case: Two priests and a nun held; The Hindu, 20, November 2008. This case relates to the suspected murder of a nun in a convent in Kerala state. The incident happened 16 years ago. At least three separate teams of police officers investigated the case and all concluded that the death of Sr. Abhaya was due to suicide. The father of Sr. Abhaya pursued the matter and later the case, under the directions from the court was handed over to the Central Bureau of Investigation (CBI). The CBI also, allegedly under pressure, concluded that the case was that of suicide. The case was again brought to the limelight when the state High Court intervened after 16 years ordering a fresh investigation. The court also directed a Chief Judicial Magistrate to supervise the investigation. This time however, the CBI came out with acceptable evidence that the death was not of suicide, but is in fact a murder. Soon after the three persons suspected of murdering Sr. Abhaya were arrested.*

*24 Police Corruption : International Perspectives, eds. Rick Sarre, Dilip K. Das and H. J. Albrecht, Lexington Books – September 2003, p. 6*

*25 The Armed Forces Special Powers Act : A Study in National Security Tyranny, South Asia Human Rights Documentation Centre <http://www.hrdc.net/sahrdc/resources/armed_forces.htm>*

*26 Freedom of Press : Yumnam Rupachandra, E-Pao Net, 28 November 2008*

*27 Concluding observations of the Committee on the Elimination of Racial Discrimination; CERD/C/IND/CO/19, dated 5 May 2007*

detained by the police pay bribes to the police officers so that they are not assaulted, ill-treated or injured while in custody.[28] Demand of bribe is not however limited to pre-trial custody. Payment of bribe is common in prisons. A convict is expected to pay bribe to ensure proper treatment while in the prison. Those who fail are denied food and other essential requirements inside the prison. A common tactic used by prison guards is to torture the person as a form of punishment for failing to pay bribe. Prison being a closed environment with minimal chances and opportunities to complain, the inmates are left with no option other than to pay for their safety.[29]

The Prime Minister of India had in January this year issued a public statement that India would ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was the first time ever for a Prime Minister in the country to make such a statement. However, since then nothing was heard from the government regarding this. The fact remains, that in the past five years on an average at least four persons die in custody every day in India, most of them from torture.[30]

Various sources within India has expressed concern about the alarming increase in the use of torture in the country. The National Human Rights Commission (NHRC) has repeatedly expressed its concern on this issue. Successive reports and recommendations by the NHRC emphasise this.[31] The NHRC has also recommended that the government must not only merely ratify the Convention against Torture as early as possible, but must also come-up with domestic legislation/s to address this issue.

The NHRC has further expressed the need to set-up an independent agency in the country to investigate complaints against law enforcement officers, particularly concerning the use of torture. The NHRC in its report to the Human Rights Council during the Universal Periodic Review (UPR) of India had also recommended the same.[32] The organizations that contributed to this report have also recommended the it.[33]

In the National Report submitted by the Government of India prior to the Review by the Human Rights Council, the government has assured the Council and its members that the country would soon ratify the Convention against Torture.[34] The Council in its

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28 *Policing the Police : Colin Gonsalves, Combat Law - Volume 6 Issue 4, July-August 2007*

29 *Jails that fail justice : Vijay Hiremath, Combat Law - Volume 7 Issue 2, March-April, 2008*

30 *Report – National Human Rights Commission of India, June 2008*

31 *Please see the annual reports by the NHRC for the years 2001 - 2007*

32 *Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to Human Rights Council Resolution 5/1; A/HRC/WG.6/IND/3 dated 6 March 2008*

33 *Id.*

34 *National report submitted in accordance with paragraph 15 (a) of the annex to the Human Rights Council Resolution 15/1; A/HRC/WG.1/IND/1, para. 38*

Concluding Observations and Recommendations has encouraged the government to ratify the convention and its Optional Protocol without any further delay.[35] Reiterating its position, the Government has further assured the Council that it will ratify the Convention soon.[36]

## 2.2 CONCLUSION:

The widespread use of torture in India illuminates the disregard the government entertains concerning a serious human rights issue in the country. The practice of the use of torture is not only indicative of the state of policing in the country, but also suggests how far the government is interested in protecting, promoting and fulfilling human rights.

In spite of repeated requests and pressure from various civil society groups, India has not extended an invitation to the UN Rapporteur on Torture to visit the country. The law enforcement agencies on the other hand find the use of torture as the easiest way of investigation and as a tool to instil fear in the people. This has distanced the law enforcement agencies further from the ordinary people.

In the context of increasing threats to national security, it is imperative for the law enforcement agencies in the country to instil public confidence in their capacity and function. Fundamental to this is the criminalisation of torture and setting up of independent mechanisms to investigate complaints against police officers.

Maintaining rule of law in a society that fears its law enforcement agencies and view their police officers as a group of organised criminals is impossible. National security and development is impossible without the participation of the average citizen. The average Indian finds himself/herself isolated from their law enforcement agencies. This is more than a congenial situation for terrorists and anti-democratic forces to wreak havoc in the country. The attacks and bomb explosions carried out by anti-state elements who launched co-ordinated attacks in New Delhi, Assam, Uttar Pradesh, Rajasthan, Gujarat and Mumbai in succession stand testimony to this fact.

Continued use of torture to subdue the public and command obedience by the law enforcement agencies in fact results in low morale of the law enforcement agencies themselves. Curbing and preventing the practice of torture by law enforcement agencies

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*35 Universal Periodic Review : Report of the Working Group on the Universal Periodic Review – India, A/HRC/8/26 dated 23 May 2008*

*36 Response of the Government of India to the recommendations made by delegations during the Universal Periodic Review of India; A/HRC/8/26/Add.2 dated 11 June 2008*

is a prerequisite for the overall improvement of rule of law in any country and India is no exception. A society, otherwise deeply divided on the basis of caste, religion, language, culture and economy cannot afford a police force with low morale.

There is no single-capsule remedy for this problem. However the first step to correct the mistakes within the law enforcement agencies will be to discipline the force. Without preventing the use of torture discipline cannot be achieved within the government law enforcement agencies.

Prohibiting torture and enforcing accountability on those who practice torture within the police is one of the primary steps that the administration must implement in India. Instead of posting officers on secondment to the central investigation agencies, a complete independent and competent agency must be created to investigate complaints against law enforcement officers. Rather than depending upon the two century-old, obsolete provisions in the Penal Code to punish officers practicing torture, a new law must be created to criminalise the practice of torture in tune with the internationally accepted norms concerning torture.

As of now no steps in the above directions are visible or even debated in India. All that has been said and heard are occasional statements by the Prime Minister that India will soon ratify the Convention against Torture. It appears that the political will on this aspect is limited to this rhetoric. However the sad reality is that the continuation of the rhetoric will not merely maintain status quo, but will in fact be a contributing factor to the further deterioration of rule of law in India and ultimately India itself.

## 3.1. BONDED LABOUR

India is one of the founder members of the International Labour Organisation (ILO).[37] It has ratified 41 ILO conventions and one Protocol.[38] It has legislated several domestic laws concerning the right to work like the Payment of Wages Act, 1936 and the Minimum Wages Act, 1948. To meet the treaty obligation under Article 8 of the ICCPR, India has also enacted the Bonded Labour System (Abolition) Act, 1976. However, bonded labour is practised in most of India.

The Bonded Labour System (Abolition) Act, 1976 prohibits the practice of bonded labour. A custom, tradition, contract or agreement cannot be held valid to justify the practice of bonded labour.[39] But when each case of bonded labour is thoroughly looked

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*37 India - Ministry of Labour and Employment*

*38 Please see <http://labour.nic.in/ilas/convention.htm>*

*39 Section 5 of the Bonded Labour System (Abolition) Act, 1976*

into, one can find the employer justifying bonded labour precisely on these grounds, which are prohibited by the statute.

The case reported by the AHRC concerning Gehru and Bothu Musahar explains this phenomenon.[40] Gehru and Bothu are from the Musahar community. Musahar literally means 'rat eater'. Musahar is a nomadic tribe in India. They live scattered in the northern states like Uttar Pradesh, Jharkhand, Uttranchal, Orissa and Bihar.[41] Owing to the shrinkage of natural resources, the Musahar in the past two decades have started settling down in remote rural areas in these states. However, due to the lack of government care and proper support, the Musahar families soon become dependent upon upper caste landlords for their survival.[42]

Gehru and Bhothu had to borrow money from their landlord Mr. Rajendra Prasad Tripathi, for which Tripathi got them to work at his brick kiln. The wages paid were so low to repay the loan. It was just a matter of weeks that the families, including their children, were forced to work for Tripathi. As the work in the kiln demanded strenuous labour in all weather conditions, the more the families worked, the more they became sick. This forced Gehru and Bhothu to borrow further money. Until the case was exposed by the AHRC, Gehru and Bhothu along with their families worked for Tripathi. When the case was exposed, the Varanasi District Magistrate was under pressure to take action.

The Magistrate initially denied the case and its facts. Under pressure, he reluctantly ordered the local police to investigate. The police after accepting bribe from Tripathi furnished a false report denying the case. The AHRC exerted more pressure, by following up the case through its Urgent Appeals Programme. The Magistrate was finally forced to visit the kiln where he found not only Gehru and Bhothu, but almost the entire Musahar village working as bonded labour. The Musahars were released from bonded labour and Tripathi directed to pay fine. Tripathi finding his scheme exposed, threatened the Musahars and the members of the local human rights group the People's Vigilance Committee on Human Rights (PVCHR), that he would make sure that the Musahars were punished for their audacity to lodge a complaint with the PVCHR and also the PVCHR punished for meddling with his business.

Threats of this nature in the rural areas in India are to be taken seriously. And Tripathi did mean business. He bribed the police officers at the local police station to file

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*40 For further information please see AHRC-UAU-004-2008 <http://www.ahrchk.net/ua/mainfile.php/2008/2718/>*

*41 The Ideology of Tribal Economy and Society : Politics in Jharkhand : 1950-1980 Stuart Corbridge, Modern Asian Studies 22, 1 (1988) pp.1-42*

*42 Id.*

fabricated cases against the PVCHR members and Gehru and Bhothu. The police did exactly what Tripathi wanted. This case is being currently contested in Varanasi Magistrate court.

What is depicted here is the interplay of caste, corruption and the failure of the local administration that leads to a series of rights abuse for the poor. Musahars being considered as untouchables found it impossible to find work elsewhere. This resulted in hunger deaths in the Musahar village. As of now the PVCHR provides life support to the Musahar village by finding short-term and long-term employment for the Musahar. Some of them, including Gehru are now employed in another brick kiln where they earn a decent income.

70 percent of Indians live in rural areas. Of this an estimated 35 percent of the population lives in appalling circumstances.[43] Of particular concern are their basic needs like food, shelter, education and health. These aspects are separately dealt with in this report. When basic facilities are denied to the rural populace, coupled with discriminatory practices rampant in India like the caste based discrimination, the poor are forced to borrow money and goods from the rich, often from landlords. Such borrowing is often a one-way trap that leads the poor to bonded labour.[44]

To check the practice of bonded labour the Labour Ministry, Government of India along with the state governments in the country has put in place several policies. Since the ratification of the ILO Convention No.29 (Forced Labour Convention 1930) on 30.11.1954, the bonded labour system was abolished by law throughout the country with effect from 25 October 1975 by an Ordinance. Subsequently, Bonded Labour System (Abolition) Act was passed by the Parliament in 1976 but given effect to from 25.10.75, the date when the Ordinance was promulgated. The Act provides for the abolition of bonded labour, bonded labour system and bonded debt. 'Bonded labour stands abolished and would be illegal wherever it exists'- this is how the subject figures as an item in the old 20 Point Programme for national reconstruction, which goes to show the primacy and centrality attached to this subject at the national level.

Institutional mechanisms in the form of vigilance committees at the district and sub-divisional levels under the chairmanship of District and Sub-Divisional Magistrates have been established. Anyone who wants to file a complaint under the law about the existence of bonded/forced labour in any part of India can file it before the vigilance

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*43 Government Spending, Poverty and Growth in Rural India : ShenggenFan, Peter Hazel and Sukhadeo Thorat; American Journal of Agricultural Economics, Vol. 82 No. 4 (Nov., 2000), pp. 1038 - 1051*

*44 Caste, Class, and Clientelism: A Political Economy of Everyday Corruption in Rural North India : Craig Jeffrey; Economic Geography, Vol. 78, No. 1 (Jan., 2002), pp. 21- 41*

committee under the Act. Executive Magistrates have been empowered under the Act to conduct summary trial of offences, to release the bonded labourers(s) and to issue release certificates. The Act also lays down stringent penal provisions against offending employers. The penalties include imprisonment for a term which may extend to 3 years and also with fine which may extend to two thousand Rupees.[45]

In order to assist the state governments in their task of rehabilitation of released bonded labourers, the Ministry of Labour has launched a centrally sponsored scheme since May, 1978 for rehabilitation of freed bonded labourers. Under the scheme, the Government of India extends rehabilitation assistance at the rate of ten thousand rupees for every freed bonded labourer.

The issue of bonded labour has been discussed in the Supreme Court in the form of several public interest litigations. As per directions of the Supreme Court in WP No.3922/85, a survey for identification of bonded labourers was conducted during October-December 1996. Under the centrally sponsored scheme, expenditure up to the end of 8th Five Year Plan amounted to 40.51 million Rupees. During the 9th Five Year Plan, an expenditure of 24.50 million Rupees has been incurred by the government. During the 10th Five Year Plan (2002-07) central grants amounting to 97.28 million Rupees have been provided to various state governments and union territories under this scheme.

The Supreme Court in its order dated 11 November 1997 has requested the National Human Rights Commission to be involved in dealing with the issue of bonded labour. In pursuance of this order, a Central Action Group (CAG) has been constituted in the National Human Rights Commission. The CAG is holding regular meetings/ sensitisation workshops at various places in collaboration with the Ministry of Labour and Employment and the matter is being pursued with the state governments. In spite of all this millions of children are employed as bonded labourers in India.[46]
Of the millions employed as bonded labourers, almost 95 percent are from the Dalit community. In a survey conducted by an Indian NGO Mine Labour Protection Campaign in 2003 about 95 percent of the bonded labourers of the three million mine workers in Rajasthan alone are employed as bonded labourers and almost every one of

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*45 Ministry of Labour and Employment, Press Release dated 10 September 2008*

*46 Small Hands of Slavery : Bonded Child Labour in India, Human Rights Watch – Child Rights Project, 1996. According to a survey conducted by the Human Rights Watch in 1996, at least 15 million children work as bonded labourers in India. The conditions since then has only improved marginally, particularly after the intervention of the Supreme Court. However, the marginal improvement only means that out of the 15 million children employed as bonded labourers as averred by the Human Rights Watch only a few thousand has been rescued. Even after rescue many of them are documented to have returned to the same employer due to the absence of any support line to continue life.*

them are from the Dalit community.[47] The Government of India itself admits that about 85 percent of bonded labourers are from the Dalit community.[48]

The Working Group on Contemporary Forms of Slavery during its 28th Session in Geneva held in June 2003 quotes an observation made by the then Commissioner on Human Rights, "Victims of slavery and slavery-like practices frequently belong to minority groups, particular racial groups or categories of people who are especially vulnerable to a wide range of discriminatory acts, including women, children, indigenous people, people of 'low' caste status and migrant workers".[49]

The Committee on the Elimination of Racial Discrimination's General Recommendation on Descent-Based Discrimination in its review on India categorically recommends that the government : review, enact or amend legislation to outlaw all forms of discrimination based on descent; resolutely implement legislation and other measures in force; and to formulate and implement a comprehensive national strategy, with participation of members of affected groups, in order to eliminate discrimination against members of descent based groups.[50]

By contrast, the recommendations and the domestic legislations ultimately depend upon the local administrator to implement the government policies. This is where in India like several other laws the policy fails to meet practice. The ILO Committee of Experts observed in 2003 that there is a "certain reluctance" by state governments in India to participate in efforts to identify and release bonded labourers.[51] The former Labour Secretary for the Indian Government was less circumspect. He noted that "There have been cases where the magistrate has refused to issue a release certificate even after all the ingredients of bonded labour system have been proved beyond doubt."[52]

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*47 Human Rights Watch estimates that there are 40 million bonded labourers in India alone (Broken People, 1999, page 139)*

*48 Ministry of Labour, Government of India, Annual Report 2000-2001, page 181. Quoted in Human Rights Watch, Small Change, January 2003, page 41*

*49 Report to the 56th session of the United Nations Commission on Human Rights (E/CN.4/2000/12), para 53*

*50 CERD strongly reaffirmed that "discrimination based on 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights."*

*51 The NGO Volunteers for Social Justice (VSJ), has filed some 2,000 cases for the release of bonded labourers in Punjab State. According to VSJ only four of these bonded labourers have been formally released since 1990.*

*52 Dr L Mishra, Secretary to the Government of India, Ministry of Labour, Bonded Labour, presentation in the National Consultation on Forced Labour, 21-22 September 2000, New Delhi, page 35*

## 3.2. CONCLUSION

Prevention of bonded labour is impossible without complete eradication of caste based discrimination. The practice of caste based discrimination and bonded labour cannot be eradicated in India without the effective implementation of the domestic laws that prohibit these practices. Bonded labour and caste based discrimination is a crime in India. To prevent these crimes, the only deterrence is the effective investigation and prosecution of those who engage in these practices. This requires the active engagement of the law enforcement agencies in India. As discussed in the previous chapter, with the law enforcement agency and its function in absolute chaos and ineptitude, these evil practices will continue in India.

## 4.1. FREEDOM OF RELIGION

Religion determines the liberty and security of an Indian.[53] Religion, and violence sanctioned by religion is used as a tool for social control in the country. Religion determines politics, shapes governments and decides its fate along with that of millions of Indians. It is the most commonly referred denominator of social identity. In this whirlpool, liberty and security are two irrelevant footnotes to religion. From Kashmir to Kanyakumari, religion decides whether one is relatively safe or insecure. Yet in theory India is a secular and democratic republic of an estimated 1.2 billion people.

Religious freedom is a fundamental right in India.[54] The Constitution also guarantees liberty and security on an equal footing.[55] Religious violence is often social control. It is a form of self-help by a group and a tool for collective bargaining. Religious violence when unilateral and non-governmental, appears in four major forms-lynching, rioting, vigilantism, and terrorism - each distinguished by its system of liability (individual or collective) and degree of organization (higher or lower).[56] Liberty and security, footnoted with religious belief takes relative shapes of perfection and imperfection amidst mass violence in India. Religion imparts far- reaching effects in India. It is capable of determining the success and failure of a business to the micro level of defining relationship between individuals of the same family.[57]

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*53 India Country Risk Assessment - Human Rights and Business, Danish Institute for Human Rights, 2005 [Executive Summary]*

*54 Articles 25 - 28*

*55 Please see Article 21 of the Constitution of India*

*56 Collective Violence as Social Control : Roberta Senechal de la Roche , Sociological Forum, Vol. 11, No. 1 (Mar., 1996), pp. 97-128*

*57 Community Social Context and Individualistic Attitudes toward Marriage : Jennifer S. Barber, Social Psychology Quarterly, Vol. 67, No. 3 (Sep., 2004), pp. 236-256; American Sociological Association*

Religious violence is a growing problem in parts of India. According to the International Religious Freedom Report for 2008, there were organized communal attacks against minority religious groups, particularly in states governed by the Hindu nationalist Bharatiya Janata Party (BJP).[58] In the state of Orissa, governed by a coalition government that includes the BJP, Hindu extremists attacked Dalit Christian villagers and churches in the Kandhamal district over the Christmas holiday 2007.

Approximately, 100 churches and Christian institutions were damaged, and 700 Dalit Christian homes were destroyed causing villagers to flee to nearby forests. More violence followed in August 2007 after the murder of a prominent Vishwa Hindu Parishad (VHP) leader. Led by a militant wing of the VHP, mobs torched churches and homes, displacing tens of thousands of Dalit Christians, many of whom are still in relief camps.

Since then, anti-Dalit Christian attacks have spread in the central state of Madhya Pradesh, Karnataka and Kerala in the south, and to Uttar Pradesh in the north. Some of the worst cases have occurred in Karnataka, which earlier this year voted in the Hindu nationalist party, BJP. Unfortunately, convictions over religious violence in India are rare. In March, the UN Special Rapporteur on freedom of religion warned that the minimal prosecutions and "political exploitation of communal tensions" put India at risk for more violence. [59]

In fact it did. In a two-month long operation spreading through September and October this year, there was a state sponsored nation-wide arrest of 'suspected' Muslims in India. The terrorist attacks and bomb blasts sponsored by Islamic fundamentalist groups operating from inside and outside India that killed an estimated total of 400 persons in Uttar Pradesh, New Delhi, Rajasthan, Gujarat and Assam prompted the state governments in these states to detain and quarantine about 1800 Muslims.

The state administrations claimed that in the absence of any documentary proof to show their Indian citizenship, these are persons suspected to be overstaying with malicious intent in India after arriving from Bangladesh or Pakistan. In a country where an estimated 30 percent of the population lacks any form of identity document, most of those who were arrested found it impossible to prove to which country they belonged.

To further deteriorate matters in Assam, the home-grown Assam for Assamese groups started attacking Muslims who had long settled in that state. Most of their forefathers had arrived in Assam prior to 1947 as estate managers and plantation labourers for the

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*58 International Religious Freedom Report 2008, United States Bureau of Democracy, Human Rights and Labour*

*59 Press release dated 20 March 2008 by Ms. Asma Jahangir, UN Special Rapporteur on Freedom of Religion and Belief after her visit to India*

British. Lynching and looting of Muslims still continue in Assam, though it is rarely reported in the media. The state administration sensing the popular sentiment against non-Assamese has done practically nothing to prevent the violence. This prompted the Muslims to form self-help groups to prevent destruction to their property and to save themselves from predominantly VHP-sponsored Assamese fundamentalists.

Members of a particular religion staying in separate and segregated parts in cities and rural areas in India, is not a rare phenomenon. Every city in India has an identifiable Muslim, Christian and Hindu sector. In some cities in north India there are even Sikh, Buddhist and Jewish sectors. Of the different groups, the Hindu-Muslim divide is the strongest. In all these self-created separate entities, the Dalits are further isolated, as in India there are Dalit Muslims and Dalit Christians.[60]

It is common knowledge that Islamic fundamentalist forces are active in India. So are their counterparts from the Hindu religion. Hindu fundamentalist forces are operative, with much impunity compared to their Islamic brethren. Even a relatively peaceful state like Kerala in the south of India is not immune to them.

On 23 November this year the state police uncovered some 20 home-made bombs at the residence of a politician in Kerala. The bombs were found wrapped in plastic bags, placed in a bucket and buried in a hole on the property of Mr. Vipin Das, a leader of the Hindu nationalist organisation, the Rashtriya Swayamsevak Sangh (RSS). The RSS is one of India's mainstream Hindu fundamentalist political parties. It claims a humanist platform aimed at revitalizing the spiritual and moral traditions of India. It requires only basic common sense to understand that humanism and home-made bombs have nothing in common. In the Indian context, however, what is common is the unholy nexus between violence, religion and politics. Mainstream religions in India – Hindus, Christians and Muslims – are all equally responsible for advocating violence, conniving with politicians and playing politics in India.

Mainstream politics of this country however has played the religion card for their exclusive benefit. One classical example is that of Jammu and Kashmir. The Hindu fundamentalist opinion about Kashmir is of such nature that its chief, Mr. Jaswant Singh questioned Government of India's intention of permitting a Muslim like Ms. Asma Jahangir that too from Pakistan to visit Kashmir during her visit to India in March this year. To the BJP - the party Singh represents, Ms. Asma Jahangir was not the UN Special Rapporteur on freedom of religion and belief.[61] For the BJP the issue in Kashmir is

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*60 Collective and Elective Ethnicity: Caste among Urban Muslims in India : Syed Ali , Sociological Forum, Vol. 17, No. 4 (Dec., 2002), pp. 593-620*

*61 Times of India, 5 March 2008*

not a right to self determination of the Kashmiris, but is that of Hindu domination of Muslims, which according to them must be the rule in a 'Hindu' state.

Given the extent of religious violence in India, which amounts to at least 30 high intensity incidents in this year alone where more than one person has lost life in each of these incidents, what stands out is the intolerance of the Hindu upper caste against the rest. This caste based intolerance, which has spiralled out of control, dominates the social and political spectrum in India.

Examining the violent events in Orissa provides alarming insight into how the state administration failed to prevent the violence and once it started failed in curbing it. Even the National Human Rights Commission and the Government of India acknowledge that the response of the state government apparatus, the police in particular was intentionally slow.[62] There are confirmed reports that a Catholic Nun was raped by a VHP mob while police officers were looking on.[63] It is also widely acknowledged that had certain criminal elements in the VHP been booked and punished for the violence they had committed in the past, the 2008 violence in Orissa might not have happened.[64]

Contrary to the popularly mooted opinion about the cause of violence, a deeper insight of the violence suggests that what is being witnessed in India is an uprising of fundamentalist Hindu forces against all challenges upon traditional Hindu practices, particularly the caste system.

It is natural for a system that exploited millions of people for more than 3,000 years to find means to regain dominance. The caste system that exclusively benefited the upper caste Hindus – the Brahmins, Kshatriyas and the Vaishyas – might not have faced such an onslaught upon its status quo other than during the four hundred years that followed immediately after the life of Buddha. Since time immemorial the three Hindu upper castes have benefited from the caste structure. The caste and its mandates have deprived the lower castes, particularly the Dalits, from land, education and a better living. In short, the caste system maintains an enforced social order where the upper castes enjoys all privileges while the lower castes such as Sudras and Dalits are expected to keep their distance from claiming equality of any form in society.

Any attempt to challenge this status quo faces stiff resistance from the upper caste. Instances of Sudra and Dalit children forced out from schools and crimes committed against educated Sudra and Dalit individuals by the upper caste count into thousands

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*62 Report - Alert Net & Reuters 28 October 2008*

*63 Five cops suspended in the nun rape case, Indian Express, 31 October 2008*

*64 Id. 58*

in India. There are at least a few hundred cases reported where the Sudra and Dalit individuals were either murdered or permanently disabled by the upper caste to prevent them benefiting from education. There have been at least three-dozen cases reported from various parts of India in the past ten years where Dalits were blinded by the upper caste. More than an immediate message to the individual Dalit or Sudra who has challenged the status quo by gaining education, these instances of violence are a louder message to the community the person belongs that those who dare to get enlightened will suffer.

Caste is a denominator that associates an individual from his cradle to his grave. On these grounds the caste system is even worse than slavery. Once born into a particular caste there is no escape from it. However the lower caste, particularly the Dalits who found that the way to liberation from this servitude is education, did not waste a single opportunity. For this they were willing to change their religion. A change in the religion was also yet another modus for an escape into freedom and a permanent way to change one's caste identity.

## 4.2. CONCLUSION

It is natural for those who get educated, often better in standard and knowledge than their upper caste counterparts, to first claim their equality in status in society and further protest against any form of discrimination. It is equally natural for upper caste communities who for years exploited the Dalits, to find such challenges most provocative. The result of this provocation is what is being witnessed in India.

Unfortunately this aspect of violence is less articulated in the Indian media. Driven by political and business interests the Indian media has reduced itself to the role of an online camera that only documents and shows the most obvious – Hindus attacking Christians and Christian interests. Beneath the skin of communal unrest lives the beast of caste domination.

The Hindu fundamentalist political parties operating in India are engaged in nothing other than making use of the frustration of the upper caste Hindu for political gains. A divided society willing to kill and injure each other on the basis of religion or its beliefs is the best possible environment a fundamentalist political force can expect to exploit.

## 5.1. RIGHT TO FAIR TRIAL WITHOUT DELAY

The right to speedy trial has been endorsed in almost all relevant international conventions, most notably the ICCPR, which India ratified on 10 April 1979. The ICCPR provides explicitly for the right to speedy trial. Article 9(3) declares that "anyone arrested

or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Right to fair trial without delay, though is not mentioned in the Constitution, it is a fundamental right in India.[65]

In the Indian context however, it is a well settled proposition that the international conventions and norms are to be read into domestic law in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

The Supreme Court of India in Nilabati Behera case took a view that in the absence of any specific domestic law an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under article 32, as distinct from the private law remedy in torts.[66] One of the questions that the Court had to decide was concerning compensation. The court said that there was no reason why international conventions and norms could not be used for construing the fundamental rights expressly guaranteed in the Constitution of India.

In India, neither the constitution nor any existing laws or statutes specifically confer the right to speedy trial on the accused. Most of the existing laws also do not provide any time frame in which a trial must be concluded; in cases where some time frames have been provided, the courts have held them to be "directory" and not "mandatory". In procedural law, for example the Code of Criminal Procedure (Cr. P. C), 1973, provides a statutory time limit to complete an investigation. Section 167 further provides that a failure to complete investigation within the statutory time frame shall lead to release of the accused in custody on bail. However, this in actual practice never occurs.

In a real life scenario delay is synonymous with litigation in India.[67] A decade of waiting is not much time in deciding a case in India. It is equally applicable to civil and criminal

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*65 In Hussainara Khatoon v. State of Bihar [1980 (1) SCC 98] the Court explicitly held speedy trial as part of Article 21 of the constitution guaranteeing right to life and liberty. In this case the Court said "...We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release."*

*66 Nilabati Behera v. State of Orissa [1993 (2) SCC 746]*

*67 Judicial Delays to Criminal Trials in Delhi : Article 2, Vol. 07 - No. 02 June 2008*

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 very inability and 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. Often many courts do not have sufficient prosecutors to represent cases as and when they are taken up. In the Sessions Court, Thrissur, Kerala State for instance, prosecutions were stalled for years due to the fact that the only prosecutor available was on deputation from another 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 dispose these cases, given the fact that every year the number accumulates 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 objects to be wrapped in newspapers and bound by jute 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 takes place.

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 the facilities provided for these labs and also the work habits of the forensic technicians. 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, only to the benefit of 'government recognised' private experts.

These technical hindrances that cause delay in court proceedings furthermore affect the quality of evidence given by witnesses. When a witness is required to testify for 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. More susceptible to threats and intimidation the longer a case is drawn out, chances are that witnesses may alter their evidence out of fear or even withdraw from the case.

The lack of basic infrastructure within the entire justice system is another crucial issue that causes delays and inefficiency. India has fewer than 15 judges per million people, a figure that compares very poorly with countries such as Canada (about 75 per million) and the United States (104 per million). In 2002, the Supreme Court had directed the government of India to raise the judge-population ratio to 50 per million in a phased manner. Indefensibly, successive governments have not done enough to address this issue; in the Tenth Plan, the judiciary was allocated a mere 0.078 per cent of the total expenditure, a small crumb more than the 0.071 per cent assigned in the Ninth Plan.

Inadequate physical infrastructure, the failure or inability to streamline procedures in the Civil and Criminal Procedure Codes, the tardiness in computerising courtrooms, and the inadequate effort that has gone into developing alternative dispute resolution mechanisms such as the Lok Adalats, arbitration and mediation are a few more causes for court delays. The backlog problem is most acute at the level of the subordinate judiciary. As former Chief Justice of India M. N. Venkatachaliah pointed out the disillusionment with the judicial system has led to a dangerous increase in Jan Adalats or kangaroo courts in many parts of the country. It is time the nation took a serious and comprehensive look at the entire legal system with special attention to tackling the problem of backlog. Too much time has gone by and too little has been done to sort out a problem that undermines the rights of litigants and accused, damages the credibility of the judiciary, and weakens the very basis of the democratic order.

The Human Rights Committee in its review on India as early as 1997 has expressed concern about delays in Indian courts.[68] Similar sentiments were expressed by the CERD Committee after reviewing India's State Party Report during its seventieth session held in February-March 2007.[69]

Paragraph 13 of the General Recommendations and Comments of the ECOSOC Committee also make similar concern.[70] During the Universal Periodic Review of India by the Human Rights Council the same issue was brought to the Council's attention.[71]

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*68 Concluding observations of the Human Rights Committee : India, CCPR/C/79/Add.81 para. 22*

*69 Concluding observations of the Committee on the Elimination of Racial Discrimination : India, CERD/C/IND/CO/19, 5 May 2007 para. 26*

*70 Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/IND/CO/5 para. 13*

*71 Id. 31*

However, the Government of India failed to respond to this.

## 5.2. CONCLUSION

The delay in the Indian justice delivery system and the impact it has is summarised in the Supreme Court's own observation. The Court said "[t]he State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State.

It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial..."[72]

## 6.1. RIGHT TO FOOD, HEALTH, EDUCATION & CASTE BASED DISCRIMINATION IN INDIA

From a nation dependent on food imports to feed its population, India today is not only self--sufficient in grain production, but also has a substantial reserve. The progress made in agriculture in the last four decades has been one of the biggest success stories of free India. Agriculture and allied activities constitute the single largest contributor to the Gross Domestic Product, almost 33 percent of it. Agriculture is the means of livelihood of about two-thirds of the work force in the country.[73] Yet an estimated 22 percent of the population live in acute poverty.[74] An equally alarming percentage of the population, particularly children, suffer from acute malnutrition.[75] Almost 80 percent of this 'underprivileged' population belong to the Dalit community.

The cases documented by the AHRC show a consistent and widespread pattern of administrative neglect that results in acute starvation, death from malnutrition and malnutrition induced diseases in India. Each case documented by the AHRC was

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*72 Hussainara Khatoon v. State of Bihar [1980 (1) SCC 98]*

*73 Economy Watch, 2007 report on India - Summary*

*74 Poverty and India's Changing Image : C. P. Ravindran, The Hindu, 17 February 2007*

*75 An estimated 60 million children in India suffer from malnutrition. India - Undernourished Children : A Call for Reform and Action, World Bank India Malnutrition Report August 2005*

immediately brought to the attention of the Government of India and the respective State/Provincial government. In each case, the response by the government was absolute denial. In spite of specific calls for administrative actions to address the issue of starvation and malnutrition, the Government of India has done nothing credible thus far to address the situation.

Most deaths from starvation are reported from the Dalit communities in the country. Discrimination within society owing to caste-based prejudices and poverty means that the benefits of government welfare programmes do not reach this community.[76] In order to guarantee food security, which is a fundamental right in India, the government has constituted a public distribution network under the Ministry of Food and Public Distribution. However, this public distribution system (PDS) is plagued by rampant corruption, causing it to malfunction.

Corruption in the PDS system promotes starvation. Coupled with the discriminatory practices in the government health service sector, the poor often die from malnutrition and malnutrition-induced sicknesses. Khusbuddin died of malnutrition on 6 February 2008. Khusbuddin was four years old and the son of late Mr. Mohammad Matin. Khusbuddin was suffering from Grade IV malnutrition.[77] He was living with his father Mohammad Matin, mother Jaharun Nisha and elder sister in Mirzapur district. After his father's death, Khusbuddin's family moved to his maternal grand parents' home in Harpalpur village, Kashi Vidyapith Block, Varanasi district.

Khusbuddin was diagnosed as suffering from Grade IV malnutrition, weighing 6.5 kilogram at the St. Mary's hospital in Kourata. Khusbuddin's mother Jaharun was too poor to get Khusbuddin treated at the private hospital. On 5 December 2007, Jaharun took Khusbuddin to the Primary Health Centre (PHC) of Kanai Sarai in Kashi Vidyapith Block which is about 12 kilometres away from Khusbuddin's house. Jaharun had to walk to the PHC since she could not manage the bus fare. However, the officer at the PHC did not provide any medical attention for malnourished Khusbuddin saying that there was no medicine at the centre at that time. Neither did Khusbuddin receive any food at the PHC. Jaharun could only give Khusbuddin some water and sugar on that day.

After Khusbuddin's death, Dr. A.K. Sahaye of the PHC and Mr. Manish Srivastava, Block Officer in charge of UNICEF programme visited Khusbuddin's house and tried to obtain Jaharun's signature forcibly on a paper certifying that Khusbuddin did not die of malnutrition and was not ill-treated at the PHC. Since they failed to obtain Jaharun's

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*76 'A Fist Is Stronger than Five Fingers': Caste and Dominance in Rural North India : Craig Jeffrey Transactions of the Institute of British Geographers, New Series, Vol. 26, No. 2 (2001), pp. 217-236*

*77 AHRC-HAC-003-2008 <http://www.ahrchk.net/ua/mainfile.php/2008/2761/>*

signature, they asked her neighbour to write her name on the blank paper.

It was reported that the Auxiliary Nursing Mother (ANM) of Anganwadi Centre (child care centre) of Harpalpur village who is supposed to be responsible for the health care of the children has never visited Khusbuddin's house and has denied any support to the family so far. It was also reported that after Khusbuddin's death, the village head Mr. Salim delivered 1000 Indian Rupees (USD 25) to the victim's family under the order by Chief Secretary of Uttar Pradesh. This is the only support Khusbuddin's family has received from the government so far.

The health workers of the Anganwadi centre have important and direct roles to prevent the poor children and women from starvation and ailments related to starvation and malnutrition at the village level. All the ICDS services are provided through the Anganwadi workers in an integrated manner to enhance its impact on child care.

Under the ICDS, the Anganwadi workers should visit the village regularly to carry out health check-up for the children. Once they identify a malnourished child, the child has to be registered at the Anganwadi centre in order to provide nutrition and health care for the child until the child's condition is safe. However, like the case of Khusbuddin, the negligence of the Anganwadi staff at Harpalpur village is one of the main reasons that result in starvation deaths in India.

The case of Khusbuddin explains that the negligence of the medical officers at the PHC accelerates not only infant mortality in India but also facilitates corrupt practices to hide data regarding infant mortality. In addition, it is a common practice in India to conceal deaths from starvation as was sought to be done both by the doctor at the PHC and the Block Officer. This fact is noted in the report of the UN Special Rapporteur on the Right to Food. This report was prepared by the Rapporteur immediately after his visit to India.[78]

Whenever a case of starvation is reported, the Indian authorities try to silence the local organisation that reported the case. The condemnable practice of the Indian authorities is to threaten and intimidate the local organisation. Registering false cases against the organisation or the persons involved with such an organisation is a common practice.[79]

The continuation of feudal practices in India is one more reason for starvation and food insecurity in India. The landlords, often from the upper caste, force members of the lower caste to work for them. Bonded labour is a common practice in the country.

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*78 Report of the Special Rapporteur on the Right to Food, Jean Ziegler, E/CN.4/2006/44/Add.2 dated 20 March 2006*
*79 Id. para 24*

Most States in India are yet to legislate and implement land reforms laws. Left with no cultivable land or work, the villagers are often forced to work for the local landlords for practically nothing. The wages are often provided in the form of a daily meal. Entire families are forced to work in conditions equivalent to slavery.

The correlation between bonded labour, the absence of land reform policies, caste based discrimination and starvation is proven by the simple fact that in States where land reforms have been implemented, cases of starvation and malnutrition are far less frequently reported. In the past three years, not a single case of starvation death has been reported from the State of Kerala. The nation-wide implementation of land reforms is yet to materialise owing to strong political opposition. Many legislators in India are feudal lords.

Even the Indian judiciary has tried and failed to address the issue of food security. The Supreme Court of India, through a series of interim orders, has tried to address this issue. The court, finding that the Government is clueless and non-responsive regarding the issue, mandated its own Commissioners to investigate and report to the court on the situation of starvation and malnutrition. The Commissioners appointed by the court were also tasked with receiving and investigating complaints of starvation, malnutrition and corruption in the PDS system. Even after six years of this exercise, the situation of food security in India has not improved.

The Government of India has also tried several indirect means to ensure a day's meal for the poor. Schemes like the National Rural Employment Guarantee Act, 2005 (NREGA), the midday meal scheme and the Targeted Public Food Distribution System are examples. It is true that the NREGA has generated rural employment. However, the payment for the employment failed to reach the poor, due to corruption. Those who challenged the system either lost their lives, or, as reported from States like Chhattisgarh, were accused of being Naxalites.

The corrupt caucus between the law enforcement agencies, landlords and their mafia, the local politicians and an inept, negligent and corrupt administrative set-up, together smother food security in India. India's accession to the International Covenant on Economic, Social and Cultural Rights took place on July 10, 1979. Most of the rights enshrined in the Covenant have been included in domestic law in India. Like the right to food, many of these rights are justiciable, yet people starve to death in India. The failure of the Government of India to protect, promote and fulfil this fundamental human right is a blight on India's human rights record.

India is one of the world's fastest developing economies and has a reasonably functioning justice system. India's courts have made commendable contributions to the development

of domestic and international human rights jurisprudence. Indians have attained and continue to occupy enviable positions in international organisations, including the UN. India has offered assistance and developmental aid to other developing nations. Yet, an estimated 22 percent of Indians in the country face malnutrition or even starvation.

The continuation of caste-based discrimination is yet another factor that perpetuates poverty and deprivation of food, as was briefly mentioned in the Special Rapporteur's report.[80] 60 years after independence, the prevention of caste-based discrimination remains on paper rather than being enforced in practice. Due to this, caste-based discrimination is widely practised and discrimination prevents the lower castes from accessing food. Additionally, the lower castes are deprived of landed property and those who have titles to particular pieces of land are frequently prevented from actual possession by local feudal lords.

Caste based discrimination also contributes to large scale denial of the right to education and health. While the 83rd constitutional amendment recognizes education as a fundamental right of all Indian citizens, disparities continue to be pronounced between the various castes. People from the Scheduled Castes, previously referred to as the "untouchables", make up 16% of the population and consistently fare poorer across various indicators related to primary education.

As per the Census 2001, the total population of the Scheduled Castes (SC) in India is 166,635,700, which is 16.3 per cent of the total population.[81] The population of SCs is unevenly distributed among the states in India, with nearly 60 percent of all SC children of primary school-going age (6-10 years) residing in the following six states: Andhra Pradesh, Bihar, Madhya Pradesh, Orissa, Rajasthan and Uttar Pradesh. The latter five states are among the most disadvantaged states in India across most social indicators.[82]

Dalit students are routinely humiliated and harassed at school. Many drop out because of this. They are seated separately in the classroom and at mid-day meals in countless schools across the country.[83] Students from the upper castes do not get abused by the teacher for drinking water from the common pitcher whereas the Dalit students often do get assaulted. Nor is there much chance of acid being thrown on their faces in the village if they do well in studies. Nor are they segregated in hostels and in the dining rooms of

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*80 Id. p. 6*

*81 2005 Report of the Registrar General of India*

*82 Social Exclusion of Scheduled Caste Children from Primary Education in India, UNICEF India Report, October 2006*

*83 Concluding observations of the Committee on the Elimination of Racial Discrimination CERD/C/IND/CO/19 dated 5 May 2007, para. 13*

the colleges they go to. Discrimination dogs Dalit students at every turn, every level. As it does Dalits at workplace.[84]

Caste discrimination is worse than slavery.[85] The avenues for those who are born into the lower caste are many in theory, however, in practice, none of these mechanisms work, especially if the person is poor.[86] Caste follows a person from cradle to grave. Theoretical framework like a prohibition in law or a policy on paper will not prevent caste based discrimination or starvation.

62 years after independence and after scores of policies and legislative frameworks, a considerable section of Indians still suffer from discrimination based on caste. For the real India to derive benefit from its Constitutional guarantees the Government of India must ensure that the Constitutional promises concerning the right to food, education and health are in fact reaching the rural population. For this caste based discrimination poses a formidable hindrance. To remove this, the administration requires a political will. This sadly is in fact what is least found in India.

## 6.2. CONCLUSION

In the voluntary promise made by India during the formation of the Human Rights Council, India has painted a self portrait of a nation that is striving to progressively achieve the universal guarantees to its entire population. However, in the domestic parlance these promises remain a mirage. The true development of a country has to be measured by taking into account of how far the fruits of development are in fact reaching the entire population. In this aspect India fails miserably, since growth and development is polarised in India.[87] The fruits of development and growth are harvested by a meagre 20 percent of the estimated 1.2 billion population in India. This disparity invariably means instability.

Mere casting of a vote once in five years does not mean democracy.[88] On a minimalistic footing democracy means the guarantee to equal participation. Rapid economic growth of a selected group in a society/state does not mean democracy.[89] Corruption in public services, widespread practice of torture, a demoralised law enforcement agency and

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*84 Discrimination for Dummies V. 2008 : P. Sainath, India Together 19 January 2008*

*85 Annihilation of Caste : Dr. B. R. Ambedkar*

*86 Cast Away by Caste: Bijo Francis, Human Rights Solidarity Vol.14 No.5, September 2004*

*87 Politics of Economic Reforms in India : ed. Jose E Moij, Sage publication 2005*

*88 Democratic Dominoes Revisited: The Hazards of Governmental Transitions, 1974-1996 : Harvey Starr and Christina Lindborg, The Journal of Conflict Resolution, Vol. 47, No. 4 (Aug., 2003), pp. 490-519*

*89 Economic Development in China : Francis Josep, Yale Law Review, October 2007 pp. 23*

societal serration on the basis of caste and religion are impediments that can fail a state.[90] India cannot be an exception to this universal rule.

*90 Political Economy of Growth : Democracy and Human Capital : Mathew A Baum & David A Lake, American Journal of Political Science, Vol. 47 No. 2 April 2003 p. 333 - 347*

# INDONESIA

## TORTURE, KILLINGS AND ATTACKS ON HUMAN RIGHTS DEFENDERS CONTINUE AFTER 10 YEARS OF REFORMS

### INTRODUCTION

In 2008, Indonesia continued on the path to reform, but continued to stumble over issues such as religious freedom and indigenous people's rights. This year marks the tenth anniversary since the downfall of Suharto, and is accompanied by a degree of optimism and progress concerning human rights. However, cases of torture and extra-judicial killings continue to be reported. The Special Rapporteur on torture and other cruel and inhuman treatment recently visited Indonesia and published his report, which confirmed the ongoing use of torture in institutions of justice such as the police and prisons, despite the country's ratification of international law prohibiting the use of torture.

The end of Suharto's authoritarian rule saw the implementation of a series of human rights laws enshrining fundamental freedoms such as the freedom of thought, the freedom of expression,[1] and many other such freedoms that were non-existent during his thirty-year rule. Successive Indonesian governments have since made certain efforts to address the country's human rights situation, through the formal initiation of an ongoing reform period (known as reformasi). Amendments to the constitution,[2] the implementation of human rights-related domestic laws and the signing and ratification

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1 *Law 9/1998 on freedom of expression in public places containing regulations for implementing rights (art. 5) and obligations (art. 6) of persons individually and in association with others as well as obligations on public authorities (art. 7); Law 29/1999 on human rights setting out the fundamental rights and duties of citizens of Indonesia, including a section on women's rights, and stipulating the Government has a responsibility to protect, promote and implement all human rights and freedoms.*

2 *In 2002, Indonesia's 1945 Constitution was amended to include a chapter on human rights. It now contains basic human rights such as the right to life, the right to freedom of expression, the right to freedom of thought, assembly or association, the right to freedom of thought, conscience and religion, and the right to be free from torture or inhuman, degrading treatment.*

of a number of major international agreements on human rights,[3] are all commendable attempts by the Indonesian authorities to address the country's human rights challenges.

Upon closer analysis, the government still has a long way to go, in terms of achieving concrete improvements in the country's human rights situation. Ten years after the beginning of reformasi, Indonesia continues to suffer from serious human rights violations, including torture, extra-judicial killings, with the grave violations perpetrated typically being accompanied by impunity for those responsible. Restrictions on religious freedoms have increased, despite the fact that Indonesia is a secular and democratic country, and most victims of these human rights abuses await justice. Although the Indonesian government continues to demonstrate willingness to move forward by making changes on paper, the actual implementation in reality of these rights remain elusive for the most part. Progress continues at a less-than satisfactory pace and most human rights defenders are, as a result, only cautiously optimistic, if at all, about the future of human rights in Indonesia. The fact that AHRC has continued to document the gravest forms of human rights violations, including cases of extra-judicial killings and torture, shows that much remains to be done.

## 1. CIVIL AND POLITICAL RIGHTS

### 1.1 TORTURE

It is apparent that the problem of torture by the police and brutality in Indonesia persists, despite numerous and repeated recommendations from various international institutions to the government to take immediate action in order to put an end to this. Most recently, the Special Rapporteur on torture has made a series of important recommendations.[4] The fact that no obvious progress has been made in this matter is underlined by continuing reports concerning cases of torture that are being committed by police officers in different parts of Indonesia. For example, as recently as the 22nd of July 2008, police officers allegedly tortured villagers in Pai Village in the West Nusa Tenggara Province of Indonesia. (See AHRC-UAC-174-2008 below for more details.) The AHRC has documented cases of torture in Indonesia for several years and has continued to receive such cases in 2008. (See for example AHRC-UAC-107-2008 or UA-317-2007[5] ). These cases represent only a fraction of those actually taking place.

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3 *See section on Status of Ratifications: Indonesia, (Signed)*

4 *A/HRC/7/3/Add.7 para 73,76, Special Rapporteur on Torture*

5 *INDONESIA: Policeman arbitrarily shoots and injures man in Yogyakarta, November 6, 2007, UA-317-2007, URL: http://www.ahrchk.net/ua/mainfile.php/2007/2650/*

***INDONESIA: Police allegedly torture villagers; one of whom is in intensive care***
August 1, 2008, AHRC-UAC-174-2008
URL: http://www.ahrchk.net/ua/mainfile.php/2008/2957/

On 22 July 2008, the torture of villagers by the Wera Sector Police and the Bima Resort Police in West Nusa Tenggara Province took place.

A protest against the construction of a mine in the area, in which approximately 700 villagers of Pai Village in West Nusa Tenggara took part, escalated and eventually turned violent.

After the villagers destroyed a base camp in an iron sand mining area nearby, local police forces arrived the following day in riot gear. Upon arriving, the police began shooting at villagers. Fortunately, no one was injured. Police officers then arrested 18 people, including one woman and her child.

Those arrested were taken to the Wera Sector Police and Bima Resort Police stations where they were detained and tortured. One man was so severely injured, that he fell into a coma and required intensive care.

The woman and her child were released from prison that same night, and the others were released the next day.

Despite the ratification of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ten years ago in 1998, it remains an integral part of the Indonesian police force's practices; it is used as a common method of interrogation. It is used mainly as a method for extracting confessions from suspected criminals. Torture is predominantly used against the poor and those from socially marginalized sections of society. It is possible for people who have the money to pay their way out of situations in which they may be subjected to torture. The threat of torture is used to extract money by the police. The general public in Indonesia perceives torture by the police as being a normal occurrence. Being taken into police custody will likely lead to torture depending on your social class background. A lack of complaints by victims of torture is accentuated when the victim in question has actually committed a crime, due to feelings of guilt and the sense that they "deserved" the violent treatment. All told, it is appropriate to say that torture is part of the culture of policing in Indonesia.. Accordingly, fear and mistrust towards the police is widespread amongst the country's citizens.[6]

In the periodic review of Indonesia's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) the Committee Against Torture (the Committee) noted several procedural shortcomings in

6 *A/HRC/7/3/Add.7 para 20. March 10 2008; Alternative Report to SG's Special Rapporteur on Torture, ALRC, October 2007*

its concluding observations[7] in July 2008. Prolonged detention in police custody for up to 61 days, the absence of systematic registration of detainees as well as restricted access to lawyers and independent doctors, allows for torture to take place not only occasionally, but as reports show, in a widespread and systematised fashion. The Committee (re-emphasized[8] the Special Rapporteur's earlier recommendations that "officials at the highest level should condemn torture and announce a zero-tolerance policy vis-à-vis any ill-treatment by State officials. The Government should adopt an anti-torture action plan which foresees awareness-raising programmes and training for all stakeholders, including the National Human Rights Commission and civil society representatives, in order to lead them to live up to their human rights obligations and fulfil their specific task in the fight against torture." [9]

Since no significant progress has been made with regard to police brutality, the authorities need to prioritise the following recommendations. Firstly, torture must be criminalized under the Indonesian Penal Code. Currently there is no adequate definition of torture, and cases of torture that appear before a court therefore do not receive adequate treatment or result in appropriate punishment and reparation for the perpetrators and victims respectively. The Special Rapporteur on torture noted that "all allegations of torture and ill-treatment should be promptly and thoroughly investigated ex-officio by an independent authority with no connection to the authority investigating or prosecuting the case against the alleged victim."[10] However, due to the lack of such investigations, many

***INDONESIA: Police burned a man alive over private matter in Semarang, Central Java***

May 19, 2008, AHRC-UAC-107-2008

URL: http://www.ahrchk.net/ua/mainfile.php/2008/2864/

On 14 May 2008, a police officer tortured a man after the man's illegal arrest, and burned him alive in Semarang, Central Java.

34-year-old Syamsul Hadi was arbitrarily arrested by police inspector Sugeng. After abducting Syamsul, Sugeng brought him into a minivan and drove around the city for several hours. Later, Sugeng blindfolded Syamsul and tied up his hands and feet. He then severely beat Syamsul. Afterward Sugeng dragged Syamsal from the van onto a road, and poured gasoline all over Syamsul's body. Syamsul was burned alive.

Fortunately, Syamsul managed to survive the incident, having been found by local villagers in the bushes.

An initial police investigation into the incident reported that the motive of the crime was personal.

7 *CAT/C/IDN/CO/2, July 2008*

8 *CAT/C/IDN/CO/2 para 10., July 2008*

9 *A/HRC/7/3/Add.7, art.76, March 2008, Special Rapporteur on Torture*

10 *A/HRC/7/3/Add.7, art.77, March 2008, Special Rapporteur on Torture*

officers remain immune to criminal procedures.

Secondly, the impunity enjoyed by police officers, especially with regard to the practice of torture, must be combated as a priority. Everyone, including government officials and law enforcers, must be equal before the law – the criminal justice system needs to be non-discriminatory. This is still not the case in Indonesia, where in fact no state official that is alleged to have used torture has been found guilty of related offences as a result.[11] Thirdly, the Indonesian police force needs to fully incorporate a culture of respect for human rights into their everyday work ethics. This transition will naturally take time, and the legal framework, as discussed above, is essential in steering this transition in the right direction.

The maximum detention period of 61 days protects the perpetrators of torture from having medical evidence obtained against them by independent doctors. This period also increases the risk that a person in custody will actually be subject to torture and police brutality. As recommended by the Special Rapporteur on torture, the maximum detention period should be radically shortened, preferably to 48 hours, in conformity with international standards.[12]

## 1.2 KILLINGS

In 2008, the killing of civilians by the security forces continued. In such incidents, the civilians are usually unarmed, while the police or the military apply excessive force without limiting the use of firearms. Such officers or soldiers do not adhere to international standards of interrogation, arrest and do not apply professional practices when encountering civilians. Extra-judicial killings through the open use of firearms continue and bringing the perpetrators to justice is difficult, in particular, in cases involving the military.

Indonesia is party to the ICCPR, which guarantees the right to life. Many of the reported cases of killings by the security forces, such as the police or the army, are related to disputes over land. With the economic development of Indonesia, private enterprises need increasing resources. State security forces while protecting such companies' interests encounter resistance from local villagers who try to protect their land and livelihood. In May 2008, a man in North Sumatra died with severe burns on his body after the police arrested him on charges of theft. He was accused of having stolen an oil palm nut. (See case AHRC-UAC-118-2008 for more information.)

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*11 CAT/C/IDN/CO/2*

*12 A/HRC/7/3/Add.7, art 59*

***INDONESIA: A man dies in police custody following arrest***
May 30, 2008, AHRC-UAC-118-2008
URL: http://www.ahrchk.net/ua/mainfile.php/2008/2881/

On 26 March 2008, Adi Sahrianto was arrested by Police Officer Anjarmara Siregar from the Regional Police Station in North Sumatera on a false allegation that he had stolen palm nut oil. He was blindfolded and taken in a car to the Regional Police Station.

At 10:05pm that evening, Sahrianto's brother, Adi Syahputra, was informed by the police that his brother had been taken to the hospital in Medan. Syahputra and Sahrianto's family immediately went to Medan to see him. When they arrived at the hospital, they discovered Sahrianto had already died.

Sahrianto's body had traces of burns all over it. The person who cleaned his body told his brother that he had also noticed several visible injuries on his brother's body while cleaning it – there were bruises on his neck and back, and cuts on his head. No autopsy report was provided to the victim's families to explain the injuries.

When Syahputra reported his brother's death in police custody to the Regional Police Station of North Sumatera, the police refused to take action, and claimed to have no jurisdiction over the case. Syahputra had to make a complaint to the other police station at the Deli Serdang Local Police Station.

The police who arrested and detained Sahrianto claimed that the victim had been severely injured before they had even arrested him. Vice Director of the Criminal Department of the North Sumatera Regional Police Station, Darmawan Sutawijaya, claimed that Sahrianto had been beaten by hundreds people after he was caught stealing the palm oil nut. No such incident however, had taken place.

In May 2007, navy forces shot unarmed villagers who tried to interrupt a cultivation process by a company on disputed land in Pasuruan (East Java). In March 2008, an autopsy during the trial in a military court confirmed that the three villagers that had been killed, had died from shots to the back of their heads. The navy forces were allegedly instructed to use "any means necessary" to protect the activities of that Rajawali Nusantara Corporation (RNC). While the military court convicted thirteen navy personnel for murder, their punishment ranged from only one and a half to three years imprisonment. Only three were dismissed from the military and no compensation was paid to the victims.

***INDONESIA: Autopsy revealed that four deceased were shot and several were injured***
April 25, 2008, AHRC-UAU-026-2008 - Update to case UA-175-2007
URL: http://www.ahrchk.net/ua/mainfile.php/2008/2829/

Four people died of gunshot wounds, and several others were injured by shootings by naval officers. During the trial of the case, which was held in the military court of Surabaya, no translator was provided for the victims, relatives and witnesses, who did not understand the language in which the trial was conducted.

During the trial, it was revealed in an autopsy report that three of the four victims who died were shot in the back of the head. The other died from bullet wounds to his chest.

The other eleven injured persons were hit by projectile fragments. The commander of the naval unit has not taken any responsibility for this incident.

In addition, no compensation has been provided to the victims, except for the medical expenses for the injured by way of a National Insurance Programme for the Poor.

Questions have been raised about the fairness of the trial, as well as the possibility of effective remedy.

In another case of military involvement in agricultural activities on disputed land, a military centre hired local staff who were ordered to attack protesting villagers. The order was given by a local village chief. One person died in the attack and several others were injured. The police investigation into the case has not taken the involvement of the military into account, leading to impunity for the members of the military.

The use of firearms by the police often threatens the lives of civilians in Indonesia. Procedural safeguards to limit the use of weapons are not put in place or not applied.

***INDONESIA: One person killed and two seriously injured by a group allegedly contracted by the military***
November 8, 2007, UA-320-2007
URL: http://www.ahrchk.net/ua/mainfile.php/2007/2655/

On 1 October 2007, Charles Limbong was beat to death by a group of men. Two others were seriously injured during the attack.

The police have failed to investigate the responsibility of the Army Cooperative Center of Bukit Barisan Regional Military Command for the death and injuries of the villagers. It is alleged that the army had contracted the group to secure the land that the villagers had been cultivating for years, leading to one's death and the serious injury of two others.

Although the Deli Serdang Police Resort conducted an investigation into the murder of Charles Limbong on 30 October 2007, it was reported that the Army Cooperative Center was exonerated from any responsibility in the incident.

This leaves many police officers with the possibility of abusing power without fear. Regulations for identification, arrest and investigation are not practiced as a common norm. The AHRC has, for example, received a case where a police officer in civilian clothes did not identify himself as being a police officer or show his identity card, but proceeded to search through the bag of a suspect on a motorbike he had stopped. When the motorbike driver tried to escape from the scene that he interpreted as being a robbery by a civilian, the officer shot at him. The victim was brought to a police hospital and then changed to a public hospital, eventually surviving the attack.

***INDONESIA: Policeman arbitrarily shoots and injures man in Yogyakarta***
November 6, 2007, UA-317-2007
URL: http://www.ahrchk.net/ua/mainfile.php/2007/2650/

On 9 October 2007, Martholomeus Suryadi was arbitrarily shot and injured by a policeman. Using a motorcycle borrowed from a friend, Suryadi was on his way to pick up another friend when he was stopped by a man in civilian clothing claiming to be a police officer. He asked Martholomeus to produce his identity card, driving license, as well as the registration and ownership book of the motorcycle.

Martholomeus showed the registration and his identity card. After checking the registration book, the policeman called a colleague to report a stolen motorcycle, and said that he had caught the thief.

When Martholomeus asked the policeman to show his police identity card, he failed to, and did not state his name or the unit to which he belonged to. Instead, he became extremely agitated. He demanded to see inside Martholomeus' bag, and upon finding a knife inside, which Martholemeus had used for fishing earlier that day, he accused Martholemeus of killing someone. The two men got caught up in a scuffle.

Martholemeus was convinced that the man was not a real policeman, but a robber. When Martholomeus escaped the policeman's grip and tried to run away, the policeman threatened to shoot. A few seconds later, the policeman shot Martholomeus in the buttocks at a distance of approximately 3 or 4 meters.

The policeman then summoned a colleague, and it then became known that the policeman who shot Matholemeus was Police Brigadier Agus Sunanto.

The arbitrary use of arms by law enforcement officials is of great concern. This case indicates how easily law enforcement officials can use arms even when the situation does not warrant it.

## 1.3 HUMAN RIGHTS DEFENDERS

After a visit by Hina Jilani, the then-UN Secretary General's Special Representative for human rights defenders, to his offices in Papua, Albert Rumbekwan, a prominent activist as well as a staff-member of the National Human Rights Commission were intimidated by members of the Indonesian military.[13] This event revealed the hostile environment for human rights defenders in Indonesia, in particular the sensitive region of Papua, where activists have even been subjected to torture, according to local sources. When Indonesia was reviewed by the Committee against Torture, the latter recommended in July 2008 that, "The State party should take all necessary steps to ensure that all persons, including those monitoring human rights, are protected from any intimidation or violence as a result of their activities and exercise of human rights guarantees, and to ensure the prompt, impartial and effective investigation of such acts."[14]

In the eastern-most region of Indonesia, the human rights situation continues to be hostile, and arrests and killings have increased over recent years. As the military presence in Papua has increased, so have the hostile actions against human rights defenders, including lawyers, civil society activists and NGO workers. One of the most commonly used means against human rights defenders is branding them with being linked to independence movements in Papua. Such a claim opens the door for arrest, fabrication of charges and often results in detention. A climate of fear and avoiding public discussion on many human rights issues has been engendered as a result.

After her visit, Ms. Jilani recommended "that legislation and procedures be instituted to prevent the prosecution of human rights defenders aimed at their harassment for conducting activities that are legitimately a part of their function for the defence of human rights. For this purpose, it is important also to sensitize judicial and prosecutorial officials as well as the police so that human rights activities are not criminalized."[15]

Since then, no institutional improvements to provide safeguards for human rights activists have been put in place. Also in 2008, the AHRC continued to receive cases of obstruction of the work of human rights defenders in other regions of Indonesia. Not only were no protective mechanisms set in place, the existing, flawed justice mechanisms were even used against human rights defenders.

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*13 INDONESIA: Human rights activists from West Papua targeted following meetings with UN Human Rights Defenders Special Representative, June 28, 2007, UA-209-2007, URL:http://www.ahrchk.net/ua/mainfile.php/2007/2465/*

*14 CAT/C/IDN/CO/2 para 25., July 2008*

*15 A/HRC/7/28/Add.2 art. 90, January 2008*

On August 14, 2008, eight staff members of the Legal Aid Institute in Aceh (LBH Aceh) were convicted and sentenced with imprisonment for distributing pamphlets about the activities of PT Bumi Flora, a plantation company operating in East Aceh. For many years, locals suffered from the companies' expansion, including being pressured to sell of their land for unreasonably low prices. The eight staff of LBH Aceh were convicted for disseminating hate material against the government and for committing a violent act in writing against it. Such vague laws continue to leave wide room for abuse of judicial and prosecutorial powers. (See AHRC-UAC-197-2008 for more details on the case.)

***INDONESIA: Eight people in Aceh convicted of disseminating pamphlets***
September 1, 2008, AHRC-UAC-197-2008

On 2 July, 2007, eight members of staff from the Aceh Legal Aid Institute (LBH-Aceh) went to villages in Aceh and distributed informational pamphlets about alleged land expropriations involving PT Bumi Flora Company and the local government. While distributing the pamphlets, they were stopped and detained by the Aceh police.

The LBH-Aceh staff members were taken to the Resort Police Station of East Aceh where they were interrogated. The police charged them with Articles 160 (orally or in writing committing a violent act against the government) and 161 (disseminating hate against the government) of the Indonesian Criminal Code. The case was brought to the District Court of Langsa in December 2007 and they were convicted and sentenced on 14 August, 2008 to three months imprisonment with six months probation.

It is yet another case of restricting freedom of expression by criminalizing the actions of human rights defenders. Repression of human rights work continues today, through intimidation and selective prosecution. These practices drain important human resources, distract organizations from vital projects, and threaten those who would speak out against injustice.

In this environment, the creation of a vibrant civil society remains difficult to achieve, in particular in rural areas and against the economic interests of military-owned or supported companies.

## 1.4 THE CASE OF MUNIR

The murder of prominent human rights activist, Munir Said Thalib, is a recent example of a politically motivated killing in Indonesia. The investigation into the case, which is ongoing, is struggling to progress through the country's flawed justice system. The lack of progress in this high-profile case, is causing pessimism about any major and imminent change in the overall human rights situation in Indonesia. Since the beginning of its investigation in 2004, the proceedings have thus far exposed a number of institutional flaws, including deep-set politicisation of the judicial process.

## *Overview of Munir's case*

Munir died of arsenic poisoning on a Garuda Indonesian Airways flight en-route to Amsterdam on 7 September 2004. Four years on, the alleged involvement of high-ranking government officials in the conspiracy has yet to be clarified for reasons related to ongoing and widespread government impunity in the country. Over the years, the course of the investigation has brought with it a mixture of hope and disappointment, making it difficult to predict its final outcome and the subsequent nature of its undoubted impact.

One example of the erratic developments in the case can be seen in the changing fate of Pollycarpus Priyanto. In December 2005, Pollycarpus was indicted for the murder of Munir and was sentenced to fourteen years in prison by the Central Jakarta District Court. In October 2006, the Supreme Court acquitted him of the murder charge, and charged him for faking documents instead. In January 2008, the Supreme Court then found him guilty for the murder of Munir, just as the District Court had two years earlier, and sentenced him to twenty years in prison. Although ultimately, justice has been served to an extent (Pollycarpus is only one piece in a much bigger puzzle), the inconsistencies during the investigation into his role in Munir's murder have diminished the confidence of human rights activists and supporters alike, in achieving swift justice. Instead, progress in the case has been slow and stunted. It is therefore understandable when more recent developments such as the arrest of former National Intelligence Agency (BIN) deputy director, Muchdi Purwopranjono, in June 2008, though comparatively more significant, is only met with muted enthusiasm.

## *The significance of Munir's case*

Whilst many are reluctant to celebrate the developments in the investigation in the past year, [16] for fear that any celebration may be premature, it is by no means a reflection on the real significance of the case.

The case's significance firstly lies in its attempt to achieve justice for an individual who has been subjected to a serious human rights violation: a politically motivated killing. Munir was killed for reasons related to his work as a human rights defender, which included calling for the cessation of the dominance of the military, and speaking out for victims who had been tortured, killed, or who had disappeared in Indonesia.

From a broader perspective, the case is significant for a number of reasons. It is

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*16 See Brief Chronology of Events, 2008: the sentencing of Pollycarpus and the commencement of Muchdi's trial are the most significant.*

significant in the fight against Indonesia's long tradition of government impunity. The process, and more importantly, the outcome of the investigation into Munir's death, will have an impact on determining the course of human rights development in Indonesia. It will be a telling indicator of any real commitment the government may have to promote and protect human rights in the country, as the removal of impunity is a key prerequisite for progress. This will be relevant for achieving justice in countless other cases of widespread killings, torture in Indonesia.

## *Previous Recommendations*

The significance of the case, coupled with the state of human rights in Indonesia, has provoked major international organisations to voice their observations and concerns. In March 2007, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, expressed his concern over the handling of the case to the government. In July 2007, the United Nations High Commissioner on Human Rights, Louis Arbour, urged President Yudhoyono, the police, and the Foreign Affairs Ministry to take action and to move towards resolving the case after several new developments had been revealed. [17]

Following that, the January 2008 Report of the Special Representative of the Secretary-General on the situation of human rights defenders, following its mission to Indonesia, recommended that guidelines and standards be laid down by the Supreme Court for more effective investigation into cases.[18] The report also specifically recommended the public release of an investigation prepared by the Presidential fact-finding team (TPF) on Munir's murder.[19]

## *Criticisms and Commendations*

There is, however, no real evidence demonstrating that the government has acted upon these recommendations. No guidelines or standards have been created at the time of writing, and no institutional process has been introduced to establish a permanent, legal procedure for investigations that are both swift and just. The fact is that government

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17 *See Brief Chronology of Events, 2007: on 14 April 2007, Indra Setiawan and Rohainil Aini were arrested in connection to Munir's murder. On 15 April 2007, the police presented new evidence implicating Pollycarpus.*

18 *Hina Jilani, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Representative of the Secretary-General on the situation of human rights defenders: Mission to Indonesia (United Nations: General Assembly, 28 January 2008), p.25, Part V, Section B, art. 91.*

19 *Hina Jilani, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Representative of the Secretary-General on the situation of human rights defenders: Mission to Indonesia (United Nations: General Assembly, 28 January 2008), p.25, Part V, Section B, art. 101.*

impunity continues to persist, despite the key arrest of Muchdi, who is no longer in any position of formal influence. Whether or not his arrest and the ongoing trial will lead to the questioning of even more senior officials, such as the former head of the intelligence agency, Abdullah Mahmud Hendropriyono, is unknown. Close observers remain sceptical.

The absence of the TPF report is imprtant: at this time, it has not been made freely available to the public. The fact that the contents of the report have not been made public runs counter to the main purpose and existence of the fact-finding team. The team was disbanded in June 2005.

It is crucial to recognise the progress made in the case since the beginning of its investigation in 2004, most notably over the past year, with the sentencing of Pollycarpus and the arrest and ongoing trial of Muchdi. However, the glaring absence of crucial elements to the process of the trial, such as an independent judiciary, far outweigh the significance any of the investigation's positive developments thus far. The power and influence of old institutions and high-ranking officials continues to exist, and effective investigation is being hindered.

It is unfortunate that more positive observations could not be made on the developments of Munir's case. Although the arrest of Muchdi is a remarkable step forward for the fight against impunity, its significance is largely diminished when taken in the broader context of ongoing problems with the judicial system, as well as serious human rights problems persisting throughout the country. The government would do well to continue in the progressive vein it has demonstrated with the continuation of *reformasi*, but it urgently needs to take more concrete action in working towards a just resolution of Munir's case.

| ***Brief Chronology of Events in the case of Munir*** | |
|---|---|
| *2004* | |
| *7 September 2004* | *Munir dies on Garuda flight GA-974 from Jakarta to Amsterdam.* |
| *23 December 2004* | *President Yudhoyono forms a fact-finding team. The team's purpose is to support the police in the investigation into Munir's murder case.* |
| *2005* | |
| *3 March 2005* | *The fact-finding team finds evidence of conspiracy.* |
| *18 March 2005* | *Pollycarpus is officially named a suspect.* |
| *9 August 2005* | *Trial for Pollycarpus begins in Central Jakarta District Court. He is charged with planning the murder of Munir.* |
| *20 December 2005* | *Pollycarpus is indicted for murder and sentenced to 14 years imprisonment.* |

| | |
|---|---|
| *2006* | |
| *3 October 2006* | *The Supreme Court acquits Pollycarpus of murder charges, citing insufficient evidence. He is found guilty of faking documents and is sentenced to two years imprisonment.* |
| *30 November 2006* | *Indonesia Police Chief General Sutanto rejects UN intervention into the case.* |
| *25 December 2006* | *Pollycarpus is released after being granted amnesty.* |
| *2007* | |
| *28 March 2007* | *UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, expresses his concern over the handling of the case to the government.* |
| *14 April 2007* | *Former Director of Garuda Airways, Indra Setiawan, and former Secretary to the Chief Pilot Airbus, Rohainil Aini, are arrested for the murder of Munir.* |
| *15 April 2007* | *Police present new evidence implicating Pollycarpus.* |
| *13 July 2007* | *The UN High Commissioner on Human Rights, Louis Arbour, urges President Yudhoyono, the police, and the Foreign Affairs Ministry to take action in light of new developments in the case.* |
| *2008* | |
| *25 January 2008* | *The Supreme Court sentences Pollycarpus to 20 years in prison for murder.* |
| *19 June 2008* | *Former National Intelligence Agency (BIN) deputy director, Muchdi Purwopranjono, is arrested by Indonesian National Police.* |
| *13 March 2008* | *The European Union Parliament issues a written declaration urging the Indonesian government to resolve Munir's murder case.* |
| *21 August 2008* | *Muchdi's trial begins at the South Jakarta District Court. He is charged with premeditated murder.* |

## 1.5 IMPUNITY

As the murder of one prominent human rights activist has shown, impunity for State-actors continues to persist in Indonesia. To date, no top-ranking government official has been convicted for any human rights violations that have taken place, and continue to take place, in the country. Far from being demonstrative of the government's lack of involvement in the vast number of gross human rights violations that have occurred, it is on the contrary indicative of a system that is failing to deliver justice when State-actors are involved. The exemption of government officials from any semblance of

accountability, even at present in Indonesia's supposedly democratic environment, comes as no surprise.

The origins of the country's extensive impunity can perhaps be traced to the 1965 massacre that preceded Suharto's presidency. Although the authoritarian dictatorship of the former president has long since fallen, the military coup that led to Suharto's thirty-year rule remains among the many gross human rights violations that have by-passed thorough investigation precisely because of government involvement. The tradition continues to this day, where no justice or redress has been achieved for the estimated half a million to one million people that were detained, tortured and/or killed by the former military dictatorship, during the coup in which it took power, on grounds that they were suspected communists.

Gross violations of human rights in Indonesia's past involving government officials – which are not limited to the 1965 massacre, but also include the events in East Timor in 1999 and many others – hinder the present government's ability to introduce a system of genuine checks and balances that are a cornerstone of any democratic governmental system. The lingering burden of unresolved cases from the past detracts from attempts to investigate officials today. Furthermolre, Suharto is still revered in certain quarters for Indonesia's rapid economic growth and development during his thirty-year rule, despite the level of human rights violations and corruption that frequently occurred under his reign. Any investigation involving the government under Suharto's rule would immediately put into question his former role, and ultimately open further inquiries into the legitimacy of his presidency. This has only served to exacerbate the difficulties encountered when unravelling the knots of governmental impunity that have long existed since the 1965 massacre. Is it possible for the present government to move forward and combat the country's widespread problem of impunity without first addressing past violations?

In order to address this question, it would be useful to first recount the major problems in the country's institutional framework that cause impunity, which have plagued Indonesia in recent years. Efforts made toward combating these problems over the past year will be examined, as will the question of whether or not they have had any real impact in reducing impunity in the long run.

## *Human rights court law*

One notable problem sustaining impunity in Indonesia is the limited jurisdiction of existing mechanisms put in place to address human rights issues. The jurisdiction of ad hoc human rights courts in the country is limited to gross violations, such as genocide and crimes against humanity. Even then, thorough investigations and due process in

cases of gross violations such as the May 98 riots, or Trisakti & Semanggi, have been rejected by the office of the Attorney-General in the past, and no justice has been achieved. The ineffective power of Komnas HAM, the national human rights institution, to conduct investigations beyond their initial inquiries, and the generally bureaucratic nature of the system, has meant that many cases are left unresolved. Although findings made by Komnas HAM are transmitted to the office of the Attorney-General, it is the office of the Attorney-General that has the authority to reject or initiate criminal proceedings, no matter how significant the findings may be.

Several such cases have in fact been rejected without reasonable justification. As the Prosecutor General is still subject to appointment by the President, and many alleged perpetrators of justice continue to hold positions of power, the failure to launch investigations into gross violations of human rights has been seen as a political act rather than an outcome of a rule of law process. A Constitutional Court ruling in 2008 clarified that the AGO department has to prepare a judicially acceptable investigation before the parliament would be in a position to then set up an ad-hoc human rights court.

These limitations allow impunity to persist in the country. Past gross violations of human rights reported so far to Komnas HAM do not yet cover the full extent of past abuses in Indonesia. Other cases such as the 11 Tribes Massacre have not even been reported to Komnas HAM yet. Faltering progress in prominent cases and the continuing fear of reprisals for reporting politically sensitive cases is sufficient to force victims into remaining silent.

Another problem that has served to exacerbate Indonesia's problem of impunity is the lack of accountability of military and law enforcement officers. According to a United Nations mission to Indonesia in January 2008, on the situation of human rights defenders, the accountability of military courts when the military is involved remains a major concern. There exists little chance for a fair trial in such cases, since military officers who are involved in criminal activities have been immune from civil proceedings. A report made by the Special Rapporteur on torture in July 2008 confirms that no state official alleged to have perpetrated torture has been found guilty (arts. 2 and 12).[20]

Also in the Mission to Indonesia report from January 2008, the Special Representative on the situation of human rights defenders noted the willingness of many from within the government to acknowledge the gaps that clearly exist in Indonesia's institutional framework. At first glance, this may appear encouraging: simple acknowledgment of the country's institutional shortcomings from within the government is no doubt a significant step towards initiating a process of resolution. However, in a universal periodic review

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*20 CAT/C/IDN/CO/2 para 12., July 2008, referring to Rapporteur on Torture*

(UPR) of Indonesia conducted by the Human Rights Council three months later in April 2008, the government only reaffirmed "its commitment to combat impunity".[21] No real effort has been made at this time to address the problem of impunity. It remains glaringly ever-present, given the number of unresolved cases that have accumulated in the past, as well as the countless number of cases that are currently disregarded because they do not qualify as being 'gross violations'. ]

A recent move in October 2008 to revive the Special Committee on the 1997/1998 Abduction of Activists seems to indicate some effort towards addressing impunity in this case. The Committee's plan to summon President Yudhoyono, as well as retired General Wiranto, retired Lieutenant General Prabowo Subianto, and retired Lieutenant General Sutiyoso for questioning, is prima facie, a serious demonstration of the State's desire to eradicate impunity. However, given approaching general elections in 2009, the genuine nature of these recent developments is put into question. One is likely to wonder why the committee for investigation into the Abduction of Activists has only been revived at this time, ten years down the road, with general elections just around the corner.

It is clear that much more is needed to be done if the deeply entrenched problem is to be successfully addressed in the near future. The government should consider extending the courts' jurisdiction over investigative proceedings. The Attorney General should make full use of his mandate as restated in the recent Constitutional Court judgment instead of hiding behind dubious interpretations of the law. Finally the Institution of the Attorney-General as a whole is still too open to being influenced by political interests.

## *Military impunity*

At the end of 2008, the government and the parliament were discussing a review bill of the law on military tribunals (Law No. 31/1997). The government has agreed to the parliamentary proposal that any ordinary criminal offences committed by the members of the military have to be brought to ordinary civil criminal courts. However, the government proposed that the investigations for such cases are to be conducted by the military police. Until such a bill is passed, crimes committed by members of the military will continue to to be investigated and tried by the military, even though this presents a conflict of interest.

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*21 A/HRC/WG.6/1/IDN/4 art. 76.4, April 2008, UPR Review Indonesia*

*The following table lists major human rights violations such as so-called gross violations of human rights together with their status in the justice process.*

| Time | Event | Komnas HAM status | Status with the AGO | Human Rights Court status |
|---|---|---|---|---|
| 1965 | **65 Massacre** After Suharto's coup millions of communist suspects, such as party members, were killed or detained for decades. | Inquiry started in 2008 | | |
| 1983-1985 | **Mysterious Shooting Cases** | Inquiry started in 2008 | | |
| 1984 | **Tanjung Priok** Not covered by Law 26 on Human Rights. | Inquiry finished in 2000 | Prosecution finished after political decision by parliament to establish ad-hoc court | Finished at the Supreme Court level. All perpetrators were acquitted |
| 1997/98 | **Student disappearance 97/98** | Inquiry finished in 2006 | Rejected, Parliament still considering the case | |
| 1998 | **Trisakti & Semanggi** | Inquiry finished in 2003 | Rejected, parliament of 1999-2004 declared it not to be a gross violation of human rights according to Law 26. | Could only start if current parliament to revoke earlier decision |
| 1998 | **May 98 riots** | Inquiry finished in 2003 | Earlier rejected on the basis that inquiries did not include names of alleged perpetrators. AGO requested amendments to the inquiries with names. After Constitutional Court ruling, AGO should conduct investigation | |

| | | | | |
|---|---|---|---|---|
| 1989, Feb. 7 | **Talangsari** Soldiers from Garuda Htam Military Resort Command attack village Talangsari in Lampung with riffles. 246 people killed | Inquiry finished in October 2008 | Earlier rejected, after Constitutional Court ruling, AGO should conduct investigation | |
| 1999 | **East Timor 99** | Inquiry finished in 2000 | Prosecution finished after political decision by parliament to establish ad-hoc court | Finished at the Supreme Court level. All perpetrators were acquitted |
| 2001 | **Abepura** | Inquiry finished | Prosecution finished after political decision by parliament to establish permanent court | Finished at the Supreme Court level. All perpetrators were acquitted. No reparation for victims |
| 2003 | **Wasior** | Inquiry finished in 2005 | Rejected in April 2008 | |
| 2003 | **Wamena** | Inquiry finished in 2005 | Rejected in April 2008 | |

## 1.6 THE DEATH PENALTY

Indonesia has ratified the ICCPR, and thus has to guarantee the right to life for all citizens. A speedy abolishment of the death penalty is not likely according to the government's international position, in which it referred to its sovereignty during the discussion of the UPR outcome in 2008. In the process, Indonesia stated categorically that "the death penalty remains part of Indonesia's positive law, namely the Indonesian Penal Code. The provision related to capital punishment was retained by decisions democratically taken through a parliamentary process. The issue has also been the subject of various public debates, and only last year was brought to the Constitutional Court for review, which decided that the application of the death penalty remains fully compatible with the Constitution."[22]

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*22 A/HRC/8/233/Add.1 art. 9, June 2008*

The constitutionality of its application in cases of illicit drug trafficking has been challenged, as referred to by the government during the UPR process, at the Constitutional Court level. The AHRC reported about these decision in 2007.[23] The Constitutional Court's judges voted six to three that the Law on Narcotics does not infringe upon the right to life, and in so doing, delivered a deplorable verdict.

Dr. Nowak, the Special Rapporteur on Torture concluded in a report following his visit to Indonesia that the "death penalty should be abolished. While it is still applied, the secrecy surrounding the death penalty and executions should stop immediately."[24] The death penalty in Indonesia is currently carried out by a firing squad. This process was applied in several instances in 2008.

In 2007, the UN General Assembly passed a resolution urging all States still practicing death penalty to put in place a moratorium on executions. Despite being a member of UN Human Rights Council, Indonesia instead headed in the opposite direction, and carried out executions in numerous criminal cases, ranging from murder to charges under the Narcotics Law. In the draft of the Corruption Eradication Law as well as in the draft of the Narcotics Law, Indonesia declared the death penalty as a maximum punishment. In the review-draft of the Criminal Code, the death penalty is still provided for.

The justice process that can lead to the application of the penalty is facing problems. As part of the reform process and civil society engagement, it is apparent that there are serious flaws in the Indonesian justice system. The justice rendered by the justice system in Indonesia is often partial, susceptible to bribery, corruption and grave errors. This makes the sentencing to death highly questionable and fraught with risks of grave, irreversible travesties of justice.

Ultimately, it is not the severity of the punishment that will deter crimes and bring justice for the victim, but it is the certainty that perpetrators will be convicted after a just and transparent trial in court, under a legal process that finds persons guilty based on evidence. Indonesia, as a State Party to the ICCPR is expected to take progressive measures to abolish the death penalty, not to retain it.

See also AHRC-STM-186-2008 on recent cases of executions in 2008.[25]

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23 *AS-256-2007 AHRC Statement, INDONESIA: Constitutional Court failed to make history in Indonesian human rights movement, URL: http://www.ahrchk.net/statements/mainfile.php/2007statements/1253/*

24 *A/HRC/7/3/Add.7, art.89, March 2008, Special Rapporteur on Torture*

25 *Joint Statement: Indonesian Community Legal Aid Institute & AHRC, INDONESIA: Failure to acknowledge the essence of right to life resulting in more people being executed, URL: http://www.ahrchk.net/statements/mainfile.php/2008statements/1614/*

## 1.7 FAIR TRIAL AND CRIMINAL PROCEDURE

The obligations contained in the ICCPR with regard to fair trials and, as a result, to criminal procedure, are fully applicable to Indonesia. However, the implementation of some of the laws including the Criminal Procedure Code, shows serious shortcomings in that regard. The weakness of the Indonesian Criminal Procedure Code and its implementation has ensured that the country remains far from being able to guarantee a fair trial. This is evident in the following example.

In 2008, David Eko Priyanto, Imam Hambali (alias Kemat), and Maman Sugiyanto were accused of the murder of a person called Asrori, a name connected by the police with a body found in a sugar cane field. The Jombang District Court sentenced Mr. Priyanto to 12 years imprisonment and Kemat to17 years, while Mr. Sugiyanto is still under trial. In a second concurrent case, Very Idham Henyansyah (alias Ryan), a person accused of serial killing, admitted that Asrori was in fact one of his victims and was buried near his house. Initially, the police refused to accept the notion that they had committed a serious error in their investigation. Later the dead body found at the sugar cane field was re-identified as being Fauzin Suyanto. The police then arrested Rudi Hartono who was alleged to have murdered Mr. Suyanto. However, Mr. Priyanto and Mr. Kemat remain imprisoned and a judge continues with the trial of Maman Sugiyanto. No action has so far been taken by the Indonesian Government, the Attorney General's Office or the Supreme Court to correct this flagrant miscarriage of justice.

## 1.8 FREEDOM OF RELIGION

While the majority of Indonesians are Muslims, the Indonesian Constitution does not refer to Islam at any point. As a secular democratic republic, the country proclaimed the aim of religious freedom and harmony. International human rights law such as the ICCPR and the ICESCR requires the State to protect the religious activities of any group. In Indonesia, only six major religions are recognized by the State and enjoy some protection. Often the government and the police take a reluctant role in protecting religious assemblies. The AHRC has received cases were religious communities were

***Pancasila - Five Principles***
the foundation of the Indonesian Republic

1. Belief in the one and only God,
2. Just and civilised humanity,
3. The unity of Indonesia,
4. Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, and
5. Social justice for the whole of the people of Indonesia

attacked, and insufficient protection was given. In other cases demonstrations based on religious perspectives ended in public violence.

In June 2008, the National Alliance for Freedom of Religion (AKKBB)[26] marked the anniversary of the Pancasila,[27] the principles underlying the foundation of the Indonesian State, with a rally. AKKBB is known for the promotion of religious freedoms, while other Islamic groups in the country are trying to gain public support and to promote Islamic values. The Indonesian Islamic Organization Hizbut Tahrir Indonesia (HTI), and the Islamic Defenders Front - Front Pembela Islam (FPI) belong to the latter ones. HTI-FPI met the rally of AKKBB and the encounters became violent. See AHRC-UAC-127-2008 for more details.

The Committee against Torture in its concluding observations in July 2008 explained:

> *Recalling the Committee's general comment No. 2 (CAT/C/GC/2, para. 21), the State party should ensure the protection of members of groups especially at risk of ill-treatment, by prosecuting and punishing all acts of violence and abuses against those individuals and ensuring implementation of positive measures of prevention and protection.*
>
> *The State party should ensure prompt, impartial and effective investigations into all ethnically motivated violence and discrimination, including acts directed against persons belonging to ethnic and religious minorities, and prosecute and punish perpetrators with penalties appropriate to the nature of those acts. The State party should also publicly condemn hate speech and crimes and other violent acts of racial discrimination and related violence and should work to eradicate incitement and any role public officials or law enforcement personnel might have in consenting or acquiescing in such violence. It should ensure that officials are held accountable for action or inaction that breaches the Convention.* [28]

In 2008, protests in relation to religious issues erupted. After threats of a governmental decree against the Ahmadiyyas, which is a religious group that consider itself as being part of Islam, protests took place. (See AHRC-UAC-127-2008[29] for more information.) There the Ahmadiyya protesters clashed with a conservative Muslim political group.[30]

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26 *Aliansi Kebangsaan untuk Kebebasan Beragama dan Berkeyakinan - AKKBB*

27 *Pancasila, is the official philosophical foundation of the Indonesian state. Pancasila consists of two Sanskrit words, "panca" meaning five, and "sila" meaning principles.*

28 *CAT/C/IDN/CO/2 para 19., July 2008*

29 *INDONESIA: Yet another attack on a group advocating religious freedom, June 5, 2008. AHRC-UAC-127-2008 URL: http://www.ahrchk.net/ua/mainfile.php/2008/2893/*

30 *Indonesian Islamic Organization Hizbut Tahir Indonesia (HTI) and the Islamic Defenders Front - Front Pembela Islam (FPI)*

The Ahmadiyya is an Islamic group that has practiced its beliefs for about 100 years under various regimes without any incidents in the past. Their beliefs differ from those of traditional Islam believers, who mostly do not recognize the Ahmadiyya's Muslim identity.

However, the State only recognizes six religions, and decided to intervene in the difference of opinion, thus requiring the Ahmadiyya group either to denounce their Islamic nature or to stop exercising religious freedoms. In June 2008, the Minister of the Interior and the Minister of Religious Affairs, together with Attorney General Hendarman Supandji, signed and issued a Joint Ministerial decree to that effect.

Joint Decree of the Minister of Religious Affairs, the Attorney General and the Minister of the Interior of The Republic of Indonesia

NUMBER : 3 YEAR 2008
NUMBER : KEP033/A/JA/6/2008
NUMBER : 199 YEAR 2008

**HEREBY RESOLVE AND MAKE**

**A Joint Decree of the Minister of Religious Affairs, the Attorney General, and the Minister of the Interior of the Republic of Indonesia to Warn and Order the followers, members, and/or leading members of the Indonesian Ahmadiyya Jama'at (JAI) and the General Public**

FIRST: Members of the public are warned and ordered not to declare, suggest, or attempt to gain public support for an interpretation of a religion that is held in Indonesia, or to conduct religious activities that resemble the religious activities of that religion which are deviant from the principal teachings of that religion.

SECOND: The followers, members, and/or leading members of the Indonesian Ahmadiyya Jama'at (JAI) are warned and ordered, as long as they consider themselves to hold to Islam, to discontinue the promulgation of interpretations and activities that are deviant from the principal teachings of Islam, that is to say the promulgation of beliefs that recognise a prophet with all his teachings who comes after the Prophet Muhammad SAW.

THIRD: Any follower, member, or leading member of the Indonesian Ahmadiyya Jama'at (JAI) who does not comply with this warning and order as specified in the first and second articles shall be liable to penalties as prescribed in regulatory laws and such penalties shall extent to the organisation and legal body.

| | |
|---|---|
| FOURTH: | All members of the public are warned and ordered to protect and maintain harmonious religious life as well as peaceful and orderly community life by not conducting unlawful activities and/or actions against the followers, members, and leading members of the Indonesian Ahmadiyya Jama'at (JAI). |
| FIFTH: | Any member of the public who does not comply with this warning and order as specified in the first and fourth articles shall be liable to penalties as prescribed in regulatory laws. |
| SIXTH: | Government and district government officials are ordered to take steps to guide, secure and monitor the implementation of this Joint Decree. |
| SEVENTH: | This Joint Decree comes into effect on the date that it is made. |

Made at Jakarta, June 9, 2008

| MINISTER OF RELIGIOUS AFFAIRS | ATTORNEY GENERAL | MINISTER OF THE INTERIOR |
|---|---|---|
| Muhammad M. Basyuni | Hendarman Supandji | H. Mardiyanto |

Source: The Persecution, URL: http://www.thepersecution.org/world/indonesia/docs/skb.html

The government of Indonesia commented as part of the United Nations Universal Periodic Review process, that this Ministerial Decree "does not outlaw the belief, but orders its followers to halt their proselytization (Syi'ar) activities and to fully respect the existing laws and regulations; it appeals to the Ahmadiyah followers to return to the Islamic mainstream and at the same time appeals to the others to refrain from violent acts against them." [31]

***AHRC Cases on Religious Freedom in Indonesia in 2008***

**UPDATE (Indonesia): Decree banning religious group must bek revoked** July 12, 2008, AHRC-UAU-036-2008
URL: http://www.ahrchk.net/ua/mainfile.php/2008/2902/

**INDONESIA: Yet another attack on a group advocating religious freedom** June 5, 2008, AHRC-UAC-127-2008
URL: http://www.ahrchk.net/ua/mainfile.php/2008/2893/

**INDONESIA: Failure to provide protection for religious group** May 21, 2008, AHRC-UAC-108-2008
URL: http://www.ahrchk.net/ua/mainfile.php/2008/2866/

*31 A/HRC/8/233/Add.1 art. 8, June 2008*

## 1.9 THE CRISIS IN PAPUA

The Indonesian provinces of Papua and West Papua are more than most other parts of the country being subjected to rule by security forces rather than by civil administrations. Mining and plantation activities by multinational corporations are supported by the local government and are run under the armed protection of the army and the police. The transmigration programme that brings Muslim traders from other parts of the country to indigenous areas of Papua is creating worrying social and ethnographic changes. For decades, the region has been troubled by conflict between by indigenous people's independence movements and heavily armed responses by the government.

This environment makes the work of human rights defenders difficult, as they are frequently falsely suspected and accused of working with independence movements. Such branding of members of civil society often then leads to arbitrary arrest, torture and even forced disappearances.

***INDONESIA: Army Special Forces threaten social workers to find out Father Johanes Djonga's whereabouts in Papua***
November 21, 2007, UP-156-200

Threats against social workers by the Army Special Forces in Papua continue since September 2007 in order to obtain information about the location of Father Johanes Djonga working for human rights. The AHRC has earlier raised the alarm about the army's threats against the Father Djonga but threats are still made to his friends and social workers who are known as the leaders of villages. The AHRC is concerned about the government's inaction against these repeated threats by the army.

more information at URL: http://www.ahrchk.net/ua/mainfile.php/2007/2670/

After his visit to Indonesia, the Special Rapporteur on Torture denounced the "routine and disproportionate use of force and widespread torture and other cruel, inhuman and degrading treatment or punishment by members of the security and police forces, including by members of the armed forces, mobile police units ("Brimob") and paramilitary groups during military and "sweep" operations, especially in Papua, Aceh, and in other provinces where there have been armed conflicts."[32] On another occasion he recalled that, "excessive violence during military and police actions can amount to cruel, inhuman or degrading treatment. The Government of Indonesia should take all steps necessary to stop the use of excessive violence during police and military operations, above all in conflict areas such as Papua and Central Sulawesi."[33]

The AHRC continues to receive cases of killings and unresolved disappearances. Past

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*32 CAT/C/IDN/CO/2 para 10., July 2008, arts. 2, 10 and 11, see also Rapporteur on Torture*

*33 A/HRC/7/3/Add.7, art.86, March 2008, Special Rapporteur on Torture*

killings are often unresolved and the prosecutor's office in Jayapura, the capital of the province, is as much subject to pressure as is the Criminal Investigation Department (RESKRIM) in the Police.

The agreement that handed Papua over to Indonesia allowed for the self-determination of the indigenous people. It then took decades until the special autonomy law came into force. In reality, life has not improved with regard to the enjoyment of civil and political rights or economic, social and cultural rights. In fact, recent years have shown an increase in killings and violence by the security forces and the repression of civil society.

## 2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### 2.1 RIGHT TO HEALTH

While the access to health care systems for the wider public across the country has been a longstanding concern, 2008 was marked by a cholera epidemic in Papua. Since April 2008, hundreds of cases of cholera were reported over a period of months. The reluctant and insufficient response by the local and national health authorities prolonged the spread of the epidemic. Only after several civil society organisations raised the issue, was the epidemic contained after about half a year. The distrust between the indigenous population and the authorities, as well as negligence by the health institutions, created this serious situation.

***INDONESIA: Hundreds die due to government's failure to control Cholera outbreak***
September 26 2008, AHRC-UAG-012-2008
URL: http://www.ahrchk.net/ua/mainfile.php/2008/3014/

In April 2008, several cases of cholera related symptoms such as severe diarrhea started occurring in villages in the Dogiyai District of Papua, Indonesia. It was soon confirmed that the cholera bacterium was the causing agent. Cholera is an easily treatable disease which need not result in any deaths, given that instant and appropriate action is taken. However, in Papua the cholera bacterium has been allowed to spread since April, and by mid September some 239 people have lost their lives due to it. This is an utterly disturbing state of affairs, given that the outbreak could have been easily contained had there been a sufficient response by the Government. Instead, the situation has been left largely up to local NGO to resolve.

It is important to note that the government neglect of the cholera epidemic in Papua is a breach of domestic Indonesian Law no 23/1992, which requires that the government provides sufficient health facilities throughout the nation and that it takes action to combat both infectious and non-infectious diseases. Additionally, as a signatory of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Indonesia also recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health, and should accordingly maximize available resources to achieve full realization of this right.

## 2.2 RIGHT TO LAND AND FOOD

As a signatory to the International Covenant on Social, Economic and Cultural rights (ICESCR), Indonesia is required to: "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing and to the continuous improvement of living conditions (Article 11 ICESCR)."

The Human Development Index (HDI) of Indonesia is slowly, but continuously rising as a stable middle class emerges in the country. However, the distribution of this living standard is worrying. For example, the Papua region ought to be one of the country's richest, given its abundance of natural resources, however, an estimated 45 per cent of the Papuan population live below the poverty line.

The UPR review of Indonesia concluded: "While acknowledging the efforts made by the Government of Indonesia, it was recommended that such efforts continue to ensure the promotion and protection of all the components of the Indonesian people."[34] This recommendation stands in stark contrast with the public reality in Papua.

Extraction of Papua's natural resources has been ongoing for centuries, but has intensified since the middle of the 1960, when Indonesia gained sovereignty over the region. The extraction of resources such as gold and other minerals has been problematic, since the companies involved in the extraction are not subjected to restrictions of their activities with the view to protect the living environment of indigenous Papuans. The World Bank noted in its 2003 report on Papua that the region was suffering from: "unfriendly and excessive natural resources management and exploitation."[35] For decades the Indonesian government has approved the exploitation of the region's vast natural resources.

Companies that are granted contracts there often come into conflict with indigenous Papuans over land right issues, as well as environmental issues. The indigenous people are dependent on their environment and have been occupying the same land for generations. However, since they have usually inherited the land through traditional customs, and these have not been adequately translated into a modern legal framework, there is no legal precedent establishing their ownership rights, which facilitates their eviction from the land.

In 2002, when the Representative of the Secretary-General on internally displaced persons submitted his report after a visit to Indonesia, he recommended that "It is

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*34 A/HRC/WG.6/1/IDN/4 art. 76.5, April 2008*

*35 NGO Foker LSMPapua*

critical for national military and police forces to provide protection for all civilians, and in an even-handed manner. In addition, adherence to strict discipline in the security forces and decisive and firm and sustained action against impunity should be high priorities." [36]

However, when it comes to clashes between mining or plantation companies and indigenous people, the security forces usually take the side of multinational corporations and use force and firearms. Peasants and indigenous people suffer from injuries and killings without hope of justice or redress.

This practice is prevalent in Papua, but cases have been reported from other provinces in Indonesia. For example, in December 2007, 300 indigenous families were threatened with forcible evictions from their land in West Sumatra by the municipal government. (See UA-341-2007 for more information.) No consideration was given to the fact that the land is an integral part of their way of life, and hence also an essential part in ensuring these families benefit from an adequate standard of living.

The government of Indonesia must incorporate and enforce the respect for the inviolable economic, social, and cultural rights of all its citizens, including the indigenous population who traditionally subsist on land for which they may or may not have a formal ownership contract. In cases where displacement takes place, the victims should be provided with sufficient remedies as well as alternative means to sustain an "adequate standard of living", in compliance with the ICESCR. In any development decisions, removal of inhabitants needs to be the least favoured option and the decision-making processes

***INDONESIA: About 300 families of indigenous villagers threatened to be forcibly evicted by the government in West Sumatera***
December 14, 2007, UA-341-2007

Around 300 families of indigenous villagers occupying land since 1918 in Lima Puluh Kota Municipality, West Sumatera, have been threatened with forcible eviction by the government. The villagers had been evicted twice before but were forced to return having no other means of livelihood after moving elsewhere. The municipal government and the Government Agency for Top Breeding Cow (BPTU) forcibly evicted them in the past in absence of a lawful court for the latter to occupy the land.

The Government Agency for Top Breeding Cow (BPTU) is a unit under the Farming Department which claims that the Ulayat land of Nagari Mungo is government land according to the Erfach Deed No. 207. In 1997, the Ministry of Agriculture had issued a Certificate of Right to Use to the BPTU effectively allowing them to claim the land. Ulayat Land refers to rights to collective ownership of land by an traditional Adat community.

For more information see URL: http://www.ahrchk.net/ua/mainfile.php/2007/2697/

36 *E/CN.4/2002/95/Add.2 art. 54, February 2002*

in this regard needs to conform with international standards. International human rights law requires such processes to be participatory, transparent and subject to review when required.

Palm oil plantations are another example where illegal logging increases economic activities, but destroys environments that serve as sources for food and water. Development projects need to be made environmentally sustainable in order to preserve the surroundings for indigenous people. This is partially an end in itself, but it is also important in order to safeguard the economic, social, and cultural rights of the people who subsist based on their environment.

The central government's settlement policies (also called transmigration), that are overturning the ethnographic balance in the provinces Papua and West Papua, have resulted in an influx of non-indigenous Papuans. Commercial activities, rural development, and expansion of settlements are driven in this way. However, this type of development has not benefited the population that pays the price of the environmental degradation and de-facto military rule in the region.

Access to secondary education is provided in theory, but is not affordable for most indigenous Papuans. Access to loans and licenses for businesses is practically unavailable for the indigenous people. Development efforts, various programs and funds granted from Jakarta to the provincial government to address this situation have not yet been able to change this situation. While funding is increased year by year, there have been insufficient programs to monitor the use of funds. As a result, the resources end up in corrupt hands at the district level.

The gaps in the two-layered society in Papua with indigenous Papuans on the one hand, and the increasing numbers of migrants on the other hand is creating social tensions. Discrimination and de-facto apartheid provokes anger and a perception of a cultural invasion among the indigenous population. Addressing these social problems is key to the stabilization of the region. Because of the politicisation of the institutions of justice in Papua, their capacity to address issues of corruption and the rule of law is in doubt. Due to the lack of effective government institutions that could provide social services and ensure equal opportunities, attempts to address these issues by increasing the budget of the region have so far failed to engender positive results.

# 3. PROTECTION OF HUMAN RIGHTS

## 3.1 LEGISLATION

Indonesia has undergone several legislative reforms since the beginning of the *reformasi* era. New legislation such as the Human Rights Court Law, or the Law on Witness and Victims protection has equipped the country with new institutions. To conform with international human rights standards and fulfil obligations under the ICCPR, it is necessary to also review the existing body of legislation.

### *Sharia Law*

In addition to legislation enacted on the national level, at the regional level within Indonesia, Sharia Law continues to be applied, for example in Aceh. Such law is applied for Muslims and is seen as not conforming with Constitutional Standards. The UN Committee against Torture advised that Indonesia "should review, through its relevant institutions, including governmental and judicial mechanisms at all levels, all local regulations in order to ensure they are in conformity with the Constitution and with ratified legal international instruments, in particular the Convention."[37]

A newly elected judge in the Constitutional Court has already raised doubts about the legality of the ongoing application of Sharia Law at the regional level. Such laws, the judge explained, are unconstitutional. However, there has not yet been a review of the law.

The Aceh Criminal Code from 2005 introduced corporal punishment, which stands in contrast with the human rights reform ongoing in the rest of the country. This legislation needs to be reviewed as it contravenes constitutional rights as well as the ICCPR and the Convention against Torture. The Special Rapporteur on Torture has stated that "the Government should ensure that corporal punishment, independently of the physical suffering it causes, is explicitly criminalized in all parts of the country."[38]

### *The Penal Code*

The Indonesian Penal Code (KUHP) has been criticised for years for lacking a proper definition of torture. The current version makes reference to "maltreatment" in art. 351 - 358, which differs from the definition of torture as provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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*37 CAT/C/IDN/CO/2 para 15., July 2008*

*38 A/HRC/7/3/Add.7 art. 75, March 2008, Special Rapporteur on Torture*

The UN Special Rapporteur on Torture, Professor Manfred Nowak, recommended that "torture should be defined and criminalized as a matter of priority and as a concrete demonstration of Indonesia's commitment to combat the problem, in accordance with articles 1 and 4 of the Convention against Torture, with penalties commensurate with the gravity of torture."[39]

Torture cases are usually labelled as "maltreatment," and court cases against perpetrators of torture systematically end in dismissals or acquittals. Minor sentences or acquittals cannot be reconciled with the grave nature of the crime of torture, as was suggested by the UN Special Rapporteur on Torture. [40]

The Committee against Torture suggested that Indonesia either amend the existing Penal Code or adopt a stand-alone bill specifically on torture. Legislation on crimes of torture should "take into account their grave nature, as set out in paragraph 2, article 4, of the Convention."[41] In that regard, the government announced during this year's Universal Periodic Review, that it "is currently considering the amendment of article 351 of the Code on ill-treatment. In particular, this amendment will bring the formulation of the Code to cover the crime of torture as defined in the Convention against Torture, an instrument to which Indonesia is a party."[42] Several drafts of a reviewed law have been discussed for a long time, but when an actual reviewed bill would be passed remains difficult to predict.

Article 160 in the Penal Code prohibits oral or written incitement in public to actions against the authorities or disobedience to statutory provisions or official orders under such provisions.

Article 161 further criminalizes publicizing such material and allows professional licenses, such as the license to work as a lawyer, to be revoked. In 2008, cases were reported in which human rights defenders were charged under these vague laws and sentenced to imprisonment, for example, for distributing pamphlets regarding mining activities. (See AHRC-UAC-197-2008 for more information.)[43]

Article 160 is often used to charge human rights defenders with offences when they question decisions and actions by local authorities. Such forms of public protest should

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*39 A/HRC/7/3/Add.7 art. 73, March 2008, Special Rapporteur on Torture*

*40 A/HRC/7/3/Add.7 art. 73*

*41 CAT/C/IDN/CO/2 para 13., July 2008*

*42 A/HRC/8/233/Add.1 art. 20, June 2008*

*43 INDONESIA: Eight people in Aceh convicted of disseminating pamphlets, AHRC-UAC-197-2008, September 1, 2008, URL: http://www.ahrchk.net/ua/mainfile.php/2008/2992*

instead be protected, in particular in the case of human rights defenders.

Article 106 and Article 110 have in the past been used to charge people with "incitement to separatist movements". In crisis regions like Papua, rights activists are frequently charged under these articles and have suffered years of imprisonment as a result.

Criminal responsibility in Indonesia begins at the age of eight years old and thus contravenes the Conventions on the Rights of the Child.

### *Criminal Procedure Code*

The problems of Law No. 8 of 1981 on Criminal Procedure (KUHAP) occur in both its substance and in its application. The first problem is the limited number of explicit and clear provisions that are provided for under the Code. A second problem is the implementation of the law in practice.

The code has loopholes with regard to safeguarding a fair trial, for example. The length of the period of detention, the lack of guarantees of the rights of the accused, the absence of protection from torture, no adequate monitoring, and lacking provisions to challenge the trial mechanism, present serious obstacles when trying to uphold a justice process that conforms with international standards. Theses problems have led to numerous miscarriages of justice.

Inadequate protection is given under the existing Indonesian Criminal Procedure Code. At this time, the Indonesian Government is preparing a new draft of the Criminal Procedure Code. A new draft Code would have to repair the imperfections of the existing Code and give emphasis to the protection on human rights and fair trial, if it is to be considered an improvement.

## 3.2 THE POLICE

The Indonesian Police is the main perpetrator of various forms of human rights violations, notably torture. The torture of detainees is commonly practiced in order to extract information from them; or force the signature of false testimonies. Torture has become a standard method of interrogation and evidence fabrication. Cases received by the AHRC in 2008 suggest widespread police brutality, which is mirrored in the mistrust with which the general public views the police. It is obvious then, that no real progress in human rights can be achieved without significant reforms to the Indonesian police. Starting in the 1998 *reformasi*-era, the Indonesian police force was to be radically reformed. However, 10 years after the reform period started, police brutality, corruption and a lack of accountability are still prevalent. What are the reasons for this?

## *Police Culture*

The Indonesian police is still struggling with the problems of a violent, militaristic history and the lack of a professional civilian approach to policing, despite an expressed aspiration for "cultural change". The general public still perceives the police as being brutal and they are generally distrusted and often even feared. Despite continued reforms since 1998, the Indonesian police are still seen as discriminatory, unprofessional, unresponsive and discourteous. It is apparent then that the police culture needs to be changed. The ideal is a civilian police force: a professional, proportional, and democratic police force that has a high regard for human rights, transparency, accountability, and the supremacy of the rule of law.[44] Cultural change must happen through interplay between institutional arrangements and educational avenues. For example, educational programmes in the Police Academy are a welcome initiative, but institutional arrangements, such as the criminalization of torture must accompany the training. The National Police Commission receives hundreds of complaints every year and has developed an expertise on needed reforms and suggests disciplinary actions based on its findings. However, none of the valuable recommendations by the commission have a binding affect and reform attempts do not result in change.

## *Investigations*

The Committee against Torture noted that Indonesia "should take the measures necessary to ensure that criminal convictions require evidence other than the confession of the detainee, and ensure that statements that have been made under torture are not invoked as evidence in any proceedings, except against a person accused of torture, in accordance with the provisions of the Convention. The State party is requested to review criminal convictions based solely on confessions in order to identify instances of wrongful conviction based on evidence obtained through torture or ill-treatment, to take appropriate remedial measures and to inform the Committee of its findings."[45] However, to date, the Indonesian Police is still functioning according to a confession-based logic. This means that more focus is put on extracting a confession from a suspected criminal, than on collecting evidence in order to prove that the person in question is guilty. Such logic is highly susceptible to torture as a method for producing fast, though not necessarily true, confessions.

The AHRC recommends that the Indonesian government take measures to introduce an evidence-based investigation system. This will reduce the incentives for the police to use torture as a method of interrogation. Additionally, the allocation of resources to the

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*44 ALMANAC ON INDONESIAN SECURITY SECTOR REFORM 2007, Sukadis, 2007: 64-72*

*45 CAT/C/IDN/CO/2 art. 14., July 2008*

police would help in combating torture, to the extent that it is used as a cost effective method for achieving results under resource deprived circumstances. Anti-corruption measures must accompany greater resource allocation. Additionally, in order to facilitate this transition, courts have to stop considering confessions produced through torture as being valid evidence. Such evidence should, according to Indonesian law, not be considered as being valid, but in practice it is frequently used.

Police Detention and Custody

A further area of concern with regard to the Indonesian police force is the lengthy duration of police custody – 61 days. The UN Special Rapporteur on Torture pointed out that "As a matter of urgent priority, the period of police custody should be reduced to a time limit in line with international standards (maximum of 48 hours)."[46] Although the Indonesian Criminal Procedure Code authorizes this lengthy detention only under special circumstances, this has become the standard period of detention.[47] This stands in direct opposition to international standards, and it is problematic for a number of reasons: it makes police abuse more likely, and the visible traces of torture are likely to have disappeared after such a long period of time. The Special Rapporteur further requested, "The maintenance of custody registers should be scrupulously ensured."[48] This had not been implemented at the time of writing.

## *Police Impunity*

As discussed above, in relation to torture, lower state officials are rarely convicted, and if they are, the punishment is lenient. The UN Special Rapporteur on Torture suggested "accessible and effective complaints mechanisms should be established. … The agencies in charge of conducting investigations, inter alia Probam, should receive targeted training."[49] Other than the quasi complaint mechanism PROPAM in the police, no other specific complaint mechanism is available. It has become obvious that the police internal complaints mechanism, PROPAM, is not functioning satisfactorily, as it is neither preventive nor remedial, nor is it specific to each case of torture. PROPAM also lacks transparency when it comes to the procedure and outcome of a complaint. Furthermore, the punishments meted out by PROPAM in torture cases are not severe enough, and therefore do not reflecting the gravity of the crime of torture. An alternative (or complimentary) approach would be the expansion of the mandate of the National Human Rights Commission (Komnas HAM) to enable it to further investigate individual cases of torture as human rights violations.

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*46 A/HRC/7/3/Add.7, art.78, March 2008, Special Rapporteur on Torture*

*47 A/HRC/7/3/Add.7*

*48 A/HRC/7/3/Add.7, art.81, March 2008, Special Rapporteur on Torture*

*49 A/HRC/7/3/Add.7, art.83, March 2008, Special Rapporteur on Torture*

Another monitoring body concerning the police is the National Police Commission, which is mandated to recommend reforms to the police. The lack of any other effective complaint procedures has made them a target for hundreds of complaints every year and they now effectively act as a complaint receiving body without being specifically mandated or funded to do so. While its establishment was an important step forward, its lack of authority over the police makes it unable to perform adequately in ensuring human rights.

### *Police Progress*

Despite all the explained problems, some positive steps towards a more accountable and generally more humane Indonesian police force can be identified. Police officers are increasingly being trained in human rights and international standards; demilitarising training forms part of the Police Academy; a number of national mechanisms have been established to monitor ill-treatment by the police, including the National Police Commission – a new oversight commission; all police members who are charged with a criminal offence are now tried in civil courts, rather than in military ones. In addition the government has established a complaints mechanism with regard to maltreatment on the part of public officers, and a telephone hotline has also been set up which is directly connected to the local police. These are all important initiatives which deserve praise. However, the impact of these initiatives may, at least partially, depend on an amended Indonesian Penal Code which has not yet materialized. The urgent need for an amended Penal Code, especially concerning the criminalization of torture and appropriate punishment therefore, can not be stressed enough.

## 3.3 THE PROSECUTION

In the last two years there have been many prosecutors convicted by the Corruption Eradication Commission (KPK) on charges of corruption beyond IDR 500 000 000 (about US$ 50 000). Among them, prosecutor Gunawan and prosecutor Urip were amongst the most prominent cases in 2008. These cases indicate the extent of the problem of corruption in the country's prosecution system. The Committee on Torture pointed out the "collusion and nepotism in the public prosecution service."[50] The Committee furthermore recommended that:

"The State party should reform the Attorney-General's office to ensure that it proceeds with criminal prosecution into allegations of torture and ill-treatment with independence and impartiality. In addition, the State party should establish an effective and independent oversight mechanism to ensure prompt, impartial and effective investigation into all

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*50 CAT/C/IDN/CO/2 para 22., July 2008*

allegations of torture and ill-treatment. The State party should also publish, without delay, the reports of Komnas HAM investigations." [51]

The problem of corruption was also recognized by President Bambang Yudhoyono who announced that the two biggest problems Indonesia faces are endemic corruption and gross violations of human rights. In the last few years the government has put unprecedented efforts into the fight against corruption. However, many Indonesian-based groups point out the neglect of gross violations of human rights in the President's working agenda.

Besides ordinary crimes, the Attorney General's office (AGO) also initiates judicial investigations and prosecutes cases of gross violations of human rights, such as past massacres, the May riots and other large-scale incidents of human rights violations. Before, Komnas HAM typically prepares an inquiry report on the case and passes it to the AGO. Since findings made by Komnas HAM remain undisclosed to the public, there is no telling whether or not the reasons for rejection of cases by the office of the Attorney General are justifiable. The AGO has attempted to justify its rejection of cases on the basis of an alleged lack of clarity concerning the law with regard to whether the AGO should wait for a parliamentary decision before starting investigations. In one case, the AGO refused to launch an investigation on the basis that the inquiry report from Komnas HAM did not mention names of alleged perpetrators. In another case the AGO refused to launch an investigation when names were provided but then on the basis that he did not acknowledge his role to act upon KomnasHAM inquiries but that the parliament would have to act first. This shows that the main barrier to the launching of investigations appears to be one of willingness on the part of the AGO.

Article 43.2 of the Human Rights Court Law requires the parliament to recommend the setting up of an ad hoc court based on allegations (dugaan in Indonesian) of a violation, which is then made effective by a presidential decree. Such allegations are to be made by Komnas HAM, but in 2008, Komnas HAM's authority to make such allegations was challenged in the Constitutional Court. The Court ruled that for the investigation to be judicial, it has to be conducted by the Attorney General's office, which should therefore not wait for a parliamentary recommendation but conduct its investigation upon the submission of the inquiry report by Komnas HAM. Only this would bring the parliament in a position to act upon an allegation.

Political interference is suspected by civil society groups in both gross violation and individual human rights cases. Two recent cases exemplify this. An investigation recently produced enough evidence against former justice minister Yusril Ihza Mahendra

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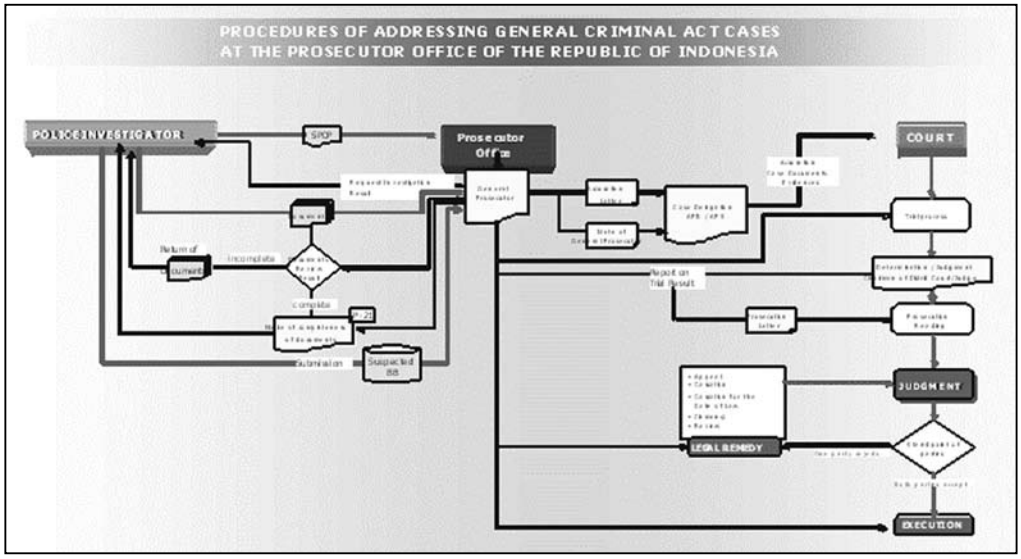
*51 CAT/C/IDN/CO/2 para 25., July 2008*

concerning corruption scandal. At the time of writing, the AGO had still not acted upon this evidence and launched a prosecution. Legal expert Romli Atmasasmita, who took part in drafting the Indonesian Corruption Court bill and is recognized as having criticised institutions such as the AGO department on several occasions, had, however, been arrested without delay on similar charges by the AGO.

The Prosecutorial Commission, a monitoring body set up by a presidential decree, has received numerous complaints of misconduct concerning the offices of several prosecutors around the country. The commission I question does not have the mandate to direct reforms, however. Strengthening the role of this commission with regard to disciplinary measures against prosecutors and reforms within the institution is a required to reduce political interference and to establish an effective, impartial AGO. The direct selection of the Prosecutor General by the President is a second contributing factor that limits the independence of this institution, notably when dealing with politically sensitive cases.

The following graph shows the central role of the Prosecutors office in handling cases:



## 3.4 THE JUDICIARY

In Indonesia's court system, the Constitutional Court is widely seen as one of the most independent and competent courts in the country. District and provincial courts are often reported as giving poor judgments or delaying judicial processes. In a recent case, Hartoyo was harassed, tortured and seriously humiliated by police personnel due to his sexual orientation. The court sentenced the policemen to a fine of 10 US cents and imprisonment for a few weeks, which was not even applied. An appropriate punishment for degrading treatment and torture would include at least several years of imprisonment. Instead, Justice Sugeng Budiyanto, who was hearing the criminal case, justified the light punishment with the argument that "the perpetrators are police officers who are needed by their country, the perpetrators confessed their acts, both parties forgave each other, and the perpetrators committed a minor offence." In addition, the judge ordered the victim to review his moral standing concerning sexual orientation. (For more information see AHRC urgent appeal AHRC-UAU-060-2008.)[52] This is just one example of the lack of education, training, and familiarity with the concept of the rule of law among members of the judiciary.

The Committee against Torture in its review of Indonesia's legal system explained that "as the State party continues its process of transition to a democratic regime committed to upholding the rule of law and human rights, it should strengthen the independence of the judiciary, prevent and combat corruption, collusion and nepotism in the administration of justice, and regulate the legal profession."[53] Little implementation of this and other similar recommendation is noticeable.

The courts' responsibility when it comes to the oversight of criminal procedures, such as treatment of persons in custody, is not being carried out in conformity with international norms. The Special Rapporteur on Torture, for example, requested that "judges and prosecutors should routinely ask persons arriving from police custody how they have been treated, and if they suspect that they have been subjected to ill-treatment, order an independent medical examination in accordance with the Istanbul Protocol, even in the absence of a formal complaint from the defendant."[54]

Of serious concerning is the continued use of testimonies obtained by means of torture in courts. The Committee explained that "the State party is requested to review criminal convictions based solely on confessions in order to identify instances of

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*52 INDONESIA: Court treats torture case as minor offence; police responsible are freed, October 15, 2008, AHRC-UAU-060-2008, URL: http://www.ahrchk.net/ua/mainfile.php/2008/3034/*

*53 CAT/C/IDN/CO/2 para 22., July 2008*

*54 A/HRC/7/3/Add.7, art.80, March 2008, Special Rapporteur on Torture*

wrongful conviction based on evidence obtained through torture or ill-treatment, to take appropriate remedial measures and to inform the Committee of its findings."[55]

The Judicial Commission, a monitoring body established by the constitution has conducted investigations upon received complaints about cases of misconduct. In many such cases the Judicial Commission has recommended disciplinary action against the concerned judges to the Supreme Court – the authority responsible for issuing such actions. However none of the hundreds of recommendations have been taken up by the Supreme Court and the implicated judges continue to serve in their offices. The Supreme Court has only used such information when reviewing a judge's record when considering promotions, notably into the Supreme Court.

Other examples are encouraging. In 2008, Mahfud Md. was elected into the Constitutional Court and was immediately appointed as the Court's Chairperson. Judge Mahfud Md. soon took a firm stand on Sharia Law. He explained that the Sharia as currently widely practiced in Indonesia an the district level contravenes the Constitution of Indonesia. The Constitution requires the same laws to be applied to all citizens irrespective of their religion.

## 3.5 THE INSTITUTION FOR WITNESS PROTECTION

An effective witness protection program is a necessary requirement for a country suffering from serious human rights violations. The delays in bringing Indonesia's Witness and Victims Protection Agency into effect are of concern. The law defining the institution was enacted more than two years ago, however the President selected its commissioners only in 2008.

The Committee against torture in July 2008 denounced the "absence of implementing regulations, the mistreatment of witnesses and victims, and the insufficient training of law enforcement officials and allocation of Government funds to support the new system."[56] The Committee requested Indonesia to "without delay, establish a witness and victim protection body, with all relevant measures required to implement Law No. 13/2006, including the allocation of necessary funding for the functioning of such a new system, the adequate training of law enforcement officials, especially in cooperation with civil society organizations, and an appropriate gender-balanced composition."[57]

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*55 CAT/C/IDN/CO/2 para 12, July 2008*
*56 CAT/C/IDN/CO/2 para 31., July 2008*
*57 CAT/C/IDN/CO/2 para 31., July 2008*

While commissioners have been elected, the institution has not resolved where it will physically locate its offices, or selected the staff to form its secretariat. In the climate of impunity that continues to prevail in Indonesia, and with the political influence that many of the alleged perpetrators of past human rights violation continue to have, many cases have not yet come to the fore, and this can be significantly attributed to the lack of effective witness protection, as witnesses are not confident enough to come forwards at present.

## 3.6 NATIONAL HUMAN RIGHTS INSTITUTIONS

Among the Commissions involved in human rights issues, the most recognized is the National Commission for Human Rights (Komisi Nasional Hak Asasi Manusia), also known as Komnas HAM. As a national human rights institution, it is unlike many others in the Asian region. While its strength lies in its credible work, independence and the commissioners' civil society backgrounds, its weakness can be attributed to limitations to its mandate and its weak link with the Attorney General's Office. Komnas HAM is currently headed by Ifdal Kasim, who headed a human rights non-governmental organisation before becoming Commissioner.

The Committee against Torture requested in 2008 that "the State party should ensure the effective functioning of Komnas HAM by adopting adequate measures, inter alia, by strengthening its independence, mandate, resources and procedures, and reinforcing the independence and security of its members. Members of the government and other high-ranking officials should fully cooperate with Komnas HAM."[58]

However Indonesia's review under the UPR process in 2008 pointed out that in many cases, Komnas HAM relies on the Prosecutor General's willingness to launch prosecutions. The recommendations of Komnas HAM to prosecute cases are being ignored by the Prosecutor General. There is also no institutional requirement for the prosecutor to follow the recommendations of Komnas HAM.

Komnas HAM does not receive full support for its work from the government. The Committee against Torture noted concern "at the fact that members of the Government have stated that military officials should ignore the summons from Komnas HAM in connection with its investigations of gross violations of human rights, such as in the Talangsari, Lampung killing case (arts. 2 and 12)."[59]

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*58 CAT/C/IDN/CO/2 para 24., July 2008*

*59 CAT/C/IDN/CO/2 para 24., July 2008*

## 3.7 INTERNATIONAL LAW

Indonesia has ratified most of the major international human rights instruments, including the ICCPR and the ICESCR. A review of the ICCPR's implementation by the Human Rights Committee has not yet taken place. With regard to ratifications that are still missing, Indonesia frequently refers to its National Plan of Action, according to which, for example, the Optional Protocol to the Convention against Torture is to be signed and ratified. The Special Rapporteur on Torture has stated that the "government of Indonesia should expediently accede to the Optional Protocol to the Convention against Torture, and establish a truly independent National Preventive Mechanism (NPM) to carry out unannounced visits to all places of detention."[60]

Other missing ratifications include the Rome Statute of the International Criminal Court, the Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict, and the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, child prostitution and child pornography. The illustration of the situation in Papua earlier in this report has also shown the need for Indonesia to sign the International Convention on the Protection of All Persons from Enforced Disappearance. Similar requests were also voiced during indonesia's UPR review in 2008. [61]

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*60 A/HRC/7/3/Add.7, art.84, March 2008, Special Rapporteur on Torture*

*61 A/HRC/WG.6/1/IDN/4 art. 76.2, April 2008*

*Following is a table of ratified conventions and treaties as well as some of the missing ratifications.*

| ***Status of Ratifications: Indonesia*** | |
|---|---|
| Relevant Conventions, Protocols (Signed) | Status |
| 2. International Convention on the Elimination of all Forms of Racial Discrimination | 1999 (accession) |
| 3. International Covenant on Economic, Social and Cultural Rights | 2006 (accession) |
| 4. International Covenant on Civil and Political Rights | 2006 (accession) |
| 8. Convention on the Elimination of All Forms of Discrimination against Women) | 1980 (signature)<br>1984 (ratification) |
| 8.b. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women | 2000 (signature) |
| 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | 1985 (signature)<br>1998 (ratification) |
| 11. Convention on the Rights of the Child | 1990 (signature)<br>1990 (ratification) |
| 11.b. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | 2001 (signature) |
| 11.c. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography | 2001 (signature) |
| 13. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families | 2004 (signature) |
| 15. Convention on the Rights of Persons with Disabilities | 2007 (signature) |

| ***Status of Ratifications: Indonesia*** | |
|---|---|
| Relevant Conventions, Protocols **(Unsigned)** | Status |
| 5. Optional Protocol to the International Covenant on Civil and Political Rights | Unsigned |
| 9.b. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | Signature intended according to National Plan of Action and Human Rights Council membership pledges. |

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|---|---|---|
| 12. | Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty | Unsigned |
| 16. | International Convention for the Protection of All Persons from Enforced Disappearance | Unsigned |

## 4. CONCLUSION AND RECOMMENDATIONS

The Universal Periodic Review commended Indonesia "for its efforts in the field of human rights training and education and is encouraged to continue in this regard, and to provide additional training for law enforcement officials, including prosecutors, police and judges, as well as for security forces."[62] A human rights attitude in daily police practices, prosecutorial practices, and other aspects of public administration and justice delivery are required. However, none of these efforts will have a sustainable impact unless institutional and legislative reforms are also implemented.

The Special Rapporteur on Torture has pointed out that, "The Government of Indonesia should ensure that the criminal justice system is non-discriminatory at every stage, combat corruption, which disproportionately affects the poor, the vulnerable and minorities, and take effective measures against corruption by public officials responsible for the administration of justice, including judges, prosecutors, police and prison personnel."[63]

That means making institutions such as the prosecution and the judiciary subject to disciplinary action in cases of misconduct. The various institutions set up often only have the mandate to make recommendations, including the National Police Commission or the Prosecutorial Commission, and these are frequently ignored. These institutions receive complaints and through them have gained considerable experience that could guide policy-making concerning efficiency, misconduct, corruption and, as a result, conformity with human rights standards in these institutions. While such commissions can make recommendations, these recommendations are not binding. No punishment or disciplinary action can be initiated by these complaint processing bodies at present.

Having set up such bodies in the justice system, the government has shown an effort in the right direction. However, real impact is being hindered by the lack of implementation of reforms beyond these initial institutional measures. The constitutionally established

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*62 A/HRC/WG.6/1/IDN/4 art. 76.1, April 2008*

*63 A/HRC/7/3/Add.7, art.88, March 2008, Special Rapporteur on Torture*

Judicial Commission faces a similar problem. While hard work is done in these institutions, their work has no impact unless their recommendations have a binding character.

## *Recommendations:*

1. Monitoring institutions, such as the National Police Commission, the Prosecutorial Commission or the Judicial Commission, must be provided with the authority to issue disciplinary actions against personnel in the criminal justice system and the authority to oversee the implementation of institutional reforms that they engender.

2. The abolishment of torture in Indonesia requires the long-delayed criminalization of torture, including a definition of torture in the Penal Code that is in line with that found in the Convention. Appropriate punishments and reparations concerning acts of torture, which are in line with international standards, must also be provided. The range of international recommendations concerning this, including the need to keep registrations of detainees, should also be implemented without delay.

3. The Attorney General's Office should take a proactive role in investigating and prosecuting cases of gross human rights violations, as victims continue to suffer and the ongoing culture of impunity is continuing to create an atmosphere where similar atrocities remain possible in future.

4. The parliament and the government of Indonesia should consider enacting legislation that protects the work of human rights defenders. The application of article 160 and 161 of the Penal Code should be halted, in order to avoid further attacks against such defenders.

5. The region of Papua should be demilitarized, and military personnel should be subject to the civilian justice process when they have committed human rights violations such as intimidations, killings or torture against civilians. The transmigration process into the region should be immediately halted until a sustainable way is found that allows such migrations streams without harming the human rights of indigenous Papuans including the right to food, water, land and the preservation of culture. The financial efforts made by the central government are welcomed but not effective due to corruption at the local level. A major anti-corruption programme needs to be implemented to tackle the issue as the Corruption Eradication Commission's (KPK) mandate only covers cases of corruption above IDR 500 000 000.

6. The murder of internationally recognized human rights activist Munir Said Thalib needs to be fully resolved, with all the perpetrators involved in planning and supporting the implementation of the assassination having been brought to justice.

# N E P A L

## IMPUNITY AND VIOLATIONS REMAIN UNDER THE COUNTRY'S NEW FEDERAL DEMOCRATIC REPUBLICAN SYSTEM

### 1. INTRODUCTION

2008 will be remembered as a historic year for the people of Nepal; a year of advances of democracy and democratic values. After the election for a Constituent Assembly (CA) was successfully held on April 10, 2008, Nepal was declared a secular, federal democratic republic by the CA on May 28, 2008. This abolished the country's 240 year old monarchy. Some three months later, on August 15, Maoist Chief, Pushpa Kamal Dahal was elected the first Prime Minister of the Federal Democratic Republic of Nepal. A coalition government led by the Communist Party of Nepal-Maoist (CPN-M) was sworn in on August 22.

Another development that the government of Nepal unveiled was the long-awaited draft bill on Enforced Disappearances (Charge and Punishment) Act 2065 B.S. in November 2008. This bill contains a provision to retroactively charge those responsible for disappearances which occurred during the conflict period. In total, 1,619 disappearances were reported in Nepal during the armed conflict, including 1,234 by the government security forces and 331 by the CPN-M. At the writing of this report the bill has not yet been approved by parliament.

While welcoming these remarkable achievements, the AHRC is deeply concerned that the government has failed to take any tangible action to rejuvenate justice mechanisms and eliminate undemocratic and feudal practices in state organs that have existed for a long time and which further deepened during the conflict period.

As a result, violations of human rights, including arbitrary/illegal arrest and detention, torture and killings, continued this year and impunity remained deeply entrenched for the perpetrators of these acts. Instead of combating impunity, Prime Minister Puspa Kamal Dahal made a remark that he would not take action against senior figures in the Nepalese army concerning war crimes and human rights abuses during the conflict period. It should be noted that, at the time of writing, none of the numerous cases of human rights abuses during the 10-year conflict have led to effective prosecution of those alleged to be responsible.

The report published by the National Human Rights Commission of Nepal in the middle of 2008 also shows the lack of government action. Among 147 recommendations that the Commission issued from 2000 to April 2007, only 16 recommendations were fully implemented. Most of the commission's recommendations are connected with taking action against guilty persons and providing relief to the families of the victims.

In particular, the case examples in the following report illustrate how systematically the victims of past and on-going human rights violations are blocked from accessing justice. This is due to the lack of witness protection mechanisms, the deliberate refusal of the police to register and investigate complaints, the non-existence of an independent investigating body as well as the lack of proper domestic laws dealing with these violations.

Another major violation that occurred this year was the Nepali government's repeated arbitrary arrests and ill-treatment of the Tibetan protesters. The latter have been demonstrating peacefully against the violence in Lhasa in front of the Chinese Embassy in Kathmandu since March 10. According to Amnesty International's report on April 22, more than 2,000 protesters were arbitrarily detained by the Nepali police since March 10. The government of Nepal has further taken the drastic step to deport all Tibetans without valid refugee certificates, to India in September 2008. This will destroy the livelihood of many of over 20,000 Tibetans currently living in Nepal.

Furthermore, unrest in different parts of the Terai region that we reported in 2007 continued into the beginning of 2008. In February, a newly formed alliance of three Madhesi political parties, the United Democratic Madhesi Front (UDMF) and other groups launched a general strike in the Terai region to support the Madhesi demands to the government. This included the establishment of an autonomous Madhesi state within a federal democratic republic and the fair representation of Madhesis in all organs of the state, including the army. The general strike ended only after an agreement with the UDMF was reached on February 28, 2008.

On top of the global food crisis, the people living in Sunsari and Saptari districts suffered severely from flooding, when the Koshi River, one of the largest river basins in Asia, breached its eastern embankment on August 18, 2008. In addition to the disaster in eastern Nepal, heavy rainfall in the mid-western and far-western regions in September resulted in more flooding and landslides in nine districts. The number of people displaced by heavy flooding in western Nepal reached almost 180,000 according to OCHA.

Meanwhile, rehabilitation of internally displaced persons during the armed insurgency is proceeding at a very slow pace. This is despite the Peace Accord mentioning the return

of IDPs to their homes or the settling in any other location of their choice. The number of IDPs due to the conflict has been estimated at between 100,000 and several hundred thousand. Reintegration and rehabilitation of the IDPs was viewed as a key issue during the peace talks. Besides, the political parties, taking into account only their self-interests, have not shown any progressive action to speed up the integration of the Maoist People's Liberation Army (PLA) into the Nepal Army.

Nepal's transition into a federal democratic republic is a remarkable milestone in its history. Furthermore, the Maoist party's victory in the CA election shows the people's great desire for real changes toward democracy, peace, human rights and a better life. However, overall, 2008 can only be viewed as a year in which the people's hopes and trust in their leaders were frustrated due to scant progress being made into dealing with ongoing violations of human rights, impunity and the failure of the rule of law.

## 2. KEY EVENTS IN 2008

### 2.1. THE CONSTITUENT ASSEMBLY ELECTION AND THE FORMATION OF A NEW SECULAR, FEDERAL DEMOCRATIC REPUBLIC

The historic event of the election for a Constituent Assembly (CA) was held in Nepal on April 10, 2008. This election materialized after being postponed from earlier dates in June and November 2007. It will be in place for a term of two years and it will have the responsibility to draft a new constitution.

Aiming at inclusiveness, the Interim Constitution of 2007 stipulated that the political parties had to ensure proportional representation of women, Dalit [Untouchables in the Hindu societies] oppressed tribes/indigenous tribes, backward tribes, Madhesi [the native people of Nepal who reside in the southern, plains region of the nation known as the Tarai] and other groups. It further stated that women should constitute at least one third of the candidates nominated to the CA. (Interim Constitution 2007, para. 63 (4) and (5)).[1]

During the election campaign, supporters of all major parties clashed almost daily. On April 6, 2008, the United Nations Mission in Nepal (UNMIN) reported that, "While campaigning was peaceful in many constituencies, incidents of election-related violence and intimidation by party workers continued, with frequent and sometimes severe clashes between political parties in many districts."[2] On April 7, 2008, even as campaigning

1 *The Interim Constitution of Nepal, 2063 (2007), As amended by 1st, 2nd and 3rd amendments, http://www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf*

2 *UNMIN election report No. 3, 6 April 2008, http://www.unmin.org.np/downloads/publications/2008-04-06-UNMIN.Election.Report.3.ENG.pdf*

drew to a close, 12 people were injured in bomb attacks and on April 8, 2008, unknown assailants shot dead Rishi Prasad Sharma, a candidate for the Communist Party of Nepal (United Marxist-Leninist). Similarly, another National United Front's candidate for CA Election Mr. Kamal Adhikari of Banke district was gunned down by Janatantrik Terai Mukti Morcha - Jwala Singh Group at his own home on March 18, 2008.

However, despite clashes during the campaign, election day itself was peaceful, with a voter turn-out of about 60 percent.

Maoist supporter's celebration in Dankuta

The official and final list of members elected was released on May 8, 2008. The Communist Party of Nepal (Maoist) became the largest party in the CA with 220 out of 575 elected seats. It was followed by the Nepali Congress with 110 seats and the Communist Party of Nepal (Unified Marxist-Leninist) with 103 seats. Altogether, there are 601 members in the CA, of which 240 members were elected through the "first past the post" system, 335 through the proportional representation (PR) system and 26 nominated by the government.[3] In the FPTP-system, in which candidates were elected individually, only 30 out of 240 are women. However, it was within the framework of the PR system, where people voted for parties rather than individuals, the aim of inclusiveness being most important. According to the Election Act of 2007, the parties winning more than one seat under the (PR) system are required to allot half their seats to women candidates. Furthermore, the parties are required to have 37.8 per cent indigenous communities, 31.2 per cent Madhesis, 13 per cent Dalits and four per cent other so-called backward groups on their lists. The remaining 30.2 per cent of seats can be allotted to other persons (The Election Act of 2007, para. 7 (3) and schedule-1).[4]

The legal provisions on inclusiveness means that Nepal's CA, is to a larger extent representative, notably regarding balance both in gender and concerning minority groups, than it would have been without these provisions. However, criticism raised was that there was no guarantee of inclusive proportional representation of Dalits and women in the geographical constituency elections (FPTP-system). This even though the parties

3 *Election Commission, Nepal, http://www.election.gov.np/EN/*

4 *Election to Members of the Constituent Assembly Act, http://www.election.gov.np/EN/pdf/CAE_Election_Act_2064_english.pdf*

were supposed to observe the "principle of inclusiveness" while selecting candidates.[5]

Moreover, criticism also came from the Dalit community. Although the Central Bureau of Statistics (CBS) data indicates that the Dalit population constitutes 13 percent of the whole population, Dalit organisations and research studies show that Dalits occupy more than 20 percent of the entire population. They should therefore have a larger representation in the CA.

The first session of the CA on May 28, 2008 voted to declare Nepal a federal democratic republic, thereby abolishing a 240 year old monarchy. The republican declaration states that Nepal will become "an independent, indivisible, sovereign, secular and inclusive democratic republic." The old structures, through which the country was ruled by long-standing political and social elites, have been dismantled paving the way for a more open, democratic process.

Dr. Ram Baran Yadav (Nepali Congress) became the first president of the Federal Democratic Republic of Nepal on July 22, 2008. Madhesi Janadhikar Forum candidate Parmananda Jha was elected vice president.

Due to an internal power struggle, difficulties arose during the three months in which they were forming a new government. The Nepali Congress and the Communist Party of Nepal-Unified Marxists and Leninists (CPN-UML) demanded adjustments and rehabilitation of the combatants through a proper proccess before the CPN-Maoist formed the new government. Almost three months after the first session of the CA, Maoist Chief, Pushpa Kamal Dahal alias Prachanda, was elected the first Prime Minister of the Federal Democratic Republic of Nepal on August 15, 2008. He was sworn in on August 18, 2008. A coalition government led by the Communist Party of Nepal-Maoist (CPN-M) was sworn in on August 22, 2008. The CPN-M's coalition partners are the Communist Party of Nepal-Unified Marxist Leninist (CPN-UML) and the ethnic-based Madhesi Peoples Right Forum (MPRF).

The implications of this political change are that doors have now opened for a radical social and economic transformation in Nepal, in accordance with the aims of the Maoist groups. It is hoped that the change that occurs will be in line with the demands for democracy, peace and human rights that gave rise to these political changes and not descend into a new form of authoritarian rule.

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5 *Bharat Nepali, "Dalits and Women in Constituent Assembly in the Context of Creating New Nepal", http://nepaldalitinfo.net/2008/04/02/422/*

## 2.2. THE TERAI PROTESTS IN FEBRUARY 2008

In 2007, there was unrest in different parts of the Terai region, which was triggered by the adoption of the Interim Constitution.[6] The key demands were for a federal structure of government with autonomy and a proportional election system taking into account caste and ethnicity. These demands were made because of the political, socio-cultural and economic marginalization of the Madhesi, who are the historical inhabitants living in the southern Terai region, bordering India. The problems in the region typically result from discrimination and exploitation by the State, political parties and powerful elites. The core issues relate to recruitment to State security forces, language, culture and citizenship.

The unrest in the Terai region continued in the beginning of 2008. On February 8, 2008, a newly formed alliance of three Madhesi political parties, the United Democratic Madhesi Front (UDMF), announced that it would launch a general strike in the Terai region from February 13, 2008. Strikes were also called by the Federal Democratic National Forum (FDNF), a coalition of indigenous groups, and the Federal Republican National Front (FRNF). The reasons for striking were to support the Madhesi demands made to the government. The demands were twofold: the establishment of an autonomous Madhesi state within a federal democratic republic and the fair representation of Madhesis in all organs of the state, including the army. The reason for these demands stemmed from the perceived marginalized of the Madhesi people.

From February 13, 2008, the strike paralyzed daily life and public transport throughout the Terai region. Protestors staged rallies in different Terai cities and there were violent confrontations between strike supporters and both the Nepal Police and Armed Police Force (APF). The restrictions on daily life were also compounded by the imposition of curfews in a number of districts. Nepal's National Human Rights Commission (NHRC) expressed concern regarding the human rights situation in the Terai plains and it said that continuing strikes and demonstrations had worsened the human rights situation.

Agreement with the UDMF was reached on February 28, 2008, thus ending their general strike. The agreement also included a provision on increasing the proportion of seats reserved for the Madhesi minority from 20% to 30%. As a result of signing the agreement, the UDMF agreed to participate in the Constituent Assembly elections. Similar agreements were signed between the government and the other Madhesi groups on March 1, 2008. The agreement granted somewhat higher representation for Madhesi people in the CA, making it more representative of the Nepali people.

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6 *Chapter on Nepal of 2007 AHRC Annual Human Rights Report, "The State of Human Rights in Eleven Asian Nations – 2007", www.ahrchk.net*

In March 2007, the Interim Parliament altered the constitution to change the country from a unitary state into a federal state.[7] This move came as a response to the protests from the Madheshi people. There was however no serious discussion before on how the federal system would be constituted in the Nepali context. The Interim Constitution states that the CA shall decide on questions relating to the structure of the state and the federal system. A problem regarding a federal Madhesi state could be the ethnic diversity. It is of the utmost importance that the human rights of everyone in such a federal state would be guaranteed. There is also a large proportion of Pahade people who have migrated to the Madhes/Terai plains from the more mountainous parts of Nepal. They, too, have to be granted the right not to be discriminated against in a federal Madhesi state.

In the OHCHR's Terai report,[8] human rights that were violated during the protests include the right to life. According to the report, six civilians died during the protests as a result of confrontations with police, five as a result of bullet wounds and one as a result of injuries sustained when he was hit by wooden sticks. In addition, hundreds were injured; many had head injuries as a result of being beaten over the head with wooden sticks. An APF officer was also killed and numerous other police officers were injured in connection with demonstrations, mostly by stones and rocks thrown by protestors. In the cases of death by gunshots by the police, the OHCHR reached an initial conclusion that in most cases the use of lethal force was not justified. Apart from the five persons killed by gunshots, at least thirty civilians were treated in hospitals for bullet wounds. Most bullet injuries were sustained above the knee. Direct live fire was rarely preceded by a clear warning, as required by international standards and domestic law, and other methods of crowd control had not been exhausted. Furthermore, in most cases there did not appear to be an imminent or grave threat to life or serious injury for the authorities. Of the five persons who died as a result of gunshots, three were found not to have been actively participating in the protests and could not have presented any kind of threat. Other rights violated during the protests include the right to physical integrity, the freedom from arbitrary arrest and detention, the freedom of assembly and the freedom from torture and ill-treatment in detention.

## 2.3. SUSPENSION OF THE PRESIDENT OF THE NEPAL BAR ASSOCIATION AND JUDICIAL REFORM

Judges in Nepal have been notorious for accepting bribes in return for favorable verdicts. In the present context of the development of democracy in Nepal, following the

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7 *BBC News, "Nepal changes into federal state", 9 March 2007, http://news.bbc.co.uk/2/hi/south_asia/6435901.stm*

8 *OHCHR-Nepal, "Summary of human rights concerns arising from the Terai protests of 13 – 29 February 2008", 27 March 2008*

overthrow of the monarchy and the re-establishment of Parliament, there is an intense debate in civil society about the need for radical changes within the judicial system in Nepal.

In August 2008, Nepal's newly appointed attorney general, Raghav Lal Baidhya, emphasized the need for restructuring the country's judiciary and recruiting competent judges. Earlier in July, the Nepal Bar Association (NBA) also decided to analyze controversial judgments to fight against judicial corruption. The judges, however, instead of seeking to weed corruption out of the judicial system, have remained critical of the NBA's decision. For example, the chief justice of Nepal described the NBA's decision as an attack on judicial independence.

During an emergency five-hour hearing of the full court on September 19, the Supreme Court, decided to ban Mr. Bishwa Kant Mainali, the president of NBA, from practicing for six months. This happened after he had referred to judges having a license to practice corruption in Nepal, during a conference in Kathmandu. It is the first Supreme Court's decision in the history of Nepal against the president of the NBA.

In fact, this decision was apparently the result of a two-hour strike by judges of two appellate courts as well as three district courts in Kathmandu valley to stop working on September 19 to pressurize the Supreme Court to take action against him. The Supreme Court denied Mr. Mainali his inherent right to be heard and given a fair chance to defend himself in the legal proceedings against him.

The AHRC criticized the Supreme Court's decision as an attempt by the judiciary to obstruct an emerging debate on judicial corruption in Nepal.[9] The judiciary of Nepal stuck with the conservative mindset that they are above and beyond the rule of law and that they are not accountable to law.

After the Supreme Court's decision, thousands of lawyers across the country launched a boycott of the courts from September 21 to 23, protesting against the Supreme Court's decision. The protesting lawyers demanded that the full court unconditionally revoke the ban on the NBA president.

Finally the Supreme Court retracted its earlier decision and lifted the ban on Mr. Mainali on September 23. The agreement between the Supreme Court and NBA also allowed for the setting up a committee by the NBA to review controversial verdicts.

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9 *AHRC statement numbered AHRC-STM-245-2008, NEPAL: Supreme Court punishes the messenger and ignores the message, September 19, 2008*

During the conflict period, the judiciary had been deliberately undermined by the government. In 2005, the AHRC reported a number of cases where released detainees were rearrested by the security forces, including within the court's premises, making a mockery of the justice dispensation system in the country.[10] As a result of repeated undermining such as that above, the people of Nepal have lost faith in the justice system in Nepal.

An immediate and overwhelming reaction by the lawyers on the Supreme Court's ban reflects the great desire of the Nepali people for accountability and transparency on the part of the judiciary, as well as a strong resistance against it under the new republican government. In Nepal, a serious debate on judicial reform is long-awaited and is a precondition for sustainable democracy. To improve democratic governance and liberties, the government should take deliberate and affirmative action to rejuvenate the judiciary and make other public institutions transparent as an essential component of State-building.

## 2.4. FLOODS AND LANDSLIDES IN SUNSARI AND SAPTARI DISTRICTS

Flooding occurred in eastern Nepal, in the Sunsari and Saptari districts, where the Koshi River, one of the largest river basins in Asia, breached its eastern embankment on August 18, 2008. According to the Nepal Red Cross Society's figures, around 60,000 persons were displaced.[11] In addition to the disaster in eastern Nepal, heavy rainfall in the mid-western and far-western regions between 19 and 21 September 2008 resulted in more flooding and landslides in nine districts. More than 30 deaths have been confirmed. Kanchanpur and Kailali districts in the far western region have been particularly hard-hit. The number of people displaced by heavy flooding in western Nepal reached almost 180,000 according to OCHA.[12]

Those affected by the floods in eastern Nepal have been living in temporary camps set up in different parts of the district. Many displaced families are living along the embankment wall of the Koshi river and in neighbouring VDCs of Saptari district, which were not flooded. The UN and its humanitarian partners issued an appeal[13] on September 25, 2008, in response to the flooding and the appeal seeks $15.5 million to cover the needs of at least 70,000 people over the next six months.[14] More than 72%

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*10 AHRC, The State of Human Rights in Ten Asian Nations-2005, the chapter on Nepal*

*11 Nepal Red Cross Society, "Koshi Disaster update" No. 23, 26 September 2008, http://www.nrcs.org/documents/Koshi_Flood_situation_26_September_2008.pdf*

*12 Mid and Far West Floods and Landslides OCHA Report No. 4, October 6, 2008*

*13 http://www.reliefweb.int/rw/rwb.nsf/db900SID/EDIS-7JTLY5?OpenDocument*

*14 Nepal Common Appeal for Transition Support, Supplement: Floods Humanitarian Response Plan*

of the displaced people were receiving humanitarian assistance at the beginning of October 2008.[15] Humanitarian aid was at this time focused mainly on people based in established camps, whereas only 15% of the displaced who lived with host families were being assisted, forcing those living outside camps to find additional coping strategies. The UN World Food Programme provided flood-affected communities with mixed-commodity relief supplies: rice, lentils, vegetable oil and salt. Daily cooked fortified food is also being given to vulnerable adults and children under five. The WHO completed a measles and polio vaccination campaign in Sunsari and Saptari districts. Food distribution was delayed due to slow delivery from local suppliers. Alternate shelter sites were still not identified in October 2008, causing over-crowding in current shelter sites and poor service provision.[16]

The floods increase the hardship of already poor and vulnerable indigenous groups in the Mid-West and Far-West regions. These two regions in Nepal are considered the most impoverished and least developed. Among the most affected are the Kamaiyas, former bonded labourers of the Tharu community, who have been in a government rehabilitation programme since 1996. They needed special protection in the aftermath of the disaster. A large number of the affected population was displaced in the immediate aftermath of the flash floods. The flood waters receded quickly in most areas, enabling many families to return to their place of origin prior to the floods. However, they found their homes, food supplies/rice stores, gardens and crops, property and livelihoods damaged or washed away. The distribution of food has been difficult and slow because of the size of the affected area and because flood-affected areas are located in a hilly region, where roads have been washed away by landslides.

In the wake of the flood disaster, aid workers were calling for stronger child protection measures.[17] Nearly 30 children went missing after they were separated from their parents while fleeing the flooded areas. Although humanitarian assistance has addressed child protection, more needed to be done on key issues such as tracing missing and separated children, providing psycho-social care for traumatized children, preventing social discrimination, and creating a child-friendly environment.

Due to the natural disasters in eastern and western Nepal, more than 240 000 persons were considered to be "food insecure," which infringes on their right to food. On September 25, 2008, the Supreme Court of Nepal issued an interim order according

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15 *Koshi River Floods in Sunsari and Saptari, OCHA Situation Report No. 10, 3 October 2008, http://www.un.org.np/ocha-situation-updates/2008/2008-10-06-OCHA-situation-report-10.pdf*

16 *Nepal Common Appeal for Transition Support, Supplement: Floods Humanitarian Response Plan*

17 *IRIN, "NEPAL: Stronger child protection needed for flood-displaced", 16 November 2008, http://www.irinnews.org/Report.aspx?ReportId=80462*

to which the Government of Nepal has to supply food immediately to 32 food-short districts.[18] The Court found immediate action necessary because over three million people were suffering from food scarcity in the country. The Government has consequently increased its budget allocated to the Nepal Food Corporation, which is a national body mandated to supply food to districts most in need.

## 2.5. INTERNAL DISPLACEMENT OF PERSONS DUE TO THE INTERNAL CONFLICT

The internal displacement of persons in Nepal is closely linked with the country's Maoist insurgency and the government's response to this. According to the Peace Accord, both sides of the conflict "express the commitment to respect the right of the people displaced by the conflict and their families to return back to their homes or to settle in any other location of their choice." The number of IDPs due to the conflict has been estimated between 100,000 and several hundred thousands. The reintegration and rehabilitation of the IDPs was viewed as a key issue during the peace talks.

The Representative of the Secretary-General on the human rights of internally displaced persons visited Nepal from April 13 to 22, 2005, and in his report, he concluded that some of the main problems and needs faced by IDPs are security and protection; discrimination; food, shelter and health; access to education for children; documentation; sexual abuse and increased domestic violence; and risk of increased female prostitution and child labour.[19] Furthermore, the Representative of the SG concluded that the government had only been focusing on financial compensation and support, and thus largely neglected other forms of assistance and protection needs of IDPs. The following key recommendations to the Nepali government were made: to adopt a national IDP policy and to adopt necessary legislation in line with such a policy; to ensure that school admissions, access to health care and other services is granted on a needs basis and does not depend on registration; to create conditions conducive to the return in safety and with dignity of the IDPs; and to recognize the right of IDPs to choose freely between returning to their homes and resettling in another part of the country.

At the time of writing, there had unfortunately not been much progress made on the issue of IDPs. In February 2007, the Government of Nepal endorsed the 'National Policy on Internally Displaced Persons'[20] to address issues of displacement. According

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*18 Food and Agriculture Organisation of the United Nations, "A victory for the Hungry in the Supreme Court of Nepal", 09 October 2008, http://www.fao.org/righttofood/news22_en.htm*

*19 "Mass Exoduses and Displaced Persons", Report of the Representative of the Secretary-General on the human rights of displaced persons, E/CN.4/2006/71/Add.2, 7 January 2006*

*20 The full text of English version can be found at http://www.peace.gov.np/admin/doc/IDP%20Policy-2063.pdf*

to the latest updates, the National Policy on IDPs has been partially implemented in a few districts in coordination with local peace committees. The peace committee has not yet been formed in several districts. This causes difficulty to set up systematic and comprehensive data describing the actual situation of IDPs in Nepal. However, it is clear that thousands of people who were displaced during the Maoist conflict are still awaiting help to safely return to their former homes or to resettle, two years after the signing of the peace agreement. The Nepali government bases its estimates of IDPs on the number that has been registered. Since a lot of IDPs do not register, the government's estimates are somewhat misleading. NGOs and international agencies put their actual numbers at between 50,000 and 70,000.

UN Office for the Coordination of Humanitarian Affairs (OCHA) in Nepal stated in its Thematic Report on Internally Displaced Persons of June 2008, that since the previous report in July 2007, many IDPs have returned to their place of origin, the majority on their own, and some with the assistance of NGOs.[21] There is however still uncertainty about the actual number of returnees, as there is concerning the total number of people displaced due to the conflict. Aside from providing travel expenses for their return, little has been done by the government to facilitate the overall return process. So far, the government has failed to make any provisions to protect the IDPs, nor has it provided a support package to re-establish IDP's livelihoods and income opportunities. In addition, a large number of the IDPs were unable to acquire civil documents, compensation and other rights, as comprised in the government's 2007 IDP policy. An obvious obstacle to help those IDPs in need of assistance and protection is the lack of a mechanism to monitor, evaluate and document cases of forced displacement.

Many IDPs are now thought to be living in urban areas and district headquarters throughout Nepal, including Kathmandu, Biratnagar, Nepalgunj, Bhairahawa and Pokhara. Numerous IDPs still live in fear of violence and insecurity. While Nepalese IDPs live in very varied conditions, many IDPs' children are facing particularly difficult conditions. Many young children have moved to urban or semi-urban areas, unhygienic conditions and hostile environments, where their families cannot afford to send them to school. Some live on the street, denied an education and exposed to a variety of threats, including sexual exploitation and other forms of child labour. Some IDPs live with family members, but others have few resources and no one to help them. The latter group often rent small rooms with other IDPs. Displaced persons living with their relatives in rural areas may also face particular hardship, overstretching their relative's resources where malnutrition rates are already at 20 percent. Many of the wealthier IDPs,

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21 *UN Office for the Coordination of Humanitarian Affairs, OHCHR-Nepal: Internally Displaced Persons (IDPs): Current Status, http://www.un.org.np/reports/OCHA/2008/idp_thematic_report_2008/OCHA_IDP_Thematic_Report_July_2008.pdf*

however, have been able to find shelter in cities and expect to return to their homes when conditions improve. Most of them were specifically targeted as they were seen as affiliates of the central government. A large majority of this IDP group sought refuge in district headquarters and main cities; they are not thought to experience major problems in their daily survival.

## 2.6. DISARMAMENT OF THE MAOISTS' ARMY AND INTEGRATION INTO THE NEPAL ARMY

As a result of its internal conflict, Nepal has two parallel armies; the state army and the Maoist People's Liberation Army (PLA). An important part of the Peace Accords was to make provisions in order to monitor and manage the arms and armies in the country. According to the Peace Accord, Maoist combatants should be placed in certain named cantonments, where all the arms and ammunition shall be securely stored. The Accord further states: "The Interim Council of Ministers shall form a special committee in order to inspect, integrate and rehabilitate the Maoist combatants."[22] The Peace Accord and the Agreement on Monitoring the Management of Arms and Armies[23] say nothing about integrating the PLA combatants into the Nepal army. As stated in both agreements, it was important to manage arms and armies in Nepal in order to hold elections for the CA in a free and fair manner. It is also imperative for any long- lasting peace in the country not to have two parallel armies, as well as to make sure that the state army is democratised and representative.

UNMIN's mandate provides that it shall monitor the compliance of the Nepal Army and the Maoist forces with the Agreement on Monitoring the Management of Arms and Armies and the provisions of the Peace Agreement. The stage of registration and verification of Maoists' army combatants was completed in December 2007, and a total of 19,692 persons have been identified as Maoist combatants. The amount of Maoist weapons registered and stored has reached 3,475.[24] However, the Maoist forces have not been entirely demobilized or disarmed, as is evidenced by the considerable gap between the number of arms and cadres registered with the UNMIN.

The Maoist approach to demobilizing and integrating the PLA is that it should be integrated into the Nepali national army. In the beginning of September 2008, the Deputy Commander of the CPN-Maoist's PLA Nanda Kishore Pun said that the

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22 *Paragraph 4.4 of the Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist)*

23 *Agreement on Monitoring of the Management of Arms and Armies, 28 November 2006, http://www.satp.org/satporgtp/countries/nepal/document/papers/28nov2006.htm*

24 *http://www.unmin.org.np/?d=activities&p=arms*

process of integrating the PLA into the national army would start in three months and would be completed in six months. He stated that "the integration of the PLA and the Nepal Army is compulsory to bring the peace process to a logical end." Pun warned that conflict will be induced if the Maoist combatants are not incorporated and transformed into the national army. The issue has provoked a major controversy in Nepal since January 2008. Nepali Congress' leader opposes the prospect of Maoist combatants joining the Nepal army and he has warned of taking steps if the PLA is merged with the national army. Madheshi People's Rights Forum's (MPRF) leader has also threatened that his party will launch a serious movement if the Maoists try to integrate their combatants into the Nepal army.[25] General Rukmangud Katuwal, the Chief of the national army, has also opposed the integration proposal.

Those who oppose integrating the PLA into the national army, argue that the integration of an ideological army into the national army means that it could create structural incompatibilities. This problem could surface when a number of recruits, with a proven political association, come into the army, which is supposed to function without any political partiality. The difference in opinion regarding the issue of integration of the PLA could be an obstacle to the progress of the peace process as well as an obstacle for a functioning coalition government.

On June 25, 2008 an agreement was signed by the leaders of the Seven-Party Alliance, in which they agreed to reconstitute a committee to supervise, rehabilitate and integrate the Maoist combatants within six months. As a response to this agreement UNMIN's mandate in Nepal was extended until January 23, 2009. The policies and program statement presented by President Dr. Ram Baran Yadav is the first official document of the government that categorically says the Maoist combatants will be integrated into the Nepal Army.

On October 28, 2008, the Nepal government formed a five-member special committee to look after the integration of the Maoists combatants into the Nepal Army under the chairmanship of Deputy Prime Minister and Minister for Home Affairs, Bamdev Gautam. Defence Minister Ram Bahadur Thapa, Madhesi Peoples Rights Forum leader Mohammad Habibullah, and Minister for Peace Janardan Sharma are members of the committee. However, the opposition party Nepali Congress (NC) has not yet joined the committee stating that the Maoist-led government has constituted the Special Committee on a unilateral basis. The integration process has become uncertain for now as NC refused to join the Special Committee.

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*25 Kantipur Report, "Integration of Maoist combatants into NA unacceptable to MPRF", 25 September 2008, http://www.kantipuronline.com/kolnews.php?nid=161892*

Apart from the issue of disarming the PLA army, there have been problems with continued violence from a group called the Young Communist League (YCL), which is the Maoists' ex-militia. Since emerging in the beginning of 2007, the YCL has been repeatedly accused acts of violence, especially during the election campaign. The Maoist party has directed YCL to end its paramilitary structure in Nepal, in order to secure the peace process.[26]

## 3. HUMAN RIGHTS VIOLATIONS DURING 2008

### 3.1. ILLEGAL DETENTION AND ABUSE OF THE REMAND APPLICATION BY POLICE AFTER TORTURE

In 2001, the government imposed the Terrorist and Disruptive Activities (Prevention and Control) Ordinance 2001--2058. With the expiry of the Terrorist and Disruptive Activities (Punishment and Control) Act -- 2058 on 12 October 2004, the government introduced a more severe and draconian version of the same law in its stead: the Terrorist and Disruptive Activities (Control and Punishment) Ordinance -- 2061. Under this law any persons suspected of being members/supporters of the Maoists could be subject to preventive detention for up to one year and police custody for up to 60 days for investigative purposes. Under this law, the security forces engaged in a large number of arbitrary arrests and detentions. Many were disappeared or killed after arrest and detention. However, the Terrorist and Disruptive Activities (Control and Punishment) Ordinance – 2061 has now been nullified.[27]

To prevent arbitrary arrest and detention, Article 24(3) of Interim Constitution, 2007 stipulated that the detainees are to be taken before a judicial authority within 24 hours (it was previously within 48 hours) and have immediate access to legal counsel.[28] However, Special Rapporteur Manfred Nowak reported that in practice, detainees in police custody are often held beyond the stipulated 24 hours without appearing before a judge or the relevant authorities and the OHCHR documented many cases where detainees have not been provided with letters of arrest/detention.[29] The Special Rapporteur further noted that in practice many detainees do not have immediate access to lawyers.

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26 *ANI, "Maoist directs YCL to end paramilitary structure in Nepal", 01 January 2008, http://www.newstrackindia.com/newsdetails/10342*

27 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 18 February 2008, A/HRC/7/3/Add.2*

28 *Ibid.*

29 *Ibid.*

The OHCHR further raised concerns that certain practices that were common during the conflict occasionally reappeared, such as unacknowledged detention, beatings and release in return for "surrender" (the detainee undertaking not to rejoin the armed group), mostly in connection with detained individuals accused of belonging to armed groups.[30]

Besides, the cases that the AHRC documented in 2008 show that the police often abuse the remand application in the court. It is done to secure more time to extract a forced confession from torture victims or to detain the victims until their wounds sustained during torture have subsided. This common practice continues, without hindrance, as the courts simply grant the police's remand application without properly examining it. Besides, the police often illegally detain the torture victims until their wounds are healed, putting the victims in a difficult position to prove that torture occurred.

In the case of **Ms. Sumitra Khawas**, after failing to get a forced confession from her despite torture, Belbari area police brought her to the Morang district court for further interrogation for the first remand that was granted by the court. On September 18, Sumitra was again brought to the Morang District Court by the APO of Belbari for the second time seeking extended remand. The district court approved the police's application and remanded her for another 4 days to the APO of Belbari. As a result she was detained in the police station where she was tortured for over 10 days. The AHRC repeatedly appealed to the government to transfer her to other detention facilities fearing further torture or threats by the police. On September 22, Sumitra was again brought to the court for the third time seeking remand. This time, the court ordered her to be remanded for an additional 10 days to Morang DPO. On the same day, she was transferred to a woman's cell in Morang DPO where she remained detained. On October 19, 2008, Sumitra was sent to Moring district jail for a further trial. The case is still pending in the courts.

In the case of **Umesh Lama**, after his arrest and torture on April 1, 2008, he was illegally detained at the Hanumandhoka Metropolitan Police Range (MPR), Kathmandu, without receiving medical treatment until April 9. He was taken to the hospital on April 9 due to his family's repeated requests to the police. The Hanumandhoka Metropolitan Police further illegally detained him until April 15 without producing him before the courts. His family filed a habeas corpus writ petition to the Appellate Court in Patan. On the same day the police made an application for Umesh's remand, indicating that they would not be able to produce him in court due to his poor health. The district court in Kathmandu granted his remand in absentia. He was only produced in court by the police on April 30. He was released on bail, after his elder sister withdrew a case filed in the

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*30 Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation in Nepal, 18 February 2008, A/HRC/7/68*

court for torture compensation. The police also attempted to fabricate the date of arrest in their records from April 1 to April 6 to cover up their torture.

In case of **four men including Deepak Kumar Senapati**, who were arrested on March 22 and 23, 2008 and tortured at the Katari APO, the police illegally detained them for 11 days until April 3. They were produced before Udayapur District Court for the first remand on April 3, with a charge of attempted murder. The police brought them to the health post on the same day for a first time medical check-up. According to the victims, the doctor ignored their claims of being tortured by the police and did not properly examine them. They were again remanded by the district court on April 19 and detained at the same APO until April 28. The APO transferred them to the Udayapur DPO on April 28 and a charge sheet of attempted murder was filed against them. On April 29, the court ordered them to be remanded at Udayapur district prison to await trial. They are being detained in this prison to date.

Another serious concern raised by the OHCHR is the increasing involvement of the Armed Police Force (APF) in arrests related to armed groups. For instance, some detainees were illegally held and interrogated by the APF after special task forces, including police and the APF personnel, were deployed to combat the activities of armed groups and criminal gangs in the Terai districts of the central and eastern regions, although the APF do not have power to detain or interrogate.[31] The APF do not have detention facilities or registers, either. The OHCHR reported that it received around 100 allegations of ill-treatment, as well as torture, during its regular visits to police stations and from other sources.

To prevent arbitrary detention, ill-treatment, or possible disappearances of detainees the Working Group on Enforced or Involuntary Disappearances recommended the government and security forces to ensure that accessible, complete, accurate and fully up-to-date lists of detainees in both formal and informal detention facilities are kept, and shared with families of the detainees and with civilian authorities, including the National Human Rights Commission. The Working Group also recommended that the lists should be held locally, with a national registry created to bring together the names and locations of all detainees.[32] However, this recommendation has not been implemented by the government so far.

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*31 Ibid.*

*32 Report of the Working Group on Enforced or Involuntary Disappearances, Mission to Nepal, 28 January 2005, E/CN.4/2005/65/Add.1*

## 3.2. STRUGGLE OF THE FAMILIES OF THE ENFORCED DISAPPEARED AND EXTRAJUDICIAL KILLINGS

During the armed conflict between the government and Maoists, large numbers of people were extra-judicially killed or disappeared. According to Informal Sector Service Centre (INSEC), some 13,256 Nepali people were killed in the conflict and among them, killings of over 8,000 civilians were recorded after November 2001 when the government declared the state of emergency and deployed the army to the conflict areas.

After the government put the police and the armed police force under the unified command of the army in November 2003, the number of the disappearances rapidly increased. The NHRC has informed that it received 1,619 cases of disappearances; 1,234 cases attributed to the security forces, 331 attributed to the Maoists and 54 where the responsible persons are unidentified.[33] In January 2005, the Working Group on Enforced and Involuntary Disappearances also reported that during the year of 2004, it transmitted 510 cases of disappearance to the government.[34] The Working Group says that 320 cases remained outstanding as of January 2008.[35] Besides, some 647 and 640 cases of habeas corpus petitions were lodged at the Supreme Court in 2006 and 2005, respectively. [36]

Transitional Justice, including accountability for past crimes, has become part a key issue of the firm commitment towards peace, human rights and democracy in the new democratic republic of Nepal. However, although the monarchy has been abolished and the new democratic republican government has been established, the government has failed to set up a Truth and Reconciliation Commission (TRC) so far. It has also failed to implement any of the Supreme Court's directive orders to deal with disappearances from the past one and a half years.

On June 1, 2007, the Supreme Court of Nepal ordered to the government to:

- enact a legislation criminalising enforced disappearances;
- consider ratifying the new International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED);
- establish a Commission of Inquiry into Disappearances in compliance with international human rights standards;
- provide interim relief to the families of the victims of the "disappeared," which is to be provided without any effect on the final outcome of these cases.

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*33 Ibid.*

*34 Ibid.*

*35 Report of the Working Group on Enforced or Involuntary Disappearances, 10 January 2008, A/HRC/7/2/*

*36 Ibid (n 27)*

The AHRC is also concerned by Prime Minister Puspa Kamal Dahal's remark in this year that he would not take action against senior figures in the Nepalese army concerning war crimes and human rights abuses during the conflict period. His statement sends a clear message that the government will not seriously tackle the culture of impunity. It is therefore unsurprising that none of the numerous cases of human rights abuses during the 10-year conflict have led to proper prosecution of the accused.

## *Non-implementation of the NHRC's recommendations and impunity*

The Interim Constitution empowered the National Human Rights Commission of Nepal (NHRC) as a constitutional body. The Interim Constitution also enlarged the mandate of the Commission such as the power to recommend departmental action against the violators, to file the cases in the court and to publicise the name of government officials who do not respect the commission's orders/direction. The NHRC has also established a special unit to focus upon disappearances. However, the government's inaction in implementing the NHRC's recommendations on the complaints relating to extra-judicial killings, disappearances and torture is serious.

In the report published in Jestha 2065 (May/June 2008), the NHRC informed that among 147 recommendations that the Commission issued from its establishment to the year of 2063 (April 2007), only 16 recommendations were fully implemented, while 20 were partially implemented and 111 are not implemented at all.[37] This means 75% of its recommendations have not been implemented by the government at all. Most of the commission's recommendations are connected with taking action against guilty persons and providing relief to the families of the victims. The NHRC also reported that there are large numbers of disappearance cases among the 6,509 complaints filed, since its establishment in 2000 until April 2007.

Out of these recommendations, the Commission issued 48 recommendations regarding extra-judicial killings by security forces. But only 2 were fully implemented and 14 were partially implemented, while the government has not taken any legal action relating to 32 recommendations. Major incidents in which the Commission's recommendations have not been implemented are the Nagarkot incident, Kotwada incident of Kalikot and Dang incident.

The Commission also made 13 recommendations relating to killings by the CPN-M but only two recommendations have been partially implemented. The related incidents include Pili incident of Kalikot district, Thankot incident, Dadhikot and Janakpur

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*37 National Human Rights Commission of Nepal, "Recommendation of National Human Rights Commission and Status of its Implementation", 2065 Jestha, Pra.no 41/92/065*

incident. Regarding the complaints relating to disappearances and torture by the security personnel, the Commission gave 11 recommendations. But only two were partially implemented, while it has not received any information of actions taken against the guilty personnel from the government in the remaining 9 recommendations. Regarding the deaths resulting from actions by the Maoist retaliation committee, the NHRC gave a recommendation regarding killings of about 46 people in Kapilvastu district as well as killings of seven persons in Makawanpur district. But the government has failed to take any action against the guilty personnel. The families of the victims have not received any compensation.

According to the NHRC's data, from 2064 Ashoj to Baisakh 2065 (September 2007-May 2008), the Commission has made 20 recommendations regarding extra-judicial killings committed by the state actors, two recommendations relating to deaths in army custody, one recommendation on death in prison and two recommendations regarding killings by CPN-M personnel. But most of its recommendations have not been implemented at all. The NHRC clearly pointed out that the major reasons for the non-implementation of its recommendations are the lack of the government's willingness and cooperation.

The Working Group on Enforced or Involuntary Disappearance has previously recommended the government to make every effort to strengthen the role of the NHRC and facilitate its work.[38] However, the government seems to work in the opposite direction. The government's apparent failure in implementing the NHRC's recommendations will be seen as an attempt by the government to undermine the role and function of the Commission. Since most of the recommendations relate to taking serious action against errant state actors, these officers are likely to see the government's inaction as an expression that the government will not carry out the recommended measures. The errant officers and others who may in the future engage in similar activities may find encouragement in this and thus discipline within the police is likely to be further undermined due to these comments. The encouragement of errant police officers and the discouragement of the NHRC by the government will only spread impunity and demoralisation in the country.

## *No domestic law criminalizing enforced disappearances*

After making a visit to Nepal on 6-14 December 2004, the Working Group on Enforced or Involuntary Disappearances made several recommendations to the government of Nepal. Among them, the Working Group recommended that as soon as possible, Nepalese criminal law be amended to create a specific crime of enforced or involuntary disappearance.

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*38 Ibid (n 32)*

On 27 November 2007, the Parliamentary Committee on Law and Justice instructed the government to withdraw the amendment proposal to the National Code of Nepal (Mulki Ain) regarding disappearances and to draft a new law on enforced disappearances that is in line with the ICPPED and the 1 June judgment of the Supreme Court. However, the chapters concerning "abduction" and "hostage taking" of the Civil Code of Nepal came into force on 30 November 2007.

There is heavy criticism that the new provisions in the Code do not provide any specific provision for enforced disappearances which have taken place whilst the victim is in custody, that is, with State involvement.
The government on November 15, 2008 unveiled the much-awaited draft bill on Enforced Disappearances (Charge and Punishment) Act 2065 B.S. with a provision to retroactively charge those behind disappearances during the decade-long Maoist conflict. The bill unveiled by the Ministry of Peace and Reconstruction (MoPR) has proposed to cover cases of disappearances between February 13, 1996 and November 21, 2006, the date the Maoist and the then-Seven Party Alliance government signed the Comprehensive Peace Agreement (CPA).

The bill has made a provision to form a five-member high level independent commission to probe incidents of disappearances during the conflict period. A committee consisted of Constituent Assembly Chairman and two incumbent ministers will recommend human rights activists, psychologists, lawyers, conflict experts and sociologists with at least 10 years of professional experience as five members of the commission. The bill proposes five-year jail term and up to Rs 500,000 [about USD 6,300] fine to the main convicted in a disappearance case. The accomplice of the convicts will be subjected to half of the jail term and fine amount of the main convict. Those involved in disappearing children and women will have to face an additional two-year jail term.

The ministerial cabinet meeting on November 20 approved the disappearance bill for formation of a Commission to probe Enforced Disappearances and decided to present it at the upcoming meeting of the Legislature-Parliament. However, the bill has not been presented to the Legislature-Parliament yet.

## *Delay of establishing TRC and Commission of Inquiry on enforced disappearances*

The institutionalisation of TRC was mentioned in the Interim Constitution of Nepal 2007. On 23 December 2007, the Government of Nepal also signed a 23 point agreement with the Communist Party of Nepal (Maoist) that required the Government to form a TRC within one month of the agreement. However, without having proper public consultation, the high-level political task force under the coordination of

Ministry of Peace and Reconciliation made a decision on January 28 to recommend the government to establish TRC and a Commission of Inquiry into Disappearances via two separate ordinances.[39] After facing serious criticisms from the civil society and international community, including OHCHR-Nepal, the government withdrew this decision.

The three governing political parties, the Communist Party of Nepal-Maoists (CPN-M), the Communist Party of Nepal-Unified Marxists and Leninists (CPN-UML) and the Madeshi Janadhikar Forum (MJF), affirmed their commitment to establish TRC and Commission of Inquiry into Disappearances in a joint document, the Common Minimum Program, announced on 21 August 2008.

However, as mentioned above, the draft bill of the TRC currently remains in limbo and has done for almost one year, and it is uncertain how long it will take until the Commission's establishment. As a result, there are currently no specific avenues through which victims or their families can exercise their right to seek legal remedy and redress with regard to enforced disappearances, torture or killings (among other things).

Besides, the mere setting up of high level commissions of inquiry or investigative commissions cannot be a solution for human rights abuses. A recent joint report published by Human Rights Watch and Advocacy Forum-Nepal noted that since 1990, various governments in Nepal have set up commissions of inquiry or investigative commissions on human rights abuses, but all such bodies have had inadequate power to secure evidence and the cooperation of security forces and their recommendations have not been acted upon. [40] Lessons from the past commissions of inquiry should be seriously considered to ensure the appropriate mandate and power to the TRC and Commission of Inquiry into Disappearances to deal with deeply rooted impunity in the country.

## *Deliberate police refusal to register the complaints of past crimes and no proper investigation*

As of present, the possible avenues victims or their families can approach for redress are the police and the court. However, it is most likely impossible for them to get effective legal remedies from these institutions, with the existing dysfunctional investigating institution - the police - in Nepal.

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*39 AHRC forwarded statement numbered AHRC-FST-013-2008: NEPAL: Government must consult public before establishing two commissions for transitional justice, 4 February 2008*

*40 Human Rights Watch and Advocacy Forum, "Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict", September 2008; http://hrw.org/reports/2008/nepal0908/*

The families of the victims of enforced disappearances and extrajudicial killings face great difficulties from the initial stage of pursuing their cases: the filing of their complaints at the police stations. The police escape from their responsibly to investigate allegations of human rights abuses by simply refusing to file a complaint lodged by the families of the past human rights abuses. Purnamaya Lama's experience with the police is a good example. For details, see the below.

**Table 1: Purnamaya Lama's case** [41]

**Complainant:** Ms. Purnamaya Lama, the widow of Mr. Arjun Bohadur Lama, resident of Chhatrebas VDC-5, Kavre district

**Date and place the FIR registered:** On 11 August 2008 at the Kavrepalanchowk District Police Office

**Case concerned:** An alleged disappearance of Arjun Bohadur Lama by the Maoists in April 2005

**Case status:** No proper police investigation upon the FIR

In July 2007, the Kavrepalanchowk District Police Office (DPO) refused to register a First Information Report (FIR) filed by Purnamaya Lama concerning an alleged disappearance of her husband Arjun Bohadur Lama by the Maoists in April 2005. At that time, the police excuse was that they had no jurisdiction over this case as it fell under the jurisdiction of Truth and Reconciliation Commission (TRC), which has not been established to date.

Purnamaya Lama then filed a writ of mandamus with the Supreme Court. The Supreme Court directed the Karepalanchowk DPO to register an FIR in relation to the case of Arjun Bohadur Lama on 3 March 2008 and issued the writ on March 10. In the writ, the Supreme Court said, "Unless upon the enactment of law in this regard that makes clear what sorts of crimes fall under the jurisdiction of TRC, it cannot be disputed that it is the duty of the concerned police office to receive the information, file a FIR and conduct an investigation according to law on all criminal cases."

On another occasion on May 2, 2008 one AHRC's staff along with local human rights lawyers, accompanied a widow who wanted to file a First Information Report (FIR) against the army commanders at the Banke DPO office regarding the killing of her husband Kamal Dahal, who was allegedly killed by the army personnel on January 1, 2002. One representative of the OHCHR-Nepal regional office based on Nepalgunj visited the Banke DPO. However, despite the repeated requests, the Banke DPO refused to register the FIR of the widow. The police first gave an excuse that the case

41 *Urgent Appeal numbered AHRC-UAU-055-2008NEPAL: A proper investigation is required on Arjun Bohadur Lama's disappearance, 12 September 2008; www.ahrchk.net/ua/*

would be investigated by a TRC when it is established and the police were not obliged to investigate past human rights abuses. When this argument was challenged that the police are obliged to register any complaint from any source according to Rule 3 of State Cases Regulations, the police then gave an excuse that they had to get permission from the superior officer – Superintendent of Police (SP) of the Banke DPO, who was absent for a meeting at that time, to register the FIR, which is also illegal practice by law. Furthermore, the AHRC was informed that Mr. Sushil Kumar Lakhe, who accompanied the widow to the Banke DPO was subjected to an attempt on her life and an illegal police search. For details, please see Table 2.

In this year's report to the United Nations Human Rights Council, the High Commissioner for Human Rights highlighted that the police rejected many FIRs filed by victims and their relatives, concerning past and ongoing human rights violations by security forces and abuses by CPN(M).[42] The report also said that "when complaints were filed, they did not lead to full criminal investigations and not one member of the security forces or CPN(M) has been convicted as a result of a FIR".[43]

The Working Group on Enforced or Involuntary Disappearances after its visit to Nepal recommended to the government that the Army Act be amended to security forces personnel accused of enforced or involuntary disappearance in relation to civilians being tried only in civilian courts. However, one of few cases where the perpetrators have been prosecuted in a civilian court is the high profile case of Maina Sunwar.[44] Maina was 15 years old when she was allegedly tortured and killed in February 2004 while in the custody of the Nepalese Army. In 2005, the Kavre DPO refused to accept the FIR filed by her mother that violates the police's official duty to investigate crimes. Because of a huge campaign by several prominent local human rights organisations and the UN OHCHR office in Nepal, the Supreme Court directed the police to conduct an investigation into Maina's case in September 2007. On January 31, 2008, the District Government Attorney's Office submitted a charge sheet to the Kavre district court naming four accused. The Court subsequently issued summons for the accused to appear before it. It should be noted that it took about 4 years until the charge sheet was filed against the guilty military personnel after Maina was killed. It is uncertain how long it will further take until the accused are convicted by the court and Mina's family will finally get justice.

Considering that the police were alone incapable of carrying out an impartial, independent and effective investigation as per the Court's directives, the local groups

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*42 Ibid (n 30)*

*43 Ibid (n 30)*

*44 AHRC urgent appeal numbered UP-136-2005*

demanded the formation of a special investigation team under the aegis of National Human Rights Commission (NHRC) and the Office of High Commissioner for Human Rights in Nepal (OHCHR-Nepal) to forward the procedures of investigation.[45]

Thousands of other families of those extra-judicially killed and disappeared, who were not lucky enough to get public attention like Maina's family, have been constantly denied justice for their loss and sufferings. In its report after the mission to Nepal in 2004, the Working Group on Enforced or Involuntary disappearances recommended the army release full and complete details, including any written judgments, of all court-martial proceedings undertaken in the last two years, and in the future. However, the OHCHR-Nepal and NHRC are complaining that the army has failed to share this information despite their requests. Also, the Working Group recommended that the Judge Advocate General undertake more aggressive prosecution of army personnel under the existing law of kidnapping and torturing civilians. However, as mentioned above, the army personnel have been prosecuted in few cases.

A joint report published report by Human Rights Watch and Advocacy Forum-Nepal in September 2008 vividly examined the urgency of this investigating mechanism by examining the fate of 62 cases documented in 49 FIRs filed with the police in 16 districts of Nepal since June 2006.[46] The report found that in most of the 62 cases examined here, police failed to initiate any investigations and in a few cases, the courts rejected the appeals of the families to get the FIR to be filed. It also revealed that "in nearly all cases where families of victims succeeded in registering complaints, police have failed to take even the most basic first steps in criminal investigation, such as to visit the scene, interview witnesses, and arrest alleged perpetrators"[47] .

One of the major reasons for inadequate police investigation into these cases is that the police feel powerless to investigate army personnel involving the cases of disappearances or killings. It is because the army personnel were their superiors as they operated under the unified command of the army between November 2003 and April 2006. Therefore, it is the most important first step to determine the transparent, effective and independent investigative body so that the courts can provide effective legal remedies to the families of the victims.

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*45 AHRC forwarded statement numbered AHRC-FST-004-2008, NEPAL: Condemnations over the lackluster police investigations vis-à-vis the murder case of Mina Sunuwar, 4 January 2008*

*46 Ibid (n 40)*

*47 Ibid (n 40)*

## *Threats against the families of the victims and human rights defenders*

Many families of the victims are still afraid of taking any action to seek justice, fearing reprisals from the army or Maoists. It is also common that the families face intimidation and threats when they try to pursue their cases. The joint report published by Human Rights Watch and Advocacy Forum-Nepal also confirmed that "the families of at least 6 victims in the cases documented threatened by security forces or Maoists"[48]. Human rights defenders assisting the families of those killed and tortured are not spared the threats. For example, the AHRC reported through its Urgent Appeals programme about the severe threats on Mr. Sushil Kumar Lakhe, a human rights lawyer as well as the regional coordinator of the Nepalgunj office of Advocacy Forum-Nepal in Banke district.[49] Mr. Lakhe was helping a widow who wanted to file a FIR against the army commanders at the Banke DPO office regarding the killing of her husband Kamal Dahal. For details of the case, please see the below.

**Table 2: An illegal police search and an attempt of life of Mr. Sushil Kumar Lakhe**

***An illegal police search***

At around 6:20pm on 11 May 2008, about 10 policemen, including a police head constable Nar Bahadur Baigwar and a police constable Dubar Yadav from the temporary Police Post of Fultekra in Banke district came to the house of Mr. Sushil Kumar Lakhe. Mr. Lakhe's wife and son were at home at the time.

According to Mr. Lakhe's family, the policemen scattered in front of their house for a while. The police head constable Nar Bahadur Baigwar and the police constable Dubar Yadav then entered Mr. Lakhe's house and searched his room. They opened a drawer of Mr. Lakhe's desk and looked at all the documents. Mr. Lakhe's son asked the police for the reason of the house search but the police did not reply. According to the family, the police neither produced a search warrant nor gave them a reason for the house search.

Upon learning of the incident, Mr. Lakhe called to the Superintendent of Police [SP] Mr. Ghanashyam Bhatta of the Banke District Police Office (DPO) as well as Sub Inspector of Police Govinda Rokka of the temporary Police Post in Fultekra to make inquiries. They denied that the police had been to his house.

***An attempt of life***

On the afternoon of May 2, Mr. Lakhe accompanied a widow who wanted to file a FIR against the army commanders at the Banke DPO office regarding the killing of her husband

48 *Ibid (n 40)*

49 *AHRC Urgent Appeal numbered AHRC-UAC-100-2008, NEPAL: Police illegally searched a human rights lawyer's house in Banke district, 15 May 2008*

Kamal Dahal. Despite the repeated requests made by Mr. Lakhe, the Banke DPO refused to register the FIR of the widow on that day.

At around 9:40pm of the same day, two unidentified persons riding a red motorbike followed Mr. Lakhe from near the Laliguras Hotel of New Road in Nepalgunj municipality, when he was returning home on his bike. When he reached Dewafulbari of Nepalgunj, he heard them saying, "this man says himself as a human rights defender and we have to finish him". He was able to escape from them by taking a different route. He stayed in a safe place overnight and went home on the following day.

Meanwhile, the FIR concerning Kamal Dahal's killing was finally registered at the Kohalpur APO in Banke district on May 4. To briefly explain about Kamal Dahal's killing, on 1 January 2002, Kamal Dahal, who was a teacher at that time, was picked up from the school premises by army personnel led by Major Ajit Thapa and Captain Ramesh Swar from the Bhimkali Battalion in Banke district. On the following day, a local radio station announced that he had been killed by the army during an encounter. However, his family members have not received any detailed information about his death and the location of his body. The progress of the police investigation into this case remains unknown.

In light of the above, the AHRC therefore appeals to the government of Nepal to:

- criminalise enforced disappearance by law and ensure that the cases of enforced disappearance are dealt by civilian courts;
- establish a TRC through public consultations that does not grant blank amnesty to the perpetrators, without further delay;
- establish the Commission of Inquiry into Disappearance in compliance with the international human rights standards;
- set up a special unit of senior level investigators, under the oversight of the Attorney General's office, to investigate the serious human rights abuses committed during the conflict;
- instruct the police to register the complaints filed by the families of the victims according to their mandate and take strong action against police officers who refused to register such complaint or deliberately avoided conducting a proper investigation into it;
- implement the directive orders given by the Supreme Court on 1 June 2007;
- enact Witness Protection Act and establish the relevant enforcement measures for witness protection, as the complainants are vulnerable to threats and intimidation;
- Suspend all those responsible security personnel named in complaints filed by the families of those extra-judicially killed or disappeared, while the investigations are ongoing, when there is sufficient evidence against them;
- take aggressive actions to reform the criminal justice system – the policing, the prosecution and the judiciary.

## 3.3. CONTINUANCE OF ENDEMIC TORTURE

In Nepal, torture is a major concern with regard to the rehabilitation of victims of past crimes. In a survey conducted by the International Center for Transitional Justice and the Advocacy Forum-Nepal, the most common type of violation reported was torture (51 percent), followed by disappearance (23 percent) and extrajudicial killings (20 percent).[50] The survey also showed that 66 and 65 percent of the respondents respectively did not trust the police or the army. It should be noted with serious concern that endemic torture continues in the country even after the end of armed conflict between the government and Maoists in late 2006.[51] According to one leading local human rights organisation, Advocacy Forum-Nepal, it has alone documented 2,271 cases of torture committed by the law enforcement officers and Maoists over a five year period from July 2001 to April 2006. The same human rights group again documented 1,313 new cases of torture during a period of one year up to June 2007.[52]

Practice of torture is still ongoing at the police stations in Nepal to date, while the perpetrators of torture enjoy impunity without facing any punishment by law. In February 2008, the Special Rapporteur on torture Manfred Nowak raised his concern that not one member of the armed forces or the CPN-M cadres has been brought to criminal justice for acts of torture committed during the conflict.[53]

In its 2007 Annual Human Rights report, the AHRC explained in detail that the torture has been used as the main method of investigation and highlighted series of torture incidents in Morang district police office. The report also highlighted how the complaints of torture incidents were silenced in a way that the torture victims face further abuses after filing complaints against police officers, and how torture is operated by the police on the request of the rich and powerful.[54]

In this year's report, we highlighted a common type of "bone beating" torture and also highlighted the urgent need for the witness protection mechanism, independent investigating body as well as the transparent and effective sanction mechanisms against security forces to deal with torture in Nepal.

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*50 International Center for Transitional Justice and the Advocacy Forum, "Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and The Transition in Nepal", March 2008*

*51 Advocacy Forum, "Sharing Experiences of Torture Survivors", 26 June 2006, www.advocacyforum.org*

*52 dvocacy Forum, "Torture Still Continues – A brief report on the practice of torture in Nepal", 25 June 2007*

*53 Ibid (n 27)*

*54 Ibid (n 6)*

## *Bone beating*

Through the documented torture cases, the AHRC recognises a certain common pattern of torture by the police – called "bone beating" in Nepal. The police often beat the joints of a person's hands and legs with a bamboo stick or a plastic pipe that causes severe pain to the person.

As mentioned in the above, after the torture the police often illegally detain the victim without producing the person before the court and also do not allow the family members or lawyers to access the victim for a while. Therefore, when the family members or lawyers finally meet the person, it is often difficult to identify signs of visible injuries. The local human rights groups say that these circumstances cause great difficulties for the victim when they pursue their cases as this effectively prevents them from having considerable evidence of torture, particularly the marks and traces of tortures, as they seek legal redress. Some incidents of "bone beatings" documented by the AHRC as follows:

**a. Case of Mr. Shekhar Gurung**[55]: Mr. Shekhar Gurung, 35 years old, is a permanent resident of ward no. 32, Maitidevi sub-metropolitan city in Kathmandu. On 31 May 2008, Shekhar was arrested on the charge of allegedly being a hooligan and for creating violence by a team of policemen from the Singhadarbar Metropolitan Police Sector (Singhadarbar MPS), Kathmandu.

At the Singhadarbar MPS, Shekhar was allegedly subjected to severe torture. The five policemen (one sub-inspector, one assistant sub-inspector and three police constables) beat him on both the soles of his feet, ankles, back of knees and both thighs with a bamboo stick. They had him beaten continuously and indiscriminately one after another for about 25 to 30 times. At the meantime, one of the policemen also beat him on the right side of his stomach with the bamboo stick.
On June 1, Shekhar was transferred from the Singhadarbar MPS to the Kathmandu Metropolitan Police Range where he was remanded in judicial custody on the charge of public offence. Upon the court order, he was given a medical checkup at the Bir Hospital in Kathmandu on June 10. But the police instead kept the results of the findings of the medical report to themselves and did not inform it to the

Shekhar Grung

55 *AHRC Urgent Appeal numbered AHRC UAC-166-2008: NEPAL: Police tortures a young man in Kathmandu, 24 July 2008*

victim. On June 19, the District Court issued an order that the victim could be release on bail amounting to Rupees 7,000 (about USD 102). No action has been taken against the alleged perpetrators.

**b. Case of two sisters Sima and Mina**[56] : At around 10:30am on 14 May 2008, one local man Mr. Aashik Kurisi, handed over 19-year-old Sima, her 13-year-old sister Mina and another 13-year-old girl named Ms. Gita [name of the victims changed to safeguard their identity] to the Surkhet District Police Office (DPO), with the accusation that the two sisters stole some money from his home located in Birendranagar Municipality -6, Surkhet district.

On the same night, Deputy Superintendent of Police (DSP) Mr. Govinda Shah along with one male officer and one female officer allegedly tortured Sima. She reported that the police beat her with a plastic pipe and sticks on her back, hands, and legs for about 30 minutes. They also tied her legs and put them on the chair and "beat the soles of her feet" for about 10 minutes. The police further implemented a brutal type of torture on Sima. They allegedly hammered a pin on the nails of her big toes. Due to pain she accepted the accusation of the theft. Even after that, the police allegedly electrocuted her on her right hand and then started beating her again.

After failing to find anything from Sima's house, the DSP Mr. Govinda Shah and ASI Ms. Gyanumaya Thapa again tortured her in the evening. They hit her hard with a plastic pipe on her head, soles of her feet, and back about 15-20 times. The police also assaulted her for about 10 minutes with their fist, a pipe, and a stick. After seizing 30,000 rupees [about USD 440] from her pocket, the police released her on the same day night without any charges.

ASI Ms. Gyanumaya Thapa also tortured 13 year-old girl Mina. Ms. Thapa slapped her face and beat her with a stick for a while and also hammered nails into her toes. The DSP Mr. Govinda Shah had slapped Gita during the interrogation. The police released Mina and Gita at about 6pm on the same day without any charges.

Sima had registered a complaint at the Midwestern Regional Police Office, Birendranagar in Surkhet district, against the police officers responsible for her torture on 18 June 2008. The regional police authority then formed a three member investigating team but the progress of the investigation remains unknown. All three victims belong to the Dalit [Untouchable] community in the country.

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*56 AHRC Urgent Appeal numbered AHRC-UAC-150-2008: NEPAL: Alleged cruel form of torture imposed on two sisters by the Surkhet district police, 9 July 2008*

**c. Case of Four men tortured by the Udayapur district police**[57]: On March 22 and 23, 2008, four young men, Deepak Kumar Senapati (18), Durga Magar (23), Raju Magar (24) and Raj Kumar BK (20), were caught by locals and handed over to the Area Police Office (APO) of Katari in Udayapur district, on suspicion of assaulting a driver named Uttam.

While in custody on March 23, the Khoksa police beat Deepak on the soles of his feet, legs, knees, chest and back with bamboo stick. He was then transferred to the APO area police office Katari on the same day. On March 26, Inspector Hari Ojha of the APO of Katari again tortured him. The Inspector kicked him and punched him indiscriminately on his chest, back, shoulder and knees. He also beat the soles of Deepak's feet for about 30 minutes. On March 23, Durga Magar was also assaulted by Inspector Hari Ojha of thye Katari APO on various parts of his body for about 10 minutes. On March 26, Inspector Hari Ojha also kicked and punched Raj Kumar BK on his chest, back, shoulder, legs, soles of feet and thighs for about 30 minutes.

The police illegally detained them for about 11 days at the APO of Katari until April 3, although the Interim Constitution of Nepal as well as the State Cases Act mentions that any person arrested should be produced before court within 24 hours since his or her arrest. The victims were produced before Udayapur District Court for the first remand only on 3 April 2008, with a charge of attempted murder. All the four men were again remanded by the Udayapur District Court on April 19 and detained in the APO of Katari until April 28. On April 28, the police transferred them to the Udayapur District Police Office (DPO). Meanwhile, a charge sheet of an attempted murder case was filed against them. The police then produced all of them before the Udayapur District Court on April 29 and the court ordered them to be remanded at Udayapur district prison for awaiting a trial. They are being detained at the prison to date.

In the year of 2007, the AHRC also documented several "bone beating" torture cases. For instance, in the case of Mr. Kalam Miya that took place in July 2007, the Morang district police made him to lie on the floor, while two policemen held his legs and chest, and beat him with a stick on his feet, ankles, legs and fingers, in particular on the joints of his hands and legs.[58] Five minors and two adults were also allegedly tortured in a similar manner by the police in Banke district in March 2007. The police made them lie down on the floor with their feet up and hit the sole of their feet with wooden sticks.[59]

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*57 AHRC Urgent Appeal numbered AHRC-UAC-096-2008: NEPAL: Four men tortured by the Udayapur district police while in illegal detention, 13 May 2008*

*58 AHRC Urgent Appeal numbered UA-253-2007: NEPAL: Man threatened with death and tortured into making false confession by police, 14 August 2007*

*59 AHRC Urgent Appeal numbered UA-126-2007: NEPAL: Five minors and two adults severely tortured by the police after their illegal arrest and detention, 13 April 2007*

In another torture case of Mohammed Pappu Miya that took place in September 2007, the Morang district police ordered him to place his legs up on a bench and then beat him on his feet and ankles with a wooden stick. He was later again tortured by the police on the calves of his legs.[60]

## *Serious threats and harassment of torture victims and no witness protection mechanism*

The cases below that the AHRC documented in this year show an urgent need for the introduction of a Witness Protection Act and the establishment of effective witness protection mechanisms, so that the torture victims can seek justice without fearing any intimidation and threats. Most detainees also do not make formal complaints of ill-treatment or torture when taken before a judge or prosecutor, mostly though fear of reprisals.[61]

**a. Case of Umesh Lama**[62] : Umesh Lama (28) was illegally arrested at Kamalpokhari in Kathmandu district by five officers in civilian clothes from the Hanumandhoka Metropolitan Police Range (MPR) on 1 April 2008. At the Hanumandhoka MPR, Kathmandu, the police allegedly tortured him in a brutal manner for about 5 hours until he fell unconscious. The police interrogated him relating to two criminal cases, of kidnapping and robbery and pressured him to confess. Only on April 8, a police officer of the Hanumandhoka MPR informed Umesh Lama's family that he was being detained at the Budhanilkantha Police Sector in Kathmandu.

Due to media coverage on the case, an investigating committee headed by DSP Kanchan Thapa was formed within the Hanumandhoka MPR where Umesh had been tortured. Umesh's two sisters, Ms. Lalumaya Jimba Bal and Ms. Samjhana Lama, met DSP Mr. Kanchan Thapa at the said MPR on 27 April 2008, following repeated instructions from the police to meet the superior officer. Then the DSP reportedly threatened the two sisters "now, do not go to the media and any

Umesh Lama at Bir Hospital

60 *AHRC Urgent Appeal numbered UA-304-2007: UA-304-2007: NEPAL: Three members of the Morang police engaged in serial torture, 24 October 2007*

61 *Ibid (n 27)*

62 *AHRC UAC-078-2008: NEPAL: Alleged brutal torture of a man by Kathmandu police; AHRC-UAU-027-2008: NEPAL: Torture victim under pressure to withdraw the case and AHRC-UAU-028-2008: NEPAL: Umesh Lama withdrew his case due to alleged serious threats by police*

other human rights organisations anymore to inform the development of the case. We will provide you the expenses that you have spent for his (Umesh's) medical treatment. We will give you 100,000 Nepali Rupees (USD 1,600) for this purpose. We will also withdraw all the charges against him. But first you have to say to the media and to other people that local people beat Umesh when he was trying to escape from the police at the time of arrest and the police did not torture him. If you would not say so, we will implicate him with other serious charges and send him directly to jail from the hospital. He will then have to spend six to seven years in jail." On the same day evening, the DSP visited Bir Hospital where Umesh has been hospitalised since April 9 and offered 10,000 Nepali Rupees (USD 160) for immediate medical support but the family refused to accept it.

On April 25 some unidentified policemen from Hanumandhoka MPR offered around 50,000 Nepali Rupees (USD 790) to the family but the family again refused to receive it. On April 27, the Umesh's family was instructed to come to the said MPR where the police threatened them that unless they withdraw the case Umesh would be implicated in other cases, which would result in Umesh's detention for six to seven years in custody.

Finally on April 28, Umesh Lama's elder sister Ms. Lalumaya Jimba Bal filed a case under the Torture Compensation Act (TCA) at the Kathmandu District Court. Soon after filing the case in the court, the police of the Hanumandhoka MPR again began pressurising them to withdraw the case. In the evening of April 28, DSP Kanchan Thapa called the victim's wife on her mobile phone and told Umesh, "Why did your sister lodge a case against the police? As your sister has filed the case, you are not going to be released!" On April 29, Inspector Laxman Giri of the Hanumandhoka MPR also called on Umesh at the hospital and told him that the police would not 'help' him because his sister had lodged the case against the police to the court. Fearing that the police would send Umesh to prison soon, Umesh's sister came to the office of human rights organisation on the same day in the afternoon and asked the lawyers to withdraw her case from the court. She said, "My brother Umesh says he will die if he has to go back to the police (cell) again. He is having a nightmare (for days). He suddenly wakes up at night and screams, 'police! police!'" When the victim's sister was having a meeting with the lawyers, she again received a phone call from the DSP Kanchan Thapa, who again asked her to withdraw the case if she wanted her brother to be released.

Again on the morning of April 30, the police inspector Laxman Giri visited Umesh and his family members at the hospital and pressurised them to withdraw the case against police officers in the court. On the same day, Umesh's elder sister finally withdrew the case filed under the TCA. In the court, the police released Umesh on bail by the order of Kathmandu District Court, relating to the charges against him on the same day as an exchange for withdrawing his case against police officers. The police also gave Umesh

100,000 Nepali rupees (about USD 1,600) for his medical treatment cost. As a result, none of the police officers involved in Umesh's torture have been arrested or punished by law. The AHRC appealed several times to the government for an urgent protection to be given to Umesh and an independent and proper investigation into the case but they all went in vain.

**b. Case of Noorjan Khatun**[63] : Noorjan Khatun, is a 37-year-old widow and permanent resident of Jamtoki, Muslim Tole, in Kathari VDC -2 in Morang District, a victim of torture who had been illegally arrested on September 5, 2007, detained and brutally tortured by officers from District Police Office (DPO), Morang. At the time of release on September 10, she was not charged with any crimes and was not provided with any arrest and detention letters. She then filed a torture compensation case with the Morang District Court on 11 October 2007.

Noorjan Khatun

On December 3, two unidentified police personnel approached her on motor bikes and scolded her for filing her case against the police officers. She was also ordered to bring her son Mo Anabarul to the police station, and she was warned that her son would be arrested and charged with various crimes if she would not withdraw her case from court.

Again on 3 March 2008, Ms. Khatun received a threat from ASI Mr. Balram, when she was returning from court with her sister-in-law. Mr. Balram approached her and insisted that she withdraw her case from court. He further told her he would provide her with money to support her daily living expenses if she dropped the case. She quotes him as saying: "how will you manage your daily living expenses? I will give you money for your daily expenses including food, clothes, etc". However Ms. Khatun refused the offer. At the time of this threat by the police, the AHRC was informed that ASI Mr. Balram, one of the alleged torture perpetrators, was still working at the DPO in Morang, and that he continued to abuse the power of his position to threaten her.

When an AHRC member of staff interviewed her at Biratnagar in Morgan district in mid April 2008, she reported that she would go to India soon to stay there some days fearing possible threats from the police as the next court hearing was about to be held two weeks

63 *AHRC UP-141-2007: NEPAL: Another two cases of torture perpetrated by the same members of the Morang Police and AHRC-UAU-013-2008: NEPAL: Morang district police have allegedly threaten a victim of torture to withdraw her case from court*

later. She reported that the police constantly threatened her to withdraw the case in the court otherwise her two nephews Mohammed Pappu Miya and Mohammad Rajjabul Hussain Miya, who were also torture victims and remained in detention at the time of the interview, would serve long jail terms.[64] The importance of attention to this case for the welfare of this victim is highlighted by the fact that the same group of policemen, including ASI Balram, have also been linked to incidents of torturing her two nephews in September 2007.

Noorjan and her two nephews belong to the poor Muslim community. When interviewed by the AHRC staff in April, a human rights lawyer of Advocacy Forum-Nepal assisting Noorjan's case said that among torture cases his office documented for the last one year, 80 percent of the victims are Muslims. He further said that the police often victimise poor and uneducated Muslims accusing them of being suspected of crimes "to solve the case", as they are marginalised in Hindu society in Nepal. The police then implicate torture on these people to extract forced confession from them.

**c. Case of Surendra Thapa**[65] : Mr. Surendra Thapa, is a 22 year-old police constable at the District Police Office (DPO), Surkhet in Nepal. On 15 October 2007, he was severely assaulted by his senior officer, Assistant Sub Inspector (ASI) Jay Bahadur Thapa and police Sub inspector (SI) Mr. Deependra Khatri, on the petty reason that he did not wear his uniform in a proper way. The victim was again beaten inside the room of Deputy Superintendent of Police (DSP) Mr. Bahadurjung Malla, who did not object to this brutal beating. He finally fell unconsciousness. After the incident, Surendra was kept for 8 days inside DPO along with other police trainees by the order of SI Mr. Khatri. He was also warned not to disclose the incident to human rights activists and journalists.

Surendra then visited senior police officers seeking justice. He met the Superintendent of Police (SP) Mr. Ram Kumar Khanal at Surkhet DPO and then the Deputy Inspector General of police (DIG), Mr. Bharat G.C. of the regional police office of Surkhet district. However, no action has yet been taken against the police officers involved in the incident. Finally, seeking justice, Surendra met a journalist and disclosed the entire incident which was published in the local newspaper on 23 December 2007. However, since then he has received threats.

The senior officers of the police deliberately created obstacles when Surendra tried to

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*64 AHRC UA-304-2007: NEPAL: Three members of the Morang police engaged in serial torture and UP-141-2007: NEPAL: Another two cases of torture perpetrated by the same members of the Morang Police*

*65 AHRC-UAC-006-2008: NEPAL: Assault and threat of a policeman by senior police officers at District Police Office in Surkhet and AHRC-UAU-010-2008 and NEPAL: Police Human Rights Cell fails to provide any justice to torture victim*

discuss the incident with those concerned. Despite his poor health, he was compelled to attend the training at Midwestern Regional Police Training Center in Nepalgunj in December 2007. However, he once vomited blood on 4 January 2008 and was sent to a hospital. Surprisingly, Surendra was sent back to DPO Surkhet on the next day with a letter by Midwestern Regional Police Training Center, stating that he was not sincere at the training. The letter addressed to the Surkhet DPO, was sent to take necessary action against Surendra.

He also received a threat of dismissal from his job from DSP Bahadurjung. Also The DPO authorities listened to his statement on 18 November 2007, but on November 29, he was called in a second time and was told that he had given a false statement on November 18.

Meanwhile, in its reply dated February 5, the Police Human Rights Cell (PHRC) of the National Nepal Police sent a reply to the AHRC stating that Surendra was not subjected to torture but was simply awarded with a formal written warning in conformity with provisions of Police Regulation 2049. However, the PHRC's finding was based on the information provided by the Surkhet DPO, where the torture perpetrators worked as senior officers. The AHRC was informed that the three senior officers involved in torture were simply transferred to another police post without facing any departmental or legal action.

In April 2008, one AHRC staff met representatives of the regional office of OHCHR-Nepal in Nepalgunj covering Surkhet district. The UN staff said that upon receiving the AHRC's appeal letter, they made a visit to the Surkhet DPO to inquire about the incident. They also said that they failed to collect a statement from eye witnesses (Surendra's colleagues) in favour of Surendra and all of the officers they interviewed simply repeated the same version that was given by the PHRC. According to the UN staff, the police officers looked to being instructed to give the same version and therefore they could not intervene into the case.

**d. Case of Kamal Pun**[66] : Mr. Kamal Pun, a 34-year-old permanent resident of Pakhapani Village Development Committee (VDC) no. 1 in Myagdi district, was arrested by five policemen of Beni Parbat Temporary Police Post (TPP) at a restaurant located in Majphat VDC in Beni city in Myagdi district on 15 July 2008 for a petty offence. At the Beni Parbat TPP, he was tortured with a bamboo stick and an iron chair for some time until he fell unconscious. His left hand was fractured as a result of torture. On the next day morning, he was released without any charges.

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66 *AHRC-UAC-195-2008: NEPAL: A torture victim allegedly receives constant threats from the police in Myagdi district, 29 August 2008*

On July 24, Mr. Kamal Pun went along with his friends to the Myagdi DPO to file a complaint against the responsible police officers regarding this torture. Instead of registering his complaint, DSP Mr. Ram Kripal Shah asked him to go to the Parbat DPO to file his complaint, as he had been arrested by the policemen from the Beni Parbat TPP in Parbat district. The Majphat VDC is located in the border area between Myagdi district and Parbat district. On August 1, Mr. Kamal Pun directly filed a case for torture compensation under the Torture Compensation Act against 6 police officers at the Parbat District Court.

Since then, Mr. Kamal Pun has received constant threats and intimidation from the police. On August 12, some unidentified policemen from the Parbat Beni TPP allegedly threatened him to withdraw his case at the court. Similarly on August 15, the same group of unidentified policemen threatened him to withdraw his case again while he was returning from the local market. They intimidated him with abusive language saying that they would arrest him and charge him with various crimes if he would not withdraw his case. On August 23, ASI Nava Raj Poudel of the Beni Parbat TPP called to the victim and told him, "Why did you file the case against me? Please withdraw the case."

**e. Case of Ms. Sumitra Khawas**[67] : Ms. Sumitra Khawas (38) of Pacham of Haraicha VDC–8 in Morang was arrested by the police from Haraicha APO on 9 September 2008, on suspicion of murdering her husband who had died on the same day under unclear circumstances. She was then handed over to the Belbari APO where she was allegedly subjected to torture. Three police officers including Inspector Mr. Tanka Prasad Bhattarai, undressed her and forced her to lie on the floor and beat her on her back and buttocks with a 'tire belt'. Despite the torture, she denied the accusation.

On September 11, the Belbari area police produced Sumitra before the Morang district court where she was interviewed by local human rights lawyers. While human rights lawyers interviewed her at the Belbari APO on September 14, one unidentified local man along with about 8 local people approached them and threatened them not to provide any assistance to Sumitra. The police did nothing to stop this man and threatened the human rights defenders saying that the police would not be able to provide any protection to them.

Sumitra reported that on September 16, Police Inspector Mr. Tanka Prasad Bhattarai threatened her not to disclose her torture incident to any human rights groups. She further said that the Police Inspector told her, "I will peel off your skin if you speak

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*67 AHRC-UAC-205-2008: NEPAL: A woman torture victim is at risk of further ill-treatment and torture in Morang district; AHRC-UAU-056-2008: NEPAL: A woman torture victim faces threats by police after disclosing her torture incident and AHRC-UAU-058-2008: NEPAL: Torture victim Sumitra is transferred to Morang District Police Office*

about the incident". On September 22, Sumitra was transferred to the Morang DPO by court order and is awaiting trial.

## *The urgent need for the Witness Protection Act*

As mentioned above in detail, as well as in Section 3.2 and Section 3.5 (below), the level of threats on victims, including torture victims, as well as human rights defenders is quite severe. The victims and the human rights defenders often face beatings, intimidations, life threats, disappearances and even murder.

In terms of the threats on human rights defenders, in its press release on November 3, 2008, Informal Sector Service Centre (INSEC) informed that 64 human rights defenders in 34 incidents were at risk from state and non-state actors during the period of 16 July to 16 October, 2008.[68] According to INSEC, one teacher was murdered by an unidentified group and one teacher was disappeared, while three teachers were beaten and four teachers faced death threats. Among 41 journalists who were victimised in 16 incidents, 12 journalists were beaten, seven received life threats and 16 journalists were arrested, while one journalist abducted and another disappeared. Besides, one lawyer was abducted and two lawyers received death threats, while one lawyer was deprived of his right to continue his profession. One health worker was also beaten and another was abducted during the period. According to INSEC's data, the CPN-M, police personnel, the government officials, unidentified group and judicial authorities were mainly involved in violations of rights of the human rights defenders.

Concerning this matter, in 2007, the United Nations Committee against Torture also recommended the government to consider adopting legislative and administrative measures for witness protection and ensure that all persons who report acts of torture or ill-treatment are adequately protected.[69] In 2005, the Working Group on Enforced or Involuntary Disappearances also recommended the government and the security forces to ensure that human rights defenders are protected from persecution for their work.[70] The government drafted the witness protection act in 2005. However, there has been no progress to enact this law since then.

The absence of the witness protection act and the relevant witness protection mechanisms in the country has become one of the major obstacles preventing the

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*68 AHRC Forwarded Press Release numbered AHRC-FPR-023-2008, NEPAL: Ensure Security of Human Rights Defenders*

*69 Committee Against Torture, Conclusions and recommendations of the Committee against Torture, Nepal, para. 17, 13 April 2007, CAT/C/NPL/CO/2*

*70 Ibid (n 32)*

victims of the human rights abuses from getting effective remedies. There will be most likely no remedies for the victims of the human rights abuses during the conflict period unless the government of Nepal takes strong steps to enact this law. The introduction of the witness protection act as well as the establishment of the effectively functioning witness protection institution will be one of the key factors that will define the success of the government on fighting the on-going human rights abuses as well as the past crimes.

The AHRC therefore recommends the government of Nepal to introduce the witness protection act and establish a well equipped and effective witness protection institution under the Ministry of Justice as early as possible. In the meantime until the law is enacted, the government should also make appropriate witness protection mechanisms so that the complainants of the human rights abuses as well as the human rights defenders can freely seek justice without fear.

## *Lack of departmental sanctions against erratic officers*

Much of the ill-treatment and torture appeared to be related to the extraction of confessions during interrogation. No criminal investigations have been launched, although there are examples of minor disciplinary sanctions being imposed in a few cases.[71] It is reported that since 1996, the Nepalese police has only taken departmental action against 21 police personnel in 11 cases of alleged torture, out of which only 6 cases were prosecuted in the court of law. [72]

As a mean to combat such impunity, the Committee against Torture has already recommended the government that the accused should be subject to suspension or reassignment "during the investigation", in connection with prima facie cases of torture.[73] The Special Rapporteur on torture Manfred Nowak also recommended to the government that any public official indicted for abuse or torture, including prosecutors and judges implicated in colluding in torture or ignoring evidence, be immediately suspended from duty pending trial, and prosecuted.[74]

However in practice, a simple transfer of the accused police officers to the other police stations are often used as a departmental sanction by the National Nepal Police, when they face considerable pressure from the media and human rights groups. The above

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*71 Ibid (n 32)*

*72 Ibid (n 27)*

*73 Ibid (n 69)*

*74 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Nepal, 9 January 2006, E/CN.4/2006/Add.5*

cases also show that strong departmental sanction against the accused police officers is necessary when the investigation is ongoing and the accused are prosecuted, as they use their position to threaten the torture victims.

## *Inaction of the Human Rights Cells and the need for an independent investigating body*

Another major reason for impunity in terms of torture incidents is that there is lack of an independent body which is able to conduct investigations into acts of torture and ill-treatment committed by law enforcement personnel. The police mostly fail to collect sufficient evidence in cases the law enforcement officers are involved. As seen in the case of Umesh Lama, the investigating officers often pressurise the victims to settle the matters with the guilty outside the court.

Besides, existing internal investigation procedures the army and police has failed to conduct a transparent and proper investigation. After facing huge criticism of their act of crimes, all three bodies of security forces, the Nepal police, the APF and the Nepalese Army, have established so-called human rights cells as internal bodies to investigate complaints about human rights violations. However, these bodies failed to properly investigate the allegations of crimes committed by law enforcement officers as well as to prosecute the guilty officers, although disciplinary action was taken against some guilty officers in a few cases. As a result, these bodies have failed to provide effective justice to a victim of human rights abuses including torture.

Taiking about the Police Human Rights Cell (PHRC), during the meeting with one AHRC staff in May 2008, inspector Manoj K.C of the Police Human Rights Cell said that a central level investigation team could be formed to investigate any gross human rights abuse cases if there is sufficient details of the case such as medical report, etc and if the local police's investigation is believed to be conducted in a improper manner. However, the cases documented by the AHRC for the last two years below shows that the PHRC's role is most likely to forward a complaint to the relevant police office. The PHRC does not have any independent monitoring or investigation function on the concerned cases.

**a. Case of Surendra Thapa**[75] : Surendra is a 22 year-old police constable attached to the District Police Office (DPO), Surkhet in Nepal. On 15 October 2007, he was severely assaulted by his senior officer, Assistant Sub Inspector (ASI) Jay Bahadur Thapa and police Sub inspector (SI) Mr. Deependra Khatri, on the petty reason that he did not wear his uniform in a proper way. The victim was again beaten inside the room of Deputy

75 *AHRC-UAC-006-2008: NEPAL: Assault and threat of a policeman by senior police officers at District Police Office in Surkhet, 15 January 2008*

Superintendent of Police (DSP) Mr. Bahadurjung Malla, who did not object to this brutal beating. Later in December, Surendra was sent to a training program despite his poor health, at Midwestern Regional Police Training Center, Nepalgunj. Surendra also received a threat of dismissal from his job.

On 18 January 2008, the PHRC replied to the AHRC concerning this case and assuring that "necessary measures will be taken" after receiving the details of the incident. However, the PHRC sent another e-mail reply to the AHRC on February 5 and attempted to hush up the case based on the information provided by the DPO, Surkhet, where the torture perpetrators worked as senior officers. In the reply, the PHRC stated:

> "In response to your recent mail, District Police Office, Surkhet has provided the following information.
>
> 1. Regarding the case of Constable Surendra Thapa, on dated 14 Dec 2007, he was failed to report on time in duty but eventually appeared 30 minutes later with no proper uniform. He was asked to submit clarification for his act of improper conduct which is the breech of the Police Code. He couldn't come up with justifiable reasons. Therefore, he was awarded with the formal written warning in conformity with provisions of Police Regulation 2049.
>
> 2. And on 29 Dec 2007 , he was selected and sent for the professional training in Regional Police Training centre Nepalgunj as he qualified the criteria set up for the course. Later, He was found expelled even from the training for not being sincere and showing gross negligence as that could hint the negative signal to the other trainees. He reported back on 5 Jan 2008 to the office."

However, the AHRC collected two statements of the victim's two colleagues who were present during the torture incident, which challenged the PHRC's reply. The reply also did not contain any information on whether the Human Rights Cell had conducted an impartial inquiry about the incident or what measures were taken against the torture perpetrators.

In the year of 2007, the AHRC has also documented several cases showing the inaction of the PHRC. In a case of Jitman Basnet, a human rights defender who received a threatening phone call from an unidentified person on 21 May 2007,[76] on June 3, the Police Human Rights Cell wrote, "Metropolitan office has been instructed to carry out a thorough investigation to track down the culprit… and report of the development on the

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*76 UA-171-2007: NEPAL: Human rights defender threatened for publishing book on violations by the military, 29 May 2007*

said case in the earliest." However, the AHRC was informed that Jitman only received a few phone calls from the police from Metropolitan Police Circle, Kamalpokhari in Kathmandu, inquiring about the threat against him. After that he was not contacted any more by any police authority. On August 7 and August 11, 2007, Jitman again received threatening calls. He registered a complaint at Tinkune Police Station, Kathmandu on August 13 but has not received any responses from the police so far. As police failed to investigate the threats and provide security to Jitman, he continuously received threats in the following days. Eventually, he had to leave the country for his safety for a while.

In another case of **Kalpana Bhandari**[77] , who was brutally tortured and sexually molested by the policemen from the Gausala Metropolitan Police Sector and from New Baneshowar Metropolitan Police Circle on 17 May 2007, on June 7, the PHRC sent a reply to the HAHRC saying that "the prohibition of torture; general requirements on human treatment; and specific requirements concerning women and juveniles are the basis of police investigation" and "all the police official has to abide by this provision of human rights instrument at all times." It further said that "Allegations of human rights violations are to be subjected to an investigation." However, the AHRC was informed that neither any investigation has been carried out on her case nor has any police authority contacted her so far. The perpetrators walk free as a result. The victim registered a case in Kathmandu District Court for torture compensation on June 11, 2007. She received a threat by a police inspector for filing this case in the court. On June 15, 2008, Supreme Court found that she had been tortured by the police personnel and awarded her with 60,000 Nepali rupees as compensation.

The PHRC has also showed its inaction on other cases including the case of **Prakash Thakuri**[78] , who was abducted by members of the Maoist-affiliated Young Communist League (YCL) on 5 July 2007, the case of Sarita[79], a 13-year-old school girl of Baglung district (name changed to safeguard the victim's identity) and who was severely threatened by Maoists along with her mother in March and April 2007 and the Case of **Kalam Miya**[80], a 27-year-old manual worker who was arrested and tortured in July 2007. Particularly in the case of Kalam Miya, the PHRC claimed that "he sustained injuries while trying to flee" and "no torture of any kind has been inflicted against him in custody". As far as confirmed, no action has yet been taken against those alleged torture perpetrators. The AHRC was informed that soon after he filed a torture compensation

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77 *UA-177-2007: NEPAL: Alleged brutal torture and attempted rape of a woman by Police and UP-094-2007: NEPAL: Torture and sexual molestation victim receives threats from the police for registering a case in court*

78 *UA-219-2007: NEPAL: Man forcibly disappeared and another severely tortured by the Young Communist League affiliated to the Maoists, 13 July 2007*

79 *UA-134-2007: NEPAL: Four cases of alleged human rights abuse by Maoists, 19 April 2007*

80 *UA-253-2007: NEPAL: Man threatened with death and tortured into making false confession by police, 14 August 2007*

case at the District Court, Morang on September 2, 2007 (reference no. 27-064/0013); the police broke his house door and took two small knives and some of his personal documents from his house on September 11. Since he was repeatedly threatened and his house searched by police, he left his home for India to avoid risks and threats from the police.

According to the information provided by the government, the Human Rights Cell at the army headquarters has been upgraded to a Human Rights Directorate and each Division and Brigade Headquarters of the Army now contains a Human Rights Division and a Human Rights Cell respectively as an integral element of its architecture.[81] The government also reported that Human Rights Cells are being established in Battalions as well as at Company level and a comprehensive human rights directive has been issued down to the platoon level structure of the Army with a view to ensure respect of human rights.

However, the report by Human Rights Watch and Advocacy Forum states that in practice, the army has failed to cooperate with police investigating allegations of crimes committed by its personnel and the army human rights cell only conducted an investigation into a few cases.[82] The report further said that the high profile court martial sentence of two years imprisonment to one army officer on the conviction of failing to control his troops relating to the execution of 19 suspected Maoist insurgents, near Doramba village in Ramechap district in 2005, is the only imprisonment sentence given to a senior army officer so far.[83]

In 2007, the Committee against Torture has recommended the government the establishment of an independent investigating body on torture and ill-treatment committed by the law enforcement officials.[84] However, there is no independent body which has full mandate to investigate the abuses by the law enforcement officers and prosecute the accused in Nepal. The above mentioned cases confirms the urgent need for reform on the police investigation practice as well as the need for the establishment of an independent and independent complaint and investigating body working on serious human rights abuse cases including torture in Nepal.

## *No law criminalising torture and denial of criminal justice*

There are no adequate domestic laws combating torture in Nepal although it has ratified

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*81 Ibid (n 27)*
*82 Ibid (n 40)*
*83 Ibid (n 40)*
*84 Ibid (n 69)*

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1991. The government has failed to introduce a specific law that defines torture as a crime to date, despite repeated recommendations given by various UN human rights bodies as well as local and international human rights groups. No progress has been made in the process of drafting such a bill and the government has provided a copy of the draft torture bill to the OHCHR on the grounds that it is not yet public.[85]

As the result, the only recourse available now to the torture victims is to the "assault" section of the National Code of Nepal (Mulki Ain), which provides for very light fines or punishment according to the nature of the "physical" wound.

To explain in detail, the maximum punishment for an offence of "general assault" under the Chapter on Assault of the National Code is up to 6 months imprisonment and fine of 2,000 Nepali rupees (about USD 30). The offence of "general assault" means causing pain and wounds on a person's body. For the offence of the "maiming assault", the maximum punishment is up to 8 years imprisonment and fine of 10,000 Nepali rupees (about USD 160). However, this offence is very narrowly applicable to gross physical assault, for example, loosing a one eyesight or dysfunction of any particular organ of a person's body.

Most torture cases in Nepal fall under the category of "general assault." This discourages torture victims from filing criminal cases with the courts. Almost all torture victims do not file a criminal case against the accused police officers using this "assault" section of the National Code, because it is waste of time for them to bear all the difficulties such as intimidation, threats and long court delays only to see the guilty parties imprisoned for six months. As far as confirmed, none of the victims in the torture cases reported by the AHRC in this year has filed a criminal case against the accused law enforcement officials. In April and May 2008, the AHRC staff met several human rights lawyers dealing with torture cases in Nepal. All of them mentioned that when a torture victim agrees, they only consider filing a case for compensation in a court under the Torture Compensation Act-1996 under the present legal set-up. Consequently, very few lawyers use this clause in court and torture victims are deprived of their rights to seek an effective legal remedy and the torture perpetrators continue to enjoy impunity without facing any criminal punishment.

Even more important is the fact that even this 'assault' section of the National Code does not provide any specific provision for assault which has taken place whilst the victim is in custody, that is, with State involvement. The Code does not make any provision for the

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*85 Ibid (n 27)*

psychological effects of torture. Besides, torture is defined very narrowly in Nepal, and torture by state officers outside custody appears to be totally exempt.

### *Inadequate Torture Compensation Act*

While being blocked from getting criminal justice due to the limited remedies given by the National Code, the torture victims also face great difficulties to get any remedies due to the inadequate Torture Compensation Act (TCA), 1996. TCA neither criminalises torture nor obligates the government to take action against a perpetrator of torture. In the TCA, compensation may be awarded to torture victims, but the perpetrators are not punished because, as stated, in law they have not committed a crime. Besides this, the Act is also only recognises claims filed by torture victims within 35 days of the alleged act of torture, or within 35 days of the victim's release from detention. For example, in the torture case of Sima (for details, please refer the above), she could not file a case in a court under the TCA because she sought legal aid from the human rights lawyers 35 days after the torture incident. Furthermore, according to the legal system in Nepal, the burden of proof is placed on the complainant (the victim), who is often incapable of giving sufficient evidence to support his claim.

According to the assessment report by Advocacy Forum, in the 12-year history of the TCA, only 208 cases of torture compensation have been filed, only 52 victims have been awarded compensation under the TCA, and of those awarded compensation, only 7 victims have thus far actually received their compensation money.[86]

The Committee against Torture recommended the government to amend the TCA to bring it into compliance with all the elements of the definition of torture provided in the Convention.[87] However, the government has failed to implement this recommendation to date.

## 3.4. CONSTANT AND ARBITRARY ARREST OF TIBETAN PROTESTERS AND THE GOVERNMENT'S PLAN TO DEPORT ALL TIBETANS WITHOUT A PROPER DOCUMENT

Since March 10 of this year, Tibetan protesters, who have been demonstrating against the violence in Lhasa peacefully as possible in front of the Chinese Embassy building in Kathmandu, have been subjected to the constant and arbitrary arrest and ill-treatment by the police as of writing this report.

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86 *Advocacy Forum, Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act-1996, 26 June 2008*

87 *Ibid (n 69)*

According to Amnesty International's report on April 22, over 2,000 protesters were arbitrarily detained by the Nepali police since March 10.[88] The AHRC also reported that the arrest and detention of at least 89 Tibetan protesters on March 28, the arrest and detention of at least 113 protesters, including about 80 monks, on March 29 and the arrest and detention of at least 210 protesters on March 31.[89] The actual number of the arrestees would be much higher as the protests have been held on almost a daily basis in Kathmandu until very recently. Many of the Tibetan protesters have been arrested several times; some of them over 10 times.

The arrested Tibetan protesters include women, children and Buddhist monks. The police failed to promptly release the arrested peaceful minor protesters whom they should have not arrested and detained in accordance with the international human rights standards.

The alleged human rights against Tibetan protesters by the Nepali police during the custody included the beatings at the time of arrest, threats of re-arrest or deportation to China, sexual harassment on female arrestees.

Tibetan protesters in Kathmandu on April 18

For example, when one AHRC staff interviewed the Tibetan detainees at the Armed Police Force Training Centre, 3 Number Bridage in Kathmandu on March 28, Miss Kalpana (name changed for security reasons), one 18-year-old student of Lalitpur district, reported that the male policemen sexually harassed her when she was arrested on March 24 and 28. She reported that one policeman even touched her breast and lower part of her body and tried to tear her clothes off.[90] The AHRC staff could also document several police beatings during the interview.[91]

88 *Amnesty International, "Nepal threatens Olympic protesters", April 22, 2008; http://www.amnesty.org/en/news-and-updates/news/nepal-threatens-olympic-protesters-20080422*

89 *AHRC Urgent Appeal numbered AHRC-UAC-066-2008: NEPAL: Constant and arbitrary arrest of Tibetan protesters by police, 1 April 2008; http://www.ahrchk.net/ua/mainfile.php/2008/2802/*

90 *Ibid*

91 *Ibid*

The Nepali police also deliberately took preventive measures blocking the protests, in violation of the freedom of assembly and the right to freedom of peaceful assembly. The AHRC documented that the police stopped the vehicles from various monasteries to Kathmandu, and illegally arrested any Tibetans they suspected, regardless of the purpose of their travel. Many monks had to wear civilian clothes, so as not to be recognised by the police when they travelled.[92]

Furthermore, the AHRC is also gravely concerned about the government of Nepal's plan to deport all Tibetans, who live without valid refugee certificates in the country, to India, as it is confirmed by the spokesman of the Ministry of Home Affairs to the media on September 11.[93] This new drastic plan has been quickly adopted concerning the relationship with the Chinese government, after the newly elected Prime Minister Mr. Pushpa Kamal Dahal made a visit to China in late August. Before then the police had usually released the arrested protesters within one day after arresting them in front of the Chinese Embassy building in Kathmandu.

The government's plan is arbitrary as it targets all Tibetans without valid refugee certificates. This will most likely destroy the livelihood of many Tibetan exiles, who had lived peacefully even under the now-abolished monarchy with de facto protection. It is estimated that more than 20,000 Tibetans currently live in Nepal. Many Tibetan refugees are expected to be victimised by the government plan because the government has stopped issuing the refugee identify cards to Tibetan refugees for more than 10 years. The government has already announced that it began to screen over 100 Tibetan protesters who had been detained and would deport those without valid documents. As of writing this report, no Tibetan exiles have been deported to India so far.

The government of Nepal's constant crackdown on Tibetan protesters violates Article 9 (right to liberty and security), Article 19 (the right to freedom of expression and opinion) and Article 21 (the right to freedom of peaceful assembly) of the ICCPR, to which Nepal is a state party.

Besides, an excessive use of force by the Nepali police at the time of the arrest is against the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers. Article 3 of the Code states that law enforcement officials may use force "only when strictly necessary" and to the extent required for the performance of their duty". Section 4 of Basic Principles also states that law enforcement officials should carry out their duty "applying non-violent

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*92 Ibid*

*93 AHRC Statement numbered AHRC-STM-241-2008: NEPAL: The Government should stop its plan to deport Tibetans without valid refugee certificates to India, September 17, 2008*

means", before resorting to the use of force and firearms.

In fact, in its concluding observations in 2007, the United Nations Committee against Torture raised its concern that the government of Nepal has not acceding the 1951 Convention relating to the Status of Refugees and other related international legal instruments and there is the absence of domestic legislation stipulating the rights of refugees and asylum-seeking persons.[94] In particular, the Committee is concerned about the allegations received concerning cases of refoulement of Tibetan asylum-seekers, given the absolute nature of the prohibition against refoulement under Article 3 of the Convention. It further recommended the government of Nepal to consider acceding to the Convention relating to the Status of Refugees and other related international legal instruments, to enact legislation aimed at prohibiting refoulement of persons without an appropriate legal procedure and to provide the Committee information on number of cases of extradition, removal, deportation, forced return and expulsion that have occurred since 1994, as well as information on cases in which deportation was not effected for fear of torture.

In its concluding observations in 2004, the United Nations Committee on the Elimination of Racial Discrimination also urged the government to make legislative protection for refugees and asylum-seekers and to work together with the Office of the United Nations High Commissioner for Refugees in this regard.[95]

In light of the above, the AHRC urges the government of Nepal to:

- refrain from arresting Tibetan protesters peacefully holding protests and stop harsh treatment on them and guarantee their right to hold peaceful assembly in line with ICCPR;
- ensure that its law enforcement officers adopt non-violent means and that they are subject to strict regulations regarding the use of force on Tibetan protesters in accordance with UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force by Law Enforcement Officers;
- inquire about the alleged arbitrary/illegal arrest, ill-treatment and human rights abuses of Tibetan protesters during the police custody and hold those responsible officers accountable;
- withdraw its plan to deport Tibetans without valid refugee certificates to India and allow those who wish to stay, remain in the country;
- accede to the Convention relating to the Status of Refugees and other related

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*94 Ibid (n 69)*

*95 Concluding observations of the Committee on the Elimination of Racial Discrimination, Nepal, 28 April 2004, CERD/C/64/CO/5*

international legal instruments;
- enact legislation aimed at prohibiting refoulement of persons without an appropriate legal procedure.

## 3.5. DOMESTIC VIOLENCE AND THE DELAY OF INTRODUCING ANTI-DOMESTIC VIOLENCE ACT FOR OVER A DECADE

In Nepal, women actively took part in a historic democratic movement in 1990 and 2006. However, many women are subjected to domestic violence at home in the country, despite the fact that Nepal has ratified the CEDAW in 1991. In a conference in Kathmandu, Dhana Kumari Sunar, a member of the National Women's Commission (NWC), had reported that every year tens of thousands of women in Nepal experience violence and that in about 80% of such cases it is domestic violence. The women's cell of the Nepal's police headquarters has recorded 1,100 cases of domestic violence against women between July 2006 and June 2007.[96] It includes beatings by husbands, dowry-related murders, and physical and psychological harassment by in-laws. However, the law enforcement agencies are reluctant to take actions on these cases; instead they try to settle disputes without pressing charges against the perpetrators.

An alleged killing of Ms. Laxmi Bohara by her husband illustrates the actual level of domestic violence against women in the country [See the below Table].[97] This case in fact became a symbol of the women human rights defenders movement in this year.

**Table 3: Ms. Laxmi Bohara's case**

**Name of victim:** Ms. Laxmi Bohara, aged 28, married with 3 children, a member of the Women's Human Rights Defender Network (WHRDN) in Kanchanpur district, Nepal
**Address of victim:** Champapur, Ward No. 8, Daji VDC in Kanchanpur district, Nepal
**Alleged perpetrator:** Mr. Tek Raj Bohara, the husband of the victim
**Date and place of incident:** 6 June 2008 at the victim's house in Daji VDC

Ms. Laxmi Bohara (aka Laxmi) died in the Mahakali Zone Hospital on 6 June 2008, after her husband Mr. Tek Raj Bohara allegedly beat and then poisoned her. The husband fled from the hospital, upon hearing of the victim's death.

There was a history of domestic violence in the case before the victim's death. Her in-laws accused her of talking with men outside, which is against Hindu culture, and suspected that she might be engaged in sexual enticement of men while doing social work. Ten days before

96 *U.S. Department of State, 2007 Country Reports on Human Rights Practices on Nepal, http://www.state.gov/g/drl/rls/hrrpt/2007/100618.htm*

97 *AHRC-UAC-138-2008 and AHRC-UAU-040-2008*

her death, the husband threw Laxmi out of the house and she went back home after the husband agreed not to beat her again.

On June 6, her father went to the Kanchanpur District Police Office (DPO) to lodge a First Information Report (FIR) against his son-in-law regarding his daughter's death. However, the police refused to do so. The police then unaccustomedly registered the FIR under the name of one family member of the husband, causing a huge risk of improper investigation. The post mortem conducted on the victim's body was also reportedly conducted by a doctor, who is a cousin of the victim's husband. Despite repeated demands by the women's rights groups, both the Superintendent of Police at the DPO as well as the Chief District Officer refused to take a proper action on these problems.

Laxmi's father again went to the Kanchanpur DPO to register the FIR on June 10 and 11 but the police again refused to do so. The State Cases Act clearly mentions that the police should register any complaint lodged by a citizen of Nepal and initiate an investigation. Laxmi's father could only register the FIR on June 16, due to huge pressure from the women rights groups. For the same reason, the husband surrendered to the Kanchanpur district police on June 27 and was detained at the prison in the district. However, he was later released on bail, after his family paid bail sum.

Kanchanpur district is known to have the highest number of cases of violence against women in Nepal, particularly domestic violence involving their dowries. For example, in this area, there still exists the practice of Chaupadi, a long-standing practice which prohibits women from staying in the house when they have their period.

Female defenders' protest in Kathmandu on July 13

On 13 July, 2008, over 500 members of the National Alliance of Women Human Rights Defenders (NAWHRD) held a huge, peaceful rally in Kathmandu as a part of the 4th activity of the Movement of the Struggle Committee to end violence against women. The participants were from areas as varied as the far western and mid-western regions of Nepal. Women human rights defenders in different districts also organised the rallies, carrying the same demands on the same day. Their main demands to the government were the formation of an independent investigative committee, the conduct of an impartial and proper investigation into the case of Laxmi, the formation of a high level committee dealing with all forms of

violence against women, and the end of all forms of violence against women human rights defenders to ensure their safety. The rally ended opposite the Constituent Assembly building. After that, some NAWHRD members went on a hunger strike in Kathmandu from July 13 to August 4 until the government would fulfil their demands.

Due to the women's group's movement, the Ministry of State for Law, Justice and Parliamentary Affairs finally tabled the Domestic Violence (Crime and Punishment) Bill 2008 in the legislative session of the Constitute Assembly (House). The government formed a high level task force committee of 9 members led by Mrs. Bindra Hada, the secretary to the Prime Minister's office, to formulate laws against domestic violence.

However, it is too early to guarantee that this Bill will be passed in the parliament and go into force, because the similar previous bills on domestic violence have been lingering in the parliament for over a decade.

Another major problem to tackle domestic violence is the serious threats and attacks on women rights defenders assisting the victims and their families. One good example is the constant threats and attacks on the female activists of Mahendranagar Municipality, Kanchanpur district, who have been actively working on Laxmi's case.

**Table 4: Threats to women rights defenders concerning Laxmi Bohara's case**

***1. Threatening phone calls including a death threat***

On 17 June 2008, Ms. Bharati Singh twice received phone calls threatening her life from unknown persons. The caller said that she should not push Laxmi's case lest she face bad consequences. Meanwhile, Ms. Sharda Chand has also received more than a dozen threatening phone calls from unknown persons on her cell phone. The caller threatened her life and pressured her not to intervene into Laxmi's case anymore. Once, the caller said, "If the members of the NAWHRD do not stop working on Laxmi's case, they would be killed within seven days.".

***2. Motorcycle attacks***

At around 7am on June 27, two men, who covered their faces and were riding a black motorbike, suddenly stopped Ms. Sharda Chand's motorcycle when she was on the way to her office. The two men then threatened her and tried to assault her. Ms. Sharda Chand barely escaped from the scene. At around 1:30pm on the same day, two social workers, Ms. Naru Singh and Ms. Kalsa Mahara, were riding on one motorcycle. According to their report, one man, riding a motorbike, suddenly stopped his vehicle in front of them with the intention to cause an accident. Fortunately, the two women managed to control the bike and avoided the crash. The men then increased the speed of their bike and quickly fled.

***3. Mob mobilisations by family members of the victim's husband***

On the morning of July 1, the brother of Mr. Tek Raj Bohara (the husband) and twenty to thirty other men came to the district office of the NAWHRD in Mahendranagar Municipality in Kanchanpur district. They then shouted slogans against Ms. Sharda Chand and commanded that she come out of the office, shouting "Burn her!" and "Throw her out!"

On the same afternoon, the sister-in-law of Mr. Tek Raj Bohara came with a group of women and surrounded Ms. Sharda Chand's office. They then threatened her, shouting that her office should be set on fire and that she should be killed. Some people even entered her office and attempted to drag her out. Ms. Sharda Chand sought help from the police, who were dispatched at that time, but the mob of women did not flee even after seeing the officers. Ms. Sharda Chand reported that rather than taking action against the crowd, the police waited for about thirty minutes until the mob dispersed. She also reported that the mob once surrounded her house and threatened her.

On June 27, Ms. Sharda Chand, Ms. Kalsa Mahara and Ms. Bharati Singh filed a joint-complaint at the Kanchanpur DPO regarding the incident mentioned above and requested protection from the police. In addition, Ms. Sharda separately filed three complaints at the same DPO regarding the attacks on her and her staff. It remains unknown about the progress of the police investigation into these complaints.

The AHRC therefore appeals to the Government of Nepal to:

- introduce the bill on domestic violence against women without further delay;
- train the law enforcement agencies for a proper and speedy investigation on the cases of domestic violence against women;
- prosecute those responsible for domestic violence and punish them by law;
- appoint female domestic violence prevention officers in every district;
- set up a family court in every district to look after the cases of domestic violence against women;
- set up effective protection mechanism for the complainants of the domestic violence and people assisting the victims and their families;
- take all possible measures to raise public awareness about domestic violence against women as well as the equality between men and women.

**Urgent action required:**

Aimed at encouraging the international campaign on this matter, the AHRC presents you the contact information of the high level task force committee as well as that of members below.

Mrs. Bindra Hada
Chairperson
High level task force committee on the investigation for the violence against women
Singh Durbar, Kathmandu, Nepal
Tel: +(977) 1 4211015, 4211069/ +(977) 9851074353 (Mobile)
E-mail: hadaopmcm@yahoo.com

## 4. CONCLUSIONS

The regrettable conclusion that can be made concerning 2008 is that the government has made many rhetorical promises while deliberately avoiding taking tangible action to reform the law enforcement mechanisms and judicial systems to implement them.

One good example is the new government's enthusiasm on drafting a new constitution, while leaving the country in a vacuum without launching any genuine actions to work on important social and human rights issues. However, several bitter examples in Asia prove that rhetoric promises without genuine reforms cannot promote democracy and human rights. The history of Thailand's 1997 Constitution can serve as a good reference to the government of Nepal. The 1997 Constitution of Thailand was the crystallization of 67 years of Thai democracy. Unlike most of the previous Constitutions, the 1997 document was called for and initiated by the citizens and the majority of Thai people were involved from the very beginning of its drafting. The whole process was unprecedented in the history of modern Thai politics. However, the democratic process of writing a new Constitution did not result in progressive reforms on the justice mechanisms and government institutions, necessary for the development of human rights and the rule of law. The 1997 Constitution was later replaced by the military junta, which introduced a new Constitution gravely hampering the rights of Thai citizens in 2007.

The post-Marcos era in the Philippines as well as the post-Suharto in Indonesia also shows that Nepal will take the same fate of these countries if the government does not immediately address human rights problems in a serious manner and develop a political system and institutions of the rule of law that are better able to promote and respect human rights, prevent violations and combat impunity. Otherwise, Nepal may remain as a country where inequality is the norm, with feudalism and caste based discrimination literally segregating its people.

# PAKISTAN

## TORTURE, DISAPPEARANCES, VIOLENCE AGAINST WOMEN AND VIOLATIONS UNDER COUNTER-TERRORISM CONTRIBUTE TO DEEPENING INSECURITY AND TURMOIL

### INTRODUCTION

The year started violently under General Musharraf's military regime, particularly for lawyers, political workers and civil society activists. Musharraf was sworn in for a second presidential term on November 29, 2007 under emergency rule, which he then lifted on December 15, 2007. Benazir Bhutto, former prime minister and the chairperson of the then-running Pakistan Peoples Party (PPP), was assassinated on December 27, 2007. General elections of the legislative assembly were then postponed (from January 8 until February 18) by the military regime, on the pretext of a crisis in law and order. About 80 persons were killed in riots following the assassination, mostly in crossfire between the police and citizens.

The year started with widespread confusion about whether elections would be held, due to a series of delays from the Musharraf government. A wave of bomb blasts at that time also slowed political mechanisms. However the general elections were eventually held and a good turnout was recorded. The elections were also relatively free and fair thanks to pressure from political parties, civil society and from pressure from outside of the country. In the run up to the elections, assertive action by the people and party members prevented much engineering of the vote, despite the administration's refusal to replace the long-serving chief election commissioner, who had tried and failed to deny the vote to about 380 million people. Finding results of the election very much against him, Musharraf handed power to the elected representatives two months later, after considerable bargaining with individual party members.

Under the new civilian coalition government – largely built from Bhutto's Pakistan People's Party and Nawaz Sharif's Pakistan Muslim League - there has been much more focus on the democratic functioning of the parliament by the representatives of the people. The new government started proceedings by including all the parties in the

political process, showing tolerance and restraint. Unfortunately Nawaz Sharif pulled out of the coalition in August in disagreement over the issue of Pakistan's deposed judges, who the PPP have not sufficiently reinstated.

## THE DISMISSAL OF GENERAL MUSHARRAF

General Musharraf, who had awarded himself with another term after declaring a state of emergency (November 3, 2007), was democratically dismissed by the new government according to the constitution. Finding that his options were few – pressure from his allies in the army and overseas yielded little success – Musharraf resigned before being officially impeached. The strategy of the government proved a peaceful and democratic way to handle a man who was on the road to becoming a military dictator. The people of Pakistan have shown their resilient and determined struggle to oust the dictator, General (Ret.) Pervez Musharraf from the post of president. This non-violent struggle of various sections of society, which included lawyers, judges, the media, legislators and ordinary citizens, is a clear example of the development of democracies on the basis of consensus. In recent years there was clear consensus that the people did not want a military regime but instead wanted a democratic government. Even the support that the military leader received from the foreign powers did not deter the people of Pakistan from pursuing their desire to see the end of militarism. It is a sad reflection on some democracies in developed countries that they failed to support the people in their struggle for democracy and instead supported a military general. That notwithstanding, the people have been able to push back the military agenda.


## THE LAWYERS' MOVEMENT

The lawyers' movement for the independence of the judiciary continued in spite of the new government's illegal, unconstitutional handling of the situation. Many judges, including Chief Justice Iftikhar Choudhry, were removed from their positions under emergency rule and have yet to be reinstated. On the first anniversary of emergency rule, lawyers held country-wide protests against the suspension of the constitution. The government took the law into its own hands, charging more than 100 lawyers with agitation and suspending the licenses of more than five office bearers in various high court bar associations, including the presidents of the Peshawar and Multan

high courts bar associations. The new government is resisting its duty to reinstate Chief Justice Choudhry, claiming that it rejects the lawyer's use of violence. In some cases lawyers, acting independently, beat other colleagues and physically prevented judges from entering court rooms.

The new government had pledged verbally and in writing to restore the judiciary when it came into power. It has been dragging its feet on the issue ever since, and at times appears to be backtracking. This response brings it closer to the country's previous dictatorial government, showing a similar lack of interest in building an independent judiciary. The coalition government had first promised to restore the judiciary within 30 days of its formation, through a resolution in the national assembly, which did not happen. It then claimed that the deposed judiciary would be restored through a constitutional package; however it is now using a form of back-door diplomacy, bargaining with the deposed judges to guarantee their 'loyalty'. After being coerced and intimidated most judges have been 're-appointed' under a new oath rather than restored to their original constitutional position. There are five judges, including deposed Chief Justice Choudhry, who have refused to bow to pressure from the new government.

The government's new policies in this matter are hardly better than those used during colonial rule, when loyalty was prized above a respect for the law. The lawyers' movement has been running since March, 2007. They observe weekly protests by marching (one march was several hundred miles long), boycotting the courts, and picketing outside parliament and Supreme Court buildings. In a number of cases large numbers of ordinary citizens have joined them, showing a growing awareness and respect for the rule of law and the supremacy of the judiciary in the country.

The government has faced defeats in the elections of different bar associations, including the Supreme Court Bar Association, which has put the government in difficult position to get support from lawyers. In retaliation, the government started infiltrating their own lawyers in the Pakistan Bar Council and offices of the law ministry and Attorney General. Licenses of presidents of Peshawar High Court Bar Association and Multan Bar Association were cancelled on the pretext of boycotting the courts in protest during the lawyer's movement. More than 100 lawyers were booked on charges of agitation on the first anniversary of the state of emergency on November 3.

## THE HUMAN RIGHTS SITUATION

Since coming to power the government of Prime Minister Yousaf Raza Gilani has started to sift through the backlog of cases involving human rights violations, and it had released those arrested by Musharraf's government during emergency rule. This includes the deposed judges, all the lawyers, their leaders, civil society activists and political workers.

- It is in the process of commuting over 7,000 current death sentences and has halted executions, working against popular conservative Islamic principles. The efforts should be applauded and the government is working hard to rally support from the political parties in parliament.
- People are beginning to feel growing security in the military operation-ridden southern province of Balochistan, but air strikes and other forms of military activity continue in some parts, particularly Dera Bugti, Kohlo, Sui and Khuzdar. Many political workers from the area, some prominent, have been released from prison. A dialogue has been started between Baloch nationalist militant groups and the government and an atmosphere of reconciliation is starting to form.
- The issue of missing persons is yet to be addressed by the government. The State intelligence agencies are independent in their workings, though it has been officially declared that they are working under the Prime Minister. The ISI and Military Intelligence (MI) agencies are reportedly largely responsible for the arrest and disappearance of more than 4,000 persons since the start of the 'war on terror', as reported by various nationalist groups and fundamentalist parties. In the nine months since the new government took power not more than a dozen people have resurfaced from intelligence agency custody. The Interior Minister has admitted that about 1,000 people are missing from Balochistan province alone.
- The issue of torture in custody is not being properly handled by the government. Torture is still considered the best way of taking confessional statements by the police and making money through bribery, and this view is not being discouraged. During the last nine months at least fifteen people have died under police interrogation. There are currently no independent procedures for looking into such cases. There is also an alarming lack of sensitivity among legal professionals, particularly the lower judiciary, regarding the use of torture. The cost of using torture as a tool of law in Pakistan is underestimated and there has been a significant lack of development in criminal law jurisprudence in the country. There are at least 52 torture centres in Pakistan, all under the control of the army. http://www.ahrchk.net/statements/mainfile.php/2008statements/1574/
- Religious minority people remain under threat from Muslim religious groups and law enforcement agencies. The blasphemy law is being increasingly used against them in ordinary feuds, and the charge carries an obligatory death sentence (though

this can often be lifted with blood money). Although Muslims do fall foul of this law, Christians, Hindus and particularly the Ahmadis, a minority sect of Islam, are the main victims, and also suffer from attacks during worship, and from their daughters being abducted, forcibly married to Muslims and thus 'converted', often never to be seen again.

A history of murder: political and religious activists killed during the past months in Karachi city, where the ruling coalition is in government:

- Balochistan National Party-Mengal (BNP-M) Karachi President Zahid Baloch was murdered on the evening of Saturday 1 November, 2008, at Petal Wali Gali, Purana Golimar, in Karachi.
- A total 34 workers of the Mohajir Qaumi Movement-Haqiqi were killed in separate incidents of target killings in different areas of Karachi, such as Nazimabad, Landhi, Saudabad, the Korangi Industrial Area, Azizabad, Brigade, Korangi, Jamshed Quarters, Malir, Sharifabad, Garden, Gulshan, and Liaquatabad. There are clear 'no go' areas for activists of MQM Haqiqi, and the Altaf group is murdering their way through leaders and workers one by one.
- A total of 11 workers of the Pakistan Peoples Party (the ruling party), including its top leader Khalid Shahenshah (an eye witness of the Benazir Bhutto's assassination) and Ejaz Qureshi were killed in separate incidents in the different areas of the city, such as Gulshan-e-Iqbal Town, Saeedabad, Korangi, Ranchorline, Garden, Nabi Bux, Pakistan Bazaar, Sharah-e-Noor Jahan, Zaman Town, Clifton, Kalakot, Baldia Town and Sohrab Goth.
- Saif-ur-Rehman, aged 33, a resident of Street No 22, Model Colony, Karachi, who ran a printing press in the Nazimabad area was allegedly murdered in broad daylight by armed guards of MQM, a coalition party in the government, after leaving home for Nazimabad on November 3, 2008.
- Seminary teacher, Shahzaib Alam, a Pesh Imam of the Jama Masjid Siddiqe Akbar, Shamsul Haq, and two men praying at the mosque, Mohammad Kamal and Abdul Malik were brutally murdered on October 28, 2003.
- Four unidentified men, riding on two motorcycles, opened fire near Nagan Chowrangi (Nov 02, 2008) on 40 year-old Ghulam Mohammed left Fatima Colony in Sipah-e-Sahaba Pakistan (SSP) President District Central in Sir Syed police limits, after he offered prayers at the Siddiq-i-Akber Mosque.
- The PMLN party's Sindh Vice-President Tariq Khan and another leader were killed in New Town and Model Colony, respectively.
- A Jamaat e Islami leader was killed in the Al-Falah area.
- A leader of JSQM, Dil Murad, (known as Dilbar Mirani) was killed in Chakra Goth at Korangi.
- A leader of the Jamiat Ulema Islam (JUI), a religious cum political party, Sardar Shah was killed in Orangi. There is a long list of JUI leaders and workers killed so far.
- A leader of the former ruling party during General Musharraf rule (PML-Q) was killed in Taimooria.

## 1. THE RIGHT TO LIFE

On July 2, 2008, in a heartening step, the federal cabinet of Pakistan announced that it would commute current death sentences into life imprisonment, suggesting that debates on abolition may be possible in the coming year. However the party has been very slow to start implementing the decision through legislation; at least four inmates have been hanged in the period since and black warrants continue to be served. Pakistan executes the most people in the world each year after China, Iran and Saudi Arabia. There are more than 7,200 people on death row, including 41 women and two children, and many have not received a fair trial. Although the Pakistan Juvenile Justice System Ordinance was extended to apply nationwide in 2004, implementation remains limited. Pakistan is one of just five countries in the world that have executed minor/juvenile offenders in the last couple of years; in one known case Mutabar Khan was hung on June 13, 2006 for a crime committed when he was 16, and authorities of another jail, Mach Central Jail, have acknowledges holding two juvenile offenders on death row. Often, after years of trial, a defendant will have trouble convincing the judge that he or she was actually underage when they broke the law.

Many, among the 7,200 on death row, are also there as a result of the blasphemy law (see Religious Freedom). This is a crime that carries an obligatory death sentence but for which evidence is often tenuous and the law is often used in disputes over property or for political or personal vengeance.

**A HISTORY OF DISSENT:** The death penalty has been debated before in Pakistan. In the seventies Prime Minister Zulfiqar Ali Bhutto commuted all death sentences to life imprisonment and he extended a life sentence to 25 years accordingly. Yet he was himself hung in a coup, the penalty was reintroduced and the life sentence has been 25 years ever since. A decade and a half later his daughter Benazir Bhutto kept all but a handful of those sentenced from the gallows while she was Prime Minister. Suggestions to commute or abolish the sentence in Pakistan are met with strong pressure from religious groups, who claim that the death penalty is required according to the fundamental principles of Islam. Earlier this year, the cabinet tried to commute death sentences but was impeded by conservative religious party members, along with Chief Justice Abdul Hameed Dogar who intervened with a sou moto action. It should be noted that the Chief Justice of Pakistan's Supreme Court, Dogar, was not elected, but was appointed by former President Musharraf during emergency rule.

**NO ACCESS TO A FAIR TRIAL:** Corruption throughout the legal system along with the widespread use of torture in police custody, means that many innocent people are on Pakistan's death row. Whether innocent or not, many of the accused do not receive a fair trial.

Zulfiqar Ali, 38, has been on death row for more than a decade and was scheduled to be hung in October despite the commutation announcement. Ali comes from a poor family and was unable to afford legal representation so he tried to mount his own defence, even though he can't speak English. Requests for clemency were denied by the President, but at the eleventh hour, Ali was given a fifteen day stay. The stay has so far been extended, but no legal solution has been looked into regarding his unfair trial.

Under Islamic Sharia law a murderer can be pardoned by a victim's relatives, usually after a blood money payment called diyat, and the courts will often urge family members to resolve matters on the side; it's what many human rights NGOs call the 'privatisation of justice' and tends to give the wealthy impunity. Because of diyat it is suspected that death penalties are dealt out more freely because judges assume a settlement will be found. However in the case of 23 year-old inmate Umer Khan, a black warrant was issued in October 2008, even though the victim's family had pardoned him in writing before the court on May 9, 2007, after the payment of blood money. Fortunately Khan received a stay on the final day.

***The human rights movement is heartened by the stay of execution given to a young man on death row***

The AHRC wishes to thank President Asif Ali Zardari for staying the execution of Mr. Umer Khan, due to be hanged on October 29, 2008 at Mian Wali Prison, Punjab province Mr. Khan has been given a two-month stay. In a previous statement the AHRC reported that Khan (23) paid more than one million rupees (US$ 16,500) as diyat to the mother, wife and children of the murdered man, Mr Mumtaz Ullah Khan. This payment was made before the District and Session court and also before the Anti Terrorist court of Sargodha district. The family then pardoned Umer Khan in writing before the court on May 9, 2007, and the judge has also made a note of this in his decision. However the government refused to withdraw the case. In light of this development, the AHRC wishes to remind President Zardari of his government's repeated promise to commute Pakistan's death sentences to life imprisonment, and that, due to widespread judicial corruption and the inability of the courts to guarantee a fair trial, the death penalty in Pakistan should be abolished. URL: http://www.ahrchk.net/statements/mainfile.php/2008statements/1750/

In October 2008, President Zardari instructed approximately 400 condemned prisoners in Adiala Jail, Rawalpindi, Punjab province to be shifted from death row cells to ordinary barracks, and some 250 condemned prisoners to be similarly relocated in Hyderabad, Sindh province. This suggests that further positive action is imminent and the government, in its political expediency, taking time to commute death sentences in to life imprisonment under the pressure from religious parties and Chief Justice Dogar, appointed by former President, General Musharraf, during the emergency.

Pakistan recently signed the International Covenant of Civil and Political Rights (ICCPR) and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the UN. In article 6(1) the ICCPR states that "every human being has the inherent right to life". However life in Pakistan can be taken by the government for a wide array of offences, from extra-marital sex to drug trafficking, many of them introduced during military dictator Zia-ul-Haq's 'Islamisation' drive. According to article 6 (1) Pakistan should abolish the death penalty; at the very least those in power must revise the list of crimes met with death. In order to prevent the execution of innocent Pakistanis an extensive rehaul of Pakistan's judicial system is necessary, plus the strategic abolition of custodial torture. People are still being executed despite the current government's stance, suggesting that the real decision-making machinery does not lie with the elected government. Those that were elected must take a strong position against the religious right, and move to join Pakistan with the majority of the developed world in abolishing the death penalty.

## 2. RELIGIOUS FREEDOM AND MINORITIES

Religious freedom in Pakistan remains severely restricted. Those that belong to religious minorities are second-class citizens and struggle to enjoy the rights of mainstream or orthodox Muslims. Local governments also tend to court popularity by cracking down on minorities in their areas, often referring to an old blasphemy law created in colonial times. The law originally banned insults directed against any religion, but in 1986 General Zia-Ul-Haq altered it to apply only to Islam. The Federal Sharia Court then made execution a mandatory sentence for blasphemy during Nawaz Sharif's term as Prime Minister. The law is most often activated to discriminate against Christians and those of the Islam-based Ahmadi sect (which was declared non-Muslim in 1974 under the Pakistan Constitution). Religious hatred can still be openly stoked in Pakistan without punishment.

**THE BLASPHEMY LAW:** Despite calls for the abolition of blasphemy laws from inside and outside of the country, Pakistan's government has yet to take any genuine steps to do so. Meanwhile, many citizens are being arrested, prosecuted and even killed under the law. In many cases, it is used to settle personal vendettas or to grab land. Just as it continues to cause destructive tension between the country's mainstream Muslims and Pakistanis of other faiths, the law is also being used to increase the power of religious conservatives, who can wield it against liberals.

> One example took place in April 8, 2008 when Jagdesh Kumar, a 27 year-old Hindu, had his eyes gauged out before being fatally beaten at work by Muslim co-workers, who accused him of blasphemy. It was revealed later that he was in love with a Muslim girl who reciprocated his feelings. The murder took place in view of the police and the management of the factory in which he worked, and to date, no official inquiries have been initiated.

**BELEAGUERED AHMADIS:** While in power, President General Musharraf issued an order calling for Ahmadi sect members to be listed separately in the electoral system – a discriminatory action that singled them out for further attacks. In 2004, a Pakistan political party, the Muttahida Majlis-e-Amal (MMA), filed a motion to demand a debate on the government's deletion of religious information from electronic passports, claiming that the removal was an Ahmadi conspiracy to get around a ban on non-Muslims entering Mecca. Since 1984 (when statistics were first compiled) around 93 Ahmadis have been killed for their allegiance to their sect, which is based on the tenets of Islam. Four had been killed in 2008 until December, the time of writing.

Christians feel increasingly fearful in Pakistan and are the targets of kidnapping and lynching, with churches often being burned or damaged. Hindus are also being targeted in revenge for the continuing conflict over Kashmir.

**ALL TALK, NO ACTION:** In its pledge to be elected to the United Nations Human Rights Council in 2006, Pakistan noted that it is a part of all major global initiatives in promoting intercultural dialogue and harmony to facilitate universal respect of all human rights in all societies and cultures. It observed that, according to its constitution, minorities should enjoy equal rights and participate in mainstream politics both through joint electorates, and through the 5% of seats reserved for them in the parliament and other elected bodies. Articles 9 to 29 of its constitution enshrine the promotion of human dignity, fundamental freedoms and human rights and the equal status of the followers of all religions. They prohibit discrimination on account of religion, race, caste or creed.

However from the cases above, and the lack of support lent to investigate them, it is clear that much of this is mere posturing. Two years later the Universal Periodic Review has recommended that Pakistan remove restrictions on freedom of religion or belief and amend legislation that discriminates against persons belonging to minorities. It urges the authorities to effectively protect and satisfy the unimpeded exercise of freedom of religion of non-Muslim citizens and the repeal of laws discriminating against non-Muslims.

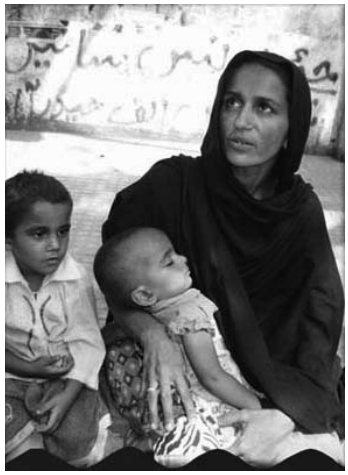
The government is responsible for the education of its people, and it must show much more interest in the promotion of rights education among minority Pakistanis, and the promotion of sensitivity and respect toward those of non-Muslim faiths among mainstream Muslims. Those who commit crimes motivated by religious hate must be clearly and justly punished, and minority peoples in Pakistan must be assured of their right to a free, fair investigation of rights violations. Government workers need to set a strong example themselves; an investigation must be set up to gauge and combat the extreme religious prejudice found throughout the police, political parties and the

judiciary. The blasphemy law can no longer be used as tool of the orthodox and it must be withdrawn.

**THE ABDUCTION AND FORCED CONVERSION OF GIRLS FROM MINORITY RELIGIOUS GROUPS:** It has become a common practice in Pakistan for Muslim seminaries to encourage young men to convert non-Muslim minorities to Islam. The young people generally kidnap young non-Muslims girls and rape them. In cases where they are later arrested by the police, they produce a certificate issued by any Muslim seminary that the kidnapped girls have adopted Islam and that they married the girls. Many of these girls are minors. However, the courts generally do not consider this fact and simply accept the certificate as legitimate. Christians in Pakistan, feel increasingly fearful of such actions.

Examples include the case of Saba and Aneela, which went through the Lahore High Court from July 2008, in which young girls were kidnapped and forcibly converted for marriage. In this case custody was granted to the kidnapper of the older girl (13), and the forced marriage was upheld. Muhammad Arif, Amjad Ali and Muhammad Ashraf kidnapped girls who were resident of Chak No. 552/TDA Chawk Sarwar Shaheed, district Muzaffargarh on June 26, 2008. The minors were kidnapped when they were on their way to their uncle's residence. The accused claimed that the girls had converted to Islam and the elder sister married Amjad Ali.

## 3. THE RIGHTS OF WOMEN



The stance of the newly-elected government bodes a little better for the future of women in Pakistan, with President Zardari posturing as pro-women. He was married to former-President Benazir Bhutto. There are 72 women in the National Assembly and more prominent positions are being held now by women than ever before, including the Speaker of the National Assembly, the Dederal Minister for Information and a number of deputy and provincial positions. None of these women wear the hijab, suggesting progressiveness in the parties who have elected them.

Certain pro-women policies are also being implemented, for example, in the case of land distribution in the Lower Sindh, plots will be registered in the name of the woman in each family unit. The current government has spoken of creating more employment opportunities and of loan

programs for women, but has not yet acted in this respect, and in terms of what still needs to be done the proposals are minor.

As a legacy of the last president, Pervez Musharraf, there is a 33% quota in all electorate forums for women at local body level, but too few are being permitted to fill this as a result of social pressure. The number stands at 17.5% in the National Assembly. However these women are not directly elected, they are merely placed into the positions by their party, which limits their value as political figures. Critics complain of nepotism. Middle-class women generally have more social and economic freedom in Pakistan, but in rural and tribal areas an estimated 12.5 million women are still denied the right to vote. Many have little or no independence on any level. The advances at the top need to be taken into the villages and onto the street and practically enforced. Businesses and local authorities such as the police and judiciary remain profoundly male-dominated.

**VIOLENCE AGAINST WOMEN:** Incidences of violence against women remain very high, and not enough is done to discourage them. One recent report (the 'Policy and data monitor on violence against women' from the Aurat Foundation) shows a sharp increase in acts of aggression against women in the second quarter of 2008. The report announced cases of violence to be up to 1,705, compared with 1,321 between January and March. Of these cases, the largest portion (20.9%) was for the murder of women, the second largest was bodily assault (11.4%) and honour killings were at 7.9%. Suicide and sexual assault statistics are also high. There were 107 cases of rape reported in this period, 66 of which were gang rape (up from 19). However statistics vary. Pakistan's Additional Police Surgeon (APS) Dr Zulfiqar Siyal recently announced that on average 100 women are raped every 24 hours in Karachi city alone. However a tedious, inefficient medical and judicial system, with few women working in either, discourages most women (up to 99.5%, says Siyal) from reporting abuse and subjecting themselves to more unwelcome male attention and further potential assault.

**RAPE AND SEXUAL HARASSMENT IN POLICE CUSTODY:** This remains a big problem and few cases result in prosecution. According to a report by Human Rights Watch, ('Double Jeopardy, police abuse of women') "more than 70 percent of women in police custody experience physical or sexual abuse at the hands of their jailers. Reported abuses include beating and slapping; suspension in mid-air by hands tied behind the victim's back; the insertion of foreign objects, including police batons and chilli peppers, into the vagina and rectum; and gang rape. Yet despite these alarming reports, to our knowledge not a single officer has suffered criminal penalties for such abuse, even in cases in which incontrovertible evidence of custodial rape exists". According to the same

report, a senior police officer claimed: "in 95 percent of the cases the women themselves are at fault." If the mindset among the authorities is not challenged, little change can be expected to be seen in the general public.

> On March 14, 2008, a 17 year-old girl was abducted by police officials and kept for almost 16 days in private custody where she was raped and tortured to make her confess to involvement in the murder of her fiancée. Her elder sister was also brought in and held naked for three days to increase the pressure. The perpetrator was a Sub Inspector, who detained the girl outside of the police station until March 29 before she was produced before the first class magistrate for judicial remand.
>
> In January 2007 a 15-year-old girl, Ms. Asma Shah of Layyah, Punjab province, was gang-raped by more than a dozen attackers in Punjab province, yet after she filed a complaint, politicians and police continually coerced her to withdraw it. The persons who helped her file the case were allegedly attacked by the relatives of the perpetrators. Although the court ordered inquiries into the case twice, police were resistant; they claimed that the alleged perpetrators were innocent before any move was made to collect statements from the victim and witnesses.
>
> In one case in April 2007 it was reported that female opposition council members of the Karachi city government were attacked and threatened with rape by council members of the Muttehda Qoumi Movement (MQM), a member of the ruling alliance in General Musharraf's government and the ruling party of the City District Government Karachi (CDGK). Sindh police refused to register case against the ruling party council members and instead registered cases of hooliganism.

Cases of domestic violence are so commonplace that most go unreported – there are still no laws to protect women from it. However in the last quarter of 2008 a domestic violence bill was given to legislators, in the expectation that it will be passed. A harassment bill has been passed by the cabinet and waits with the committee. Similar bills were drafted by Musharraf's government, but polarisation and infighting among parties prevented many practical bills being passed. However rural or tribal areas continue to restrict the freedom of women to the extreme, and 'honour killings' continue, and are mostly not investigated and go unpunished (see Honour Killings below). These largely take place in the north of the country.

> In August 2007, a pregnant woman was severely beaten by the police and later raped repeatedly in public by her cousin in Punjab province, Pakistan, for secretly marrying and living with a man other than the one her parents had chosen for her. The husband was charged with her abduction, and the woman was punished publicly by being raped by the man she had been instructed to marry. She has since been detained at this man's house and was forced to abort the foetus that was conceived during the rape. The legal counsel of her original husband has claimed that the case records had been filed or burned, and the case has been unnecessarily delayed

**WOMEN DISADVANTAGED IN EDUCATION AND WORK:** In the workplace, women must still contend with lower salaries, and sexual misconduct is common. They are generally not paid according to the law and receive few benefits. The majority are not officially registered so are vulnerable to occupational abuse. It is mostly women that work in government factories and other informal sectors (unregistered under government laws), and here they have no labour law benefits, such as medical allowances, pregnancy allowances, transport or childcare services from the factory management. Through a finance bill passed during the Musharraf government, most are now expected to work 12 hours a day rather than the original eight. In rural areas women are often required by employers or landlords to work all day alongside their husbands for little extra remuneration, often as bonded labour, to pay off loans.

Discrimination is still strong in education. The majority of schools cater to either boys or girls, and in remote areas several hundred schools were recently burned by tribal-members to protest against the education of girls, notably in the northern province, bordering Afghanistan, which isunder the control of Taliban and militant Muslim organizations. In such areas girls are not allowed to pass above grade five (primary school level); grade ten is required for many jobs. The authorities mostly fail to intervene in these areas, where they are seen to pander to the more powerful of the religious fundamentalists.

***Women and poverty – statistics***

Women comprise 49% of the population of Pakistan, and comprise of 30% of the total labor force, but 65.7% of this female labour force is officially accounted for in the informal sector. The informal sector has grown by a factor of 8 to 9 since 1978-79. One example of this problem is that of the brick kiln workers in Pakistan. An estimated 100,000 women work in brick kilns, but they are not "officially" employed because whole families work in a form of bonded labour, in which only the male head of the family is registered.

Some 66.4% of the female labour force works in the rural economy. Such women are said to work between 12 to 16 hours a day. The female labour force has grown at an average annual rate of 16.7% over the last 15 years, although their position is becoming less secure day by day. On the other hand, women's participation in the formal industrial labour force is 34.3%, whether self-employed or contracted.

Every year some 500,000 women die from complications arising from pregnancy and a further 200,000 are estimated to die from unprofessional and clandestine abortions.

In Pakistan's pledge for election to the Human Rights Council in 2006, it claimed that:

*…attention is being given to the social and economic emancipation of women. All forms of violence against women are punishable under the law including the infamous 'honour killing'. Pakistan will*

*continue to promote awareness of human rights in the society by introducing human rights component in educational and curricula at all levels and mass awareness campaigns through media and civil society with particular emphasis on the rights of vulnerable groups including women, children and minorities.*

**SMALL STEPS HAVE BEEN TAKEN:** The mass awareness campaigns from the government have failed to materialise on a substantial scale, especially in the northern regions where there are most urgently needed. The growth of awareness on these issues is due to a stronger interest from the print media and work by activists. However, it is the responsibility of the government to make women in Pakistan aware of their rights and freedoms, including their right to an investigation and redress if abused.

During the Universal Periodic Review, Pakistan's claimed that its priority areas for gender issues included mainstreaming the political and economic empowerment of women, particularly through a national employment policy for women, to create jobs and widen the participation of women in the economy. This is being done slowly in the country's economic hubs, but much greater efforts must be taken to see these benefits spread to the women marginalized in rural areas. Education should be something made equally accessible to girls and boys.

Demands made of Pakistan during the 2008 UPR included that that it:

maintain its commitment to overcoming barriers associated with deep-rooted tribal and traditional mindsets with regards to women's rights, and reinforce the implementation of constitutional and legal guarantees with a view to ensuring that all human rights of women are safeguarded throughout its territory, and ensure punishment for perpetrators of all violence against women; that it thoroughly investigate and punish members and leaders of illegal jirgas for their calls to violence against women; that it do everything possible to prevent early and forced marriage and recognize rape within marriage in legislation; that it put an end to inequalities between men and women, particularly for access to property; that it prioritise the adoption of legislative and practical measures to raise public awareness about the laws, and better train police and other authorities to deal appropriately and effectively with victims of sexual assault and other violence against women, ensuring victims' access to justice and improving support services such as shelters and burn units for women.

It is especially important that more women be brought into roles in state authorities, particularly into the police sector. This would do much to strengthen the legal process, by encouraging victims to properly report crimes against them and ensuring that they are protected from abuse while at their most vulnerable.

## 4. HONOUR KILLINGS AND THE JIRGA

In the last six years over 4,000 people have died in murders sanctioned by illegal jirgas or tribal courts, two thirds of them women. Their deaths have often occurred under barbaric circumstances. Many are considered Karo-kiri or 'black women', charged with having a relationship out of marriage (which is often a fabricated claim) while others are victims of rape or are suspected of planning marriages contrary to those arranged for them by their families. This type of murder has become known as 'honour killing', and due to the ease by which an unjust sentence is passed, they have become a way of resolving property disputes, particularly by male family members who resent losing property to another family through marriage.

In rural, strictly patriarchal areas women's lives are worth little. It is a matter of prestige to have more than one wife and young girls are often sold into marriage to settle disputes.

***Selected cases of honour killings in 2008***

In March 2008 a 17-year old girl in Sindh province was pressured by her uncle to convince her parents to hand over acres of farm land. On her refusal, the uncle and his accomplices brought in her father and made him watch as the girl was mauled by a pack of dogs and then shot. In May, a jirga was arranged in which the dead girl was posthumously declared 'Kari' (involved in an illicit relationship). The murderers were vindicated and a local man was forced to confess to being the illicit lover of the girl, and to pay Rs 400,000 as compensation. A government probe has done little to bring the perpetrators to justice.

In August 2008, eight women, three of them minors, were buried alive in Balochistan, reportedly by the same men. In the first case the three girls were allegedly on their way to another town with two aunts, for their weddings. The girls were reported to have been non-fatally shot and buried, and the aunts, on protesting, were buried alive with them. Days later, three local women who had protested against the incident met the same fate. Those responsible have close ties to the provincial government and to the police, and investigations into the case have gone through an array of delays and setbacks. It's a good example of how badly murder cases are dealt with in Pakistan's feudal areas, especially those that involve women.

In October 2008, in Sindh province, under the orders of a Jirga and with the knowledge and apparent acquiescence of the police, the daughter and nieces of a man (aged 10, 12 and 13) were handed over as compensation to a man despite the fact that he had openly killed his last two wives. The complainant had accused the father/uncle of having an affair with his last wife.

***The Jirga***

Tasleem Solangi

Both jirgas and honour killings are illegal in Pakistan, and those that commit the killings are supposed to be punished with a life sentence, but the true culprits are rarely convicted. Many men serving in parliament now have been a part of jirga courts, which is a major reason so little has been done to combat the practice. One of the main obstacles is the defense of these practices under the umbrella of custom. When the case of the eight buried women came to light, at least two Pakistani senators defended the act as an example of Baloch tradition. Both have since been promoted in the new government, one very disturbingly, to Minister of Education. The word 'tradition' tends to conjure up wholesome, age-old, culturally-rich practices under threat from secular or western values, and these terms should not apply to arbitrary, extra-judicial killing.

In a tribal court, witnesses and hearsay are the primary form of evidence and a verdict often rests on the reputation or power of a witness. Women are automatically considered sexually corrupt and their testimonies carry little weight. During a session spectators will gather and they tend to pick a side, after which they will heckle and pressure the decision makers. Needless to say, the most popular verdict may not always be a just one; it is difficult to reconcile justice with the will of an over-excited mob. Superstition also comes into play. In certain cases defendants have been told to walk on hot coals and if they feel and show no pain, then they are innocent. These are not conditions of a humane or rational system.

The power of the jirga has increased over the years because of flaws in Pakistan's legitimate legal system. Judgments can take years, even generations, and Pakistanis with small civil complaints often prefer to take the swifter route through local Jirgas. The Jirga's expansion into life and death judgments has grown from there.

**POLITICAL WILL IS REQUIRED:** To conquer these practices – which go against the nation's constitution – Pakistan needs to look deep into its own system and make strong, confident changes. Creating new laws will not do much good, since they are not implemented. Instead there must be a bigger crackdown on illegal jirgas and those conducting them must be punished and brought before the law, without exception and with no leniency awarded as a result of blood money transactions. Those who have killed through jirgas must be tried for murder; a country should have only one law for murder, without distinctions or impunity.

Furthermore, those who have conducted jirgas should be banned from holding public office, and those already in office must be ejected. Political will is required for curbing this practice. A clear signal should be sent that the constitutional law of Pakistan needs to be respected.

During the 2008 Universal Periodic Review, Pakistan pledged to put an end to honour killings through the faithful and effective application of the 2004 Criminal Law Act; to remove abuses of the Hadood laws that violate women's rights (noting that the 2006 Prevention of Anti-Women practices (Criminal Law) Act was designed to end these practices, and the 2006 Amendments, which bring the laws relating to Zina and Qazf in line with the objectives of the Constitution and the injunctions of Islam) and to take legal and administrative measures to attack domestic violence.

The legal rights of the relatives of murder victims must be recognized and acted on. This includes the right to an investigation and trial. Under Article 2 of the ICCPR (International Covenant on Civil and Political Rights), which Pakistan has signed, the state is obliged to take measures to protect rights and provide remedy for victims of rights violations. Those who carry out extra-judicial violence must see that it will no longer be tolerated. Victims must understand that there is a process by which they can seek justice. To make sure that these steps are taken an independent monitoring body needs to be established, funded and given free reign.

Finally, it is a government's responsibility to educate, and a strong educational network must be created that can work against what has become an entrenched practice – particularly in tribal northern areas which remain isolated, ideologically, from the rest of the country. If the government is genuinely serious about tackling honour killings and modernizing its legal system, this is the least it can do. To combat extra-judicial crime in Pakistan will be no mean feat, but it is clear that it begins with the development of a strong, unified judiciary and open, genuine commitment from the government.

## 5. DISAPPEARANCES AND ARBITRARY ARREST

The forced 'disappearance' of political opponents by state intelligence services continues in spite of the newly elected government's claims that they will swiftly clean up the issue. In the nine months since the PPP came to power again no serious moves have been made to address it. On the contrary, the state intelligence agencies are operating freely with the knowledge of the government. In the past nine months about 52 persons have gone missing after their arrests, mostly in the southern province of Balochistan where military operations continue. Some religious organisations claim that more than 23 persons belonging to various religious groups, mostly young students are still missing after their arrest.

Fighting terror with terror: The global 'War on Terror', triggered by the attack on

New York's World Trade Center, has given the Pakistani military an excuse to exercise a free hand when it comes to opponents of the government and religious activists, who are commonly arrested, tortured and kept incommunicado for several months in order to obtain confessional statements. Such practices have continued under the newly elected government, as the Pakistan army is refusing them access to their domain. The Asian Human Rights Commission has issued a report mentioning that at least 52 illegal detention and torture centres are being run by the Pakistan army.

Baloch intellectual, Dr. Allah Nazar Baloch is being brought to civil hospital from a military torture cell where he was kept more than one year.

In one example, Dr Safdar Sarki, the nationalist leader of Sindh province and Mr Muneer Mengal, managing editor of a television channel, were released during the first quarter of this year after they had been missing for more than a year. They were dumped by the intelligence agencies on the roadside with torture injuries. Moments later, the police arrived and arrested them on several criminal charges.


A demonstration for the recovery of disappeared persons with their photographs

***The FBI is responsible for disappearances, illegal detention and torture in Pakistan***

On 24 July, 2008, the Asian Human Rights Commission issued an urgent appeal regarding the disappearance of a lady doctor. The American Federal Bureau of Investigation (FBI) initially admitted that they had arrested Dr Siddiqui and then later denied it. After coverage both in Pakistan and internationally they were pressured to announced that "Dr. Afia Siddiqui is alive, she is in Afghanistan, but she is injured". Details were slow coming, and those that were given often defied logic. Dr Siddiqui had been missing along with three young children for five years after being arrested by the Pakistani Intelligence Agency. Acting on the information received, the AHRC in its appeal suspected that the doctor was being kept in Bagram jail, Afghanistan, along with her children, and had been severely tortured. After more pressure an FBI official visited the house of Dr. Afia's brother in Houston to deliver the news that she was alive and in custody, though little other information was offered her family, or her US lawyer. After serious delays and extreme operational opacity, Dr Siddiqi was transferred to the U.S, where she remains in custody, and one of her sons was released to his family. Nothing more has been heard of the other two children. The operation involved the complicity of the FBI, Pakistan state agencies and the Afghan government, and covers numbers of human rights abuses, including torture and illegal detention. http://www.ahrchk.net/ua/mainfile.php/2008/2947/

The government has never made a serious attempt to stop the arbitrary arrests and disappearances, and has often hampered the judiciary in its efforts to clear the backlog of such human rights abuse cases. The state of emergency was called and the former chief justice was removed largely over this issue, meaning that more than 350 cases of missing persons were filed in the Supreme Court of Pakistan and have never been addressed. Those who have testified after being held incommunicado for months, and then released, have told the courts and the media that they were arrested by police and were handed over to intelligence agencies, who kept them in military interrogation cells and used torture to obtain confessional statements about anti-state activities. (Please see AHRC urgent appeals, UA-171-2006, UP-001-2007, UA-413-2006).

Several nationalists and religious groups have calculated that about 5,000 persons remain disappeared after arrests since 2001, when the united front against terrorism emerged. In the southern province of Balochistan, nationalist groups and political parties are claiming that about 4,000 persons have been missing since military operations began there seven years ago, and that the Pakistan army has killed several hundred persons in aerial bombardments. In the North Western Frontier province, where the Pakistani military and foreign forces are carrying out operations against militants, the media and political parties are claiming that more than 1,000 persons are missing. The nationalist forces of Sindh province claim that about 100 persons have been disappeared, but that some of them were released after the intervention of the Supreme Court and the Sindh High Court. In Punjab province most of those arrested, around 100 persons, were from religious groups working in its southern and north western areas.

***The Government should release all disappeared persons in custody of police and intelligence services***

AHRC-STM-229-2008
September 1, 2008

The advisor to the prime minister and minister in charge of interior affairs has said, in his recent visit to the Balochistan province on August 27, 2008, that 1102 persons are still missing from Balochistan and that the government will try to locate them. His acceptance of the statistics that more than 1,000 persons are missing is itself an indication that government has no control over the law enforcement authorities and furthermore, has no intention to initiate any probe in the affairs of state intelligence agencies particularly the ISI. The former interior minister in the cabinet of ex-president Pervez Musharraf, told the national assembly in December 2005 that 4,000 persons have been arrested in Balochistan province. However, nationalist and human rights organisations in the province claim that not more than 100 persons have been produced before any court. The minister in charge has not given any indication of the fate of at least 1,102 persons which are according to him, are missing. He was shy to point out that the missing persons are in the custody of law enforcement agencies, and has given little indication that he will work toward their recovery. During 2006 and 2007 the now-deposed Chief Justice Iftikhar Choudry started forcibly taking up the cases of missing persons, and about 110 persons were released from the captivity of intelligence agencies; most were dumped on streets in remote areas.

Senator Baber Awan, secretary of the Pakistan People's Party's Reconciliatory Committee on Balochistan, has announced the formation of two committees on the province (Daily Dawn 05.05.2008). Of these, one has been formed to investigate complaints by family members of missing persons, and the second was to be for the internal displacement of people during military action. But later on it was clarified by the ruling party, Pakistan People's Party (PPP), that the committee was constituted for missing persons only. The day after the AHRC issued criticism of the government's false statements on missing persons in May 2006 (please refer to URL: http://www.ahrchk.net/statements/mainfile.php/2008statements/1503/), a news item appeared in the Daily Jang newspaper, noting that the PPP's committee on Balochistan had arranged a six-member subcommittee on the recovery of missing persons. The majority of members of the committee are from the PPP's lawyers' wing, the People Lawyers' Forum, with just one member from the national assembly.

The government has shifted from a position of creating the committee for missing persons to suddenly shifting the responsibility for this committee to the political party. By doing this the government is distancing itself from one of the most important issues the country faces. For the newly-formed government to now start back-peddling on this issue rings warning bells for the future of human rights in the country. There were no

terms of reference described by the government and the committee does not have any constitutional or legal coverage.

There's also been little clarification about the terms of reference of the committee, such as:

- Whether it is independent of its party affiliations.
- What the jurisdictions of the committee are.
- Whether it can visit the places where missing people were generally kept (some of those released through the sou moto actions of Chief Justice Iftikhar Choudry later testified that they were kept in army torture camps and they themselves saw several persons in the camps).
- Whether this committee has the authority to ask suspect military or police officers to report before the committee.
- What the legal and constitutional status of the committee for recovery of missing persons is.

Without the proper terms of reference, the formation of the committee is meaningless and will only serve as 'eye wash', rather than a purposeful exercise for missing persons and their families. It is vital for the newly elected government to maintain the confidence of the people of Pakistan by forming a high powered tribunal with all the independence, authority and material and financial resources necessary for the recovery of disappeared people. The jurisdiction of the tribunal should cover the whole country.

It should be noted that a significant failure of the Universal Periodic review of Pakistan in 2008 at the United Nations was this review's failure to raise and address the critical issue of disappearances in Pakistan.

***The case of Dr. Aafia Siddiqui best shows the reach and the depth of this entrenched problem***

URL: http://www.ahrchk.net/ua/mainfile.php/2008/2947/ PAKISTAN/USA: A lady doctor remains missing with her three children five years after her arrest

URL:http://www.ahrchk.net/statements/mainfile.php/2008statements/1702/ WORLD/PAKISTAN: Pakistani and US State authorities must release information on the two children of Dr. Aafia who remain missing

URL:http://www.ahrchk.net/statements/mainfile.php/2008statements/1681/ PAKISTAN: Children of Dr. Afia Siddiqui are removed from Bagram and their whereabouts are unknown and Dr. Afia is denied permission to attend court proceedings

URL: http://www.ahrchk.net/statements/mainfile.php/2008statements/1714/ USA/PAKISTAN: Dr. Aafia Siddiqui is removed to a psychological facility and denied access to her family, lawyers and her government

## 6. POLICE AND CUSTODIAL TORTURE

Torture in custody in Pakistan is a continuous, common place phenomenon. It is still widely considered the best means by which to obtain confessional statements. As yet, there have been no serious efforts made by the government to make torture a crime in the domestic laws of the country.

**THE POLICE – A SYMBOL OF FEAR:** Rather than being symbols of security and justice, policemen widely represent the abuse of power and inspire fear. The most common methods of police torture in interrogation situations include beating with batons or whips, suspension by the ankles, burning with cigarettes and punches to the abdomen. Women are likely to be raped in custody. Torture is also carried out to extort bribes or to show efficiency in an investigation.

> ***A Television channel shows torture in custody – the authorities take no action***
>
> Geo TV, a prominent and popular Urdu language television channel has shown the custodial torture of a famous bandit in its weekly program a number of times, but authorities have not taken any action against those shown to have been involved. In its series 'FIR' it showed a two or three part program titled, 'Lyari Gang War', the channel telecasted recorded footage of suspect, Rehman Dacate being hung upside down with ropes and shackles,and beaten with wooden and iron bars. The man was severely injured, and finally agreed to accusations involving the killing of numerous people, bomb blasts and extortion. The program offered little challenge to the torture, and the government has not responded to the case. This example neatly exemplifies the extent to which torture has become accepted, socially and politically in Pakistan, as a legal tool. (http://www.youtube.com/watch?v=4CLCJFzCPHY&feature=related)

This is despite the fact that Pakistan signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on April 17, 2008, and ratified the International Covenant of Economic, Social and Cultural Rights (ICESCR). It also signed the International Covenant on Civil and Political Rights (ICCPR). Torture is prohibited in the constitution: Article 14 (2) states that, "No person shall be subjected to torture for the purpose of extracting evidence".

Currently there are no independent investigation procedures in Pakistan to investigate cases of torture. To report cases, victims need to go through the authority responsible: the police. They must then contend with the lower judiciary, which is known to side with the prosecution in such cases. An extreme lack of sensitivity is commonly shown by prosecutors, law enforcement agencies like the police and also the judiciary, particularly the lower judiciary. The damage such practices causes the country and its ability to maintain the rule of law, goes understated. The development of criminal law jurisprudence has been effectively stunted.

***Cases of torture in 2008***

- In March 2008 a 17 year-old girl was abducted by police officials, raped and kept for almost 16 days in a private lock up near a police station, under suspicion for the murder of her fiancé. Her elder sister was also brought in and held, naked for three days, to pressure the sister to confess to the charges. The SI involved thereafter produced the girl before the first class magistrate for judicial remand. http://www.ahrchk.net/statements/mainfile.php/2008statements/1438/
- On 22 January, 2007, 24 year-old Mr. Hazoor Buksh Malik was arrested by the Market police, Larkana district, Sindh province for not possessing a national identity card while he was shopping. Late in the night of 25 January, the SHO Mr. Mohummad Tunio came in drunk to the police station and ordered three on-duty police officers to fasten the victim with ropes and chains. The SHO then began to brutally torture Mr. Hazoor Buksh, at the height of which, he allegedly severed the victim's penis with a sharp-edged knife. The police allegedly registered a false attempted suicide case and a First Information Report (FIR) No. 17/2007 against the victim under sections 34, 337 and 334 of the Pakistan Penal Code. URL: http://www.ahrchk.net/ua/mainfile.php/2007/2444/
- A high ranking police official used police officers of four different districts to keep a labourer, the father of five children, in illegal detention in the private jail of a notorious drug dealer, for the return of some money to which the victim was witness/guarantor. He was severely tortured in three different police lock ups for the return of the money. http://www.ahrchk.net/ua/mainfile.php/2008/2932/
- Police refused to register a complaint and file charges against an abusive provincial minister and his armed men in Punjab province. The minister allegedly ordered the assault, arrest and detention of six student activists and teachers, two of whom were women, on 2 February, 2008, in Lahore City. The city mayor also allegedly defended the minister's actions by threatening the police ready to file charges against him. The activists were holding a demonstration and distributing leaflets to supposedly celebrate the release of one of the leaders of the lawyers' movement when they were attacked.
- Mr Abdul Wahab Baloch was arrested on May 28, 2008, after a demonstration against the tenth anniversary of nuclear experiment. He went through severe torture during illegal detention for six days. The government has not taken any action against the officials involved. URL: http://www.ahrchk.net/ua/mainfile.php/2008/2883/
- Eight persons were forced to strip naked and behave like dogs and bears by police officers while in custody. The victims were beaten and had ropes and chains tied around their necks. No investigation was made into the matter. URL: http://www.ahrchk.net/ua/mainfile.php/2006/2533/
- Mr Mohammad Khan Lund, a human rights activist is presently in Deeplo Jail fr the 43rd time, and has been beaten or tortured in some way numerous times. His political rival Dr. Arbab Rahim, the former chief minister of Sindh province in the president Musharraf's government, is alleged to be behind his continual detainments. No investigation has been instigated. URL: http://www.ahrchk.net/ua/mainfile.php/2008/2777/

**PAINFUL STATISTICS:** Case reports have shown that certain provinces excel in this matter, the Punjab and Sindh provinces being at the top of police abuse records. Statistics collected from the group Lawyers for Human Rights report 9,364 reported cases of police torture in the last nine years, the most in any one year (1,723 cases) occurring in 2007. Between January and June in 2008, 743 cases have already been reported, suggesting that little is being done. Journalists and lawyers were beaten and abused with impunity during the struggle of the judiciary in 2007 and 2008.

It is in the day-to-day work of the lower judiciary that this underdevelopment is most visible. One example is the practice of the lower court judges of allowing detainees to be remanded in custody with ease, despite clear indication that torture has been used. This practice even fails to make use of the little space available to it in the current criminal law, in which a judge can demand a reason from the investigating agency for handing over the accused to such agencies, rather than keeping them in judicial custody.

***French authorities were unable to stop the torture of a detained French woman***

One case of a French visitor to Pakistan offers insight into the government's lack of will or power in torture cases. Ms Florence Nightingale, a French scholar was detained illegally and tortured in the police lock up of Thatta district, Sindh, on September 2007, before several persons. The authorities failed to prevent torture in custody even after the intervention of French Consulate of Karachi. The police simply refused to listen. The provincial government had not taken any action against the police since. Please see URL: http://www.ahrchk.net/ua/mainfile.php/2007/2631/

Put simply, the practice of torture continues because there is no prohibition against it the domestic law of Pakistan. Police records and procedures are rarely followed, making cases difficult to monitor or legislate. Civil and political parties are not pushing hard enough for the proper implementation of police ordinance and the government has taken few steps, despite promising to reform the police and make it 'people friendly'. Without an honest police system a country has no hope of developing a free and fair rule of law.

The instruments of torture used in military torture cells

***The use of torture during the lawyers' movement***

Law makers are not spared from torture by the police in detention. Several lawyers, including the office bearers of different bar associations were tortured physically and psychologically during their detentions under emergency rule, including Mr Munir A Malik, former president of the Supreme Court Bar Association, who was arrested on November 3, 2007 and provided with unknown medicine during his detainment, which served to poison him. Both his kidneys shut down and he suffered chronic renal failure. Mr Imdad Awan, president of the Sukkur high court bar association, was arrested on November 4 after having a protest meeting with the lawyers and was beaten, denied sleep and denied medicine for his diabetes and high blood pressure. Two female lawyers, Ms Noor Naz Agha and Ms Jameela Manzoor, were also arrested on November 3 and 5 respectively and were beaten and mishandled. A prominent human rights lawyer, Mr Syed Hassan Tariq was brutally tortured by the police upon instructions (allegedly from the provincial chief minister in Nawabshah, Sindh Province) after he was arrested on 8 November 2007. He emerged from custody with internal bleeding to his lungs, marks on his back and two ribs fractured. URL: http://www.ahrchk.net/ua/mainfile.php/2007/2664/

**ESTABLISHED TORTURE CENTRES:** The AHRC has issued a report on 52 identified torture and detention centres in the country, compiled with information from former detainees, some of whom were imprisoned for several years after their arrest without charge. The centres are army-run, and are allegedly for suspects of terrorist activities. Amy officials are interrogating persons from Balochistan to force confessions about involvement with the Balochistan Liberation Army (BLA) and from Sindh, for confessions about involvement with the Sindh Liberation Army (SLA). The military rulers are keen to prove that the organisations are working to disassociate themselves from Pakistan. Arrestees from the North West Frontier Province were initially held in the custody of the army before being transferred to Afghanistan. There, after going through severe torture and being held incommunicado, many of them were handed over to the occupied forces, to be again transferred to Guantanamo Bay, the notorious American holding/interrogation centre.

Military Intelligence (MI), Inter Service Intelligence (ISI), the Federal Intelligence Agency (FIA), the Pakistan Rangers and the Frontier Constabulary (FC) are the main agencies responsible. Many of the missing persons have testified in courts and to the media that they were kept in the custody by the army and that they were tortured as in the following AHRC reported cases: UG-003-2006, UA-227-2006, UG-013-2006, UA-145-2006, UP-127-2006, UA-171-2006, UA-169-2006, UA-132-2006 and UP-191-2006.

## 7. CHILDREN'S RIGHTS:

The biggest threats facing children in Pakistan today come from poverty and the risk of abduction. Pakistan has a very high population of street children, and despite the country's posture as an Islamic welfare state, and provisions in the constitution that call for the care of vulnerable minors, there is little done for them. Care facilities such as orphanages are poorly regulated and under funded. Street children often come under the control of the mafia.

**ABUSE:** Cases of abuse and abduction remain high, particularly those resulting in sex slavery or conversion through forced marriage. Reported abduction cases totalled 418 in the first half of 2008, according to Sahil, a domestic NGO for the protection of children from sexual exploitation, which gathered statistics from 15 Pakistan newspapers; 339 of those kidnapped were female. A high proportion of abducted children are raped and there were 177 cases reported of the gang rape of minors during this period. Figures were highest for sexual abuse in Punjab province, followed by Sindh. The same report noted that in about 6% of the cases female abettors were involved, and that 81% of cases that reached the newspapers had been registered with the police.

**A BIAS FOR BOYS:** Female children are still less valued than male children, and many are abandoned and left to die. Under Pakistan law such cases should be reported and investigated as murders, with post mortems conducted, but hospitals and police surgeons report few such requests, and the law allows doctors some room to issue a certificate based on observation rather than an autopsy. For infants found alive, a PPC can be lodged under Section 329, which states: 'whoever, by secretly burying or otherwise disposing of the dead body of a child whether the child dies before or after or during birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both'.

There remains confusion about the age at which a person ceases to be a child. Pakistan has ratified the UN Convention on the Rights of the Child, in which adulthood begins at 18, and it issues national identity cards at this age. However the Employment of Children Act states that a child is under 14 years old. Children, like women, tend to work mostly in the informal sector, which leaves them vulnerable to abuses ranging from sexual and physical assault, to overwork and underpay.

**CHILD SOLDIERS:** The recruitment of minors in preparation for military action is still of concern, with madrasses coming under more scrutiny than the army. Voluntary recruitment age for the army is 17, but a person can't engage in active combat until 18 years-old. The international Coalition to Stop the Use of Child Soldiers reported this year that some cadet colleges (which tend to offer a high standard of education) can

admit children as young as ten, but that these children can choose whether to join the army after their schooling. However last year a national children's organisation referred to unconfirmed reports that children as young as 15 were involved in political violence in Karachi in May 2007, as well as at the Lal Masjid in Islamabad in July 2007, and expressed concern that they are being trained for conflict by the state.

Madrasses offer an alternative to the struggling public school system, but tend to focus on little other than Islamic studies. There are numerous unregistered schools that remain free from any kind of official regulation. Some madrasas reportedly continued to promote religious radicalism and violence and are used for military training, and in the second half of last year a number of children were linked to suicide attacks, one of which, in the NWF province, was successful. Nationalist groups in Balochistan province and schools run by pro-Taleban insurgents along the edge of Pakistan's tribal belt have been suspected of recruiting and training children between 11 and 15 years old.

**CHILDREN IN PRISON:** Despite a ruling obliging juvenile prisoners to be kept separately from adults due to the high rate of abuse in prison, there are few facilities for juvenile offenders. There are two in Sindh province (Karachi, Hyderabad) and two in Punjab (Multan and Faisalbad). Minors should at least be kept in separate barracks, but in many places this is not the case. Some children are incarcerated with a guilty parent, but under the law this should only be able to apply to children under the age of six.

Pakistan remains one of five remaining countries in the world known to have executed juvenile offenders – people who committed a crime while under 18 – in the past few years and Mach Central Jail has admitted to having at least two juvenile defenders on its death row.

***Pakistani and US State authorities collude in the illegal detainment of Pakistani children***

In July 2008 a missing twelve year-old boy, Mohammed Ahmad resurfaced with his mother, a US-listed Al Qaeda suspect, in detention in Afghanistan's notorious Bagram prison. The child had been missing for five years along with two younger siblings, and is thought by NGOs to have been handed over by Pakistan into US/Afghan custody as part of a terrorism pact in 2003. While the child flitted in and out of contact with the outside world in US custody, no explanation was given for his six month detention and no contact or guarantee of his health was given to his family. After an international campaign Ahmad was handed over to his aunt in Karachi. His siblings remain missing and unaccounted for.

In its statement http://www.ahrchk.net/statements/mainfile.php/2008statements/1702/ The Asian Human Rights Commission is concerned that the children may have been used in the interrogation of their parents (the father being held in Guantanamo Bay), and that they may be at risk because of what they have seen and experienced in Afghan prisons. The AHRC demanded the transparency and accountability expected of these UN member states, and it demanded the immediate release of the two remaining Siddiqui children.

**BARTERING USING CHILDREN:** In some rural areas the practice of awarding children as blood money compensation through tribal courts has become common place. The children will often be used for labour and sexually abused by their new owners, until old enough to be married or sold on, whether into marriage or sex slavery. The new minister of education in Pakistan, Mir Hazar Khan Bijarani, was himself ordered under arrest by former Chief Justice Choudhry in 2004 for his role in a tribal court that tried to use a number of children as compensation in an honour killing dispute. As noted (under Honour Killings) three minors were buried alive in Balochistan province, along with two of their aunts in July 2008. A minister that publicly defended the act as Baloch tradition was just promoted by the Zardari government.

***Three girls handed over to a man who killed his wife on the pretext of honour killing***

In a jirga held on October 20, 2008 a man who killed two of his wives for allegedly having an illicit relationship with another received impunity on the pretext of an honour killing. The jirga ordered the man – had allegedly fraternised with one of the deceased wives – to hand over three young girls, his daughter and nieces, together with 20 buffaloes as compensation to the husband. Police arrested the killer but soon released him and have respected the decision of the jirga. URL: http://www.ahrchk.net/ua/mainfile.php/2008/3042/

## 8. THE MOVEMENT FOR JUDICIAL INDEPENDENCE

Pakistan's judiciary was deposed on November 3, 2007, by the then-chief of army staff through the imposition of a state of emergency. Since coming to power the new civil and elected government has gone back on its written and verbal promises to restore it. Rather than follow through with a constitutional package and a legal restoration process, it has embarked down a road of intimidation and coercion, with the aim of dividing the movement. Willing judges have been 'reappointed' under new oaths – a procedure little different to that initiated by General Musharraf in the first place. A number of judges have refused to comply and remain deposed, including the former chief justice, Iftikhar Choudhry.

**UNCONSTITUTIONAL POSITIONS MAINTAINED:** Meanwhile the judges who bent to the will of the government back in November and were awarded senior positions, remain in those positions. Abdul Hameed Dogar, who was put in place by General Musharraf, is still working as the chief justice. At one point the government of Mr. Yousaf Gillani considered reducing his tenure as chief justice to 2009, however Choudhry should remain in that seat until 2013, according to the constitution. The constitutional amendments made during the state of emergency remain part of the government. The ruling party displays no political will to restore the judiciary to its

original formation (of November 2, 2007), before it was tampered with by Musharraf. In protest on this issue, the party of Nawaz Sharif left the coalition in August.

The 19-month struggle of the lawyers has done much to raise the awareness of Pakistan's citizens regarding the rule of law, and has reinvigorated people power. It is a struggle unprecedented in the history of the country. Citizens have witnessed and rallied behind the protests, in which lawyers have been beaten, fired upon, arrested and barred from their profession. Many lawyers have lost their livelihoods and the campaign is now escalating into aggression, as those fighting begin to realise that rule of law is still being used as a political tool, despite the change in governance. Those campaigning continue to be persecuted, and the present government's current agenda suggests that there is little hope that Chief Justice Iftikhar will be restored in the near future.

***Lawyers beaten and burned***

The lawyers' movement has long been under threat by the government of General Musharraf, whose coalition partners have been able to freely use violence against lawyers, particularly in Karachi, Sindh province, which is mainly ruled by Muttahida Quami Movement (MQM), a political ethnic party. Brutal attacks during street protests on April 9, 2008, in Karachi claimed the lives of 14 persons including a child. Six persons were burned alive, of which at least two were lawyers and two others their female clients. 19 lawyers went missing for days, before reappearing abused and in bad shape. More than 70 offices were ransacked and burned, including the office, house and vehicle of the general secretary of the Karachi Bar Association. The offices of the Malir Bar Association, 20 km away from Karachi city courts, were burnt to ashes. Five journalists were severely beaten, one a female journalist working for a local television channel, whose arm was fractured in the incident. More than 50 vehicles were burned and smashed, most owned by lawyers. Two private bus drivers were shot dead. The media and sources close to the bar associations alleged that these attacks on the lawyers, looting, killing, burning and abductions were carried out by the members of the MQM.

Prior to this in May 12, 2007 more than 40 persons were killed. The lawyers reported to the media that the attackers were in possession of incendiary weapons that exploded when thrown at a target. The killings were covered in detail by the media, with most accusations leveled at members of MQM. Just one day before, the group's leader Altaf Hussain had verbally abused Pakistan's lawmakers and urged MQM to thwart their support of Chief Justice Iftikhar Choudhry. (URL: http://www.ahrchk.net/statements/mainfile.php/2008statements/1470/) The new government has fostered a relationship with the MQM, now part of the new coalition and with seeming impunity. The government at federal and Sindh provincial levels have promised to investigate the attack several times, and have not followed through.

**PERSECUTIONS CONTINUE:** The arrest and persecution of activist lawyers and their leadership has continued. Recently the Pakistan Bar Council (PBC), under pressure from its chairman, the attorney-general for Pakistan, suspended the practicing licenses of the presidents of the Peshawar High Court Bar Association and the Multan Bar Association, plus another 10 lawyers, in retaliation to their activism. After a countrywide protest on the first anniversary of Musharraf's state of emergency, more than 100 lawyers were arrested on charges of agitation and disturbing the peace.

The dodging tactics of the new government threaten to damage the rule of law in the country even further, discrediting the supremacy of the judiciary and the civilian rule of the country.

## 9. FREEDOM OF THE PRESS


Pakistan claims that it has a free press. Before the latest government, there were greater restrictions like the PEMRA (Pakistan Electronic Media Regulatory Authority) Ordinance, through which several electronic channels were attacked and shut down by the authorities due to their coverage of the lawyers' movement. Many newspapers were prevented from publishing, and journalists covering protests were arrested and man-handled by the police. The new government has withdrawn the PEMRA Ordinance and thus its authority over the press, and the situation has greatly improved. However the government has yet to abolish the press and publication ordinance, 1963, which allows the government a variety of chances to intervene in the publication of news.

**THE LYNCHING OF THE MEDIA:** Powerful religious and ethnic groups can currently attack media houses, bully their staff and dictate their coverage unhindered due to political ties. Since journalists feel at risk they will tend to avoid coverage of certain topics, and submit to orders from these groups. For example when one powerful ethnic group attacked lawyers and burned a number alive on two occasions, the name of the ethnic group was omitted from the coverage. Those attacked and cowed include GEO TV, ARY ONE, AAJ TV, FM103 and almost all of the national newspapers.

***JOURNALISTS KILLED FROM 1999 TO 2008***

During the year 2008 at least eight journalists were killed in Pakistan, including Qari Shoaib Mohammad on November 8 (killed by 'mistake' say security forces), Mohammad Ibrahim on May 21 after a high profile interview of Maulvi Umar, by unidentified gunmen, and Khadim Hussain Sheikh on April 14, by unidentified gunmen. According to the report issued by the Pakistan Federal Union of Journalists, 33 journalists were killed during the nine-year rule of General Pervez Musharraf. Please see the following link. URL: http://pfuj.info/site/index.php?option=com_content&task=view&id=148&Itemid=40

**SELF-CENSORSHIP BY MEDIA HOUSES:** There is still self-censorship from the media. Little news is broadcast of trade union activity, or from those who regularly speak against the army or the security forces, particularly about the military operations in Balochistan and the suppression of separatists and nationalist groups. This is in part because of intimidation, but is also due to a narrow patriotic mindset, and a wish to secure the ideological boundaries of the country; for example, editors tend not to cover cases of religious groups attacked by majority groups. Self-censorship is most commonly activated for events that might be seen as against the Pakistani nationalism, Islamic ideology and commercial interests.

Trade unions rarely receive coverage due to the media's need for revenue from related advertisers. For example there has been campaigning from employees of Hotel Pearl Continental since 2002 against the retrenchment of about 350 employees, and little space has been given to it in newspapers and electronic media. The same can be said for the trade unions of the Dalda cooking oil company, Ghafooria textile mills, Hamdard, and other commercial enterprises; in this way it appears that the news can be controlled by any business with enough money to advertise. Peasantry movements in rural areas are generally ignored by media houses to appease the powerful landlords.

**JOURNALISTS ARE DENIED THEIR RIGHTS BY MEDIA HOUSES:** Journalists are denied their constitutional and legal employment rights, such as the wage board award for journalists from 2005 (salaries and benefits). There are three wage awards still due to be announced for the past three years, and journalists are being denied wage rises and pressured to work underrate. This increases the temptation for journalists to earn their money by other means, such as bribes, and weakens the system. The Supreme Court has several times asked the owners of the media houses to implement the wage award but nothing, as yet, has been done.

***An anti-media mind set***

In January 2008, during his rule as president, Pervez Musharraf asked a gathering of 800 overseas Pakistanis in London to "put one, two or three punches" to Pakistani journalists, who he believed were destroying the country's image overseas. Musharraf had been annoyed by a senior Pakistani journalist and correspondent of the Daily Dawn, Mr Zia Uddin, who questioned the security of the country's nuclear assets after a high profile terrorist escaped from the custody of Pakistani intelligence. While lamenting the critical questions, President Musharraf asked, "What types of Pakistanis are here? What can the enemies do against us when these people (the journalists) are already sitting here?" He appealed to the workers of the ruling party to stop such disgruntled elements. URL: http://www.ahrchk.net/statements/mainfile.php/2008statements/1351/

**SELF-CENSORSHIP BY PRIVATE TV CHANNELS ON MILITARY OPERATIONS IN TRIBAL AREAS:** According to the GroundReport website all private Pakistani TV channels have voluntarily has stopped airing Taliban comments on continued military operations in different parts northwest province bordering Afghanistan. (Please see URL: http://www.groundreport.com/Arts_and_Culture/Pakistani-TV-channels-banned-Taliban-statements) The channels are instead focusing on the reports showing the progress of military operations against the Taliban in the NWFP. Karachi-based Geo News, the most popular private Urdu channel; Karachi-based Aaj News, the second largest private Urdu channel; Karachi-based Dawn News, the first and only English news channel are following suit.

In August the private channels began airing lengthy reports detailing the progress of the military operations, but without broadcasting the Taliban's statements against the offensive or the government's claims. Geo News TV was observed to have made a special multimedia presentation entitled 'Situation in Tribal Areas' in which it briefed its audience at regular intervals throughout each day on the progress of the military operation. Anchors at Dawn News and Aaj TV were seen calling the militants Taliban and criticising them for the violence. The private channels focused only on troop activities in the program.

## 10. MILITARY OPERATIONS

Two provinces of Pakistan, namely Balochistan and the North Western Frontier Province (NWFP), have been under military operations for a number of years in the name of "war on terror".

**BALOCHISTAN:** This has been subject to large scale military operations since 2000, according to the strict policies of former president General Musharraf. During this period the Pakistan Army had used gunship helicopters and armoured cars against the civilian population, and the Pakistan Air Force used F-16 jet planes to bombard them. After the formation of the newly elected government in April an announcement was made to halt the operation. The prime minister and parties in the government apologised openly to the people of Balochistan. It has been alleged that more than 3,000 persons have been killed due to this operation in the Balochistan province. The military government wants to construct several cantonments here but there is serious resistance among residents in the area, as several districts in the province have been bombed by the Pakistan Air Force. A former governor and a chief minister of the province, Sardar Akbar Bugti, died with several other important persons in a series of aerial bombings.

It is also reported that more than 200,000 people have been displaced and have had to move to shelters in different districts due to the bombardments. More than 4,000 people have also disappeared after being arrested by law enforcement agencies, particularly by military intelligence and the Inter Services Intelligence (ISI). The former federal Interior Minister stated before the National Assembly of Pakistan on December 5, 2005 that more than 4,000 persons have been arrested in Balochistan province due to their involvement in anti-state activities. However, he did not clearly mention where those arrested persons were being held and why none of them had been produced before the courts for trials. According to the testimonies of persons who returned after having been missing for several months, and the research conducted by some human rights organisations, it has been revealed that the abducted persons were detained in military camps in different cities. The former detainees have also testified that they have seen many friends and their family members in detainment, who have also been missing for a long time.

The current situation is very much the reverse of what the prime minister and other people from ruling parties are announcing. The disappearances continue, and in a recent event on April 28, just four days before the visit of the prime minister to Quetta, the provincial capital of Balochistan, military personnel attacked and raided houses and hostels of Khuzdar Degree College in the city of Khuzdar, and arrested more than 200 persons. Among them ten persons are still missing. On April 29, army officials raided the house of comrade Ghaffar, the district president of the Jamhoori Watan Party, a

nationalist group, and since then his whereabouts are unknown. Attacks on civilians were carried out after the killing of two persons from military intelligence. A separatist organisation, the Balochistan Liberation Army, claimed responsibility for the killings but in retaliation the army attacked the whole city. The prime minister announced the withdrawal of the armed forces but the army has made no moves to leave the province.

On May 2, when the prime minister was visiting Balochistan, five persons were kidnapped by the law enforcement agencies and their charred bodies were later found in the centre of the market place at Dera Bugti city. These persons, namely, Nazar Mohammad Bugti, Rustam Bugti and Jeo Bugti (the names of other two were not available), were arrested before witnesses by military personnel on charges of having links with the Balochistan Liberation Army. Four persons were burnt alive in hot coal tar and there were other abuses reported during the military operation in Balochistan.

***Four persons burned alive in hot coal tar while other abuses reported during military operation in Balochistan***

On April 5, just six days after the formation of the civilian government, four people were arrested in the Zainkoh area in Dera Bugti district by military officers and were taken to torture cells there. They were asked to name the persons who are working with "Balochistan Liberation Army" (BLA). After failing to get a confession from the victims, the officers put four people in hot coal tar. Three died instantly while the fourth person, Mr. Jaffer Khosa died in custody seven days later. The army was searching for persons involved in the blasts of the natural gas pipelines which provide gas to different parts of the country, and other subversive activities.

According to local newspaper reports, the military started to use heavy force in Dera Bugti, Bairoon Pat and the border areas of Jafferabad district again, and searched the houses without warrants from the court. During this operation, army officers killed 12 persons on July 19, 23 persons on July 20 and 36 persons on July 24. It is also reported that 30 persons were killed and seventy were injured on July 27 and 28. Villagers claim that the military used chemical gas against the villagers and when they fainted, they were taken to unknown places where they were shot dead. Their bodies have not been handed over to their relatives. The affected areas are known as Pat Feeder, Bhawan, Baroon Pat, Shameen, Gwar, Chouber, Sari Darbar, Rustam Darbar, Baranjan, Khawar, Sand Curry, oacgh, Pir Koh and Sui Filds.

The Daily Jang, the largest circulated newspaper of Pakistan, reported on August 21, early that morning, that the army had deployed fresh contingents of troops in the areas of Bareli, Tukhmarh, Jhabro, Sano gari, Andhari and Nisao cheera. Seven innocent persons were killed and 18 persons were injured due to a whole-day of aerial bombardments in

the said areas. After a lapse of one day the military again started bombardments which killed several, including 13 women and children. The federal in charge, the minister of interior, visited the area on August 20 and announced that the military operation would continue if separatists were protected by the people. The newspaper also reported on August 24 that the military operation began again in the areas of the Balochistan and the Kohistan-e-Marri. Several groups claim that about 250 persons have been missing since the military operation started on July 19.

**THE NORTH WESTERN FRONTIER PROVINCE:** This regions has been badly affected by the military operations since 9/11 on the pretext of the 'war against terror' and militancy from the Muslim militant groups, particularly by the local Taleban members, who are responsible for the worst of the violence, including the hanging, stoning to death and killing of people through suicide bomb attacks. The civilian population is sandwiched between them, and there are reports of heavy casualties.

After 9/11 Pakistan has been faced with a new breed of militant. Perceiving the 'war on terror' as an open-ended crusade against anything Islamic and Muslim, a certain breed of educated young men are becoming increasingly angry at the Pakistani establishment, which they feel is compromising on issues with the USA administration, to a level of servility. These middle class youths are ready to go after their leaders, as well as those in the West.

The military operation in Swat valley will have be a year old in November, during the year the government claims more than 700 militants were killed. According to the official news agency, Associated Press of Pakistan, over the period of one year, 17 suicide bomb attacks were conducted in which 1,200 civilians were killed and more than 2000 injured. More than 700,000 persons have been displaced by the attacks from both sides: the military and Muslim fundamentalists. The government claims that during operations many hideouts of militants were also destroyed and 62 police officials, 35 persons from Frontier constabulary, 86 Army personnel and 7 from frontier core were killed. More than 1000 officers from law enforcement agencies were injured.

On November 24, in Mingora, a woman councillor, Ms. Bakht Zaiba and another local leader of Pakistan peoples Party, Mr. Siraj-ul-Haq, the ruling party leader and 15 militants were killed in acts of violence and clashes in Swat valley. According to Swat Media Centre, 15 militants were killed and six others injured and six vehicles were destroyed when security forces attacked Taliban hideouts in Matta, Charbagh and Khwazakhela tehsils. In the area of Matta the Taliban has threatened women not to come out of their houses or go to the markets otherwise they will be killed.

The daily Dawn reports, in a feature published on October 14, 2008 that Security forces, backed by helicopters and tanks, have launched an operation to flush out militants from areas close to Charsadda and Peshawar as part of a wider plan to establish the government's writ in the Mohmand tribal region. There are conflicting reports about the number of casualties. Officials have said that 21 militants were killed and several wounded in the operation launched late Friday night. Local people said that seven militants and six civilians were feared dead in the ensuing gun battle between troops and insurgents.

Reports say that one security personnel (army personnel) was killed and another sustained injuries during an exchange of fire with militants. One student was killed in shelling while three children suffered injuries while sailing in a boat trying to flee the embattled area. The small boat carrying 40 displaced people capsized in Haji Zai River, a tributary of river Kabul on Thursday night.

Residents say that security forces made an announcement at 11am warning residents to leave the area within 30 minutes. They said that soon after this helicopters started shelling the area. Troops backed by tanks with Cobra helicopters flying overhead were advancing towards Pir Qalla, Juma Khan Korona and Michni, areas which are considered hubs of the militants. Army, paramilitary forces and police were conducting joint operations in settled areas. Local people said that helicopters and tanks targeted suspected positions and several hideouts of the militants in 25 villages of Yaka Ghund sub division adjacent to Mohmand tribal region. These villages were declared part of the settled areas of the province about ten years ago.

These disputed villages housing a population of over 30,000 have virtually been declared a "no go area" and local Taliban had set up their own parallel courts and administration. A few months back an alleged kidnapper was publicly executed in front of a big mob. Police writ has been eroded and militants have now focused on the provincial capital. Residents said that choppers destroyed an explosives-laden vehicle of the militants in Badai Korona in which six people were feared dead. The house of a Taliban commander was destroyed in Qala Shah Begg. Forces have captured strongholds of the militants in Rashakai and Juma Khan Korona and have started advancement towards Michni.

A student of 10th class, Abadatullah, who was fleeing the violence-hit area was killed while five civilians were wounded. A large number of people, including women and children have been stranded in the conflict-hit areas due to heavy shelling and a curfew. Sources say that excessive use of force has caused collateral damage.

Army and paramilitary forces were deployed in the northern outskirts of Peshawar and parts of Charsadda district to block entry of the militants. Security forces have set

up checkpoints and stopped IDPs from moving out of the troubled areas. Bombing campaigns have started in Lakaro sub division of the Mohmand region. Helicopter gunships and heavy artillery were used in the operation and militants' hideouts were shelled in Lakaro adjacent to Bajaur tribal region.

Sources said that security forces opened fire on a motorcycle, killing one person and wounding two others including a bystander. Headquarters of the militants in Qanadaro and Karier areas were destroyed while a government school in Sandokhel area was targeted. Militants have captured the school and declared the building their hideout.

(http://www.dawn.net/wps/wcm/connect/...r+peshawar-sal)

350 schools and colleges in five tehsils had been closed since January due to military operations and the massive displacement of people of the Mehsud tribe. Of a total of 580 public sector educational institutions in the South Waziristan, 350 schools have been closed because the buildings of these facilities have been so badly damaged due to the ongoing conflict. The building of the Government Degree College Laddah sub-division was bombed which damaged the infrastructure, while equipment and furniture from many schools has been stolen. The damaged buildings of the college "are now under the use of the security forces". Some 200 students had been enrolled in the college. The Army launched an operation against militants in the Mehsud area of the troubled tribal region in January, which caused large scale displacement of civilians.

Locals said that many houses had been targeted in the area particularly in Laddah and Serwakai tehsils. The main road between Jandola and South Waziristan has been closed since the army launched the operation in the region and even displaced people were not allowed to return to their houses, even though an unofficial ceasefire had been declared in the region. Inhabitants of Wana and other areas of the restive region are using alternative routes due to closure of the main road, causing great hardship to the local population.

The girl's schools are the main target of the extremist Muslims and Muslim organisations. 250 girl's schools were burned or destroyed throughout the province. According to the BBC the city of Peshawar in north-west Pakistan faces a heightened threat from Islamist militants barely five months after a military operation cleared them from its outskirts. Back in July, suspected militants based in the tribal region surrounding the city started bombing music stores and warning barbers against shaving their clients' beards in several areas of the city's outskirts. They also picked up some prostitutes from the city to punish them for their "sins", and kidnapped more than a dozen members of the minority Christian community. The perpetrators were widely believed to be criminal gangs connected to the tribal underworlds operating out of Darra Adamkhel and Khyber tribal

regions - both lying just outside the administrative boundaries of Peshawar. Hundreds of video and barber shops were set on fire or destroyed. The Taliban and other militant organisations hold their own courts and punished more than 100 people in different parts of the province, including Parachinar, Bajor, Swat, South and North Waziristan and Dir, by slitting their necks, slaughtering them before hundreds of people and stoning to death. The women are not allowed to come out from the houses where the militants have a strong hold.

In a major extremist action earlier this month in the north western city, suspected Taliban fighters briefly kidnapped some 16 members of the minority Christian community. There were also reports of militants warning traders against video and music businesses. On November 22, a Taliban attack targeting a police check post and a bomb blast at a Sunni Muslim mosque on Saturday killed at least six people in Pakistan's restive NWFP, officials said. Three policemen were killed and one injured when Islamic militants raided a security post at 3:45 am in the Lora Pull area of Bannu district, about 200 kilometres south of the provincial capital, Peshawar.

There are continuous violations of Pakistani borders by suspected US drone planes killing dozens of civilians by missile attacks. In the month of November a marriage party was also attacked by drone planes, killing about 25 persons. On October 22, drones killed at least six people in a missile strike in a Pakistani tribal region of North Waziristan near the Afghan border. Two missiles were fired at a house in the Khushali Torikhel area near Mir Ali town at around midnight, according to local media reports. Pakistani intelligence officials said the missiles struck the home of a local Taliban commander.

# PHILIPPINES

## THE HUMAN COST OF INSECURITY

The situation of human rights in the Philippines in 2008 was marked by renewed conflict and an escalation of violence in some parts of Mindanao. The conflict was aggravated by the aborted signing in August of this year of the Memorandum of Agreement on Ancestral Domain (MOA-AD), an agreement that could have set the framework for peace negotiations between the government and the Moro Islamic Liberation Front (MILF) concerning the decade-old conflict. The renewed violence has resulted in dozens of civilians being killed after being caught in fighting, being hit during military air strikes, or dying from illness and diseases at evacuation centres. At least 500,000 persons from different conflict-affected areas have been displaced from their villages, fearing for their lives. The fate of civilians and displaced persons remains unclear given the lack of a breakthrough in peace negotiations.

When the Supreme Court (SC) ruled on October 14, 2008, that the MOA-AD was contradictory to the 1987 Philippine Constitution and that it had violated the right to information due to a lack of public consultation with concerned parties, the negotiations halted. The failure of the government and the rebel group to resolve the conflict has left civilians, including women and children, at risk of dying from being caught in fighting at evacuation centres. The evacuees, who are farmers for the most part, have become dependent on hand-outs and food rations while their crops have been left to rot.

The renewed conflict also witnessed the re-emergence and strengthening of the government's long-standing policy of arming civilians. Under the pretext of defending civilian communities from rebel attacks, the Philippine National Police (PNP) has replicated the military's Citizens Armed Forces Geographical Unit (CAFGU), calling them the Police Auxiliaries (PAXs). The members of the CAFGU are known to have been responsible for many acts of violence and other abuses since its creation. The police began recruitment and training in August to enable so-called "force multipliers" in defending civilian communities, while the soldiers were pursuing the MILF forces. The MILF was blamed for the murders of innocent civilians in Kulambugan in Lanao del Norte and in Maasim in Sarangani, which resulted in the escalation of violence in August. The violence subsequently spilled over to two other provinces, North Cotabato

and Maguindanao. Thousands of shotguns were being given to civilian recruits in conflict affected areas.

Police Auxiliaries' (PAXs) duties are to defend civilian communities from attacks. However, the measures have instead placed the villagers and these communities at serious risk of communal violence and vigilantism, as has been the case in the past under similar situations. When the recruitment of PAXs was publicly announced, a vigilante group who called themselves the Reformed Ilaga Movement came out in public vowing to fight against the Muslim rebels. The policy to arm civilians has given legitimacy to vigilantism and exposed civilians to greater risk of being caught in the conflict.
In the cities of General Santos and Davao, in Mindanao; and Cebu in Visayas, 2008 was marked by a serious increase in vigilante killings of persons suspected of involvement in criminal activities. These places already have a history of vigilantism in the 1970s and 1980s and such problems have now become resurgent as a result of the authorities' actions.

Cases of targeted extra-judicial killings of activists and enforced disappearance have sharply dropped this year following a concerted campaign by local and international NGOs and other actors at the international level. This is a very welcome development for the Asian Human Rights Commission, which has been one of a number of groups actively campaigning to bring these grave abuses to a halt. It must still be noted that none of these killings have resulted in effective or transparent investigations or successful prosecutions, so the perpetrators remain at large and free to kill again once the spotlight moves elsewhere.

Furthermore, the killing of ordinary persons with impunity has continued through this upsurge in vigilantism, in which murders have been taking place almost daily without credible measures being taken by the authorities to render justice and halt these crimes. The victims and families of the dead have not obtained any remedies. Not a single perpetrator of vigilante killings was charged and prosecuted in court in 2008.

While the government's security forces have been engaged in fighting rebels in the south, the actions the authorities are taking for the protection of lives of civilians in the rest of the country, notably those who remain as potential targets of extra-judicial killings and threats, have been ineffective. The writ of amparo that the Supreme Court promulgated in response to the extra-judicial killings also faced challenges concerning its effective implementation. The remedies provided by this writ, which provides protection for persons under threat, were initially seen as being a ray of hope in the fight against the hundreds of extra-judicial killings (numbering over 800 since 2001 according to local sources). However, the usefulness of the writ was undermined after the courts hearing petitions dismissed several applications for writs concerning threatened activists (see

details below). The failure by the government to take measures and introduce laws to assist the effective prosecution of cases - for instance, a strengthened witness protection programme, clear policies defining command responsibility, and laws criminalizing enforced disappearances and torture - frustrated attempts to ensure the protection of lives and the security of persons.

The lack of adequate laws criminalizing enforced disappearance and torture also prevented victims from obtaining remedies. The families of disappeared persons have not been able to obtain adequate assistance from the police or other concerned agencies. Given the lack of a legal obligation to take such cases seriously, cases of disappearance have routinely not been thoroughly investigated, and none of these authorities have been held accountable for their failure or negligence. The absence of these key laws has provided impunity to the security forces accused of having been involved in disappearances.

The practices used in arresting persons resemble those that have taken place when persons have been forcibly disappeared, notably because no arrest warrant was produced, and the victims were not allowed access to legal counsel or to their families, who often initially remain in the dark about the whereabouts of the detained persons. The police have deliberately prevented victims from contacting their relatives, blocked their access to legal counsel and held them incommunicado before being presented before court. Some victims, who are briefly disappeared, are later surfaced in police custody, and are often detained thereafter under false charges.

In previous years, the government and specifically the army, carried out a campaign of eradication of left-leaning opponents in a well-documented spate of extra-judicial killings. International pressure initially resulted in numerous forced disappearances taking place instead. More recently, targeted individuals are more likely to be disappeared for a short period and then surfaced in detention under charges that offer no prospect of being released on bail. While the AHRC has been encouraged by the drop in the number of killings, it remains clear that the authorities are still engaged in illegal actions against their political opponents in an unjustifiable campaign of rights violations that seriously undermines the rule of law in the country. In addition, given that there are no legal protections from these kinds of actions and that the perpetrators of grave rights violations have not been made accountable, it is possible to foresee a resumption of killings in the Philippines.

Some legal remedies have been made possible through concerted efforts on the part of civil society, notably concerning a case that concerns the lengthy detention of five

persons, known as the Tagaytay Five[1] , three of whom are activists, who were arbitrary arrested and detained for two years on the false pretext that they were involved in rebel activities, before being released in August 2008 (see further information on this case further down in this report). They were released after a court ruled to dismiss the police's complaint against them.

Political and human rights activists continue to be subjected to a pattern of threats. Activists investigating cases of disappearance, labour leaders who are fighting for workers to be provided with adequate compensation and benefits, amongst others, have been targeted in particular. Such threats are also extended to these persons' families. The military is making threats and conducting overt surveillance on the offices and houses of their targets. This surveillance is subsequently followed by activists being killed, disappearing or arbitrarily arrested on the basis of fabricated charges. In some places, the extent of fear and threats has been so severe that discussion about human and labour rights has been curtailed and individuals have become less willing to make complaints concerning violations of their rights.

## THE AUTHORITIES' INABILITY TO PROTECT LIVES

As mentioned above, in April of this year, the Philippines was reviewed under the United Nations Human Rights Council's new Universal Periodic Review (UPR) process. This resulted in a series of recommendations being made by various States which the Philippines should comply. Under the UPR process, the State being reviewed can either accept or not accept the recommendations made. Among the recommendations which the government accepted was that calling on the government to: "intensify its efforts to carry out investigations and prosecutions on extra-judicial killings and punish those responsible; and to strengthen the witness protection programme and address the root causes of this issue." The government was also urged to "provide a follow-up report on efforts and measures to address extra-judicial killings and enforced disappearances," including by taking into account the recommendations of Professor Philip Alston, the United Nation's Special Rapporteur on extra-judicial, summary or arbitrary executions.

The UPR's outcomes reaffirmed the findings of the Melo Commission, an independent body which the president created to conduct an inquiry to "address the media and activist killings" and subsequently those of Professor Alston. In concluding its inquiry, the Melo Commission report released on 22 January 2007, pointed out that its recommendations "mostly fall within the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" of the United Nation's Economic and Social Council issued on May 24, 1989.

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1 *Please see further information in the AHRC urgent appeal at: http://www.ahrchk.net/ua/mainfile.php/2008/2989/*

Apart from stressing that there should be "political will" to address the extra-judicial killings, the Commission recommended that: all reports and complaints of extra-judicial killings against the military must be investigated promptly; an adequate forensic laboratory should be made available to enhance investigative capability; the police's collection of evidence must be strong and sufficient for conviction; prosecution of cases is to be handled with efficiency and dispatch; the implementation of Witness Protection Programme must be enhanced - by also including the protection to persons receiving threats; and laws which would maintain a strict chain-of-command responsibility with respect to extra-judicial killings must be enacted.

In March 2007, less than two months after the Commission's report was released, the Supreme Court acted on the report's recommendation calling for the speedy disposition of cases of extra-judicial killings and designated at least 99 special courts to hear these cases. However, they have been rendered meaningless as cases have not been filed with these courts.

In the AHRC's 2007 annual report, both the Melo Commission and Professor Alston's recommendations were described as requiring urgent and effectively implementation. However, one year later, the lack of progress illustrates the government's inability and unwillingness to effectively implement them. While there has been a welcome drop in the number of killings, there have been no effective prosecutions of those responsible, who continue to enjoy impunity for grave crimes, threatening the enjoyment of human rights at present and in future.

This gives rise to several questions:

- Is the government incapable of implementing recommendations made by local and international expert bodies and mechanisms and the international community? The country's capacity can only be measured by conducting an examination of the functioning, or lack of, of its justice institutions and the reality of the respect for the rule of law.
- If it capable, is it unwilling to implement these recommendations and why is this the case?
- If it is unwilling, what credibility should the international community give to the Philippines, notably as it continues to violate its voluntary pledges made to secure membership in the UN Human Rights Council?

## THE LACK OF PROSECUTIONS AND CONVICTIONS

139 cases of extra-judicial killings and 23 cases of forced disappearance have been documented by the AHRC since January 2003 and were communicated to the United

Nations in the AHRC' sister-organisation, the Asian Legal Resource Centre's (ALRC), submission under the UPR process in November 2007. Five cases of extra-judicial killings have been documented by the AHRC in 2008. None of the cases documented by the AHRC between 2003 and end 2008 have resulted in successful prosecutions and the conviction of the perpetrators by the authorities. This indicates that there is total impunity for one of the most heinous human rights violations in the country. As previously mentioned, 2008 has also seen a significant increase in vigilante killings, particularly in the central and southern part of the country, which likely stems from the evidence that one can get away with murder in the Philippines.

Those seeking legal remedies or redress have been met with barriers and risks. The ineffectiveness and weakness of the Witness Protection, Security and Benefit Act (RA 6981) has also been exposed. For instance, the qualification for protection does not cover witnesses to cases that have not been filed in court or persons facing death threats, which remain contrary to the Melo Commission's recommendations. This means that many persons that urgently require protection are not getting it.

In April, 2008, the Office of the President (OP) pledged to strengthen the witness protection programme by certifying as urgent the legislation to strengthen the programme. However, a draft of this legislation is not known to exist as of the time of writing (December 2008). The government has pledged to increase the funding for the programme, but there is no information about how the funds would be spent or how this will directly benefit witnesses and the families of the dead.

This is not the first time the OP has made misleading claims. For example, when the OP issued a press release on April 22, it claimed that the government had already ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Actually, President Gloria Macapagal-Arroyo's had signed the instrument, which is an expression of intent, but it is only after the Senate concurs to the ratification of a treaty that it is considered legally ratified. The Senate has not done so as yet.

Neither the Department of Justice (DoJ) nor the Philippines National Police (PNP) have taken any serious actions to provide interim arrangements for the protection of witnesses facing threats. Although the Supreme Court has taken the initiative by promulgating the writ of amparo, in response to the lack of an effective witness protection mechanism, the enforcement of this remedy remains poor. The writ is a temporary judicial protection available to any persons whose life and liberty are seriously threatened. However, having this judicial remedy enforced effectively has been difficult in practice, as will be seen below. This is why legislation to strengthen the witness protection programme remains and urgent priority.

The implementation of the writ of amparo has been undermined. Five petitions for writs have been rejected on the premise that the petitioners have failed to produce "clear evidence" of "apparent or visible" threats to their lives in recent times. The National Union of Peoples Lawyers (NUPL), which is involved in representing victims in courts, has raised serious concerns as to how the remedy is being understood in courts. The courts' decisions have run contrary to the writ's intent as they cast the burden of proof concerning threats on the complainants, while the writ calls for cases to be dealt with in a way that guarantees personal safety urgently, rather than as a case under trial, which would cause inappropriate delays and requirements for persons seeking protection.

## THE POLICE IS FAILING IN ITS DUTY TO PROTECT

The police force has the utmost obligation as part of investigations to ensure that witnesses come forward and are encouraged to cooperate by affording them the necessary protection, including being recommended for the witness protection programme. However, the police have been completely failing in this regard. In the case of human rights violations, it can be surmised that this is more often than not in order to protect the authorities and guarantee impunity.

For years, the authorities have been using the lack of witnesses that are willing to come forwards concerning cases such as extra-judicial killings to justify their lack of action, even though the main failing in these cases has been the lack of methodical and effective investigations. In Davao City, the head of the local police has used the lack of witnesses as a convenient excuse to try to exonerate himself and his men from blame concerning their continuing failure to have those responsible for vigilante killings identified, arrested and effectively prosecuted in court. Despite there being at least 54 such killings between February and July 2008, not a single person has been prosecuted in court.

The protection of lives and properties, and the need for investigation is clearly stipulated as being amongst the police's highest obligations under Republic Act 6975, section 24 (a, b and c). The police are clearly failing in this department, notably by failing to ensure interim arrangements for protection in the absence of a strengthened witness protection programme.

The case of journalist Dennis Cuesta of General Santos City, who died on August 9, 2008, days after unidentified gunmen shot him, illustrates the failure by the police to ensure protection for witnesses and for journalist facing threats. Before Dennis' murder, it is reported that he had been receiving death threats for testifying in a land dispute case against an influential person and for being critical in his radio programme. The police did not affording him protection and security. All they did was offer to issue him with firearms by enlisting him as a "police asset" so that he could protect himself. However,

he was killed before even such an evidently flawed arrangement was put into place.

In another case, the wife and children of activist Jose Manegdeg (a.k.a. Pepe), who was murdered on November 28, 2005, have struggled for three years to obtain any reasonable arrangement for long term protection. Jose's wife, Florence, and her two children, have had to move from one place to another for their own safety. The murder charges filed against a soldier, Captain Joel Castro, formerly of the 50th Infantry Battalion, Philippine Army, who was said to have shot Jose, have been dismissed for lack of sufficient evidence and witnesses. The lone witness to his case recanted his statements out of fear, prompting the prosecutor to dismiss the complaint. The police did conduct fresh investigations into the case, but there has not been any substantial progress made.

Florence and her two children have appealed to the Philippine National Police (PNP) but they have not been given any protection. These experiences, which lead to loss of faith in the system, are shared by many other victims who survived attempts on their lives and the families of the dead who are pursuing cases in court. In fact, targeted persons do not tend to seek judicial protection through a writ of amparo or from the authorities, even if they receive serious death threats, as there is little or no faith in these.

Take the case of activist Gerardo Cristobal, a labour activist and member of the Solidarity of Cavite Workers (SCW), who was murdered on March 10, 2008. Gerardo first survived an attempt on his life on April 28, 2006, when a police officer and a member of a local security force ambushed the vehicle he was riding in Imus, Cavite. At the time of his murder, Gerardo had been involved in actively organising workers and labour unions in Cavite province for them to assert their rights and welfare. In Gerardo's case, to seek protection from the local police would be impractical, as they were the ones trying to kill him. In February 2007, he was again shot at by a gunman riding on motorcycle, while he was inside a government office in Imus, Cavite. Finally, he was killed in March 2008, without having been able to seek any protection. Actions by the government to protect persons under threat and investigations into extra-judicial killings would have prevented many such grave abuses.

## TO BE AN ACTIVIST IS TO BE THREATENED AND RISK BEING KILLED

Persons who work in favour of human rights or the interests of the poor and marginalized face serious risks in the Philippines. Such persons are branded as being sympathisers or supporters of the armed communist rebels fighting against the State and are then considered as being "legitimate" targets for reprisals by the military and other pro-State groups. Activists have been charged in court in acts of reprisal for their having pursued investigating cases of disappearance or for exposing abuses by the military

soldiers deployed in rural villages. Labour activists have also faced threats attempting to force them to refrain from carrying out legitimate union activities on pain of facing reprisals. The military also places labour and other activists under surveillance and has offering reward money for the arrest of a union leader, Dante F. Senillo[2] , on the pretext that he is a communist sympathizer. Details concerning such cases can be found later in this report.

Also the colleagues of activists that have been killed have also become the subjects of death threats due to their work and their association with the other victims. Threats are often sent by SMS (short message service) from phone numbers of unknown persons, warning activists to cease their activities on pain of death. Sometimes the threats are made by sending an envelope to an activist containing bullets. The activists are told that they are being watched. This phenomenon, which was common during the peak of the extra-judicial killings, continues to date.

The apparent lack of technical capacity by the police to effectively investigate these threats and identify the origin of the threats contributes to their continuing prevalence. Activists often don't report the threats they are receiving to the police as a result of a lack of trust.

When four activists from the Alliance for the Advancement of People's Rights (KARAPATAN) in Cebu City, assisted the family of Calixto Alfante, who had disappeared on June 11, 2008, they began receiving threatening messages on their mobile phones warning them to stop investigating the case. When they exposed the soldiers' involvement into the disappearance of Calixto, the military retaliated by charging the group with criminal offences - kidnapping and illegal detention - accusing them of holding their witness against his will and forcing him to make false statements against the soldiers. The witness has denied being held against his will when the preliminary inquiry was conducted on October 17, 2008. However, the serious allegations concerning the military's involvement in the abduction have yet to be impartially investigated.

Instead of complaining to the police regarding the threats against them, the four activists opted to write protest letters addressed to the headquarters of the Armed Forces of the Philippines (AFP) in Metro Manila, seeking their intervention. Ordinary police investigations are not perceived as being capable of delivering results. Such distrust has become the rule rather than the exception in the Philippines, leading to a dearth of registered complaints. The police urgently need to take steps to regain public trust. The only way to do this is by performing credible investigations and getting real results.

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2 *Please see further information in the AHRC urgent appeal at: http://www.ahrchk.net/ua/mainfile.php/2008/2825/*

The manner in which the police are investigating cases involving threats sometimes verges on the incredible. In one such case, the police effectively asked the victim to perform the investigation himself. Labour activist Dante Senarillos of Ormoc City had been the subject of continuing threats on his life since April 2004. The police's investigation was clearly failing to get any results. As the result of an intervention by the UN's Special Rapporteur on Human Rights Defenders, the police summoned him and required him to prepare a reply to the police authorities that should have been answered by the local police following an investigation.

In Tarlac City, soldiers have also been threatening several labour leaders, four of whom are union officers of the International Wiring System (IWS), a firm located inside the Special Export Processing Zone (SEPZ) in Hacienda Luisita. Dozens of other workers have also been threatened but their cases have not been made public for security reasons. The soldiers reportedly came to their houses and told them to refrain from their union activities, for instance, calling for better compensation and benefits, or there would be reprisals against them and their families. The military attempts to justify such activities by claiming the targets of the threats are supporting the communist insurgents.

In Tarlac, the legacy of threats, targeted attacks and the extra-judicial killings of several political, human rights and labour activists, has resulted in high levels of fear in the community. Many activists formerly working in this place were forced to migrate elsewhere due to the gravity of the insecurity and the risk of being killed.

## ARBITRARY ARREST, FABRICATION OF CHARGES

Arbitrary arrests, notably of activist and human rights defenders, continue to be a problem in the Philippines. The fabrication of charges is also used as a method to keep targeted persons in unjustifiable detention.

Persons have been arrested and detained despite being unaware of the charges against them. This is often the result of prosecutor's failure - either deliberate or otherwise - to ensure that the accused receives summons or notices informing them of the nature of the charges, in accordance with Rule 112, Section 3 of the Revised Rules of the Criminal Procedure, enabling this person to be given the opportunity to reply and find legal counsel to represent him in court. The AHRC has also documented the misuse and abuses of authority by prosecutors during inquiries and the filing of charges, in particular concerning activists and human rights lawyers. Although the charges against the victims or accused are typically later dismissed for lack of evidence, the prosecutors' practice of endorsing the filing of fabricated cases in court has resulted in victims suffering needless detention.

The case of the so-called Tagaytay Five is a point in case. When the police arrested these five persons, three of whom are activists, in April 2006 in Tagaytay City, the arresting officers were acting on unverified intelligence information that they were committing rebellious acts and that they had planned to overthrow the government. Two years later, the Regional Trial Court (RTC), Branch 18 in Tagaytay City ruled on August 20 to dismiss the complaints against them for lack of substantial evidence, releasing the five persons from detention. However, it took over two years before the trial could begin, subjected the victims to prolonged unnecessary and arbitrary detention, which included torture in detention. Even after their release, the police responsible for arbitrarily arresting and detaining them, and for torturing them while in custody, have not been held accountable. The prosecutors who recommended the filing of charges were likewise not held accountable.

These five persons have experienced a blatant violation of their rights under the law on Rights of Persons Arrested, Detained or under Custodial Investigation (Republic Act 7438). The law rightly stipulates that any persons under arrest or under custodial investigation should not be deprived of their right to legal representation, or contact with and visits from their relatives, and should be treated appropriately while in custody. However, these five persons had been deliberately hidden from their relatives following arrest, held incommunicado and tortured for days while in police custody. The National Commission on Human Rights (CHR) on May 14 of this year also affirmed, in concluding the inquiry they conducted into this case, that the victims' rights have been violated as cited above.

In a letter to the AHRC has received dated September 23, Commissioner Leila de Lima, the chairperson of the CHR wrote: "We would like to inform you that the CHR-National Capital Region (NCR) Regional Office has already resolved this in a resolution dated 14 May 2008. It found that respondents—who are members of the Philippine National Police (PNP) and the Naval Intelligence and Security Group (NISG) of the Philippine Navy—are guilty of violating the human rights of the complaints". In the resolution, the CHR also mentioned that the records of the case would be forwarded to the Office of the Ombudsman for the filing of the appropriate criminal and administrative cases against the respondents.

However, three days after the Tagaytay Five were released, on 31 August 2008 in Silang, Cavite, another nine persons, eight of whom are peasant activists and organizers in Cavite, were arbitrarily arrested after the policemen stopped the vehicle the activists were riding en-route to a meeting in Silang, Cavite. All of them were forced to alight from the vehicles and they were subsequently taken to the PNP's Regional Office in Camp Vicente Lim in Calamba City, Laguna. Their hands were tied, their mouths and eyes were shut with adhesive tape, and they were taken to a place where they were subjected to

questioning and torture. Each of them was repeatedly beaten.

Ms. Janice Javier (23) was hung upside down and was tortured to force her to admit that she is a member of the New People's Army (NPA) guerrilla. Mr. Franco Romeroso's (27) nipples and testicles were squeezed when he would not answer questions. Bernardo Derain was electrocuted on the head and on his sexual organs, a hard object was inserted in his penis and a plastic bag was placed over his head. Felix Nardo (24) was also electrocuted and his head was immersed in a drum full of water. Two days later, however, they were released from police custody for lack of evidence.

In this case, the police violated Rule 113 on Arrests, as they should have been able to prove that the accused: had committed, were actually committing or were about to commit a crime; or that there was probable cause to believe they had committed a crime. None of these requirements of a lawful arrest in absence of an arrest order were met when the police arbitrarily arrested and detained these nine persons. This was seriously aggravated by the subsequent incommunicado detention and torture to which the victims were subjected.

Seeking legal remedies or compensation for torture is blocked due to the absence of a domestic law on torture. Although there is a law that provides compensation for victims of violence and illegal detention - the Board of claims for victims of unjust imprisonment or detention and victims of violent crimes (Republic Act 7309) - its implementation has not been effective and it does not take into consideration the gravity of torture. Compensation can only amount up to a maximum of Php 10,000 (US$ 203) and the application should be made within six months of the incident taking place. This is obviously not effective or appropriate for victims of torture or those illegally detained for many years.

The National Prosecution Service (NPS), whose prosecutors are responsible for prosecuting cases in courts, are under the direct control and supervision of the Department of Justice (DoJ), the agency that is also responsible for implementing this compensation Act. The DoJ operates under the executive branch. There is a public lack of the trust in the DoJ as concerns the implementation of the compensation Act, resulting in victims largely not seeking compensation under this system. For example, in the case of the Tagaytay Five, the DoJ prosecuted the charges against them in court, rendering absurd any attempts to then attempt to apply for compensation from the same agency that initiated legal action against them.

## LEGAL PERSECUTION OF ACTIVISTS

The arbitrary arrest and continued detention of Remigio Saladero Jr., a labour lawyer,

after being issued arrest orders over fabricated charges of murder in Calapan City Mindoro Oriental, was also a result of the prosecutors deliberately abusing their authority. Saladero was forcibly taken from his house on October 23 in Antipolo City making use of an arrest warrant concerning murder charges. Saladero was not aware of any charges filed against him. The name of the person and the address in the arrest order was different from his but the policemen took him anyway. He was first briefly disappeared and was unable to have contact with his relatives to inform them of his whereabouts while in custody. By not having been aware of the charges against him, he was not able to make a defence in court. He was later taken to a provincial jail in Calapan City, Mindoro Oriental where he is presently detained.

It is thought that the prosecutor deliberately notified the murder charges against Saladero to the wrong address in order to deprive him of any opportunity to respond to the murder charges. A correct address would have enabled him to receive the prosecutor's summons or notice and prepare a defence. Also, the refusal by the court clerk to provide the court documents to the persons helping Saladero's case ran contrary to the victim's right to be properly informed of the nature of charges being filed against him.

Furthermore, he was also falsely charged by the prosecutor's office in Lemery, Batangas, together with 18 other political and human rights activists for allegedly being responsible for burning the cell site of a telecommunications company on August 2. The prosecution service in such cases is being used to persecute activists as could be seen in the case of the Tagaytay Five above.

The charges were a physical improbability as one of the accused, Romeo Aguilar, was confined in a hospital when the incident took place – he was in a wheelchair due to diabetes. The burning of the cell site was also claimed by a rebel group, the New People's Army (NPA). In the complaint before the prosecutor's office, Saladero and the 18 other activists were charged with "arson and conspiracy to commit rebellion".

In Cebu, activist Vimarie Arcilla who had been receiving threatening messages was also charged with kidnapping and serious illegal detention by the Provincial Prosecutor's Office (PPO) in Oriental Negros. The charges were posted in a press release in July 29, 2008, on the Philippine Army's (PA) official website, based on a complaint filed by the family of Catalino Ortega of Barangay Dobdob, Valencia.

## EXCESSIVE DELAYS ARE DEPRIVING TORTURE VICTIMS OF REMEDIES

Excessive delays in the prosecution system and the courts are depriving victims, particularly those alleging torture, from obtaining redress and remedies. As an example, take the case

of the Abadilla Five, who are five persons who were illegally arrested, falsely charged and tortured while in police custody.

In this case, the Abadilla Five were arrested in separate incidents on June 1996 by several persons attached to a special police unit, "Task Force Rolly", in Fairview, Quezon City, in connection with the murder of Rolando Abadilla, an influential police colonel during the regime of President Ferdinand Marcos. The police arrested them without any arrest warrants and they were detained incommunicado for days in a police "safe house."

There they were brutally tortured forcing them to confess involvement in Abadilla's murder. The policemen used electric shocks, suffocate them with plastic bags, severely beat and assaulted them, amongst other things. They were eventually sentenced to death in August 2000 based on evidence extracted under torture.

Before they were convicted for the murder of Rolando Abadilla, the CHR conducted its investigation into the allegations of torture, maltreatment and violations of their rights under Republic Act 7438. On 26 July 2007, the Commission concluded its investigation finding prima facie evidence to charge the 21 respondents, 15 of them policemen—six of whom were already reported to have died. One of the respondents was Senior Superintendent Bartolome Baluyot whose men were involved in allegedly planting evidence and the torture of three men. Their recommendation was submitted to the Office of the Chief State Prosecutor (OCSP) which is under the DoJ for their appropriate action.

The CHR has the authority under the Constitution to investigate complaints of violations of rights and submit its findings to the prosecutor's office, in this case with the OCSP of the DoJ. The CHR, as a public complainant, has concluded that "it [has] found a prima facie evidence" in indicting the policemen and their accomplices. Similar to Tagaytay Five's case of this year, the Commission also concluded the victims' rights were violated. The complaint was then taken over by State Prosecutor Marilyn Ro. Campomanes for preliminary investigation, in order to resolve whether or not there was probable cause to file a case.

However, for five years, Prosecutor Campomanes failed to conclude the preliminary investigation and to act on the recommendations by the Commission. Despite repeated appeals by the victim's legal counsel for the immediate resolution of the complaint and endorsements by Prosecutor Campomanes' head, the Chief State Prosecutor, the complaint dragged on for many years without resolution. Some of the documents have gone missing following Prosecutor Campomanes' reassignment from the OCSP to the City Prosecutor's Office (CPO) in Muntinlupa City. Despite having been reassigned and years of delay though, the OCSP continued to handle the complaint.

In explaining the loss of some documents and years of delay, Prosecutor Campomanes stated in her affidavit in replying to administrative charges filed against her with the DoJ that she had decided to take the documents home, and some were lost as a result. She was charged with neglect of duty, loss of case documents, and failure to resolve the complaint promptly. She, however, claimed the victim's legal counsel had sought to defer the conclusion of the resolution, which the latter denied. The administrative charges against her are yet to be resolved. Under the procedure, the prosecutors are required to resolve complaints promptly.

Only after the administrative charges were filed with the NPS against Prosecutor Campomanes was the case transferred to other prosecutors for their resolution. On 21 August 2001, the three special prosecutors assigned to resolve the case decided to dismiss the Commission's recommendation on the basis on subjudice rule. While Prosecutor Campomanes failed to conclude the case in five years, the panel concluded it in one month. The panel argued that to proceed with the investigation and prosecution of the case would "unduly influence or bend the mind of the Supreme Court (SC)" which at that time was reviewing the death sentence handed the five men by a local court in August 1999.

After the panel dismissed the complaints, several appeals were made to the DoJ by the complainant's legal counsel for the prosecutor's office to reconsider its decision. Under DoJ Department Circular No. 70, section 3, the DoJ Secretary has the authority to decide whether or not a charge is filed in court once a prosecutor's findings are challenged. However, the appeal process dragged on for over a year, and it was only on January 8, 2003 that the DoJ Secretary allowed the case to be reopened for preliminary investigation.

On March 25, 2004, the prosecutor issued charges against the respondents in court, but they did not include charges concerning torture. On 27 September 2004, the prosecutor submitted recommendations to the Ombudsman, who has the authority to review and make recommendations concerning criminal cases perpetrated by members of the police and military, for their review and appropriate action. The complainant's legal counsel has filed a partial motion for reconsideration to the prosecutor's office; however, it ruled that since the case was already under the jurisdiction of the Ombudsman, the authority to decide on its merit is upon them.

At the time of writing, the Ombudsman is yet to recommend the filing of charges in court. The complaint is still pending with the Ombudsman. Apart from the delays to the complaint of torture the Abadilla Five have filed, their two other appeals—the Petition for Review on Certiorari and the Motion for Reconsideration filed before the Supreme Court and the Court of Appeals (CA)—regarding the latter's decision on 1 April, 2008, affirming their conviction for murder, had not been resolved.

## THE WRIT OF AMPARO IS UNABLE TO HELP THE VICTIMS OF VIGILANTE ACTION

While there is a glimmer of hope for activists facing threats that they may be able to obtain judicial protection under the writ of amparo, this is not the case for persons who are routinely targets of the vigilante killings in southern and central part of the Philippines. These victims are typically alleged to have had involvement in criminal activities or are former detainees. Vigilantes have been taking the law into their own hands and executing such persons, with impunity. In the cities of Davao, General Santos and Tagum in Mindanao and Cebu in the Visayas, where vigilante killings have become part of local people's daily lives, persons who are likely targets of such action cannot obtain protection from the State, notably the police and the judiciary. Many persons are not aware of the writ of amparo and do not know how to seek protection under it. Many do not trust the authorities to help them, notably as some local officials have been openly endorsing as justifiable the murders of suspected criminals.

Furthermore, the authorities publish lists of individuals who are involved in illegal drug dealing and those using drugs, saying that they will suffer the consequences. These amount to death threats. In Davao City, these lists and threats are attributed to Mayor Rodrigo Duterte.

The plight of Jhonson Tiempo, a resident of 1st road, Barangay Calumpang, in General Santos City, who had to seek refuge in a local radio station instead of seeking police assistance or judicial remedies, after having been told that he was going to be killed, shows the lack of protection mechanisms provided to targets of vigilante killings. Another man, Aque Aballe of Purok 6, Sitio Lanton, Barangay Apopong, was an eye witness to the murder of another victim by vigilante group in his village in Barangay (village) Lanton, in April. He killed himself by hanging on July 27. His suicide was driven by fear that he was now being targeted because he had witnessed the murder of his neighbour who was sitting next to him when he was shot dead. The gunmen warned he would be next.

These two incidents took place at the peak of vigilante killings in General Santos City this year. They illustrate how ordinary persons have been deprived of protection or are not aware of how to avail themselves of it. It is the government's duty not only to provide protection, but to make sure that these offers are known to the public.

While there is a Public Attorney's Office (PAO) that may be able to assist the victims, this office is overwhelmed with cases.

Most of the applications for writs of amparo are filed by human rights lawyers or

lawyers who are involved in private practices, who know the law and its intricacies. For most persons, notably the types of persons being targeted by the vigilantes, this remains out of reach. There is no local group currently assisting persons experiencing threats of vigilante killings. Local NGOs are too frightened to get involved in documenting cases of vigilante killings or to assist families of the dead by way of affording them the legal assistance they require.

There is also a perception that the families of the victims of vigilante killings are unwilling to pursue cases in court. As a result, none of the tens of cases involving vigilante killings have reached courts. It is therefore of utmost priority for the concerned authorities, in particular the judiciary, to address these needs with urgency. In the cities of Davao and General Santos, although the existence of a "death squad" has long been public knowledge, no action has been taken to prevent further killings or bring justice concerning past killings.

One of the Melo Commission's recommendations was the need for legislation on the principle of command responsibility with respect to extra-judicial killings. The Commission sought to "penalize a superior government official, military or otherwise, who encourages, incites, tolerates or ignores any extra-judicial killing committed by a subordinate". Since the Commission's recommendations were put forward, no such legislation has been created, which means that public officials who incite or tolerate vigilante killings cannot be held accountable for their actions. Officials and the police authorities are failing with regard to their constitutional obligations to protect the right to life of any persons regardless of their social standing, and have furthermore often become complicit in these deaths by failing to act.

## ARRESTS RESULTING FROM FALSE TERRORISM CHARGES

The country's prosecutors have abused their powers in particular in cases relating to terrorism charges.

An example is the case of Edgar de la Cruz Candule of Botolan in the Zambales province. When the police arrested him from his friend's house on March 21, 2008, he was first charged with illegal possession of a firearm and ammunition. Candule was forced to admit that he owned the pistol and the ammunition recovered from the house while in police custody.

However, on April 1, 2008, the prosecutor, in the absence of substantial evidence, amended the complaint from illegal possession of firearms and ammunition to a violation of the Human Security Act of 2007 (Republic Act 9372). The prosecutor simply copied verbatim the core elements, notably "sowing and creating a condition of

widespread and extraordinary fear and panic," stipulated in the law that would constitute an act of terrorism, without providing any further information to substantiate the amendment to the complaint.

On November 28, 2007, Mr. Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, expressed concern in his report, concerning several provisions of the RA 9372. Mr. Scheinin criticised the law for not being "in accordance with international human rights standards." The government gave assurances that only when the elements mentioned earlier – "sowing and creating a condition of widespread and extraordinary fear and panic" - are satisfied could there be charges filed in court against any a person. However, Candule's case illustrates that even if they are not substantiated and irregularities take place at the prosecution level before they are endorsed to court, terrorism charges can be filed. The Human Security Act remains in effect despite criticism about the prosecutor's misuse and the UN expert's opinion.

Before Candule was charged for terrorism, this law had also been used against activists. Once a person is charge with terrorism, he is exposed to risk and may be killed. Those who kill a person charged with terrorism know they do not risk prosecution.

For instance, Jaime Rosios disappeared, having been forcibly abducted after he was charged for acts of terrorism. Rosios, a member of the Board of Trustees of the YBL (Yellow Bus Line) employees union, was charged for the August 2007 bomb blast at the company's bus terminus in Koronadal City. At the time he disappeared, he and the union were in the process of negotiating a Collective Bargaining Agreement (CBA) with the company, seeking better compensation and benefits for union members. He was charged together with three other persons for allegedly committing acts of terror. Rosios' whereabouts remain unknown to date.

As with the Candule case, the prosecutor who endorsed the filing of terrorism charges against Rosios and his fellow accused in court did not substantiate these or satisfy the requirements needed to make such charges. Rosios and his fellow accused were charged with committing acts of terror without the prosecutor having established that there were grounds to suspect that they were the ones responsible for the bomb blast. It is believed that Rosios' disappearance was directly linked to his being charged.

## CONCLUSIONS AND RECOMMENDATIONS

Many of the human rights problems facing the Philippines are well known. At the heart of the problem is a lack of political will to implement solutions to problems, even though there are many recommendations about how to bring about these solutions.

In particular, the AHRC is of the opinion that the strengthening of the justice system should be of primary importance, as there is no other way to effectively ensure the protection and enjoyment of rights, the punishment of perpetrators and reparation to the victims of violations.

Therefore, it is strongly recommended that an independent mechanism be created to monitor and evaluate the actual implementation of the recommendations made by the concerned international and local agencies, in particular the UN Special Rapporteur on extra-judicial, summary or arbitrary executions and the Melo Commission, as well as the key outcomes of the Universal Periodic review and other UN Special Procedures and relevant Treaty Bodies. There has been a serious failure by the government to date concerning the implementation of much needed recommendations from these bodies.

There should be a thorough review of the provisions and the implementation of the Witness Protection, Security and Benefit Act (RA 6981). The government's pledge to have this law strengthened, in particular the clauses regarding the requirements before a witness can be admitted into the programme, have remained unfulfilled to date. The draft on strengthening this law, if there is one, should be made public to enable a reasoned discussion on this subject.

The concerned government agencies, in particular the Philippine National Police (PNP), the Commission on Human Rights (CHR) and the Department of Justice (DoJ), should urgently develop interim protection measures for persons facing continuing threats and risks, as the failure to take steps regarding this will likely lead to further deaths, that it is the duty of the government to prevent.

The DoJ and Task Force 211, the presidential agency created to take responsibility for the prosecution of murder cases that are political in nature, should also consider as a priority the expansion of their mandate to include vigilante killings. Although these cases may not be political in nature, the number and frequency of such killings are making a mockery of the country's justice system and the represent a significant failure concerning the government's obligation to protect the right to life and security of the country's citizens, regardless of their social orientation.

The Supreme Court's (SC) adoption of two writs, the writ of amparo and the writ of habeas data which complements it, deserves recognition. However, there have been strong reservations as to how judges are dealing with applications, as they are ignoring the fact that these writs are designed to provide urgent relief and not lead to exhaustive and lengthy procedures before decisions. These are tools designed to protect the lives and security of persons.

With regard to the government's policies of arming civilians, in particular the continued operation of the Citizens Armed Forces Geographical Unit (CAFGU), Civilian Volunteer Organization (CVO), and the Police Auxiliaries (PAX), it must be abandoned. These groups must be disbanded. The continued existence and operation of such armed militias has already obscured the notion of state responsibility, permitting abuses of authority and rights while enabling impunity.

In addition to the policies arming civilians, there should also be a thorough review regarding the implementation of firearms controls. The spread of firearms is exacerbating the incidence of extra-judicial and vigilante killings in the country. The practice in which officials of the military and the police issue de facto weapons permits to persons they consider as being "assets" should be abolished.

Existing laws that lead to the violation of human and constitutional rights, in particular the Human Security Act of 2007 (RA 9372), which has already been declared contrary to international standards, must be repealed. The continued implementation of this law has arbitrarily deprived accused individuals of their rights, notably concerning their right to obtained legal counsel, the rights of the accused under custodial investigation, and the type and extent of punishment they face, inter alia. The arbitrary use of this law by public prosecutors, notably in the filing of unsubstantiated criminal complaints, has already resulted in arbitrary detentions.

In addition to the country's pledge that it would ratify the Optional Protocol on the Convention against Torture (OPCAT), the country's Congress should also ensure that domestic laws criminalizing torture are enacted without delay. The ratification of OPCAT would have no meaning, unless domestic laws are promulgated to bring national legislation in line with the Convention Against Torture, notably concerning legal remedies, and the country's constitution.

The government should also ensure the enactment of the proposed laws regarding the criminalization of enforced disappearance. The lack of such a law, even though the Philippines is a signatory to the Declaration on the Protection of All Persons from Enforced Disappearance, is a contributing factor to the families of disappeared persons' inability to seeking adequate legal remedies in cases of disappearance.

# SOUTH KOREA

## A YEAR OF HUMAN RIGHTS REGRESSION AND STATE AGGRESSION

### AN OVERVIEW OF THE SITUATION

South Korea has been viewed in recent years as one of the most developed and democratic States in Asia. However, 2008 has seen a new government take power and begin the erosion of many of the fundamental pillars of democracy and the human rights that underpin it. In particular, the use of force against popular demonstrations and efforts to limit the freedoms of assembly, expression and opinion, have given rise to concerns within and beyond the country. The police and prosecutors, in particular, have abused the powers provided to them under the law.

While the severity of human rights abuses may be far higher in other countries in Asia, the fact that one of the region's countries that had shown leadership in the protection of rights and freedoms is now regressing needs particular attention, as it may have ripple effects beyond its borders.

While the new administration has made policies that favour industrial conglomerates and the rich, it has not provided any protection for the poor. It is feared that this is the beginning of a trend, in which the justice system is misused to the detriment of the rule of law and in favour of the rule by law.

### 1. CONCERNS THAT HAVE BEEN HIDDEN ARISE AFTER POLITICAL CHANGES

Mr. Lee Myong-bak, a former CEO and Seoul Mayor, was elected President in elections held in December 2007. Before his inauguration, the Presidential Transition Committee was formed to make a plan for changes to government institutions and policies on the grounds of his presidential pledges. Out of these changes, the committee hinted that it would put the National Human Rights Commission of Korea (NHRCK) under the direct control of the president. It insisted that the NHRCK breached 'separation of powers'

according to the Korean Constitution. [1]

This plan drew both national and international attention, as it would constitute a serious setback for human rights as well as the independence of the NHRCK, in a country where government institutions are already fragile and lacking in independence. Due to the pressure from inside and outside of the country, the Transition Committee finally withdraw this plan.[2] Besides, the Transition Committee also established several other plans, such as the creation of a national waterways and canal system and education reforms. However, such plans have been criticised due to the lack of proper discourse with experts in each field.

In parliamentary elections held on April 9, 2008, the Grand National Party to which the President belongs took the majority. After these two main political changes, civil society alleged that channels of communications with government officials have been obstructed and officials have been also hesitant to communicate with civil society concerning sensitive issues. These changes have been interpreted as stemming from the President's dictatorial style of governance.

Mr. Lee made several business-friendly policies but at the same time, has restricted civil and political rights. On August 15, on Korea's Independence Day, several CEOs who had been imprisoned for economic crimes such as tax fraud and other crimes were given amnesty[3] . However, the freedom of assembly and demonstration and freedoms of expression and opinion, which are essential components of a working democracy, have been restricted.

For the first year as president, his economic policies have been criticised as favouring only the rich. The justice delivery systems such as the police and prosecution have voluntarily obeyed or been subservient to the new administration. The judiciary has also shown that it has not been free from political bias.

## 2. WHEN AN INTERNATIONAL AGREEMENT RISKS VIOLATING INTERNATIONAL HUMAN RIGHTS LAWS

After his inauguration on February, President Lee flew to the United States of America (USA) to have a meeting with President George W. Bush. Before this meeting, the governments had come to an agreement to restart importing US beef, with several

1 *Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2719/*
2 *Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2758/*
3 *Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1650/*

changed conditionality clauses, such as the expansion of the concerned beef products and the ages of livestock used, as compared with the previous agreement, which contained greater restrictions and therefore better health protection for Korea's people. People were concerned about their health due to the fears concerning risks associated with Bovine Spongiform Encephalitis, or Mad Cow Disease. The changes in the agreement prompted public demonstrations by persons holding candles asking for a renegotiation to secure people's health and strengthen the national quarantine system.

The Lee administration's failure to communicate properly with the public resulted in escalating demonstrations, and a stage was constructed for everyone to be able to express their frustrations and criticism of the government policies. The government reportedly viewed the protests as resulting from agitation by anti-US groups or leftists. This later encouraged the prosecutor's office to prosecute leading demonstrators under the National Security Act.

Due to popular pressure, the Korean government eventually changed some conditions in the agreement during further negotiations - the Quality System Assessment (QSA) scheme was adopted to guarantee that beef came from cows under 30-months old. However, protesting continued as this was not enough to placate the demonstrators. It is worth noting that the USA only distributes meat from cows under the age of 20 months for its own domestic consumption. The Ministry for Food, Agriculture, Forestry and Fisheries (MFAFF), in charge of the agreement, published it in the government gazettes on June 25, 2008, when the agreement came into effect. Whereas the Japanese government inspects all imported beef from the USA, the Korean government only tests below 3 percent of all imported beef for Mad Cow Disease.

Mr. Lee's administration simply advertised the US beef as being safe and campaigned to encourage people to consume. At the same time, it labelled the protesters as being mislead by masterminds, rather than engaging in dialogue or strengthening inspection systems to protect people's health.

During this whole process, it surfaced that there is no established domestic process for monitoring the content of agreements to ensure that they are in line with Korea's obligations under international treaties. The agreement has several articles that have failed to respect, protect and fulfil the enjoyment of the right to health. [4]

Article 60 (1) of the Constitution states that, "the National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties

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4 *Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1604/*

of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters". However, this agreement had been never discussed in the National Assembly.

Besides this, the agreement-making process has been lacking in transparency. A civil society organisation has asked for relevant documents concerning the agreement from the Ministry of Foreign Affairs and Trade and MFAFF, but they have not been provided, without a reason being given.

What if the rights of people enshrined in international human rights laws to which the Korean government is a State party are nullified by agreements the government enters into?

## 3. STUDENTS HOLD CANDLELIGHT VIGILS

When the US beef agreement became known to the public in April, 2008, middle-school students started holding candles in protests in Cheongyecheon, near Seoul City Hall. These students began the action because they feared being the first consumers of the US beef in school meals. Teachers prohibited them from holding these protests and monitored them to see if their students were participating. The police also visited the school and investigated those who took part in the protests. Students submitted a complaint to the NHRCK alleging that their freedoms of assembly and association as well as freedom of speech were being violated.


Meanwhile, a group called "People's Conference Against Mad Cow Disease", a coalition of about 1,700 organisations nationwide was formed on May 6, 2008, to regularly organise candlelight vigils to provide a platform for people to express their views and to gauge Korean's views on the contents of the agreement. A number of people volunteered for the candlelight vigil including professionals such as photographers, lawyers, medical doctors and food providers.

The candlelight vigil was broadcast live through the internet. Experts also provided interpretation on the agreement and pointed out the failure of the government to protect

people's health, comparing the deal to a similar agreement by Japan, notably on the issue of the inspection system.

Amateur photographers assembled together as the 'Civil Press', taking photos of the marches and any incidents of police violence. Others volunteered to provide medical treatment as and when needed. Small shop owners offered free noodles, coffee and tea to the participants, while farmers offered watermelons and other agricultural products. Human rights activists wore vests identifying them as 'human rights monitoring group' and distributed flyers showing possible actions to be taken if they were arrested, as well as encouraging demonstrators not to respond when provoked by riot police. Staff from the National Human Rights Commission were also present at the demonstrations to monitor any abuses of human rights. All of these voluntary activities continued daily for over 100 days.

The police and prosecutors were mobilised to suppress the demonstrations, leading to concerns related to the right to information, the freedoms of assembly and demonstration, the freedoms of opinion and expression, the unnecessary use of police force and the misuse of power by the prosecutor's office.

## 4. COUNTER-ACTION BY THE GOVERNMENT AGAINST DEMONSTRATORS

Theoretically, the freedoms of assembly and demonstration are guaranteed under the Korean Constitution. Article 21(1) of the Constitution reads, "All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association" and the same article's section (2) says, "Licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognised".

However, to be able to hold the demonstrations in question here, civil society had to organise cultural festivals due to the Act on Assembly and Demonstration preventing assembly and demonstrations. The Act says that everyone who wants to hold an assembly and demonstration, has to inform and get permission from the police. Not only does the Act itself restrict the rights to assembly and demonstration but it also breaches the Constitution as well as provisions in the International Civil and Political Rights (ICCPR), to which the government of South Korea is party.

In practice, the police did not allow people to hold assemblies and demonstrations on the pretext of public order. However, the police have failed to provide an explanation about this arbitrary decision. The police gave permission to one side that supports government policy, not to the other side that oppose it. They also communicated their decision to

organisers only a few hours before the scheduled assembly. The Act has been arbitrarily misused by the police at their own discretion, making it function as a permission system. The Act says that no assembly and demonstration is permitted before sunrise and after sunset except concerning cultural festivals or performances.

After repeated failures in getting permission from the police, organisers called the candlelight vigil a cultural festival in order to avoid it being illegal, however the police considered it as being a demonstration on the grounds that a political message was involved. This is how the candlelight vigil became branded as being 'illegal' by the police. While people continued taking part in the vigil, the police blocked all gates of the subway station nearby where the assembly was supposed to be held and trains were not allowed to stop there.

Frustrated by the government's response to the people's demands and wanting to deliver their messages to the President directly, the demonstrators began a march. The police blocked all roads with police buses to the Cheongwadae, the Presidential Office. In general, people held peaceful demonstrations during the whole period of protest, which lasted over three months, except for a few days when some protestors tried to move police buses and damaged some of them in the process. However, police interpreted the assembly and demonstration as being technically illegal and, began arbitrarily arresting people for violating the Act on Assembly and Demonstration and Road Traffic Act.[5] The police also indiscriminately assaulted people with batons, shields and their boots. Fire extinguishers and water cannon were also used in ways that constituted violations of crowd-control regulations.[6]

During this whole process, the police hid their name tags to make identification impossible.[7] To worsen matters, on August 5, a group of specially trained officers for the special purpose of arresting demonstrators began operating. The police also proposed a plan under which money would be paid to officers depending on the number

5 *Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1554/*
6 *Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1570/*
7 *Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1641/*

of people they arrest and calculated retroactively into their salary beginning from May 2. According to the plan, officers were to be paid 20,000 KRW (USD 20) for each person arrested and investigated without leading to detention and 50,000 KRW (USD 50) for a person arrested and investigated resulted in detention. This initial plan was modified to a system with a different name but similar contents, accumulating the number of arrests and providing rewards for officers at year's end. Likewise, the police were encouraged to arrest people to assist their chances of promotion.[8]

The police arbitrarily arrested people who took part in the vigil on the grounds that they did not get permission from the police. If a protester even simply stepped on the road, he or she was arrested under the Road Traffic Act. Police equipment such as shields, batons, water cannon and fire extinguishers had not been used defensively, but to attack protesters.[9]

The amended Criminal Procedure Act came into force this year with a view to promoting and protecting human rights. However, during the vigil, the police simply ignored these guidelines and regulations in the process of forcible dispersals of demonstrators. The police also forced women protesters to take off their bras during detention in police stations.[10] In spite of thousands of protesters being injured, only one policeman caught on film kicking a young woman in the head has been arrested, with two police commanders being dismissed and four other police officers receiving various administrative forms of punishment concerning the same incident. This low level of accountability encourages even more violence by the police. It should be recalled that the government agreed to the recommendation made by Canada during the Universal Periodic Review concerning the necessity for all allegations of torture and ill-treatment by law enforcement officers to be investigated. The government must ensure that it now makes this a reality in practice rather than simply words expressed at the United Nations.

Meanwhile, in a symbolic action, all 14 members of Human Rights Advisory Committee of the National Police Agency resigned, to demonstrate their strong protest and concern about the excessive use of force by the police in handling the protesters. The Committee, led by Chairperson Mr. Park Kyung-seo (the former Human Rights Ambassador of Korea as well as the former Commissioner of the NHRCK), consisted of 14 prominent legal experts as well as civic leaders.

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*8 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1643/*

*9 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

*10 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1658/*

## 4.1 ATTACKS ON LAWYERS PROVIDING LEGAL ADVICE

An organisation consisting of lawyers took part in the protest to provide legal advice to those arrested, as and when required, and to monitor human rights violations by the police. They wore a vest plainly identifying themselves as "A Group of Lawyers Monitoring Human Rights Violations."
Whenever people were arrested, the lawyers were not allowed to talk to them by the police, despite identifying themselves as lawyers. Instead, those arrested were sequestered in police vehicles at the site of the protest. The lawyers had to wait for a phone call or message from the police station from the arrested individuals before being allowed to visit them – which only occurred long after their arrests.

When forcibly dispersing protestors, the police ignored procedures for arrest that are stipulated in both the Korean Penal Code and its Procedure Act. Lawyers identifying themselves and appealing against an illegal arrest were also arrested along with the demonstrators. Attorney Ms. Lee Jae-jung was beaten with a police shield several times, arbitrarily arrested twice, illegally detained and later released. Even though she stated she was a lawyer, it proved to be of no use.[11]

Whenever the police forcibly dispersed protestors, their actions often resulted in injuries caused by shields and batons. The case of Mr. Lee Joon-Hyung, another lawyer, is one example. At 2 a.m. on June 26, when the riot police were chasing protestors with their shields held horizontally, an unidentified riot police officer hit Mr. Lee on the forehead with his shield, knocking him unconscious and resulting in a serious injury that required hospitalisation for eight days. As a result of this attack, his skull and eye socket sustained fractures, and there were injuries to his entire face. Bruises also covered his whole body.[12]

## 4.2 ATTACKS ON JOURNALISTS

Journalists were not protected from attacks by the police during the protests, even though they were wearing helmets and/or armbands that clearly identified them as being members of the press at the time of the attacks. Even though they told the police they were journalists, the assaults continued.

In addition to injuring journalists, their camcorders and video cameras were damaged by the police to such an extent that the equipment was inoperable. Mr. Ha, from the

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*11 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

*12 Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2925/ and a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

newspaper 'The hankyoreh' said that his camcorder was intentionally twisted and broken by the police so that he could no longer film those who were beating him and the police's violent response to the protests on June 29. Mr. Kim, of Voiceofpeople, said that journalists' equipment has been damaged by the police's use of water cannons and fire extinguishers directed at journalists.

Why have these tactics now been employed by the police? The police only rarely targeted journalists at protest rallies in the past, but under the new government of President Lee, the police have blocked the path to those who were arrested or injured, or the police put their hands over the lenses of journalists' cameras. Moreover, Mr. Kim also said that a special unit of the police used at the rallies to arrest protesters is trained to block journalists from covering the event by surrounding them or pushing them.[13] Several journalists were even beaten by the police. The police later changed these tactics, using their shields to block photographers from taking photos.

## 4.3 ATTACKS ON VOLUNTEER MEDICAL WORKERS

During the protest, several people volunteered to provide medical treatment either to the protestors or to the injured police. They also wore clear identification markers indicating that they were medical staff. However, they were also attacked by the police during the forcible dispersal of protestors. Even though several medical staff were attacked by the police, they did not lodge a formal complaint or bring a legal case against the police because they do not want to jeopardise their work at future rallies to serve people in need.[14]

## 4.4 ATTACKS ON ORGANISERS

When the government announced the beef agreement in the gazette on June 25, about 1,000 people including Mr. Ahn Jin-geol and Ms. Yoon Hee-sook attended a press conference criticising the government's gazette. At 3pm, the police started arbitrarily arresting people on the spot, including Ms. Yoon and Ms. Lee Jeong-hee, a Member of Parliament and a 12-year-old girl. Seeing the arrest of the minor, Mr. Ahn appealed against this arrest but he too was arrested. Mr. Ahn and Ms. Yoon were later accused of violations of the Act on Assembly and Demonstration and Road Traffic Act.[15]

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*13 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

*14 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

*15 Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2924/*

Arrest warrants were also issued for six people on June 27: Mr. Park Won-seok and Mr. Han Yong-jin, co-chairs of current affairs of the People's Conference Against Mad Cow Disease; Mr. Kim Gwang-il and Mr. Kim Dong-gyu, team leaders of organising of the People's Conference Against Mad Cow Disease; Mr. Paik Eun-jong, vice president of the internet cafe Anti-Lee Myung-bak; and Mr. Baik Seong-gyun, president of the internet community Minchincow.

Since July 5, they sought sanctuary in Jogye Temple, a Buddhist temple in the centre of Seoul, and couldn't leave without being arrested by the police, which had maintained 24-hour patrols around the temple. Since then, another person - Mr. Gwon Hye-jin, the general secretary of Hung-Sa-Dan Education Movement headquarters - joined them after an arrest warrant was issued for him on July 10. They were charged under the Act on Assembly and Demonstration and the Road Traffic Act.

On October 30, those in the Buddhist temple escaped and went into hiding. Mr. Park Won-seok, Mr. Han Yong-jin, Mr. Kin Dong-gyu, Mr. Paik Eun-jong and Mr. Gwon Hye-jin were arrested by the police at 1:30am on November 6. The police also arrested Mr. Oh Jong-ryeol, 70, and Mr. Ju Je-jun, 38, who are also members of KSPM, for "organising an illegal assembly and demonstration" on November 14. Mr. Kim Gwang-il and Mr. Lee Seok-heng, Chairperson of Korean Confederation of Trade Unions (KCTU) were still hiding as of early-December 2008.

At 5:50pm on 30 June 2008, about 40 police officers came to the office of Korea Solidarity of Progressive Movement with a seizure and search warrant and arrested Mr. Hwang Soon-won, the director of democracy and human rights at the organisation. The reasons given for his arrest were: planning an illegal assembly and demonstrations. After his arrest he was interrogated at the Jong-ro Police Station.

Police also raided the office of the People's Conference Against Mad Cow Disease that

had temporarily used the first floor of People's Solidarity for Participatory Democracy (PSPD), and the office of Korea Solidarity of Progressive Movements (KSPM), a member of the coalition, on June 30.[16] At the time of search and seizure, the police allegedly failed to follow the required procedures.

Mr. Ahn was released on bail on August 11 and Ms. Yoon and Mr. Hwang were released on bail on September 10. Their cases are currently pending before a court. Meanwhile, the Seoul Central District Court decided to ask for adjudication on the constitutionality of article 10 of the Act on Assembly and Demonstration by the Korean Constitutional Court on October 9.

On October 29, those who stayed in the Buddhist temple escaped and went into hiding and Mr. Park Won-seok, Mr. Han Yong-jin, Mr. Kin Dong-gyu, Mr. Paik Eun-jong and Mr. Gwon Hye-jin were arrested by the police at 1:30am on November 6. The police also arrested Mr. Oh Jong-ryeol, 70 and Mr. Ju Je-jun, 38, who are also members of KSPM, for organising illegal assembly and demonstration on November 14. Mr. Kim Gwang-il and Mr. Lee Seok-heng, Chairperson of Korean Confederation of Trade Unions (KCTU) are still hiding.

Two mothers of children created a web site in order to share information on how to raise their children and on food. During the period of vigil, they also took part with their children, using strollers. After the vigil, the police investigated them. Some politicians and conservative newspapers stated that the mothers who brought their children to the protests are child abusers. The police also announced that they would investigate them for child abuse.

It must be recalled that during the session of Universal Periodic Review held on August 13, when being asked by the government of Algeria whether guarantee shall be provided for the freedom of association and assembly in law, the Korean government replied that it would do so. [17]

## 5. RECOMMENDATIONS BY THE NATIONAL HUMAN RIGHTS COMMISSION

The National Human Rights Commission has adopted recommendations regarding the candlelight vigil on October 27. They are as follows:

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*16 Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2924/*

*17 UN Doc. A/HRC/8/40: http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/KR/A_HRC_8_40_RoK_E.pdf*

1. The National Human Rights Commission of Korea (NHRCK) recommends that the Minister of Public Administration and Security give a warning to the Commissioner General of the Korea National Police Agency regarding some acts of excessive violent suppression by the police in the process of suppressing candlelight demonstrations, thereby causing injuries of some demonstrators.

2. To prevent recurrence of human rights violations in demonstrations, the Commission recommends that the Commissioner General of the National Police Agency adhere rigidly to defence-centred policies which guarantee citizens' physical safety.

3. The Commissioner General of the National Police Agency is held accountable for human rights violations committed during the suppression operations around Anguk-dong Rotary on the morning of June 1, 2008 and in Taepyungro and Jongro around midnight on June 28, 2008. The Commission has recommended that he take disciplinary measures against the chief commissioner of riot police and the commander of riot police regiment 4 of the Seoul Metropolitan Police Agency.

4. As it was recognised that demonstrators, residents, and a large number of civilians experienced traffic difficulties due to extensive traffic blocking measures taken by the police around the site of demonstrations, the Commission recommends that the Commissioner General of the National Police Agency not block traffic confirmed to have connection with the demonstrations.

5. The Commission recommends that the Commissioner General of the National Police Agency provide legal provisions beyond ministerial regulations on factors that may inflict serious physical injuries upon a human body, such as the maximum pressure or the nearest distance to be observed when water cannons are to be used.

6. The Commission recommends that the Commissioner General of the National Police Agency not deploy a fire extinguisher directly at a person and use it only for its original purpose of extinguishing fires; the powdered gas emitted by fire extinguishers has the potential to inflict physical harm upon a human body and the smoke screen formed by the ejection of fire extinguishers may induce violence by concealing violent acts by the police.

7. The Commission recommends that the Commissioner General of the National Police Agency take steps to prevent acts of throwing by the police, as objects thrown at unarmed demonstrators have a high potential for causing harm.

8. The Commission recommends that the Commissioner General of the National Police Agency discontinue the customary practice of forcing arrested persons to provide a

signed written statement and that the form of bansungmoon (a statement of regret of one's conduct) be examined; both practices have been indicated as violating the Law on Assembly and Demonstration.

9. The Commission recommends that the Commissioner General of the National Police Agency ensure that all riot police officers attend to their guard operations in uniforms that have certain marks attached to them so as to facilitate identification.

However, these recommendations were met with an immediate and complete refusal from the government. In a press release on October 29, the Korea National Police Agency (KNPA) claimed that the Commission's findings about the candlelight protests are partial. The KNPA stated that the Commission's findings are based on "a few exceptional cases of police abuse" and did not take into consideration that the candlelight protests were "illegal and violent". As before, the police parroted in the press release that they will protect and support a peaceful legal protest, while firmly dealing with illegal and violent protests "in accordance with laws and principles".

During the parliamentary audit on November 3, Prime Minister Mr. Han Seung-soo and Justice Minister Mr. Kim Kyung-han also refused to accept the Commission's recommendations with similar reasons to those given by the KNPA. Prime Minister Mr. Han Seung-soo further said that he would accept the Commission's findings only if they are made "appropriate."

Interestingly, the Korean government gave the same opinion in reaction to a recent Amnesty International report[18], which confirmed the Korean police's use of unnecessary and undue force against protesters.

To avoid similar allegations by the police and to ensure the impartiality and accountability of its inquiry as an independent government agency, for almost three months, the Commission in fact carefully inquired into about 130 petitions relating to allegations of police abuse during the candlelight protests, listened the testimonies of both protesters and police and strictly dealt with only relevant evidence, before making final conclusions. The significant criticism from both inside and outside the country has fallen on deaf ears, however.[19]

The credibility of the national human rights institution lies in its capacity to deal without fear with the State authorities that violate rights. A national human rights institution that

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*18 Amnesty International, "Policing the Candlelight Protests in South Korea", ASA 25/008/2008: http://www.amnesty.org/en/library/asset/ASA25/008/2008/en/7866408a-9395-11dd-8293-ff015cefb49a/asa250082008en.pdf*

*19 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1751/*

would not condemn the violations of rights by State agencies does not deserve to bear the name of a national institution for the protection of rights. The Paris Principles on which national institutions are built expressly state that the State should guarantee and respect the independence of such institutions.

The prime minister and justice minister, speaking on behalf of the government, expressed the political perspective of the government. Therefore their rejection of the recommendations made by the NHRCK will be seen as an attempt by the government to undermine the role and function of the Commission. Since the recommendations relate to taking serious action against errant police officers, these officers are likely to see these high ranking government officials' statements as an expression that the government will not carry out the recommended measures. The encouragement of errant police officers and the discouragement of independent national institutions by the government will only spread demoralisation and pessimism.[20]

## 6. FREEDOM OF OPINION AND EXPRESSION

### 6.1 CONTROL OF MEDIA

President Lee appointed Mr. Choi Si-jung as the CEO of the Korea Communications Commission (KCC) on March 26. It is well known to the public that Mr. Choi is a mentor to the President. Mr. Choi asked for cooperation from the chair of the board of Korea Broadcasting System (KBS) to dismiss its CEO, Mr. Jeong Yeon-ju on March 27.

Meanwhile, after the US beef agreement was aired by PD Notebook, a weekly television magazine programme produced by the Munhwa Broadcasting Corporation (MBC), producers of the programme were targeted. The programme features segments tackling prevalent issues in the country. On April 29, 2008, PD Notebook featured an interview with Ms. Robin Vinson, the mother of an American woman, Aretha Vinson, who died of a brain disease. During the interview, Ms. Vinson discussed several causes for her daughter's death, and some of those mentioned as probable causes include the Creutzfeldt-Jakob disease (CJD) and the variant Creutzfeldt-Jakob Disease (vCJD), the latter of which is the human form of mad cow disease.

The following week, after the broadcast of the above-mentioned interview, the MFAFF made a request to the prosecutor's office to investigate criminal defamation. With respect to the alleged complaint filed before the KCC, the commission issued an order on July 16 to MBC, particularly to the producers of PD Notebook, to make a public apology for

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*20 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1755/*

broadcasting the interview with Ms. Vinson.[21]

Starting from the attack on the producers of the PD Notebook programme, the new administration followed on with several other actions in order to control the media. An individual working at the presidential election camp for instance, has been appointed as the CEO of YTN, one of South Korea's 24 hour news channels. Opposing his appointment, labour unions and several junior journalists protested in order for the new CEO not to come to the building of the YTN. Since this protest began, the CEO took action against the journalists who tried to prevent him from coming to the building. The CEO lodged complaints against 12 journalists, and dismissed 6 journalists, suspended 6 journalists, reduced 8 journalists' salary and gave warnings to 13 journalists. This case is currently filed at the court.

The dismissal of the CEO of KBS - one of the most reliable public broadcasters in the country - is another instance showing the government's growing attempts to control the media. He was pressurised to voluntarily resign since the new administration took office, even though his tenure was guaranteed in accordance with the law. Several government institutions were mobilised in order to make him resign.

According to the Broadcast Act (2000), the president can nominate KBS' CEO but there is no provision allowing him to dismiss the individual; rather, the tenure of office has been fixed for three years and cannot be terminated unless he is involved in corruption. Despite this, the Board of Audit and Inspection (BAI) has suddenly begun 'special' investigations into Mr. Jeong Yeon-ju, the CEO of KBS, on the basis of allegations of mismanagement. Despite internal criticism, a special KBS board meeting was held and six board members proposed the dismissal of Jeong to President Lee. On August 11, the dismissal orders were signed.

A complaint has been lodged by Jeong asking for a court to confirm the invalidity of his dismissal and to suspend its execution on August 11. The Broadcast Act only allows for the BAI to propose an officer's dismissal if he has been involved in serious crimes such as corruption, usurpation or personal misdeeds. It is therefore not clear whether mismanagement can be a reason for dismissal; whether the BAI can propose the dismissal of the CEO; or whether the president has the authority to dismiss him. It is now left to the judiciary to interpret the law and clarify the matter.[22]

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*21 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

*22 2008 Ethics in Action → Vol. 2 No. 4 - August 2008: http://www.eia.rghr.net/archive/2008-ethics-in-action/vol.-2-no.-4-august-2008/democracy-in-south-korea-mature-society-versus*

While the case of dismissal of Jeong is currently pending before the court, since the new CEO was inaugurated, several previous programmes relating to current affairs were changed in late October, but have received criticism from the public, for an increasingly blatant pro-government stance.

It is also alleged that the government is trying to privatise the MBC. The new administration has taken several actions in order to control media by mobilising other government institutions.

## 6.2 CONTROL OF THE INTERNET

While the candlelight vigil was going on, some major newspapers, such as Chosun, Dong-A and Joong-Ang, subscribed to the government's claims that alleged that there must be masterminds with sinister intentions behind the protests.

Many protesters believed that these newspapers distorted the truth, which is one major reason why the people held vigils and started rallying. They also noticed that these newspapers now strongly support the government's policy on beef imports and labelled the demonstrators as instigators controlled by masterminds, namely leftists. Before the new administration, however, these newspapers had severely criticised the then-government's agreement on beef imports and had written articles saying that US beef is not safe.

As a result, some individuals started online campaigns and created a web site where they published a list of companies that had provided advertisements for these newspapers. They also asked others to phone the companies requesting them to withdraw or stop paying for advertisements in these newspapers.

Subsequently, the newspapers began writing articles in which they said that the campaign constituted an obstruction of their business and asked for an investigation. Accordingly, the prosecutor's office started an investigation, even though it had received no formal complaint from the companies. It has also been reported that government officials encouraged or attempted to persuade CEOs of the companies to register a complaint so that its investigation would have credibility.

Some 20 individuals have been banned from leaving South Korea while the investigation takes place. Such sanctions are usually imposed on people involved in corruption involving huge losses, foreign exchange fraud, or murder and other serious crimes. This investigation is believed to be a punitive action against individuals resulting from their

campaigns against the newspapers.[23]

Four absurd amendment laws aiming to control the internet have been submitted: the Amendment of the Act on Promotion of Information and Communications Network Utilization and Information

Protection, dealing with the expansion of real-name internet registration; the Amendment of the Criminal Act and the Act on Promotion of Information and Communications Network Utilization and Information Protection, creating a new criminal offence called 'cyber insult'; and the Amendment of the Protection of Communications Secrets Act that enables internet wiretapping.

### 6.2.1 REAL-NAME INTERNET REGISTRATION

Under article 44 (5) of the Act on Promotion of Information and Communications Network Utilization and Information Protection and article 30 of its Enforcement Decree, portal service business operators whose websites have an average number of daily visitors of over 300,000, operators of User Created Contents (UCC), and internet media whose daily average number of visitors is over 200,000 visits are subjected to the 'limited self-verification identity system,' also known as the 'internet real-name registration system.' The amendment to the enforcement decree of the Act will be enforced as of April, 2009. According to the amendment, the number of daily visitors of web sites will be set at 100,000, which means the number of those websites affected by the system will increase. In addition, if a person wishes to write an article or post a comment for these websites, they have to fill out a form with their name and national ID number, the so-called Resident Registration Number, or RRN.[24]

According to the current Act on Promotion of Information and Communications Network Utilization and Information Protection, the Korea Communications Commission (KCC) can order a service provider of information and communications to temporarily block the publishing of an article for a month without a court order. The orders are legally binding to service providers so that if the provider fails to follow the order, he or she has to pay a fine for negligence not exceeding thirty million Korean won (equivalent to US$ 20'830).

After the beef agreement, internet users criticised the president and the government for

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*23 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

*24 To see more, a fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

failing to protect the people's right to health in the agreement. Their concerns, especially about mad cow disease, spread quickly. The government understood that the reason for its failure to stop the spread of what it claimed were "rumours" about mad cow disease was, in its view, weak controls over the verification of the identity of authors of comments and articles on the internet.

For this reason, the KCC has prepared a bill to amend the Act on Promotion of Information and Communications Network Utilization and Information Protection, and is to submit it to the National Assembly. At a public hearing held on July 22, 2008, the KCC announced it was going to increase the number of web sites requiring the self-verification identity system to 178 from the current number of 37, by decreasing the number of daily visitors necessary to qualify for this system to 100,000 visitors per day. This will reportedly affect up to 75% of all internet users in the country. The Ministry of Justice, for its part, recommended that this system should expand to web sites whose numbers of visitors are more than 10,000 per day.

This will likely lead to self-censorship on the part of internet users and hinder their free speech. As an example of why this will likely take place, a man was recently arrested because he predicted his gloomy views on finance over the internet.[25] Since this incident, several bloggers have reportedly left the community having deleted all the articles they had written.

### 6.2.2 CREATION OF A NEW CRIMINAL OFFENCE CALLED THE 'CYBER INSULT'

Two amendments to Acts are proposed to control the internet through the creation of the 'Cyber Insult' offence. The Criminal Act and the Act on Promotion of Information and Communications Network Utilization and Information Protection, are to be modified in this way.[26]

Criminal defamation already exists under the current Criminal Act. Article 307 (1) of the Criminal Act says, "a person who defames one's reputation by publicly alleging a fact shall be punished by imprisonment with or without prison labour for not more than two years or a fine not exceeding five billion won." Article 307(2) of the same act also says, "a person who defames one's reputation by publicly alleging a falsity shall be punished by imprisonment for not more than five years with prison labour, suspension

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*25 Please see further at: http://www.rsf.org/article.php3?id_article=29954, http://online.wsj.com/article/SB123178875223174403.html or http://www.iht.com/articles/ap/2009/01/16/asia/AS-SKorea-Blogger-arrested.php.*

*26 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1764/*

of qualifications for not more than ten years or by a fine not exceeding ten million won." It is prerequisite for a victim to lodge a complaint to the prosecutor for prosecution in such cases.

However, some of main content of the amendment Criminal Act proposed on October 30, 2008 by Mr. Chang Yoon-seok, a former public prosecutor and now a member of the Grand National Party, are: "anyone who defame one's reputation by publicly alleging a fact by using any information and communications system for the purpose of slandering shall be punished by imprisonment with or without prison labour for not more than five years or a fine not exceeding twenty million won. A person… alleging a falsity….shall be punished by imprisonment with prison labour for not more than nine years or a fine not exceeding fifty million won."

According to the same amendment Act, it also creates an article stating that "anyone who publicly insults one by using any information and communications system shall be punished by imprisonment with or without prison labour for not more than three years or a fine not exceeding ten million won." In addition, these do not require any complaint, which means that police and/or prosecutor can investigate and prosecute at their own discretion.

Besides, amendment to the Act on Promotion of Information and Communications Network Utilization and Information Protection, was proposed on November 3, 2008, by Ms. Na Kyeong-won, a former judge and now a member of the Grand National Party. Some key additions in the amendment are: "Korea Communications Commission may order providers of Information Systems to deny dealing, suspend or restrict information that publicly insults a person." The amendment Act also creates provisions that anyone who publicly insults one by using information and communications networks shall be punished by imprisonment with or without prison labour for not more than two years or a fine not exceeding ten million won. These also do not require any complaint.

According to the current Act on Promotion of Information and Communications Network Utilization and Information Protection, article 70 (1) of the same Act says, "anyone who defames one's reputation by publicly alleging a fact by using information and communications networks for the purpose of slandering a person shall be punished by imprisonment with or without prison labour not more than three years or a fine not exceeding twenty million won." The article 70(2) of the same Act also says, "anyone who defames one's reputation by publicly alleging a falsity by using information and communications networks for the purpose of slandering a person shall be punished by imprisonment with prison labour for not more than seven years, suspension of qualifications for not more than ten years or a fine not exceeding fifty million won." Its article 70 (3) states that (1) and (2) of this article do need a victim's complaint.

### 6.2.3 INTERNET WIRETAPPING

The Protection of Communications Secrets Act was enacted in 1993 and amended in 2005. It requires investigatory authorities such as police, prosecution and information investigatory agencies to get a warrant from court when investigating.

Even under the current Act, there are several flaws in relation to the right to privacy: the possibilities for wiretapping are too broad; it can be interpreted to read that all people are considered as potential criminals even though crimes do not take place; it allows excessive use of wiretapping for 36 hours without a warrant from court and a maximum 4 months of wiretapping with a court warrant, or up to 8 months if the matter is related to national security.

However, a new amendment to this Act was proposed on October 30, 2008 by Mr. Lee Han-seong, who has 20 years experience as a prosecutor and is now a member of the Grand National Party.

According to the amendment, all communications businessmen are required to install wiretapping facilities in order for investigatory institutions to be able to wiretap whenever necessary. If they do not prepare the facilities in a certain period of time, they may be repeatedly imposed a penalty surcharge of not more than ten hundred million won. Included as possible targets of wiretapping are: all details of telephone communications, including SMS and chatting, messenger and writings on non-public boards on the internet. All communications businessmen have to keep all log-records of communications for not more than one year and have to provide all details to investigatory agencies whenever they ask for them. If they fail to comply, they shall be punished by a fine for negligence not exceeding thirty million won.

Statistics released by the KCC in late September also show that the number of inquiries concerning the identity of internet users in 2008 increased by about 130% compared to the corresponding period in the previous year.

## 6.3. NATIONAL SECURITY ACT

Government institutions such as the Cyber Terror Response Centre, the national security bureau under the Korean National Police Agency, the National Intelligence Agency and the Prosecutor's Office are involved in a case under National Security Act (NSA).

After the country's democratisation in 1987, the power of these agencies compared to under the military regime had been diminished. However, several government investigatory agencies have been trying to strengthen their power and enlarge their agencies by way of

proposing bills or amendments under the new administration.

This trend, in particular in the Korean context, gives rise to serious concerns. History has shown that these investigatory agencies, notably those concerned with "national security" had been controlled and mobilised by those in power in order to suppress opposition politicians, labourers, student activists etc. There are only few cases in which the accused in cases related to thee NSA are found not guilty.

The case of Professor Oh Se-cheol, the leader of the Socialist Workers League of Korea, shows how prosecutors attempt to target people under this Act regardless of a lack of evidence. After an initial failure, the prosecutor attempted to get a second warrant from a court on November 18, 2008, but the court did not allow it. Professor Oh is the leader of the Socialist Workers League of Korea. The aim of this organization is to achieve a socialist workers' system peacefully (officially dissociating itself from the DPRK). However, during the candle light vigil, the prosecutor's office found the name of this organization on the list of those supporting the candle light vigil and criticizing the government's failure to respect right to health. The prosecutor's office clandestinely investigated this organization and asked for the court to arrest Prof. Oh and other major members under the NSA for forming an anti-government organization.

Mr. Lee Si-woo, photographer for peace, took photos showing the tragedy of the divided Korean peninsula and uploaded them to his website. He was arrested and charged under the NSA and Military Secret Protection Act on April 19, 2007. Finally, the Seoul District Court found him not guilty and freed him on January 31, 2008.

The case of Mr. Song Du-yul, a Korean-German professor is another example. The Supreme Court decided on April 17, 2008, to free him concerning charges of participation in an anti-government organisation under the NSA, based on the ground that he had visited North Korea.[27]

However, there are several cases where people are charged under this Act. Particularly during and after the candle light vigil, prosecutors misused their powers under this Act. One of the improvements in this situation is that while the prosecutor's office has attempted to excessively make use of the NSA, the courts have begun interpreting it more strictly. However, the court has yet to change its position in the cases concerning members of the 'Hanchongryeon' students union, which have been declared illegal activists, and the interpretation of 'enemy-benefiting activity' under the NSA. Earlier, the UN Human Rights Committee expressed in its jurisprudence that the South Korean

27 *Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2828/*

government is found to be in violation of the ICCPR regarding this issue.[28]

Ryu Min-seon, the 15th chairperson of 'Hanchongryeon' was sentenced to two and a half years of imprisonment with prison labour, which was suspended for four years, and she was also suspended from standing for election or participating in elections for two years on January 2, 2008.

Song Hyeon-a was convicted of having enemy-benefiting materials under the NSA and Act on Assembly and Demonstration on February 19, 2008.

There are also other cases where school teachers were targeted by the authorities under the NSA. Kim Hyung-gun took part in a commemoration for patriots of reunification with children in consultation with school authorities in 2006. However, after the new administration, he was arrested and prosecuted under the NSA.

Choi Bo-kyong uploaded articles relating to materials for teacher's instruction for students, but was charged under the NSA, as the writings were deemed to be enemy-benefiting materials on February 24, 2008.

A civil society organisation called 'Solidarity to implement South-North Korea's Joint Declaration' was established on October 21, 2000 after the then-South Korean President Kim Dae-jung met North Korean President Kim Jung-il and came to a declaration on June 15, 2000. It aims to play a role in the reunification through the civil sector. On September 27, the police raided the office of the organisation and each house of staff members and arrested six staff members and charged them under the NSA.

This organisation has reportedly been targeted because the policy towards North Korea has been changed under the new administration. It is expected that more civil organisations working in the field of reunification will be targeted under this Act in the coming years.

During the session of Universal Periodic Review (UPR) held on August 13, the government responded to recommendations raised by the Democratic People's Republic of Korea, the United Kingdom and United States of America emphasising that the National Security Act should not be misused or interpreted arbitrarily. As shown above, however, the police and prosecutors have already misused this Act.[29]

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28 *CCPR/C/84/D/1119/2002: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.1119.2002.En?OpenDocument*

29 *UN Doc. A/HRC/8/40: http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/KR/A_HRC_8_40_RoK_E.pdf*

## 7. COMMISSIONS FORMED TO ADDRESS THE STATE'S PAST VIOLATIONS

A Truth and Reconciliation Commission was formed, as an independent body, on December 22, 2005 for a term of four years. A total of 14 commissions have been formed since 1996, either by the country's then-President or Prime Minister, to investigate past violations. Victim's relatives are able to ask for reviews of cases by courts based on the investigation reports produced by these commissions.

For this year, the followings are some of the cases in which individuals were reported to having been found not guilty after review.

Mr. Kang Hee-cheol, 48, travelled illegally in 1975 to Japan to visit his parents and stayed there for 7 years before being deported to South Korea. He was investigated for being a spy but was found innocent and released in 1981. On April 23, 1986, two police officers illegally arrested him and took him to a anti-communist branch under the Jeju Police Station, where he was detained for 85 days. He was deprived of food and sleep for about a week, and was subjected to "water torture" to confess to being guilty of spying. Based on a fabricated by the police, he was convicted and sentenced to life imprisonment in 1987. He was given an amnesty in 1998. Even after his release, he was placed under surveillance by the police. Based on the findings by the Truth and Reconciliation Commission, his case was reviewed and he was found innocent on June 23, 2008, of the crimes for which he had been imprisoned.

Mr. Seo Chang-deok, 61, was abducted to North Korea in 1967 while he was fishing and returned to South Korea 124 days after his abduction. However, he was prosecuted under the National Security Act (which remains in force to date) and the Anti-Communism Act, which was abolished in 1980. The police fabricated a case based on which he was convicted in 1969. Based on a confession extracted under torture, he was convicted of being a spy and imprisoned for 10 years. He was released after seven years, but continued to be placed under surveillance for almost 20 years. He was again arrested and illegally detained for 33 days in 1984. His case was reviewed and he was finally found innocent on October 31, 2008.

On April 19, 1982, five persons commemorated those who were killed by military forces in Gwangju in May 1980. As a result of this, they were arrested for forming an "enemy-benefiting group," a "praising and/or inciting anti-government group" and reading books banned under the NSA. After the arrest, they were illegally detained and tortured into making confessions of guilt. The police fabricated a case charging them under the NSA, following which they were sentenced to between 1 and 7 years imprisonment with forced labour. They have since suffered from being labelled communist spies. This case was

investigated by the Truth and Reconciliation Commission in 2007, as a result of which they were found innocent under a court review on November 25, 2008.

There are a number of other victims and their relatives who are seeking such redress from the courts with the assistance of these commissions, however, these commissions, in particular the commission looking into suspicious deaths in the military, are at risk of being abolished. [30]

Mr. Shin Ji-ho, a Grand National Party-affiliated Member of Parliament, introduced a bill to amend the mandate of these commissions on November 20, 2008. According to the bill, the 13 commissions are to be abolished and the Truth and Reconciliation Commission is to take over the cases that the other commissions have not finished. Mr. Shin claims that it will enlarge the orbit of work of the Truth and Reconciliation Commission and avoid repetition of the mandates of those commissions as well as increase effectiveness of the work of government's institutions.

However, this move is being seen as an attempt to nullify the work and functions of each commission. The budget and lack of human resources have been criticized since the Truth and Reconciliation Commission was established. If the commissions are to be abolished and the remaining cases are to be transferred to the Truth and Reconciliation Commission without appropriate human resources and budget for work, this will likely deprive victims or their relatives from knowing the truth.

## 8. CONSCIENTIOUS OBJECTORS AND MILITARY SERVICE

In South Korea, every man between the ages of 19 and 23 has the constitutional duty to serve in the military. After being conscripted, the primary areas for completing this duty are in the service of the army, navy or air force. There are also other forms of military service, such as the auxiliary police or through certain professional activities concerning particular fields of expertise, such as doctors.

Young men conscripted to serve in the army are randomly recruited to serve as members of the so-called battle police. Those who do not wish to complete their duty in the army can apply for service with the auxiliary police. There is no difference between them in terms of completing one's duty.

During the recent candlelight vigils, such young men from the battle police and the auxiliary police were deployed to protest areas and ordered to forcibly control protesters. They were armed with batons and shields and, as a result, were considered to be riot

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*30 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1769/*

police, even though they did not have the training required to perform these duties. Each unit from a police station has its own commander, who is a professional police officer. The job of these young men is meant to only involve assisting professional police officers, but, in reality, they were the ones sent as the first line of defence to confront protesters and were under orders to use force. These conscripted young men are not well-trained in the use of police equipment to disperse protesters in a peaceful manner. Instead, they are instructed how to prevent themselves from being photographed while forcibly dispersing people. Several videos taken by individuals, for instance, have shown a commander shouting at the young conscripts to hit protesters in the head with their shields. When a photographer tried to take a photo showing the manner in which the police arrested a protester, the commander ordered his men to block his view by holding up their shields to prevent them from being identified.

According to several researchers, these young conscripted men have suffered from sleep deprivation, poor quality rations and from long hours of heavy-duty labour. They have been obliged to follow orders from their commanders from the professional police force to assault unarmed, civilian demonstrators with batons and police shields. If they want to complete their national duty without facing detention and other problems, they have to follow these orders. Such young conscripts have, in fact, been the victims of this system for a long time.[31]

If a young man refuses to follow the orders of his commander, he receives a departmental order, including an order of detention. This order does not come from the courts, but from a committee consisting of professional police officers. This period of detention is not included in the period of required military service. Therefore, the conscripted man has to serve extra time in his unit to make up for the days in detention.[32]

The case of Mr. Lee Gil-gun is a good example. Mr. Lee, who was performing his military service as an auxiliary policeman, refused to use violence against the protesters. He then held a sit-in for two days in protest and returned to his unit two days late. Following repeated order to engage the protestors that he refused, Mr. Lee was detained for 15 days for disobedience.[33]

31 *Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1703/*

32 *Please see the AHRC's fact-finding mission to South Korea with Forum-Asia: http://material.ahrchk.net/docs/AHRC-SPR-006-2008-SouthKorea.pdf*

33 *Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2966/*

He was later prosecuted for disobedience and was sentenced to one and a half years imprisonment with prison labour under the Establishment of Riot Police Units Act by the Seoul North District Court (Chief Judge, Mr. Lee Sang-cheol) on November 14, 2008. He is currently being detained in Anyang prison and his case is pending an appeal. The case of Mr. Lee is another example. Mr. Lee expressed his opinion on the internet about conducting military service with the police. He also requested to be allowed to serve in the army on June 12, 2008. As a result, he was detained for 15 days for neglect of duty and disobeying an order. He conducted a hunger strike and was hospitalised due to deteriorated health condition. After his release from hospital, he was again detained for 15 days, for being unable to perform his regular duties during his hospitalisation. To avoid further punitive action, on August 19, he was transferred to another police station to finish his service as recommended by National Human Rights Commission.

Violence against conscripts in military service is a serious and widespread problem. Most conscripted young men, even though they are ill-treated either in the police or in military service, have to suffer in silence so that they can finish their service and return to society. Those who commit a crime, including attacking and even killing other recruits or superiors during the service, often claim to have been victimised during their service.[34]

The UN Human Rights Committee has concluded that South Korea has violated the rights of the person under the ICCPR in the cases of two conscientious objectors.[35] Although a Research Committee on Alternative Service finished its research in 2006, and there had been a plan to institute a system of alternative service in the country starting in 2009, the Ministry of Defence announced in mid-2008 that a new research committee will be set up to evaluate the matter, which will serve to postpone the creation of such a system.

The lack of recognition of conscientious objection to military service and absence of an alternative service system has led to an estimated 3761 youth being imprisoned between 2002 and 2006. As a result, such persons often encounter difficulties in obtaining employment and social discrimination as the result of the stain this creates on their criminal records. As of September 30, 2008, it was estimated that there were 408 conscientious objectors in the country's prisons.

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*34 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1703/, Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1769/*

*35 CCPR/C/88/D/1321-1322/2004: http://daccessdds.un.org/doc/UNDOC/DER/G07/402/00/PDF/G0740200.pdf?OpenElement*

## 9. MIGRANT WORKERS

As reported in the AHRC's 2007 annual report, the number of migrant workers in South Korea is estimated to be over 420,000. It is estimated that some 224,000 out of this number are undocumented workers.

The situation of migrant workers has been deteriorating since the new administration has undertaking programmes to enforce a quota control and to arrest 100,000 illegal migrant workers. Immigration control officials are required to arrest overstaying workers to reach the quota, as a result of which all migrant workers, regardless of their legal status, have been targeted by immigration officials.

Officials frequently raid the premises where undocumented workers are likely to be staying, without court warrants, and allegedly assault them at the time of arrest. Several migrant workers have received injuries as a result. The following are some of the examples.

Immigration control officials entered a motel to check workers' identities at 3pm on January 15, 2008. For fear of being arrested, Ms. Kwon, 51, who is holds the Chinese nationality, jumped from the 8th floor of the motel and died. The Hyehwa Police Station investigated this case for two days and closed it on January 17. The AHRC believes that the way in which the authorities carry out these raids leads to persons being so scared that they come to harm while attempting to escape. The authorities must take further precautions to ensure that such deaths and serious injuries are avoided where possible. Other examples below show a pattern concerning such cases.

While immigration control officials were checking the identity of migrant workers working at Maseok factory complex, Gyeonggi-do, at 8:30am on April 16, a Bangladesh national, jumped from the 3rd floor of a building in order to avoid arrest and injured his arms and legs. Several others were also injured during arrest.

The case of Mr. Zhuo Hongquan, a Chinese national is another such example. At 8:50pm on August 26, about 27 officials raided a building and arrested 17 overstaying Chinese. As soon as they opened the door of a room on the 4th floor, Mr. Zhuo Hongquan was frightened and jumped out of the window. He suffered a cerebral haemorrhage and injured his face and skull as he hit the ground. A bone in his right arm was also severely fractured. After he received emergency surgery, the police deported him ignoring a statement made by the doctor who conducted the surgery that he should not be moved.

The case of Burmese national Mr. Thar Sow Aye, 39, also shows medical negligence by immigration control officials. Officials raided a work place in Gyeonggi-do at 4:40pm on

September 26 and arrested Mr. Thar Sow Aye. In the vehicle he claimed to be suffering from chest pain and was taken to hospital where he received basic treatment at 5:39pm. He was then taken to Incheon International Airport at around 8:30pm and repeatedly complained to officials about his chest pain but was ignored. He was checked again at a medical centre at the airport at 11:54pm as a result of which he was immediately taken to hospital. He arrived at 1:10am on September 27 and received a treatment but died at 4:41am.

Statistics released by Ministry of Justice state that the Immigration Control Office arrested 18,412 migrant workers and deported 14,368 from January 1 to July 31, 2008. This shows that officials wrongfully arrested 4,046 migrant workers and later released them because they were legally allowed to stay in the country.

There is no government institution where those who overstay can safely make complaints, even though they faces abuses, such as non-payment of their salary, assault, discrimination or sexual harassment - especially concerning woman migrant workers in the latter case. Under the new government, whenever relevant government officials receive a complaint from migrant workers, they now automatically inform immigration control officials. This means that such migrant workers no longer risk approaching these offices.

An amendment to the Immigration Control Act came into force in December 2007. There are several articles that de facto nullify basic criminal procedures and due process, notably by blocking court interventions in the process. The Act now allows officials to enter any premises without a warrant and detain over-stayers for up to six months in protection facilities. Their detention and extension of their detention does not require court order.

In order to decrease the number of undocumented migrant workers, a meeting was held at the Presidential Office and a plan for the improvement of the non-skilled foreign work force was created on September 25. According to the plan, the government will decrease the number of illegal workers from 19.3% to below 10%. It will form a comprehensive government unit to periodically carry out arrests, and will increase controls of those who join migrant trade unions.

After this plan was announced, large-scale arrests of migrant workers took place on November 12. Around 100 police officers and immigration officials raided the Masok industrial complex and arrested at least 100 migrant workers and took them into custody. It is reported that the authorities failed to present proper identification, inflicted verbal and physical abuse and used excessive force including handcuffs, unlawful breaking and entering into homes and factories, and racially-based targeting of migrant workers

without checking their passports or visas at the time of arrest.[36]

There is a union in South Korea called the Migrants' Trade Union (MTU) that advocates for the rights of migrant workers irrespective of their status. When the MTU tried to register in order to form a Trade Union with the Seoul District Labour Office, its application was denied on the basis that its staff contained undocumented workers. Such a denial is illegal under Korean Constitution, which guarantees the right to form a union regardless of status.

The MTU filed a case in 2006 and the Seoul High Court made its decision to permit the MTU to form on 1 February 2007 (Case No. Seoul High Court decision 2006 NU 6774). The appeal case is currently pending at the Supreme Court.[37]

However, leaders of the MTU have been targeted since they became a complainant in a case for the establishment of the union. Mr. Torna Limbu, a Nepalese citizen, and Mr. Abdus Sabur, a Bangladeshi citizen (respectively the president and vice president of the MTU) were arrested and deported on May 15. The National Human Rights Commission had intervened in their forcible deportation but was ignored by Immigration Control Officials.[38] The MTU's previous leaders were also deported.[39] The first leader of the union was also targeted on 14 May, 2005, and later left the country.[40]

The Korean Constitution states that, "any Korean has a right to form a union." The enjoyment of right to form a union in such cases as those mentioned above will depend on whether or not the Supreme Court narrowly interprets the constitution to only apply to persons with Korean nationality, or whether this right will be provided to all persons in Korea.

The government accepted the recommendations made by Canada concerning the need to ensure the protection of migrant workers, in particular women and children, during the Universal Periodic Review process in Geneva. However, it is reported that since the UPR took place, a pregnant migrant worker and children have been ill-treated by immigration control officials during arrest. Under the UPR process, Mexico also recommended ensuring access for migrants to services including access to the justice system, which the South Korean government has agreed to implement. However, as described above,

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*36 Forwarded Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1771/*

*37 Forwarded Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2931/*

*38 Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2008/2860/ and Open Letter: http://www.ahrchk.net/statements/mainfile.php/2008statements/1410/*

*39 Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2007/2701/ and http://www.ahrchk.net/ua/mainfile.php/2007/2692/*

*40 Urgent Appeal: http://www.ahrchk.net/ua/mainfile.php/2005/1102/*

migrant workers have been targeted by immigration officials due to the quota system and when migrant workers who had overstayed appealed to the National Human Rights Commission for assistance, they were deported.

## 10. THE LACK OF CRIMINALISATION OF THE ACT OF TORTURE

As a State Party to the Optional Protocol to the Convention Against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the government of South Korea has the obligation to take measures to define and criminalize torture in its domestic law, in accordance with the CAT. The Committee Against Torture has also recommended that the government define torture in its domestic legislation. At the UPR session, in response to questions concerning this issue, South Korea's representative replied that domestic law is capable of punishing acts of torture.[41]

However, the government has refused to criminalize torture under its Penal Code, claiming that there are many provisions in other legislation that prohibits torture. However, during a review of South Korea's implementation of the Convention Against Torture conducted by the Committee Against Torture in May 2006, in response to questions about the lack of a definition of torture in the country's criminal law, a member of the Korean delegation admitted that:

"…we did not fulfil the sufficient condition of this issue. So upon returning home we will make positive review on revision of Criminal Act in cooperating provisions on the definition of torture based on the article 1 of the Convention."

However, to date, nothing has been done in this regard and the government is therefore failing to respect a key obligation under the CAT. While cases of torture seldom occur in the country these days, cases of ill-treatment still take place.[42] For examples we need look no further than the treatment of people taking part in the candlelight vigil and following arrest continue to raise concerns.

## 11. FAILURE TO IMPLEMENT VIEWS FROM INTERNATIONAL HUMAN RIGHTS INSTITUTIONS

The UN Human Rights Committee (HRC) has issued opinions concerning ten

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*41 UN Doc. A/HRC/8/40: http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/KR/A_HRC_8_40_RoK_E.pdf*

*42 Statement: http://www.ahrchk.net/statements/mainfile.php/2008statements/1658/*

cases concerning human rights cases in South Korea. In seven cases out of ten, the government has been found to have violated the International Covenant on Civil and Political Rights (ICCPR), since 1994. These cases are: Sohn v. Republic of Korea[43], Kim v. Republic of Korea[44], Park V. Republic of Korea[45], Kang v. Republic of Korea[46], Shin v. Republic of Korea[47], Lee v. Republic of Korea[48] and Yoon & Choi v. Republic of Korea.[49] The government has, so far, failed to provide remedies to the victims as suggested in the UN HRC's views.

## 12. RECOMMENDATIONS

The Asian Human Rights Commission (AHRC) urges the government of the South Korea to:

1. Establish a system to enable oversight, as provided for under Article 60 (1) of the Constitution, concerning the signing of all agreements, including trade agreements. The respect for South Korea's human rights obligations must be guaranteed under all such agreements as a pre-condition;
2. Amend all flaws in the Act on Assembly and Demonstration, in particular, the license system and the prohibition on assemblies after sunset, to ensure that it is in accordance with international norms and standards;
3. Recognise the work of human rights defenders and take necessary steps to ensure that they are able to carry out their activities without hindrance;
4. Reinstate all of YTN's dismissed journalists and stop all attempts to the control media and the internet, including the through Real-Name Internet Registration, the creation of 'cyber insults' and internet wiretapping, that clearly restrict and violate the freedoms of opinion, expression and information;
5. Abolish criminal defamation;

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*43 CCPR/C/54/D/518/1992: http://daccessdds.un.org/doc/UNDOC/DER/G95/181/56/IMG/G9518156.pdf?OpenElement*

*44 CCPR/C/64/D/574/1994: http://daccessdds.un.org/doc/UNDOC/DER/G99/400/65/PDF/G9940065.pdf?OpenElement*

*45 CCPR/C/64/D/628/1995: http://daccessdds.un.org/doc/UNDOC/DER/G98/194/37/PDF/G9819437.pdf?OpenElement*

*46 CCPR/C/78/D/878/1999: http://daccessdds.un.org/doc/UNDOC/DER/G03/432/13/PDF/G0343213.pdf?OpenElement*

*47 CCPR/C/80/D/926/2000: http://www.unhchr.ch/tbs/doc.nsf/0/963903e05b5730b4c1256ed100485df9?OpenDocument*

*48 CCPR/C/84/D/1119/2002: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.1119.2002.En?OpenDocument*

*49 CCPR/C/88/D/1321-1322/2004: http://daccessdds.un.org/doc/UNDOC/DER/G07/402/00/PDF/G0740200.pdf?OpenElement*

6. Abolish the National Security Act instead of repeatedly saying that the Act should not be misused;
7. Define and criminalize the act of torture under the Criminal Code, in accordance with the UN Convention Against Torture and ensure those involved in torture or ill-treatment are punished as the result of fair trials and in line with international standards;
8. Guarantee the activities of commissions relating to past violations of human rights by the State;
9. Establish an alternative military service system, so that conscientious objectors are no longer criminalized;
10. Recognise the Migrants' Trade Union and ensure that arrests, detention and deportation of migrant workers are only conducted on order of courts;
11. Establish a domestic system to implement the views of international human rights institutions.

# SRI LANKA

## THE LOSS OF THE SUPREMACY OF THE LAW

### 1. A PARADIGM SHIFT

The most significant paradigm shift in the Sri Lankan political situation is the emergence of the military as the arbiter on all important issues in the country. The following warning made in the Final Report Of The Commission Of Inquiry Into The Involuntary Removal Or Disappearance Of Persons In The Northern And Eastern Provinces.

Two problems are facing this country. One is the problem of the youth which took militant form under the J.V.P. The other is ethnic problems which takes militant form under the L.T.T.E. These two problems unless handled with vision and statesmanship will distort all organs of Society and make the Army arbiter in national issues.

These words, which were meant to be a warning with the expectation of preventive measures have now turned out to be a prophesy. The military is indeed, if not the arbiter, at least a very significant player in decision making in the most important national issues.

### 1.1 THIS PARADIGM SHIFT IS REFLECTED IN RELATION TO THE STATE OBLIGATIONS OF RESPECTING AND FULFILLING THE PROTECTION AND PROMOTION OF HUMAN RIGHTS:

a. In the legislative area – the most important laws for the protection of human rights cannot be passed, as such legislative measures will seriously come into conflict with the military influence in the country. One such example is the witness protection law. A draft of a witness protection law has been before parliament since June. In fact, the law had been discussed for years. Government spokesmen in international forums promised that this law will be passed by the 26th June. However, the talk about this law has subsided. Of course, even passing of the law will not be a guarantee that the law will be implemented. Providing the necessary resources for implementation

is in the hands of the executive. Even when things are at that stage, the government shows no interest even in the passing of this law which is so basic for creating the legal framework for providing redress against human rights abuses. Perhaps the government's unwillingness to pass this law may be due to the fear that if the law is passed, the courts may insist on its implementation. For example the law provides the possibility for witnesses who have a genuine fear of threats to their lives, to give evidence through a video link. If this is possible many witnesses may come forward to give evidence in cases of alleged atrocities by the military and the police. It will significantly undermine the government's policy of allowing witness intimidation.

There are many other laws which need to be passed rapidly for efficient functioning of an administration of justice system. There is the need for the development of substantive laws like for example making forced disappearances a recognised crime in the country. However, more important perhaps is the development of procedural laws both in terms of the criminal procedure code and evidence ordinance in order to improve the quality of justice within the country. Such legislative changes require political will to usher them in. However, such political will is no longer possible when subservience to military interests is an unavoidable consideration for the government.

b. In the functioning of the investigation into crime in general and in particular investigations relating to human rights abuses, there is an extreme crisis. In fact, more than a crisis it is a matter of deliberate disruption. It can safely be said in all cases that are considered sensitive the investigations are simply not allowed. The stopping of investigations happens due to many factors. Some of these factors are the military strategy coming into conflict with any investigations into alleged abuses.

- The politicisation process which sees efficiently investigating police as a threat to political power.
- A policing system within which the command responsibility does not virtually exist.
- The increasingly independent character of police units operating in different areas and increasing linkages of the police with the criminal elements.
- Widespread corruption in the political system as well as the policing system; within the policing system as there is the widespread perception that many high ranking policemen themselves are corrupt they are unable to exercise supervisory power over their subordinates.
- The near collapse of the disciplinary processes within the police.
- The disruption of the most sophisticated section of the police, the Criminal Investigation Division by unjust transfers and political interference into investigations.
- The failures of the judiciary which are numerous, such as delays and even

allegations of corruption which lead to a poor rate of success in prosecutions. Perhaps even more important as the compromise that has been developed between the law enforcement authorities that resist cooperation with the judiciary. Due to this compromise the judiciary fears or is unwilling to challenge the overwhelming arbitrariness of the police. Many individual judges who have tried to take some independent action have been taught hard lessons of the withdrawal of cooperation by the police. The breaking of this compromise could come only from a holistic approach coming down from the top of the judiciary with the full understanding of the entirety of the judiciary. Such an approach has not emerged as yet.

- Many decades of the degeneration of the policing system has reduced skill levels in the police, particularly at local and police station levels. This does not mean that persons with considerable training have ceased to exist. However, this only means that such officers have been displaced and it is no exaggeration to state that rank and file officers lack education, training and experience.
- The direct use of torture and extrajudicial forms of punishment have causal links to the overall collapse of the investigative systems which is a result of many of the factors mentioned above. Such abuse of police powers is often intended to give an impression of there still being some kind of policing. The public is made to believe that there is a visible presence of the police despite of the considerable lowering of efficiency levels by constant reminders of the use of violence on citizens. On the other hand the rank and file officers who have no understanding of functions or skills of investigation, are prone to use torture and extrajudicial punishment as the only way to known of as to how to carry out their functions.
- The overreaching consideration for the collapse of the investigating function is the severance with the constitutional form of governance. The deliberate abandonment of the provisions of the 17th Amendment to the Constitution is a political act that has been directed towards crippling, among other things, the investigative function of the state into crimes in general and human rights abuses in particular.

c. In the body of the report we comment on the consequences of this situation on the prosecution and judicial systems. The executive system from the time it was introduced in 1971 has constantly undermined the independence of the judiciary and the independence of the prosecutor's function exercised through the Attorney General's Department.

## 1.2 PERCEPTION OF THE IMPOSSIBILITY OF ACHIEVING REDRESS:

The consequence of this situation is that there is something worse than impunity that has begun to prevail in Sri Lanka. It is the conviction that has been created that it is not possible to obtain redress against violations of state officers but that the very attempt

to get redress will lead to extremely dangerous consequences such as death or very serious harm. Often the only way out for a serious complainant if he wishes to stay alive is not only to leave his locality for to leave the country itself. That is not possible for most people. For most people the option is to accept the pain and the humiliation of the violations of rights however serious such violations may be – murder, mass murder, forced disappearances, rape and the like – and to find some form of a compromise for the sake of survival of the person or their family members. We are reminded of an episode from the deep countryside where rich landlords and the police used to determine the fate of everyone. In that background if a police officer killed a bull belonging to a poor peasant and took it for his dinner, the wife of the farmer had to prepare chilly and ask her husband to take it to the police officer. By this ritual the farmer's family conveys to the police officer that his stealing of their cattle has not generated any animosity between the officer and the family. In this way the farmer's wife tries to protect the life of the farmer and his children from being dragged into fabricated litigation or other hardships that the police officer could impose on them. This condition of some of the farmers in the most rural areas in the 19th century has now become the condition of the ordinary folk in the country including those living in the south.

## 2. SOME SYMBOLIC EVENTS WHICH SIGNIFIES THE REALITY AT THE PRESENT TIME

### 2.1 CASE NO. 1 – THE GRENADE ATTACK

The grenade attack on the house of Mr. J.C. Weliamuna, a senior lawyer who also specializes in human rights law and anti graft law. Two grenades was thrown on the 27th September around midnight. Only one grenade exploded and even caused the collapse of the wall of a neighboring house as well as damaging part of the upper of Mr. Weliamuna's house. had both grenades exploded it is quite likely that his whole family consisting of his and two young children would have suffered extremely serious consequences. Within three days while the event was receiving local and international attention an unknown person tried to enter the Transparency International office of which Mr. Weliamuna is the Executive Director. Despite of a huge protest including a resolution at a general meeting of the Sri Lankan Bar Association and

international condemnation at the highest levels no one has yet been arrested as suspects of this incident. Mr. Weliamuna and everyone else have excluded the possibility of personal motivation for this attack. Whoever designed this attack was hoping for an event of some magnitude to get across the message to the whole society or at least a part of it that would instill a mentality of fear.

Within weeks from this event came an announcement to all human rights lawyers making death threats if they engage in their legitimate duties of the legal representation for those alleged to be terrorists.

## 2.2 CASE NO. 2 – THE BATTALION OF THE GHOSTS OF DEATH

The notice from the Mahason Balakaya (Battalion): The following is the translation of the full text of this notice:

### To those who represent the terrorists today

> The innocent people of our motherland have been subject to the killing sprees of terrorists for over three decades. Expectant mothers and farmers have been among those killed - chopped to pieces – by the terrorists. These terrorists now engage in bombings intended to kill innocent civilians in various parts of the country, in a bid to escape defeat at the hands of the valiant forces.
>
> To date, the number of innocent that have fallen victim to these terrorist bombings extend into their thousands. Thousands more have been maimed. But there is no one today to speak for the human rights of these innocent people.
>
> However, we know that there are many traitors who voice their concerns for the human rights of the evil terrorists and those who assist them in carrying out these indiscriminate killings.
>
> Can such people who strive to free these terrorists when they're captured and imprisoned for their crimes against the innocent be considered anything but traitors? We have the names and addresses of these traitors who take home salaries numbering into hundreds of thousands and even accept bribes in exchange for acting as enemies of our beloved motherland and its innocent people.
>
> We have decided that all those who try to split our motherland in two

> and all those who represent the interests of and speak on behalf of the terrorists who kill our innocent civilians will be meted out the punishments that they deserve. There is still room for those who sell out on the cause of the nation, of the motherland, for financial gain, to cease such treacherous acts. In the future, all those who represent the interests of the terrorists will be subject to the same fate that these terrorists mete out to our innocent people.
>
> **Traitors to the nation, mouthpieces of the terrorists,**
>
> Remember the faces and bodies of those innocents who have been killed and maimed by the terrorists. Be warned that meting out the same fate to you in the name of our motherland would be a favour that we would render to the entire nation.
>
> THE *Mahason Force* THAT REPRESENTS THE INTERESTS OF THOSE WHO HAVE LOST THEIR LIVES AND THOSE WHO HAVE BEEN MAIMED AT THE HANDS OF TERROR.

This notice comes at a time when there are several well-known cases where suspects have challenged the charges filed against under anti-terrorism and emergency laws as being baseless. At the same time many cases also come before the Supreme Court by way of fundamental rights applications regarding the forced deportation of persons from Colombo and other Sinhala areas and arbitrary forms of registration imposed on Tamils arriving from conflict regions to safer areas. The Supreme Court has made several interventions in order to protect the rights of these persons.

Under these circumstances the notice of death threats announced against lawyers who appear in these cases could come from sources which are linked to the agencies that investigate into alleged offences under anti-terrorism laws and other arbitrary acts that are undertaken for the purported purpose of keeping terrorists away from other areas. As all these activities come under the auspices of the Ministry of Defence it will be this ministry that will must come under the greatest suspicion about such notices.

This announcement may also be seen as a direct threat to the Supreme Court itself since the Supreme Court in recent months has given many judgements against the government, among which are matters relating to the protection of minorities. If the lawyers can be intimidated from taking cases to the Supreme Court, the Supreme Court would not have the occasion to intervene into arbitrary forms of deprivation of rights under the pretext of national security by agencies of the state.

Sri Lanka in the past has seen many formations of death squads which act under various names. There were many such squads in the period from 1986 ?1990 when there were counterinsurgency activities against the predominantly Sinhala JVP. One such group named the Black Cats left a tremendously chilling impression in the minds of people. During this period the number of disappearances has been estimated officially to be around 30,000. It is now well established that these death squads functioned under the country's security forces and police during that period.

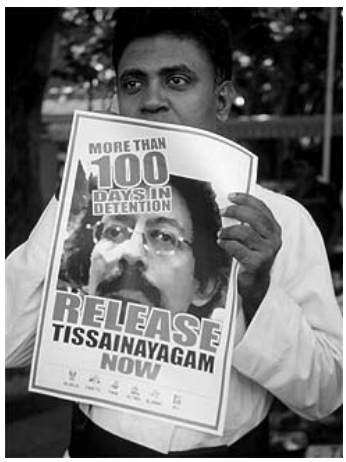
The re-emergence of such death squads is a frightening reminder of the extreme loss of the rule of law in the country. Such death squads in the late 1980s were used against all political opponents of the regime as the reports of the Commissions on Enforced Disappearances clearly demonstrates.

It may not be a coincidence that there was a grenade attack on the house of a well-known human rights and anti graft lawyer, J.C. Weliamuna on the 27th September, 2008. Had both grenades that were thrown at the house exploded Mr. Weliamuna and his entire family might have been killed. Despite of the intervention of the Bar Association no one has been arrested for this attack.

It is the duty of the government to investigate and to arrest the persons who have been sending such death notices under the name of the Mahason Balakaya. However such investigations will not happen if the government itself is directly or indirectly linked to this initiative. It is only through pressure from everyone, including the political opposition in the country, civil society and the international community, that this threat can be exposed and eliminated.

## 2.3 CASE NO. 3 - THE CASE OF TISSSAINAYAGAM

J.S. Tisssainayagam is a well known journalist in Sri Lanka. He was the editor of www.outreachsl.com. One of his colleagues was arrested by the Terrorist Investigation Unit (TID). When Tisssainayagam went to visit his friend he was also arrested on the 7th March, 2008 and later two other persons were also arrested. According to many reports published at the time Tisssainayagam was kept incommunicado. Tisssainayagam's arrest resulted in extensive protests by the Free Media Movement (FMM) and by all the media except the state media in the country. Internationally all the leading media associations and human rights organisations protested the arrest and called for his immediate release.



In the months before and after his arrest there was serious criticism against the journalists by the military commander, Sarath Fonseka and the state media which tried to portray independent reporting on matters relating to the 'war' directly or indirectly helped the LTTE. The attempt to create the image that journalists who write anything other than the promotion of the government's version of 'the war', were being portrayed as direct or indirect agents of the LTTE. The idea of the traitor also became an important tool in the state media which wanted to suppress independent journalism.

This period was also marked by direct physical assaults on journalists. The two most prominent event were the incident relating to the Minister, Mervyn Silva, who with a group of his supporters entered the SLBC and the huge confrontation inside the station which took place thereafter. That event was followed by a series of attacks such as stabbings, attempted kidnappings and other forms of harassments against journalists. All these harassments lead to serious media protests.

The second major event was the abduction of a deputy editor and defense analyst of the Nation, Mr. Keith Noyahr. He was abducted on the 23rd May and returned home the following day after suffering severe physical trauma.

All the reports indicate that this time was marked by an extensive attack on independent media in the country. Tisssainayagam's arrest and continuous detention lead to a continued local and international highlighting of the attacks on journalists and the free media in Sri Lanka. One of the demands of the local and international protest was to produce Tisssainayagam before a court.

Tisssainayagam was detained even after the 90 day period which was time allowed for detention by the TID. However, he was further remanded on the order of the magistrate. Once again the order was criticised by the media movements.

He was finally indicted in court on the following charges:

> That between June 01st 2006 and June 01st 2007, he wrote articles for the 'North Easter Monthly magazine in a manner that renders itself for punishment for committal of an offence in terms of Sections 102 (abetting) and 113 B(conspiracy) of the Penal Code read together with Section 2 of the PTA in that such writings amounted to causing or intending to cause acts of violence and/or communal disharmony and/or bringing the State into disrepute
>
> 2. That in between the same period, due to publications specifically listed in annexure X of the indictment, he committed the above stated offences

> 3. That by accepting money from non-governmental organisations for the publication of the said 'North Easter Monthly magazine' in a manner that amounted to a terrorist act in terms of Reg. 6 read together with Reg. 12 of ER No 7 of December 6, 2006, he committed a punishable offence under the said ER.

The Tisssainayagam case marks a disturbing beginning in the attempt to prosecute writers for their writings. Over a period of several decades the Supreme Court of Sri Lanka in a series of cases the right of the freedom of expression including the right to criticise the government in power. Of particular importance from among these cases are: Ratnasara Thero vs Udugampola (1983 1 Sri LR 461), Mohittige and other vs Gunatilleke and others (1992 2 Sri LR 246), Armaratunga vs Sirimal and others (Jana Ghosha case) (1993 1 Sri LR 264), Deshapriya and another vs Municipal Council, Nuwara Eliya and others (1995 1 Sri LR 362), Gunawardena and another vs Pathirana, OIC, Police Station, Elpitya and others (1997 1 Sri LR 265), Channa Pieris and others vs Attorney General and others (Ratawesi Peramuna Case) (1994 1 Sri LR 01), Mrian and another vs Upasena (1998 3 Sri LR 177), Wanigasuriya vs. S.I. Peiris (SC(FR) 199/98), SCM 22.9.88, Wijeratne vs Perera (SC(FR) 379/93) SCM 2.3.94, Saranapala vs Solanga Arachchi and others (SC(FR) 470/96) SCM 17.7.1997.

Sri Lanka has also abolished criminal defamation. The attempt to prosecute writers for their writings under the emergency laws and the anti terrorism laws seems to be an attempt to circumvent the legal recognition of freedom of expression which is entrenched in Sri Lankan law. It is further, an attempt to prosecute purely for political reasons. On this basis the AHRC wrote the following comment as a warning of the possibility of the introduction of politically motivated trials in Sri Lanka.

"Amongst the few great achievements of human kind, the establishment of the idea and the practice of fair trial is one of the best examples of civilisation's struggle against barbarism. Centuries of the practice of the contempt that power has against justice was defeated by the developments relating to fair trial. Absolute rulers and ruthless religious organisations had earlier used the pretext of trials merely to suppress dissent. By the establishment of basic norms and standards of fair trial human kind has demonstrated that human wisdom can overcome some of the ugly aspects of humanity itself.

Whatever might be said of colonial powers, one of the better aspects introduced during colonial times was the meting out of justice by means of fair trial. If there is anything that is modern in contemporary Sri Lanka, fair trial is certainly the most prominent aspect of it all. Devoid of this aspect Sri Lankan life would be most primitive and barbarous indeed.

It must be admitted that even from the time of the introduction of fair trial in Sri Lanka, there were many factors that inhibited the full realisation of its principles and practices. It took a long time for the development of judges, lawyers, prosecutors, defenders and others to be created. The old feudal 'justice' was based on ruthless, absolute power concepts and ingrained habits of inequality entrenched in a caste based society where equality was an alien factor. Even after a long period of education the old habits of inequality and prejudice were not completely erased.

Besides this there were also other limitations based, perhaps, on insufficient allocation of resources into the development of a justice tradition. As a result there were enormous delays in the administration of the justice process, there were huge deficits in the people's access to justice and there were severe limitations in the development of discipline in the policing service, which operates as the investigator into crimes within this system.

Despite of these and other factors it can be said that a basic system of justice, which is ultimately founded on the cornerstone of fair trial, has been adequately introduced to Sri Lanka.

The essential of fair trial is that the decisions are made by independent and impartial courts that evaluate evidence purely on the basis of norms and standards of justice and upholds the highest standards of rationality. In criminal trials this means that the guilt of any person is decided entirely on the basis of crimes defined on the basis of law and on the evaluation of evidence based on the principles of law and justice only.

It is now acknowledged that in the recent decades Sri Lanka has ultimately entered into a period of tragedy known as the politicisation of all aspects of governance and social life. The national consensus on this age of tragedy was reflected when the 17th Amendment was almost unanimously passed in order to bring about some basic constitutional reforms in order to get over this national ailment called politicisation.

This attempt to cure the ailment has failed or at least has been abandoned and Sri Lankans today live in an age where all things are politicised. Everyone has acknowledged this aspect of the national tragedy.

The question now is will such politicisation also affect fair trial? Some may argue that fair trial has already been undermined for some time now. However, will there be a dramatic change from fair trial practices to naked political trials? This should be a serious enough question to be pondered upon.

It is possible to point out the major factor that distinguishes a political trial from a fair trial. There have been masters who have formulated the basic notions of political trial

and among such masters, a prominent place is held by Andrei Vyshinky, Joseph Stalin's prosecutor. He defined the purpose of trials as a means to send messages to the people. The individuals charged were a matter of no importance at all. Whether a person had committed a crime for which he could be charged or whether the charge can be proved at all, was a matter of no consequence. The person charged was merely a symbol to send a message to others so that they will be discouraged from having any opinions or doing anything that might be considered in a negative light by the regime in power. In the course of a trial reducing the accused to despair by the use of blackmail, threats and physical intimidation was allowed. The accused were even encouraged to contribute to the good of the nation by cooperating with the prosecutors and judges in admitting their own guilt. The accused were brought to such pressure that several of Lenin's closest collaborators, who fought for the Russian Revolution, confessed that they were traitors to the socialist nation. Such trials gave the impression as being all important, while in fact remaining insubstantial.

In such political trials the people could be tried for holding opinions. In fact, the 'trial' was more directed towards the outlawing and elimination of certain opinions and strongly re-imposing certain other opinions.

Will the next stage of the spread of the disease of politicisation in Sri Lanka be the introduction of political trials and the complete displacement of fair trial? To ignore this question is to remain blind and passive before one of the greatest threats to civilisation itself and one of the few great achievements of humankind introduced to Sri Lanka with whatever limitations.

An AHRC statement dated August 15, 2008.

## 2.4 CASE NO. 4 – THE CASE OF SUGATH NISHANTA FERNANDO

Sugath Nishanta Fernando who was a complainant in a fundamental rights case and a bribery case was threatened with death if he did not withdraw his cases in June 2008. On September 20th the threat was carried out and he was assassinated in broad daylight. The content of the affidavit he wrote seeking protection to the Inspector General of Police, the Human Rights Commission of Sri Lanka and the National Police Commission was as follows:

**A translation of an affidavit that the deceased Nishanta Fernando made to the authorities seeking protection due to death threats.**

I Siyaguna Kosgodage Anton Sugath Nishantha Fernando of 349/2A Jayamawatha Road, Dalupata, Negombo, being a Catholic make oath and declare as follows:

An Affidavit

01 I am the declarant in this case.

02 On 23.6.2008 at around 11 a.m. my wife, Surangee and myself were traveling in my three-wheeler bearing number 205/8052 for going to Negombo hospital to get treatment for my wife for asthma.

03 While going there near the Chilaw, Colombo Road at Dalupata Bridge a lorry belonging to the category Chana bearing number WPL(D or G)/5347. And there we saw Niroshan and Namal, who are known to us and two other persons who are not known to us.

04 As Niroshan and Namal extended their hands and signaled to stop we stopped the three-wheeler at that place. The drive of the three-wheeler in which we were traveling was Ajith. Niroshan and Namal put their heads into the three-wheeler and told us, threateningly, "If you fellows do not withdraw the petition for human rights you have filed against the Negombo police by tomorrow we will kill all of you. We have got the permission of the Negombo police to kill you."

05 As we were frightened by this threat we turned the three-wheeler back and returned home.

06 Shortly after we came back home we heard a loud banging on the door of our gate and two people who were outside the gate shouting and telling, "Open the Gate. If you do not withdraw the petition we will kill you all by the evening of tomorrow. Police have given us the permission. Open it."

07 Due to fear we did not open the gate and when we looked over the gate we saw Niroshan, Namal and the two other persons that we saw before. The two persons who were hitting our gate and shouting were Niroshan and Namal. After a short time this group got into a vehicle and went away. I have learned that Niroshan is a person who has fled from the armed forces.

08 It is very clear that the reason why these persons are making these threats to us is to make us withdraw the fundamental rights petition we have filed against several officers of the Negombo police station regarding violations of human rights.

09 Regarding this on the same day (23.6.2008) we went to the Crimes office of the Deputy Inspector General of Police and made a complaint which bears No. SHB345/265.

10 Due to these threats we have become very frightened to remain in our house and we are requesting respectfully to provide protection and create an environment in which we can continue to live our lives.

Signed
Siyaguna Kosgodage Anton Sugath Nishantha Fernando
24th June 2008 at Negombo

The affidavit was signed before Justice of the Peace, Rev. Ghanarathane

On this basis the AHRC also appealed to the HRC, the NPC, the IGP and also the Ministry for Disaster Management and Human Rights to take steps to provide protect to Mr. Fernando. Despite of all the appeals no protection was provided and the assassination was possible.

Following the assassination the wife and two children gave detailed evidence at the inquest inquiry stating that they suspected the police officers who are the accused and respondents in the cases where Mr. Fernando was the complainant as the suspects for the murder. To-date, no one has been arrested and the family and the observers do not believe than an impartial inquiry is being carried out into this murder.

Meanwhile Mr. Fernando's widow has to go into hiding with the two children as they have also received death threats. The family has made complaints but not received any protection.

Sugath Nishanta Fernando's murder and the death threats to his family reveal starkly the collapse of the investigation and protection mechanisms in Sri Lanka.

## 2.5 THE HIGH COURT JUDGEMENTS IN TORTURE CASES

Two judgements have been given recently in cases filed under the CAT Act that acquitted the accused. The legal reasoning in both cases all fall short of the developments of international law relating to torture and also the locally developed standards of jurisprudence on the evaluation of evidence. In one case, that of the Gerard Perera, the court held that while the evidence indicated that the accused had arrested and brought the victim to the police station, and that the torture had taken place within the next 24 hours when the victim was in custody at the same station, there was no evidence to prove that torture had been perpetrated by the accused officers. The victim has been killed and one of the accused in the murder case was also the main accused in the torture case. The court failed to consider the prosecution argument that the accused failed to provide an explanation of their innocence after a prima facie case had been established against them.

In fact, the accused, in their dock statement stated that they had used minimum force to subdue the victim. The medical report clearly established that the victim suffered renal failure, among other injuries, as a result of assault.

In the judgement relating to the torture of Lalith Rajapakse the court misrepresented the medical report stating that it did not contain injuries to the soles of the feet. Whereas, the medical report clearly indicated two injuries to the soles of the feet which the judicial medical officer stated could have only happened due to assault by a blunt instrument. The judge seemed to be unaware of the medical report and the evidence of the doctor lead in court.

In another judgement, that of the torture of Palitha Tissa Kumara in October 2006, which also acquitted the accused, the judgement stated that the use of excessive force (which lead to serious injuries as indicated by the medical report) did not amount to torture within the CAT Act. All three cases have been appealed from.

## 2.6 THE CONDITION OF THE YOUNG IN THE NORTH

The following is an extract from Special No. 31 dated October 28, 2008 issued by the University Teachers for Human Rights, Jaffna, Sri Lanka. UTHR(J) is a highly respected human rights organisation which has been extremely critical of the LTTE, other Tamil militant groups taking to violence and the Sri Lankan government and the armed forces.

> A number of Christian churches in the Vanni are stridently pacifist. But as a group, they found themselves unable to resist conscription of their young. When one of their young dies in battle, the ministers of the churches and the Pentecostal Sisters have preached at funerals that God in his mercy took away these young persons to spare them the pain of killing others.
>
> Young conscripts, who resist the LTTE as conscientious objectors, are liable for heavy punishment. For this reason several of them have taken personal vows and informed their parents and guides not to worry on their account as in whatever situation they find themselves, they have sworn not to kill, but are ready to be killed instead.

The words are a poignant indicator of conditions of life in the north and symbolises the tragedy.

## 2.7 LIFE IN THE NORTH AND EAST

The following passages from the same report - Special No. 31 dated October 28, 2008 issued by the University Teachers for Human Rights, Jaffna, Sri Lanka. UTHR(J) is symbolic of the life of a people who have lost the protection of the state as well as the community.

As another indication, the Government's nominated Tamil leadership, the former LTTE Pillayan group, was meeting the public in Trincomalee. The question was asked why they were killing former LTTE cadres who are no longer combatants. A Pillayan man replied, "*If they had left the LTTE, they should have joined us. If they have not done so, we are bound to treat them as LTTE sympathisers.*" In fact, Karuna and Pillayan had conscripted many of them for the LTTE as children, when they were Prabhakaran's Eastern henchmen.

In the face of this, what would be the fate of the people in a 'liberated' Vanni? For a cadre who manages to escape from the LTTE, family is the first and last line of defence. The foreign humanitarian staff quit well in advance of the deadline set by the Government without forcefully arguing the case of the people they are meant to protect. This places the families of LTTE conscripts in a difficult position. How can they run away without knowing the fate of their sons and 'daughters conscripted by the LTTE, leaving them at the mercy of two sets of predators? That they are running into the dubious protection of what are virtually government prisons, makes the decision that much more heartbreaking.

Having taken out expatriate aid staff, the Government suggested that the local staff of these organisations could work as government volunteers paid by their nominal employers. This has created a painful dilemma for agencies who instilled into them certain ethics appropriate to their calling. As government volunteers, they would report to the government machinery in their area, which has no choice but to take orders from the LTTE and perhaps later, the Government — something they have been trained to resist.

By pulling the expatriates out, the Government has created a situation that has strengthened the LTTE's control over people and resources. A number of articles in the press have raised questions about what this could mean in a conflict where military and

political stakes are high, given the LTTE's record of unscrupulous use of the civilian population and 'the Government's proverbial callousness. A particular fear is the control of food rations to locate the people. The other is the distribution of food.

Presently over 80% of the population is displaced and their own resources of food are negligible. Of the three other sources of food, the first is the food rations distributed by the Commissioner General of Essential Services (COBS) to displaced families not resettled during the ceasefire amounting to Rs. 1000 a month. This is all the food supplied by the Government and it covers a very tiny fraction. It is also very slow and also inadequate. The second source is the World Food Programme in an agreement with the CGES, which covers most people, including now most of Mannar District. This aims at providing each person with 2100 calories per day. At the last reckoning the food going into the Vanni to feed an estimated 430 000 people was 750—800 tonnes, while the actual requirement was 1500 tonnes. If the Government believes that the estimated population is excessive, it must tell us with evidence what the real figure is. If not the Government and the agencies open themselves to the charge of starving the people.

The third source and the only one meaningful in an emergency are the INGOs, who immediately provide two weeks of rations to the newly displaced. This source is now in disarray. Although the Government claims to be able to look after the people, its machinery at best is very inadequate for that purpose as seen in the bureaucratic delays and lack of capacity — many government officers are absconding. With a view to blunt criticism, the Government hit upon the idea of allowing UN food monitors to go with WFP food convoys and hand over the food to the government administration. This accomplishes little in overseeing the distribution of food.

It is remarkable that while the Government carries on shelling and displacing people, nearly all the money to feed the displaced comes from foreign donors, who are in turn abused and flayed on the charge of supporting the LTTE, and finally the government gets is own way with them. What it wants them to do next is even more grotesque.

## 3. AN OVERVIEW OF THE MOST CRITICAL PROBLEMS RELATING TO HUMAN RIGHTS IN SRI LANKA

Any sensible discussion on human rights must address some of the basic problems to be found in the contemporary context of Sri Lanka affecting respect for human rights.

### 3.1 INCREASINGLY THE LAW IS LOSING ITS BINDING CHARACTER

A law which is not binding is not a law at all. Whether the law is binding or not cannot be judged purely from the text of the law. The text, such as the Penal Code, or many other laws that have created vast numbers of crimes may prescribe punishments. The Criminal Procedure Law may prescribe how complaints into such offences be investigated, prosecuted and adjudicated. There can also be constitutional provisions stating how the law may operate. However, the binding nature of the law becomes operative only in the process of the practical implementation of the law.

The law that people perceive as merely existing in the books but not in real life does not have the capacity to achieve the purposes law. In fact when the public perception of lawlessness, meaning the absence of belief in the practical implementation of the law spreads, such disaffection itself has the capacity to degenerate the situation even further. Politicians and the top bureaucrats who know that the law relating to corruption is not really binding become more corrupt. Criminals who know that the laws relating to murder robbery, theft, rape and other such crimes are really binding in a practical sense takes to such offenses without fear. The police and military officers who know that the laws relating to torture, arbitrary deprivation of life by various means such as forced disappearances, custodial killings and various forms of the killing of persons after arrest where even the arrest can be denied, engage in such things also without fear. Fraudsters may engage in crimes of very great magnitude without any fear of the consequences. Persons who manipulate the electoral process may take to electoral violence and various means by which the voting process itself can be manipulated with the same absence of the fear of any consequences.

The feeling of the non-binding nature of the law affects also civil matters such as contracts and tort. People who are aware that contractual obligations can be violated without expecting prompt and effective intervention of the law to protect the interests of the victimised party can easily engage in many practices that defeat the purpose of the contract. A housing contractor may create houses which may collapse at any time; a vendor who wants to cheat a retailer may give fraudulent cheques knowing that no consequence will follow. A manufacturer may produce products that may harm the consumer, an importer may import products such as medical items, milk powder and the like, knowing that the defects of these products will harm the consumer. Borrowers may

intentionally cheat their creditors. Back street money lenders will charges exorbitant rates of interests. Garage owners may substitute valuable parts of a vehicle given for repairs with substandard equipment. Teachers may use their official hours of work to give tuition and to make money. Doctors may find it more lucrative to engage in practices which bring in a lot of money without really providing a service that is in keeping with professional standards and the lawyers may find a thousand ways to cheat their clients. The police will use their powers to arrest persons in order to make money and sometimes for that purpose will collude with lawyers and thus, the act of arresting itself can become a lucrative business. Judges may learn many ways to make personal profits from cases that come before them and the case decisions may become things that are prearranged through various forms of bribes and favours. Powerful politicians may talk to the police and judges and tell them what to do irrespective of the laws that may be contravened thereby. Suppression of information or the complete falsification of information by responsible authorities with the deliberate view to deceive people can become a normal way of life. Making false documents such as title deeds may become a frequent habit thus depriving legitimate owners of their right to property and creating rival parties who may claim such title after having purchased them on the basis that the transferor had the legitimate title. Falsification of documents maintained by the police themselves may become a more frequent habit. As a result of such falsified documents the courts themselves may be lead to believe in the authenticity of false claimants. Disputes of the types mentioned above can lead people, more and more to take to the use of force directly or through gangsters to settle disputes. In this way murder and other forms of violence may increase a hundred fold.

Naturally the list that is mentioned above is a very incomplete one. It only demonstrates the type of nightmare that every aspect of life can become when the law is perceived to be non-binding. This stage has already been reached in Sri Lanka.

## 3.2 THE CONSTITUTION IS BEING DISREGARDED AND HAS LOST THE CHARACTER OF BEING THE PARAMOUNT LAW

Sri Lanka drifted away from the liberal democratic constitutional framework partially in 1972 when the then existing coalition government promulgated a constitution which it called autochthonous which under the pretext of asserting the sovereignty of the parliament in fact, undermined the judiciary. The 1978 constitution was a complete abandonment of the liberal democratic principles of constitutionalism though this constitution still retained some of the jargon of liberal democracy. The 1978 constitution created an all powerful executive in which the power was entirely concentrated on one person called the executive president. In fact, what the 1978 constitution created was a constitutional monstrosity although at the time it only appeared as a tailor-made constitution to suite the political ambitions of the first holder of the executive

presidency, J.R. Jayewardene who was also the creator of this constitution. Thirty years of the experience of this constitution has had the effect of destroying all the public institution of the country from functioning on the basis of norms and standards by which such institutions are normally run. Instead direct control over all institutions has been established.

The irony is that all the political parties by the late 90s had come to a consensus that the 1978 constitution was a monstrosity and that it had the effect of destroying all the internal mechanisms of public life. However, it has not been possible for the political parties of the country to find a way out of the problem by discarding this constitution and adopting a constitution that would reinforce a liberal democratic system of governance.

A partial attempt for reform was made in 2001 by consensus of all parties to bring an amendment that would create obstacles for direct presidential control of the public institutions. The method suggested was to create a Constitutional Council, members of which are selected to represent all political parties and this body would consist of persons of proven integrity in the country. Their function was to select, on the basis of merit, a number of persons called commissioners in important public areas such as public service, police, the electoral system, public media and other commissions such as the Human Rights Commission of Sri Lanka. These other commissions would have the sole power over appointments, transfers, disciplinary control and dismissal of public servants coming under these commissions.

On the basis of the 17th amendment the Constitutional Council was created which in turn helped to create several of the other commissions. However, the election commission was never created as the successive presidents refused to allow the Constitutional Council to create the election commission. Within the short period of three years the commissioners that were elected contributed to some degree to be a buffer against the unlimited power of the president.

Naturally the all powerful presidency understood the conflict between himself and the limitations imposed by the Constitutional Council. The result was that under various pretext the government did not appoint the Constitutional Council and thereby the 17th Amendment to the Constitution was confined to the book and is no longer operative.

The statement from the executive president clearly indicated that he does not consider himself obliged to follow the Constitution if he feels that it is defective. The 17th Amendment is declared by the president to be defective and is in need of amendments. This task has been given to a Parliamentary Select Committee. Thus, the operation of this constitutional provision is suspended by the mere wish of the president.

The controversy on the 17th Amendment is perhaps the clearest evidence of the way constitutionalism has lost its relevance in Sri Lanka.

## 3.3 LOSS OF RESPECT FOR TREATY OBLIGATIONS

Sri Lanka clearly does not see the obligations arising from its membership of the United Nations and being party to UN conventions as creating serious responsibilities. The government spokesman openly refers to human rights as western and anti-nationalistic. It has been portrayed as the white man's burden. We have summarised below the government's failure to implement any of the recommendations made by the UN agencies relating to human rights.

While the government engages in such attacks on the very concept of human rights, extreme right wing organisations portray human rights as a conspiracy pursued by imperialism in order to subjugate the less developed countries. The subject of human rights is also referred to as a strategy of the former colonial powers in order to maintain their hold on their former colonies. Most of all human rights have been portrayed as aiding and abetting terrorism.

A major policy line of the government supported by these extreme right wing sections is to highlight that law, including the international law, has no relevance in times of war and that in the war against terrorism everything is fair. In this light local as well as international intervention on human rights is seen at best as the work of intruding fools. However, more often such work is seen as people who are traitors knowingly or unknowingly.

The portrayal of human rights as a sinister plot is a constant theme in the government media. There are attempts to brainwash the population to believe that all calls for the elimination of torture, extrajudicial killings, forced disappearances, for fair trial and judicial independence, and any concern shown for the victims of human rights abuses including displaced persons as parts of a sinister scheme to undermine the military efforts to eliminate terrorism.

The government, thus, is caught in a severe contradiction in trying to create the impression that it respects the conventions it has ratified and wants to be a part of the

global effort to protect and promote human rights on the one hand and on the other the need to keep up a strong media campaign to brainwash the population that human rights is a sinister plot against the nation. A study of the documentation from the executive as well as the spokesman for the government and the government media manifests this contradiction sharply.

## 3.4 MAKING THE INVESTIGATIVE MECHANISM UNDER THE CRIMINAL PROCEDURE LAW AND MILITARY INOPERATIVE RELATING TO INVESTIGATIONS INTO HUMAN RIGHTS ABUSES.

Sri Lanka has a sophisticated system of law relating to investigations into crime as laid down in the Criminal Procedure Code. The code has been amended on many occasions in order to incorporate new developments. In the past Sri Lanka was also able to develop the competence of the criminal investigators. Although there may be areas of training that can be improved such as the use of forensic science, the actual apparatus that existed was quite capable of absorbing these developments.

By deliberate interference into this system by the executive this system now lacks independence to operate. The punishment of investigators who do their jobs in terms of professional standards with integrity has become a common feature and this change has become part of the popular perception among the Sri Lankan people. Particularly the lawyers, prosecutors, judges who are more knowledgeable about the system know how much the system has succumbed to the manipulation of the politically powerful elements.

Non-investigation into serious human rights abuses by the military and the police have become an entrenched part of the state policy. This policy developed over several decades particularly due to approaches to counter-insurgencies beginning from 1971. As mentioned earlier the policy line that considers that dealing with such counter-insurgencies cannot be conducted while at the same time respecting the law is also the basis for interfering and suppressing the investigating machinery into human rights abuses.

**Military Police:** Before this counter-insurgency mentality became the dominant thinking mode relating to investigations the military had its own military police to investigate into any of the alleged abuses. Even at the movement while such a branch exists in name there is no evidence to suggest that the military police investigate against the military in a credible fashion. In such well-published allegations as the killing of the 17 aid workers of Action Contra La Faim, the killing of the five students in Trincomalee, allegations of abductions and forced disappearances, the military police, if they have investigated the matter would have more easily found how the incidents had, in fact, happened.

Instead of speculating into the manner in which these things could have happened the government could have requested reports from the army authorities on the basis of the conduct of investigations by the investigation units of each of the branches of the Armed Forces. The clear absence of such reports is an indication of the breakdown of credible inquiries within the armed forces themselves into the allegations of abuses by the armed forces.

The lack of credible investigations by the investigating units of the armed forces themselves into allegations of abuses is also an indication of the change of approaches to the question of military discipline. When there is tolerance of abuses as an unavoidable aspect of military operations the consequence will be to downgrade the levels of discipline. This too, results in discouragement of credible inquiries into allegations of human rights abuse.

**Police investigations:** The same pressures to prevent abuses by the military has even more been incorporated into the mentality relating to investigations by the police. There is bulky documentation of the abuses of the police investigations. Particularly the reports of the commissions enquiring into forced disappearances and the transcribed documentation at these commissions which is also available, demonstrates the scale of denial of taking down of complaints by the police and the absence of any investigations into the complaints which recorded. The very appointment of the commissions many years after the incidents was for the purpose of providing an opportunity for the relatives of disappeared persons officially counted at around 30,000 to record what they knew about such disappearances. Even in these cases where the commissions thought that they had adequate information for further action, hardly any action was taken.

Inaction of the police into complaints which directly or indirectly relate to counter-insurgencies later spread to the normal criminal investigation processes. The complaints about abuses of the police during investigations relating to crimes under the Penal Code such as murder, robbery or fraud are generally ignored. Where some investigations take place victims and their witnesses come under severe threats including possible assassinations.

Usually when complaints are made by lawyers or human rights organisations some investigations are initiated but these are done usually by the high ranking officers of the same areas where the abuses have taken place. It is quite rare for any of such inquiries done by superior officers of the same police officers who are accused of abuses, produce any credible results. Usually, these investigations are dragged on for a long time. Such long delays provide the opportunity for the perpetrators of such abuses and their colleagues to harass the complainants.

The reports also show that they high ranking officers try to persuade the complainants to arrive at compromises and abandon their complaints. Though the Police Regulations also provide procedures for investigations these are not usually followed. In essence the criticism against inquiries by high ranking officers is that they are conducted in an atmosphere of intimidation towards the complainants and without credible attempts to win the confidence of the complainants about the legitimacy of such inquiries.

Due to constant criticism against such inquiries by the high ranking officers of the same areas from about 2003 to 2006 there developed an initiative to refer serious allegations of human rights abuse to Special Investigating Units (SIU) of the Criminal Investigation Division (CID). The reference was often done by the Attorney General's Department or the Inspector General of Police. In some instances the Human Rights Commission of Sri Lanka (HRCSL) and the National Police Commission (NPC) also requested such inquiries by an SIU. In a few instances even the Supreme Court has ordered such inquiries.

Such references to a competent group of investigators did bear some results. Over 60 cases relating to torture were filed under the CAT Act, Act No. 22 of 1994 by the Attorney General's Department on the basis of inquiries done by these SIUs.

However, since the time the 17th Amendment became inoperative and the NPC abandoned its strong policies pursued under the former commission, the reference of cases to SIUs has been abandoned except in very rare instances. The most prominent reason is the resistance that developed from the officers who were affected by such inquiries and other officers who feared them. The agitation by these persons found support from the high ranking officers of the police. There is, thus, a very heavy organised resistance against inquiries into abuses by the police through independent and competent investigators.

Since 2006 the actions inquired into by the SIUs have diminished and the filing of indictments for human rights abuses in the High Courts by the Attorney General's Department has also diminished.

The communications with the Attorney General's Department indicates that there is a deliberate policy of discouragement of prosecutions into police abuses. One glaring example was the case of Gerard Perera. When the High Court of Negombo acquitted the police officers who were charged with the torture of Gerard many human rights organisations made representation to the Attorney General to point out the glaring errors of law and fact in the judgement and requested that the AG appeal. A lawyer for the widow of Gerard Perera also requested such intervention. No action was taken by the Attorney General's Department and not even replies were sent to the requests made.

This is in contrast to a few earlier cases under the CAT Act when the AG officially filed appeals on a few of the judgements of the High Court where there was reason to believe that there were serious errors of law in these judgements.

Though the investigative function in Sri Lanka is exercised by the police and the prosecuting function is exercised by the Attorney General's Department there are underlying links between the two. The policy on prosecutions is developed and carried out at the Attorney General's Department. When there are clear messages of investigations into crimes from the Attorney General's Department the investigation agencies pay heed to messages. However, when the message emanating from the AG is a negative one naturally the investigators are discouraged from pursuing their investigations because the exercise at the end is a futile one.

What exists in terms of criminal investigations in general and investigations into human rights abuses in particular is a situation of chaos which had been deliberately generated. This chaos generates inaction. Once in a monolithic institution such as the police inaction begins to develop there are many who manipulate the situation for their own benefit. Thus, the criminal investigation process can turn into the very opposite. The harassment of complainants and the protection of the perpetrators can become the objectives of the "investigations". Once these changes take place people begin to notice the metamorphosis of the system and become discouraged to make complaints or to pressurise about having their complaints investigated.

The change that comes in the will of the population to distrust the investigating process can lead to many results. Some may resort to the criminal elements and the underground to have their problems sorted out. The direct use of violence against perceived enemies through the criminal elements can become a large enterprise. In this process the criminal elements who find many lucrative avenues for their existence can make their influence felt into the policing establishment itself. Thus, the police criminal link may become a visible factor in local life. This naturally will aggravate the investigating agency's metamorphosis into a perpetrator protecting agency.

Once the power of the criminal element and the linkage with the police becomes consolidated the political establishment itself begins to rely on this for their benefit. Thus, the electoral processes can come under considerable manipulation of this new combination of criminal and police elements, often for the benefit of the politicians representing the ruling regime. Several of the past elections have clearly demonstrated the tremendous developments in this aspect.

Unscrupulous business organisations also exploit the power of the criminal underground and the police that play a subservient role. Fraud can take place on a very large scale

under such circumstances. Recent reports of the massive fraud by some "finance companies" have demonstrated the extent to which fraudulent elements can operation without fear of the legal consequences.

Serious undermining of the implementation of the Criminal Procedure Code is one of the most important factors that adversely affect the rule of law system in Sri Lanka.

## 3.5 THE UNDERMINING OF THE PROSECUTION SYSTEM OPERATED THROUGH THE ATTORNEY GENERAL'S DEPARTMENT

For many decades now the prosecutors of Sri Lanka have often been called upon to perform the contradictory role of being the defenders in many cases. These are usually cases in which police and military officers or those who work under their direction are the alleged perpetrators.

The evolution of the prosecutors playing the role also of defenders developed in a complex way. One of the most prominent ways by which the Attorney General's Department has been called upon to play this dual role is when it is called upon to assist inquiries into serious crimes involving state officers. The instances of which this has happened are many. Perhaps one of the outstanding examples is the case of the prison massacres in July 1983. In this case two officers from the Attorney General's Department both of whom were later to become Attorney General have been criticised for their role in subverting the course of justice during the investigations into these two massacres which took place in the Welikada Prison. This story as recorded by Ranjan Hoole in a recently published article is worth quoting here in full.

### 3.5.1 Impunity, a debilitating fixture in state culture - 25 years after Welikada massacre

**Ranjan Hoole**


Colombo's Welikada high security prison was the scene of two massacres of Tamil political prisoners during the communal violence of July 1983, first after lunch on July 25 claiming 35 prisoners and second, about 4.00 PM on the July 27 claiming a further 18. On both occasions Secretary of Justice Mervyn Wijesinghe asked Colombo Magistrate Keerthi Srilal Wijewardene to

hold inquests with the assistance of Tilak Marapone and C.R. de Silva (the present AG) from the Attorney General's Department. No culprits were identified and the case was hushed up.

The massacres made life a living hell also for those on the spot, who driven by moral aversion tried unsuccessfully stop them, but were not even allowed to clear their names.

**The inquest**

One of them, Superintendent of Prisons (SP) Alexis Leo de Silva, upon hearing the alarm on the 25th, rushed into the mob in the Chapel Section with ASPs Amarasinghe and Munaweera, followed by Deputy Commissioner (DC) Cutty Jansz, but to little avail. Leo felt very angry that the army unit at the prison headed by Lt. Mahinda Hathurusinghe, 4th Artillery, did nothing to stop the murder, and later also blocked emergency hospitalization of injured survivors. A lieutenant would hardly have dared to override DC Jansz and doomed the survivors, without prompting from Army HQ. While some prison staff protected Tamils, others, including a jailor, attacked the survivors in the compound. At the inquest on the 26th, Leo wanted to place the truth on record.

Magistrate Wijewardene left out chunks of his testimony. Leo's son Lalanath de Silva recently told us, "An AG's department counsel called my father outside the room where the inquest was being held and attempted to persuade my father to go along - pleading that the truth would place Sri Lanka in a very adverse position internationally." At one point the Magistrate became so angry that he refused to take down Leo's testimony.

The Police under Detective Superintendent Hyde Silva questioned the survivors on the 26th following the Magistrate's order. To Suriya Wickremasinghe of the Civil Rights Movement belongs the credit for painstakingly seeking out survivors of the massacres, interviewing them and keeping the issue alive. She told us that survivor Manikkadasan in his statement to the Police, blamed two jailors of active complicity. A thin jailor warned him that mention of names might lead to similar jeopardy from inmates.

**Eyewitnesses**

Suriya believes that the second massacre owed to earlier survivors being also eyewitnesses. On the 27th Lt. Nuvolari Seneviratne of Army Engineers commanded the platoon outside the prison. Hearing a commotion where the survivors had been re-housed, Nuvolari radioed the Duty Officer (DO) at Army HQ. He told the Junior DO who answered that he wanted authority to go into prison and disperse the mob. The Junior DO gave him a telephone number and asked him to phone the DO (a colonel). Nuvolari used the coin phone at the entrance to ring the number at Army HQ. The DO told him to stick to standing orders and stay outside prison, or would face court-martial if he went in. Nuvolari asked for the Army Commander. He was refused, being told the

Commander was with President Jayewardene, and relief was being sent to deal with the problem. (Cutty Jansz had also phoned Army HQ.)

The relief, commandos under Major Sunil Peiris, promptly went in and saved 19 of the 37 prisoners. Nuvolari felt the deaths to be sheer murder, which his platoon could have prevented if not constrained by HQ. At the second inquest, the AG's men, Marapone and de Silva, were keenly selective. Leo who was in prison the whole day, had at the first forebodings asked DC Jansz to expedite the removal of the survivors to safety. As if by design, the attack began when he went for a late snack in lieu of lunch, causing him to rush back. Neither he nor his ASPs were called upon to testify at the inquest.

The AG's men and Magistrate tried to frame a jailbreak attempt that supposedly left inadequate resources to prevent the massacre. The AG's men and Army's lawyers importuned Lt. Seneviratne to tell the inquest that he was outside the prison controlling a jailbreak. He refused. The world had crashed around the 22-year-old sportsman from Trinity College who joined the Army with high hopes. Major Sunil Peiris stepped in saying not to harass Nuvolari and if he won't, he won't, and if their object was having someone from the Army testify, he would.

To a leading question, Major Peiris answered with professional precision, "I did not notice any prisoners attempting to break out. Therefore I gathered that the attempted mass jail break had been contained before our arrival!" Undeterred by Peiris' refusal to perjure, the Magistrate summed up, "...prompt and efficient steps taken by the special unit of the Army under witness Major Peiris had effectively prevented the jail break ... and helped quell the mob which might otherwise have caused [even greater death]."

**Taming scandals and condemning posterity**

In July 2001, President Kumaratunge appointed the Presidential 'Truth' Commission on Ethnic Violence headed by former Chief Justice Suppiah Sharvananda, with S.S. Sahabandu and M.M. Zuhair. Suriya Wickremasinghe had repeatedly been thwarted in her efforts to obtain from the Police, testimony they received from the survivors of the first massacre. The Commission, which relied heavily on Suriya's work, could have followed this up to further its investigations, but did not.

Tamil survivors named to us Jailor Rogers Jayasekere, Jailor Samitha Rathgama and Location Officer Palitha as the protagonists on the ground. Senior prison officials have indirectly affirmed Jayasekere's culpability. His family were strong UNP supporter from President Jayewardene's old Kelaniya electorate, shared in 1983 by Ranil Wickremasinghe and Cyril Mathew. Rumours charged that gangsters under Gonawala Sunil of Kelaniya UNP fame were brought into prison to assist the second massacre.

**Vehicle check**

Nuvolari Seneviratne's testimony bears relevance here. His soldiers at the entrance checked the vehicles going into the prison to ensure they were the government's. Jail guards just inside the entrance did the identity checks. The soldiers at the entrance told Nuvolari that some of the official vehicles entering took underworld figures, but exited without them. Asked who the underworld figures were, Seneviratne replied, "I did not see them myself and there is no way my men would have known them. But the jail guards knew them as persons in and out of jail. They told my men."

During the second massacre, Journalist Aruna Kulatunga wrote recently, he saw airline hijacker Sepala Ekanayake coming out of the prison gates screaming "kohomada ape wede" (How is our job?), felled by a thundering blow from Major Sunil Peiris. Peiris had told me something more, that Sepala was carrying a severed human head.

Senior prison staff dismissed this as fantasy. I published it in my book Arrogance of Power, since I knew Peiris. I had checked back with Peiris, who, a little hurt, explained, 'You know your Bible? It was like John the Baptist's head on a charger'. It happened before Peiris saw the scene of crime. Peiris' action makes sense only if Sepala's utterance, reported also by Kulatunga, drew his attention to something revolting. Peiris' testimony at the inquest speaks for truthfulness and accuracy that are hallmarks of a good officer. Nuvolari's refusal to perjure again stands his testimony in good stead.

About when Peiris' party arrived, Nuvolari's men drew his attention to a fresh hole in the prison wall near the cricket ground. Upon inspection he saw an Air Force truck standing by. No words were exchanged. The Army's legal unit also removed Nuvolari's standing orders and the logbook with records of vehicles entering. On 27th, the Tamil detainees fought back, some attackers were mauled and soldiers shot some, but there is no account of casualties. SP Leo de Silva felt impelled by his honour to place the truth on record. His later investigations were stalled by an order from Commissioner Delgoda. Then Justice Minister Nissanka Wijeratne threw Leo out of service at the age of 56 by refusing a routine extension. The total cover up and a diversity of coherent testimony pointing to the nefarious deployment of broader resources, gives surely the lie to representing the massacres as an outburst of subaltern patriotism. No perpetrators were named and Sepala walks free. Is it not because they have beans to spill?

Whether or not directly intended, what our commissions and AG's Dept. achieve is to protect the State's inbuilt abuses that have gone over tolerable limits. The blame for its repeated crimes is invariably shuffled off to subaltern sectors. The routine official prevarication also leads to Sinhalese seeing the ethnic problem as Tamils making mountains of molehills, and the solution as being to knock them about, pat them on the head and give them sweets to suck.

Regrettably, few Sinhalese would be shocked that Attorney General C.R. de Silva guides important commission proceedings such as the ACF investigation. He, or Marapone, tried to stop Leo de Silva 25 years ago, pleading that 'the truth would place Sri Lanka in an adverse position internationally'. Lanka would have redeemed itself had all such crimes been faced squarely long ago, rather than make fixers of truth a permanent feature of the State. On a further point, the prison murders of rising Tamil leaders Dr. Rajasundaram, Kuttimani and Thangathurai led to the fracture of the original Tamil youth leadership and the rise of Prabhakaran. That is another intricate story.

**3.5.2 The conflicting roles of defender and prosecutor:** The same issue of playing the role of defender at the initial stages of the inquiry in cases where evidence is available have come up in all inquiries in which the officers of the department had to play a role at the inquiry stage. This happened mostly in cases where there was a popular outcry for an inquiry following a certain incident. In order to satisfy the public sometimes commissions are appointed together evidence or to monitor the inquiries. Sometimes such inquiries take place at the inquest stage where decisions of a magistrate at the initial stage may decide as to whether there will be any further inquiries at all. At this stage if some vital evidence is suppressed or distorted that may lead to conclusions obstructing the due proves of law being pursued any further. For example if at the Magistrate's Court inquiry into a prison massacre leads to the conclusion that it was just a mob attack this can lead to the conclusion that trying to identify the perpetrators as well as those who were part of the conspiracy for the attack is no longer needed.

The suppression of evidence at the early stage can be done in many ways. When a witness is called before an inquiry at the initial stage questions may be asked in order to contradict the statements made to the police at the first instance by the same person. Sometime witnesses particularly state officers who come as witnesses can be instructed to make statements denying earlier statements or giving a different version of the events to the original statement. Lay witnesses can also be intimidated either not to attend the inquiries or to give false evidence so as to subvert further inquiries. When witnesses who have initially come forward to give evidence do not come to give evidence at these commission inquiries or inquests that may lead to the conclusion to the effect that no reliable evidence is available to proceed with the case. There are many other subtle devices by which the witnesses can be intimidated or mislead.

The result of all this would be to come to the conclusion that there is not case to prosecute. It is an absurd situation when the would-be prosecutor participates in a process with a view to arrive at the conclusion that there is no evidence to proceed.

**3.5.3 Defender at UN forums** - Once again the conflict between the Attorney General's role as a prosecutor comes into conflict with the role that it also plays in being

the advisor for government delegations attending UN forums and other international and local forums related to human rights issues. The role of the government delegations in these matters is to deny all allegations and portray a picture of the absence of human rights abuses.

Playing this role of having to deny human rights abuses is done through many activities. One such is to prepare reports for various UN forums. In preparing reports for the purpose of denial often facts have to be distorted and manipulated. For example when the government delegation made a report to the CAT Committee xxxxx the government report tried to answer the allegation of routine torture practiced at police stations in Sri Lanka by trying to manipulate figures to the effect that, in fact, occurrences of torture were negligible. Where the argument was built was to select a limited number of cases that had been reported by one agency and compare it with the number of arrests that had taken place during the relevant period. In this manner falsely selected figures of torture cases when compared to all the arrests that had taken place in the country gave the impression of a thin percentage. To do this the writer of the report had to suppress the fact that is repeated by almost everyone including the Human Rights Commission of Sri Lanka that the number of reported incidents of torture is only a fraction of the actual extent of torture that is taking place in the country. Further the report had to be silent about the enormous fear psychosis prevalent in the country particularly in rural areas which constitute the largest areas of the country of people to complain about state officers in general and police in particular. Further even the figure of reported cases given was significantly minimised. This report was authored by an officer of the Attorney General's Department.

When the department has to deny human rights abuses such as torture, forced disappearances, extrajudicial killings and the like it cannot at the same time do the job of the prosecutor who has the duty to prosecute all cases of torture or human rights abuse which amounts to crimes under the Sri Lankan law. If the Attorney General prosecuted all the cases then the figure would be too big and would a cogent argument against the denials of the government. If fewer prosecutions are done to give the impression of fewer abuses then the role of the prosecutor fails.

3.5.4 What is even more disturbing is the fact that in the media campaign by the state and others who have an interest in obstructing the protection and promotion of human rights the activities of the department play a prominent role. In fact, in some instances the Attorney General and senior state officers have appeared on panels before the media in order to defend the position of the government as against serious allegations of human rights abuse in the country. One such highly published incident was the government media conference to attack the report of the IIGEP who were tasked with observing the proceedings of the Presidential Commission of Inquiry into some serious

abuses of human rights. There are many other instances in which the Attorney General's Department officers are called upon to create the impression of the falsity of the allegation of human rights abuse for media purposes.

The acts of the Attorney General's Department as media spokesmen affects the prosecutor's role through the change of public perception about the department. When the public see in the media that the spokesmen from the department are engaging the denial of abuses of rights naturally the question arises in the public mind as to the sensibility of approaching the same department or relying on the same department to prosecute alleged offenders of human rights abuses. By repeated performances the deep impression that has been made in the public in Sri Lanka is that the Attorney General's Department is very much linked with the security apparatus and it is obligated to defend this apparatus at all costs. The political task of defending the public security apparatus overrides all other obligations including the tasks involved as a public prosecutor. The conflict of interests involved is a matter that is part of the perception of the people in the country.

### 3.5.5 IIGEP critique of the AG Department's role - These contradictions in the Attorney General's Department were highlighted in the final report of the IIGEP:

(a) The role of the Attorney General
The IIGEP expressed its concern about the role of the Attorney General from the very beginning of its work. Justice Bhagwati recommended to the Commission to remove members of the Attorney General's Department from the inner workings of the Commission as early as 27 February 2007 by reason of the apparent conflict of interest. The IIGEP's concerns were repeated in all subsequent public statements, and in many other communications, written and oral, with the Commission, Ministers of the Government of Sri Lanka, and with the President himself.

The fundamental conflict of interest, in the opinion of the IIGEP, arises out of the position of the Attorney General as the first law officer of Sri Lanka and chief legal adviser to the Government. The Attorney General is legal adviser to all levels of the national Government, including the armed and security forces, and the police. In a Commission whose tasks include an inquiry into the efficacy of the original investigations into certain

One of the witnesses at the Presidential Inquiry who gave evidence through a video link.

cases, including investigations and inquiry into certain incidents involving the armed and security forces and the police, the Attorney General's staff is thus potentially in the position of being a subject of the inquiry, and is, in any event, not an independent authority.

The Attorney General rejected the charge of conflict of interest. He took the view that his officers had played no role in the investigations of any of the cases under review by the Commission, a view which is not supported by documentation provided to the IIGEP by the Commission. At a later time, the Attorney General offered to remove himself and his officers from the Commission, if any of the Commissioners so requested. No Commissioner did so.

The Commission itself rejected the notion of a conflict of interest and stated that it is the tradition for the Attorney General to play a leading role in commissions of inquiry. A study made of previous commissions of inquiry commissioned by the IIGEP revealed that not all previous commissions of a similar nature have given a role to the Attorney General. In addition, the Commission stated that it did not have the funds to engage independent counsel to act as counsel assisting it. Nevertheless, it did appoint counsel from the Unofficial Bar to assist it in the Trinco 5 and the Pottuvil cases, and the Attorney General's Department did not play a leading role in these cases.

An astonishing event occurred in November 2007 at the joint plenary meeting held between the Commission and the IIGEP. A letter dated 5 November 2007 from the Presidential Secretariat and addressed to the Chairman of the Commission was revealed to the meeting. It stated that:

*The President did not require the Commission to in any way consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regard to or in relation to any investigation already conducted by the relevant authorities.*

This letter, which also extended the term of office of the Commissioners, was stated to be by way of a "clarification" of the scope of paragraph 5 of the Presidential Warrant establishing the Commission. The IIGEP was deeply disturbed by this communication. Even some of the Commissioners appeared to be taken aback. The IIGEP considered that such a "clarification" from the President could only be viewed as a directive from the highest level, rather than as a suggestion to the Commission to be taken as an advice. It was the single most important event prompting the IIGEP to decide shortly thereafter that it should bring its presence in Sri Lanka to an end.

The IIGEP is of the opinion that this statement, on behalf of the President, constituted a direct interference in the independence of the Commission in two ways. Firstly, the "clarification" not only seeks to restrict, but also transforms, the mandate, thereby impinging on the independence of the Commission. The effect of this clarification is that members of the Attorney General's Department who might legitimately be called to give evidence, are granted immunity. Secondly, it undermines and reduces the Commission's own choices as to which influences and aspects of the original investigations in the various cases should be further investigated. This fundamentally undermines the ability of the Commission to discharge its mandated goal of ensuring that the original criminal investigation was carried out properly and effectively, and in case of its failure, clarifying what led to such failure, which was a central purpose of the establishment of the Commission. Any such interference or unwarranted influence, in the opinion of the IIGEP, erodes public confidence in the Commission's capacity to function in an independent and transparent manner, and could impede the search for the truth. Moreover, the erosion of public confidence further deters potential witnesses from coming forward.

The IIGEP was greatly strengthened in its opinion on this vital question by the opinion it solicited from two eminent Sri Lankan jurists with long practical experience in the law. This opinion concluded:

*The CoI is required to examine and comment on the adequacy and propriety of investigations already conducted. Necessarily, therefore the Col must scrutinize the role of the Attorney General and officers of the Attorney General's Department who supervised, instructed and/or gave directions to the investigators. Using the Panel of Counsel, consisting of those very same officers and/or their colleagues, will undoubtedly give rise to a public perception of a conflict of interest and even of an appearance of bias. The public, and especially victims — to use the language of the Disappearances Commission — will be 'very much affected by the awareness that State Officers are investigating into complaints against Officers of the State.' Independent counsel are a sine qua non*

An amendment2 to the Commissions of Inquiry Act 1948 formalises the role of the Attorney General in all future commissions. The newly enacted Bill goes beyond the right of the Attorney General to be present in Commissions of Inquiry. It gives the Attorney General the right to provide counsel to assist the present Commission of Inquiry as well as all future inquiries under the Act. This confirms the IIGEP's apprehension regarding the absence of political will and the institutional inability of Sri Lanka to conduct human rights inquiries in accordance with international norms and standards.

## 3.6 FAIR TRIAL AND JUDICIARY

Fair trial has suffered severe setbacks for many reasons. Some of the more prominent reasons are:

**Undermining of the judiciary by the Constitution** – We have dealt the undermining of the judiciary by the separation of powers and the absolute powers of the executive president earlier. The direct result of this constitutional change and about 30 years of practices that develop under the Constitution has affected the judiciary in many ways. It has created an overwhelmingly popular feeling that the executive interferes with the judiciary both directly and indirectly. The politicisation of the selection process of the higher judiciary and the virtual loss of expectations within the judiciary to be promoted on the basis of merit and seniority has created great uncertainties within the judicial system. As security of tenure has been considered universally as one of the paramount considerations with regard to the independence of the judiciary such uncertainties about promotions appointments and dismissals is in violation of the norms and standards required for the maintenance of an independent judiciary.

This same process of uncertainty has spread in the worst way among the minor judiciary. The UN Human Rights Committee in the case of the dismissal of a former district court judge. Soratha Bandaranayake, expressed the view that the denial of a fair hearing to the former district judge by the judicial service commission was a violation of article 25 of the ICCPR, guaranteeing the right to access to the civil service and article 14 (1) which guarantees fair trial. There have been large numbers of similar complaints regarding dismissals although many of the complainants have not pursued their complaints up to the UN Human Rights Committee.

**Impunity of the executive** – The constitution itself provides that the chief executive should not be called before any court by any suit. There is blanket impunity. The courts so far, have also declared that there is such blanket impunity. This has gone on for 30 years. For the first time after the 1978 Constitution notice has been issued to the executive president only in August, 2008 regarding the non-implementation of the 17th Amendment. This has happened only within an atmosphere of a perceived rift between the Supreme Court and the executive in the months preceding such issue of notice.

**Impunity to the police, military and other state officers through emergency and anti terrorism laws** – For decades now Sri Lanka has been under emergency and anti terrorisms laws within which many of the laws of the country remain suspended. Under these special laws access to the judiciary which is normally available is restricted severely. As a result many events and incidents are not subjected to judicial scrutiny at all. The absence of judicial scrutiny particularly in the criminal justice process means severe restrictions in investigations and prosecutions. Thus, impunity of state officers is assured by the limitations created in the process of investigations and prosecutions. We have dealt with this issue at greater length earlier.

**Perception of the deterioration of judicial competence** – The factors mentioned in the above three paragraphs naturally have the influence of deteriorating the qualities to go to constitute the competence of the judiciary. The popular perception of such deterioration of quality is the subject matter of constant discussions among lawyers as well as the litigants. Many judgements from high courts and lower courts demonstrate remarkable limitations of understanding of basic principles of criminal law, civil law and laws relating to procedural fairness. In a climate where there are widespread fears of interference with the judiciary by the executive or by powerful persons and also in a climate where settlements are encouraged without weighing the fairness of such settlements it is not surprising to see the degeneration of the quality of the judiciary.

**The absence of witness protection** - A well known principle of fair trial is that the outcome of the trial depends on witnesses. If witnesses do not come forward at the initial stage of the investigations the investigators have to work on very limited amounts of information about the things they are supposed to investigate. The situation becomes even worse when even the limited number of persons who have initially come forward do not come before courts to give evidence. The situation becomes even worse when many of the witnesses who come forward due ot fear or favour change their original versions and give false evidence in court. To this list it may also be added that when the willing and honest witnesses are being killed before giving evidence then the court is left with little option than to acquit the alleged culprits. The direct result of that is many persons become more reluctant to come forward to give evidence in court. Fear of the absence of protection makes courts and the trials a matter of irrelevance to the larger sections of the population.

**Delays** – delays in adjudication in Sri Lanka is not a new phenomena. However, in recent times the consequences of these delays have become worse due to the environment of insecurity in the country. The assassination and intimidation of witnesses is encouraged by delays. The opportunities to destroy documents, to buy adverse witnesses and also to engage in undue influences on the lawyers of the opposite side and even judges is provided by the process of long delays pending trials. Delays further strengthens the

feeling of the irrelevance of the law and encourages people to look for alternatives, however, unseemly such alternatives might be.

Due to all these factors and the overall environment in the country which has been described in other parts of this chapter, the right of fair trial has suffered enormous setbacks. The figure of a 4% of convictions in criminal cases indicates the lowest depth to which the system has failed.

## 3.7 INTERNALLY DISPLACED PERSONS

**Internally displaced persons** – Please see below an article by Mr. D.B.S. Jeyaraj, which appeared and is reproduced by courtesy of the Daily Mirror on October 4, 2008.

### CIVILIANS OF WANNI ARE WRETCHED OF LANKAN EARTH

Franz Fanon's famous phrase "wretched of the earth" is quite applicable in the Sri Lanka of today to the civilian population inhabiting the northern mainland known as the "Wanni".

More than 200,000 internally displaced persons trapped in territory that was/is controlled by the Liberation Tigers of Tamil Eelam (LTTE) are in existential terms the wretched of the Sri Lankan "Wanni" earth.

Legally, constitutionally and geographically they are people of the sovereign state of Sri Lanka entitled to full, inalienable rights. Yet these "De – Jure" citizens have for nearly two decades been denizens of a "De – Facto" administration of the "shadow" state of Tamil Eelam run by the LTTE.

What is happening now is that the Sri Lankan state is re-asserting its dominance and writ over all parts of its legitimate territory and people. The armed forces are engaged in a ferocious military campaign for the avowed objective of "liberating" the people from the clutches of the LTTE.

The tragic irony is that the people on whose behalf the current war is being waged are suffering tremendous agony and despair. Even as the military juggernaut continues to advance, civilian displacement also continues on a massive scale.

Sadly the plight of these pathetic people is ignored, overlooked or underplayed in a situation where militaristic gains and losses are given pride of place.

The "war" is not the sole narrative of what is going on in the Wanni. From a humanitarian perspective it is the sad situation of the people – most of them internally displaced – that is more important.

It is this plight faced by the wretched of the Wanni earth that this writer would be focusing on today in what is formally an inaugural column for the"Daily Mirror".

Fighting in the northern theatre of war began in earnest last year after the conquest of the Eastern province. It began intensifying after April this year.

The armed forces have been able to wrest back all areas of the Mannar district that were under Tiger control. They have also made significant gains in Vavuniya north and the Assistant Government Agent divisions of Thunukkai and Manthai East in Mullaitivu district. Inroads have also been made into certain regions of Kilinochchi district and the Manal Aaru/Weli – Oya regions of Mullaitivu district.

The re- acquisition of areas under LTTE control has seen the people moving away. There were two major reasons.

One is that people did not want to be caught up in the line of fire as the armed forces advanced. So they moved further and further away from the zones of active conflict.

The other reason is that the LTTE also began pulling and pushing the people towards the interior into areas remaining under their military control.
As Mao Ze Dong said guerillas are like fish in an ocean of people. The LTTE "fish" did not want their "ocean" of people to dry up.

Thus we have a situation where more than 200,000 internally displaced persons are located in LTTE controlled areas east of the A – 9 highway or Jaffna – Kandy Road. Some of these people have been displaced at least seven times during the past ten months.

It has been a scenario of getting into one area considered "safe" and then getting out as the fighting escalated. They move into another comparatively "safe" area only to move out again as the war moves in.

This was the tragic tale of the Eastern Tamils living in the Muttur east, Sampoor

and Eechilampatru divisions of Trincomalee district who suffered immensely. Now the Northern Tamils undergo a similar predicament.

Compounding the issue further was the fact that areas regarded as "safe havens" for many years got drastically affected as the army advanced and Tigers retreated. Palampitty, Periyamadhu, Adampan,Iluppaikkadavai, Vellankulam,Vannerikulam, Akkarayankulam,Thunukkai , Mallavi, Vannivilaankulam and now Mankulam and Kilinochchi have all been drained of its civilian population.

In recent times there have been three general lines of movement by internally displaced civilians. The major "displaced" movement has been along the Paranthan – Mullaitheevu Road. The next was along the Mankulam – Mullaitivu Road and the third along the coastal roads of Mullaitivu district.

Currently almost all IDP's in Tiger territory are in regions to the east of the A-9 highway. While the displaced are dispersed widely, the bulk are concentrated in places like Oddusuddan, Mulliyawalai, Puthukkudiyiruppu,Viswamadhu, Tharmapuram and Kandawalai. Even the district secretariat of Kilinochchi is being re-located to Kandawalai.

Realistic population estimates suggest that there are 250,000 – 300,000 civilians living in LTTE controlled areas of Wanni.

According to situation report No 145 released by the Inter – Agency Standing Committee (IASC) Country team the IDP figures for September 18 – 25 were 147,313 for Mullaitivu district and 74,347 for Kilinochchi district respectively. These include people displaced from Mannar district and Vavuniya north who sought refuge in K'nochchi and M'Tivu.

A new development occurring now is the large – scale displacement of people from Kilinochchi town and its environs in the Karaichchi AGA division. The number of people living in Kilinochchi/Karaichi prior to on going displacement was calculated at around 45,000 – 50,000.

Thus it could be said that 85% - 90 % of the Wanni civilians are currently displaced. This figure could be 100% if and when the armed forces begin moving into areas east of the A – 9 highway.

This then is the miserable backdrop against which a human catastrophe is unfolding. Slowly and steadily the so called Tiger territory of the Wanni is becoming a region populated entirely by displaced persons.

In such a sorrowful environment it becomes the fundamental duty of the democratically elected Government to provide for the displaced people of this land to the best of its ability.

Sadly such care and concern have been conspicuously inadequate notwithstanding official explanations and arguments aimed at scoring debating points. Indeed the meticulous planning that has gone into the war effort is lamentably lacking when it comes to hmanitarian imperatives.

The government at one level claims correctly that the Wanni people are an integral part and parcel of this country and have to be liberated from LTTE tyranny. It has even recalled internal agencies and non – governmental organizations rendering humanitarian service in the Wanni saying that the Government will look after its people.

But the harsh reality has been a glaring hiatus between precept and practice. Despite its professed intentions the Government has found itself wanting in addressing the immediate needs and requirements of a people being rapidly displaced .

These problems were remedied to a great extent by the humanitarian organizations. They augmented efforts of government employees in these spheres.

In the past government efforts were effectively supplemented and even complemented by the role of International agencies and humanitarian NGO's.

The recalling of such organizations has had a drastic effect threatening disruption of services provided to the people.

If we take the question of food the system in place was one where the Commissioner – General of Essential Services (CGES) catered to those displaced before August 2006 and the UN"s World Food Programme (WFP) looked after those displaced after August 2006.

The recent, rapid rise in numbers has increased the role and responsibility of the WFP. The relocation of UN officials away from Wanni has affected WFP functions.

Incidentally the Government peace secretariat claims on its website that the WFP and UNHCR were asked by the Government to remain in the Wanni and that the offer was rejected by the UN. There has been no official confirmation or rebuttal

by the UN so far.
The food situation for Wanni IDP's was not satisfactory even earlier. The security restrictions and delays resulted in fewer food-laden vehicles going in as opposed to basic requirements.

All WFP food convoys to the Wanni were stopped after Sep 11. This was resumed in October when 51 trucks carrying 650 metric tons of essential items went into the Wanni.

Although the UN was out of the Wanni at least seven UN officials accompanied the Kilinochchi GA led convoy which flew the UN flag. The UN officials are expected to oversee the distribution of food at four locations and return today October 4.

The government decision to allow the food convoy in is a welcome decision. The important aspect however is that adequate supply must be ensured regularly. At least 100 trucks with food and essential items need to go in every week if the IDP needs are to be addressed reasonably.

LTTE supporters and other pro – Tiger elements are conducting an international campaign saying that Tamils are starving and a famine situation exists. This is highly exaggerated and factually incorrect.

The crisis though acute has not reached such magnitude. Nevertheless there is no room for complacency. If adequate supplies are not sent into the Wanni continuously there could be a serious shortage.

However it must be noted that the current food distribution is by no means satisfactory. Though it prevents starvation which is only the bottom line, three square meals a day is impossible. There is malnutrition and undernourishment.

Rapidly shifting frontlines have resulted in rapid displacement. On many occasions it takes nearly a month for displaced people to be registered within the WFP system and be entitled for dry rations.

In such a situation various other agencies and organizations filled in. They assisted the government administrative machinery to provide cooked meals and later food rations until the CGES and WFP got into the act. With these NGO"s out of the Wanni, their input will diminish thus affecting the IDP's.

The INGO's and NGO's also provided shelter materials, basic medicine and

utensils etc to IDP's. The supply of clean and safe drinking water to IDP's was mainly provided by the INGO's and NGO's. They also contributed greatly in providing sanitary facilities.

Another area in which INGO's and NGO's help the displaced is the actual process of displacement itself. Most people do not have the money to hire vehicles and move out of an area. So humanitarian organizations step in.

With these organizations being recalled and all NGO activity ceasing the people feel the pinch. Currently in the Wanni diesel is 1000 Rupees and Petrol 2000 Rupees a litre. Kerosene is 300 Rs per litre . Transport costs are astronomical now.

In such an environment there is an urgent need for resumption of services by the INGO's and NGO's. Further delay coupled with the escalation in fighting can bring about a climate where the displaced civilians would be in greater jeopardy.

There is an imperative need for the non – governmental humanitarian organizations and international agencies to resume functioning from within the Wanni to ensure that IDP needs are serviced properly.

Besides, there is also another potential problem. The presence of foreign personnel in the Wanni helped to check and even contain LTTE pressures on NGO's and INGO's.
With their removal the Tigers could exert more pressure without restraint. A worst case scenario could be one where the food distribution itself is "influenced" at ground level by the LTTE.

The Tigers could use this to compel people to live in areas determined by the LTTE.

The Government's reason for recalling these humanitarian organizations was to prevent harm befalling foreign personnel when fighting escalated. Since the Government is firmly resolved to capture Kilinochchi the NGO's and their offices, buildings, personnel etc were in the line of fire.

The government also has the Muttur massacre "albatross" hanging around its neck. It did not want a situation where such an incident would recur in the Wanni also.
There is however a twist to this. The 17 ACF personnel killed in Muttur were local Tamils and Muslims. No foreigner was killed.

It can be argued therefore that local persons working in humanitarian organizations and not foreigners were "more" vulnerable.

What has happened is bizarre. The LTTE refused to allow local employees of NGO's and INGO's permission to leave the Wanni. Even those working for UN organizations were not allowed to take family members. This was the LTTE at its worst.

The result is that 21 Tamil UN employees remain in the Wanni as they could not abandon their families. Also more than 500 Tamil employees of INGO's and NGO's are in the Wanni with their families.

So in a nutshell the situation is one where the more vulnerable local humanitarian workers remain exposed to danger in the Wanni while the foreigners are all out safely. The rationale behind the Govt recall is rendered invalid.

This state of affairs is not one about which the NGO and INGO bosses can be proud of. Their vulnerable local employees have been left in the lurch.

The government too is in the dock. Their concern seems to be about foreigners rather than Sri Lankan nationals.

The need of the hour is for the humanitarian organizations and international agencies to work from within the Wanni. It is only then that the helpless civilian victims of the war in the Wanni could have their needs met with as efficiently as possible.

One possible compromise is one where these organizations are allowed to function from a particular location alone. That specific zone could be declared "safe" with both the armed services and LTTE honouring it.

Even if something could be worked out where INGO's NGO's and other International agencies are allowed to function from within the Wanni, that by itself would not guarantee the safety and security of the civilians.

All that the humanitarian organizations can do is to help reduce the problems to some extent. They cannot eradicate them.

What then is the best option available to alleviate the suffering and ensure safety of the civilians? Obviously it is an end to the war!

But realistically it is not possible at this point of time when both the Government and LTTE are embroiled in a "make or break" war.

Under such circumstances the second best option is for the beleaguered Wanni civilians to move out from the conflict – ridden areas to the relatively safer areas under Government control.

For this safe passage must be guaranteed through the setting up of a viable civilian corridor. Temporary ceasefires should also be declared and honoured.
The hitch (and one hell of a one at that) is the self – styled protectors and self – imposed sole representatives of the Tamil people. The LTTE will not allow the people to move out from areas under its control.

The draconian pass system will prevent people from moving out. Besides, decades of totalitarian control have conditioned the people into submission. Moreover the vast distance from Vavuniya to the areas where IDP's are concentrated is also a deterrent.

Likewise there is some reluctance by the people in moving to Vavuniya. This is due to fear that they would be penalised as people with LTTE links. Also they would be kept in "camps" like in the cases of existing ones at Kalimoddai and Sirukkandal.

While acknowledging the fact that certain segments of the Wanni population would prefer to stay put in the Wanni rather than moving out to Government controlled areas it must also be emphasised that those desiring to leave LTTE areas should be permittedto do so.

It was this writer who first wrote in another newspaper during the first week of August about the growing IDP predicament in the Wanni and urged the LTTE publicly to allow the people to leave saying "Let my People Go".

This column reiterates that position and appeals to the LTTE that it must grant those among the wretched of the Wanni earth who want to leave Tiger territory, an opportunity to do so.

The easiest way is for the LTTE to relax its controls and allow "exit" to those who want to move out to government areas.

The lack of care and concern displayed by this government to those civilians living in the arena of war deserves condemnation.

Likewise the callous conduct of the LTTE towards displaced Tamil civilians in the Wanni is reprehensible too.

IDP's are entitled to the right of movement. They should be allowed to move to areas of safety if they want to do so.

While the government increases the burden on civilians in the name of security the LTTE adds to their woes in the name of liberation. The IDP's are caught in the middle.

The UNHCR drafted guiding principles regarding IDP's emphasise that the displaced be allowed freedom of movement. Principles 14 and 15 are particularly explicit on this aspect.

The LTTE is violating the spirit and letter of UNHCR principles by restricting movement of IDP's.

"Let my people go" was the poignant plea made by Moses to the Egyptian Despot of yore.

That was a demand made to an alien ruler by the representative of an oppressed people.

Today the same cry "Let my people go" can be articulated on behalf of the Wanni IDP's to the LTTE hierarchy.

Sadly the LTTE and the Wanni civilians are all of the same ethnicity. Ironically the LTTE claims to be fighting for the Tamil cause.

This then is the tragedy of the Tamils, particularly those wretched of the Wanni earth. (ENDS)

# 4. A REVIEW OF STATE ACTIONS TO IMPLEMENT THE RECOMMENDATIONS OF UN AGENCIES

## THE RECOMMENDATIONS OF THE HUMAN RIGHTS COUNCIL AFTER THE UPR

The following is a review of the recommendations of the Human Rights Council dated xxxxx. We give below the recommendation in bold lettering and our comment on the implementation in normal text.

1. **Continue to enhance the capacity building of its national human rights institutions with the support of the international community (China), including OHCHR, and seek the effective contribution of OHCHR to strengthen the NHRC (Cuba);**

2. **Strengthen and ensure the independence of its human rights institutions such as the National Human Rights Commission (Czech Republic, Ukraine), in accordance with the Paris Principles (United Kingdom of Great Britain and Northern Ireland, Germany, Ireland), including through implementation of the 17th Amendment at the earliest (Canada), and ensure its pluralist character (Ireland);**

3. **Encouraged Sri Lanka to further empower the various institutional and human rights infrastructures, including by strengthening the structural and operational independence of the NHRC (Republic of Korea);**

The recommendations, 1-3 relate to the HRCSL referred to unfortunately as the NHRC. It is not an institution that respects the Paris Principles both from the manner of selection and the nature of the independence (the lack of it), it is an institution of the regime. The appointments to the HRCSL are made contrary to the Paris Principles. According to Sri Lanka's Constitution as amended by the 17th Amendment, the proper authority to make nominations for appointments for commissioners is the Constitutional Council. The 17th Amendment has been deliberate neglected and appointments are made by the president himself without any regard to any of the norms of appointment of an independent institution. In fact, the policy line of the state party is to discourage the functioning of the HRCSL because the increase of complaints that may result through the availability of a proper complaint mechanism and investigation mechanism is seen as an encouragement for persons to come forward to make their complaints. The policy line of the state party is to claim fewer violations of rights by stating that the HRCSL has received fewer complaints than before. The Paris Principles are not followed regarding the functioning of the HRCSL. It does not act promptly and often relies of

the reports of the alleged perpetrators to decide on the violations. The urgent action mechanism which provide for the HRCSL officers to promptly react to complaints of illegal arrest, detention and torture are not utilised for the protection of the people. Even the limited progress made some years back has now been lost. Even after inquiries which often take a long time the sums awarded for compensation are puny and not in any consistent with the international norms and standards. In fact, the commissions and the staff lack the understanding of international norms and standards of human rights and demonstrate no commitment to these principles. It does not appear from any of the official statements or publications of the state party that it has any plan to implement this particular recommendation.

Even the OCHR cannot transform an institution that is based on the Paris Principles into a credible national institution.

As for the recommendations for implementation of the 17th Amendment this is incapable of realisation as it is the policy of the government to erase the institutions of the Constitutional Council and the other commissions in order to benefit from the politicisation of these institutions.

4. **Cooperate actively with international mechanisms in order to implement human rights at all levels of society and consider participating in core human rights treaties, as well as special procedures of the Human Rights Council (Ukraine);**

All the recommendations made by all the treaty bodies have been ignored. (Kindly see the attached charts). With regard to extrajudicial killings the ignoring of all the recommendations has been commented on by the United Nations Special Rapporteur on Extrajudicial Killings.

5. **Try to respond in a timely manner to the questionnaires sent by the special procedures (Turkey);**

Even if this recommendation is implemented it is of little use as the recommendations of special bodies are always ignored.

6. **Continue close dialogue with the United Nations human rights mechanisms, and OHCHR (Republic of Korea);**

Dialogues without implementation of recommendations does not make any contribution to the improvement of the protection and promotion of human rights.

**7. Take into account the recommendation made by the Human Rights Committee that it incorporate all substantive provisions of ICCPR into its national legislation, unless already done (Mexico);**

The views expressed and the recommendations made regarding all the communications by citizens of Sri Lanka to the UNHRC have been ignored. The government has taken cover under the Supreme Court judgement in the Singarasa case to state that it cannot implement these recommendations as it is bound by the judgements of the local courts. The government has made no attempt to incorporate its ratification of the Optional Protocol of the ICCPR by way of domestic legislation.

**8. Ensure full incorporation and implementation of international human rights instruments at the national level, in particular ICCPR and CAT, unless already done (Czech Republic);**

The UN HRC has already held that several provisions of the ICCPR have been violated by the Supreme Court itself. However, no attempt has been made to incorporate the implementation of the ICCPR by improving provisions for legislative, judicial and administrative measure for the implementation of the ICCPR as required by article 2 (3) of the same.

**9. Ensure that its domestic legislation is in full compliance with the Convention on the Rights of the Child (Poland);**

The failure to develop investigative, prosecution and judicial aspects of the implementation of rights as required under article 2 (3) of the ICCPR being ignored affects also the right of the child as much as all other rights.

**10. Continue its efforts for the full implementation of international human rights instruments to which it is a party (Morocco);**

As pointed out before all the recommendations of the UN agencies relating to human rights are ignored it can be said that there is no effort to implement international human rights instruments.

**11. That civil society organizations, including those from multi-ethnic communities and conflict affected areas in Sri Lanka's north and east, be involved in the follow-up to the UPR process (United Kingdom of Great Britain and Northern Ireland);**

There is a tremendous propaganda against the civil society organisations lead by

the ruling regime utilising its media and political apparatus. Particularly civil society organisations dealing with human rights have been castigated as traitors and trouble makers. Besides as none of the recommendations from the UPR review are being implemented the question of seeking cooperation does not arise. What exists is not cooperation but the enormous repression of civil society organisations

**12. Further support human rights machinery and capacity building in its national institutions to implement the human rights instruments, such as the introduction of a human rights charter as pledged in 2006 (Algeria);**

The basic national institutions that have the capacity to protect human rights are criminal investigations mechanisms with the power to act independently and the independent prosecutor's branch. both these are not present in Sri Lanka as the policing system and the prosecution system exercised by the Attorney General's Department is politicised. What is happening is not capacity building but the destruction of existing capacities by arbitrary transfers and pressure systems that discourage independence and integrity.

**13. That the National Plan of Action provide specific benchmarks within a given timeframe (The Netherlands);**

In fact, a national action plan to destroy human rights protection is working strongly. Therefore the establishment of a national plan for the genuine implantation of human rights protection is not being contemplated by the state. It may come out with the purported plan with a lot of verbiage but for a plan to improve legislative, judicial and administrative mechanisms as required under article 2 (3) of the ICCPR is not even being contemplated.

**14. Take measures to ensure access to humanitarian assistance for vulnerable populations and take further measures to protect civilians, including human rights defenders and humanitarian workers (Canada, Ireland);**

As the war between the government and the LTTE intensified both parties have been blamed by international agencies for not taking adequate action for the protection of civilians. The human rights defenders have no access to the areas affected by the war as both the government and the LTTE do not wish their situations to be scrutinised. Humanitarian workers including UN agencies, except for the Red Cross staff have been asked to evacuate certain areas where heavy fighting is expected.

**15. Ensure the adequate completion of investigations into the killings of aid workers, including by encouraging the Presidential Commission of Inquiry to use its legal investigative powers to their full extent (United States of America);**

This inquiry has not been completed and there is no possibility that under the present circumstances an independent inquiry can be conducted in a credible manner into this massacre.

**16. Implement the recommendations of the Special Rapporteur on the question of torture (Denmark, France);**

All the recommendations of the special Rapporteur on the question of torture have been ignored. Kindly see the attached chart for details.

**17. Ensure a safe environment for human rights defenders' activities and that perpetrators of the murders, attacks, threats and harassment of human rights defenders be brought to justice (Poland);**

No case has been brought against any of the perpetrators of violence against journalists, human rights defenders and others who are engaged in assisting persons on human rights issues. The environment that has been created is one that is extremely hostile to the human rights activists and the NGOs. The official spokesman for the government tries to portray human rights activists as persons working for foreign donors and motivated by baser considerations. They are also portrayed as persons promoting the agenda's of aliens. These critics also insinuate that human rights activists and journalists directly or indirectly aid and abet the LTTE and promote terrorism. Under emergency regulations and through the Prevention of Terrorism legislation there is an attempt to suppress human rights activists. Particularly the reporting of human rights abuses to UN and international agencies is portrayed as unpatriotic acts.

**18. Increase its efforts to further prevent cases of kidnapping, forced disappearances and extrajudicial killings; ensure that all perpetrators are brought to justice; and enhance its capacity in the areas of crime investigations, the judiciary and the NHRC, with the assistance of the international community (Japan);**

The agents of the state party carry on a heavy attack on those who document and lobby on kidnapping, forced disappearances and extrajudicial killings. The state party's political reaction to such allegations is that persons claiming to be abducted or forcibly disappeared are persons who are hiding themselves for reasons of their own and are trying to create favourable impressions for themselves to find refugee status in developed countries. The genuine actions and good faith of the complainants and those who support them are constantly doubted and such persons are publically scorned. The absence of political will to investigate these matters is evidence. Such events as kidnapping, forced disappearances and extrajudicial killings are generally assumed to

be unavoidable and an inevitable consequence of the war against terrorism. It is also assumed that any attempt to seriously probe these matters may have an unfavorable reaction from the armed forces and the police.

**19. Increase its efforts to strengthen its legal safeguards for eliminating all forms of ill treatment or torture in the prisons and detention centres (Islamic Republic of Iran);**

There are no positive steps with regard to this recommendation. For details regarding this aspect kindly see the chart on the recommendations of the UN Rapporteur against torture.

**20. Step up its efforts for the rehabilitation of former child soldiers – in particular through enhanced cooperation with the international community – and adopt measures necessary for their rehabilitation in an appropriate environment (Belgium);**

There are no known measures for such rehabilitation. There was a massacre of persons undergoing such rehabilitation at Bindanuwewa prison camp. Since then there are no known efforts for dealing with this issue.

**21. Adopt measures to investigate, prosecute and punish those responsible for serious human rights crimes such as the recruitment of child soldiers, in accordance with international norms and in a transparent manner (Sweden);**

**22. Take judicial and other measures to put an end to the recruitment of child soldiers in all parts of its territory, and accordingly give further appropriate directions to the security forces and police to ensure their implementation (Belgium);**

**23. Investigate allegations of forced recruitment of children and hold to account any persons found in violation of CRC and its Optional Protocol (Slovenia);**

**24. Take further steps to improve the effectiveness of measures to combat the recruitment of child soldiers (New Zealand);**

**25. Take active measures in order to put an immediate end to forced recruitment and use of children in armed conflicts by all factions (Italy);**

There have been no attempts to prosecute recruiters of child soldiers either in the LTTE or in other armed militant groups. While the state party uses the recruitment

of child soldiers by the LTTE for propaganda purposes it does not make any effort to prosecute the offenders. It there were such prosecutions the country would have had an opportunity to learn more about such operations and there would have been community involvement to deal with the issue.

**26. Investigate and prosecute all allegations of extrajudicial, summary or arbitrary killings and bring the perpetrators to justice in accordance with international standards (Canada);**

**27. Adopt measures to investigate, prosecute and punish those responsible for serious human rights crimes such as enforced disappearances, in accordance with international norms and in a transparent manner (Sweden);**

Non-investigation of persons who commit extrajudicial, summary and arbitrary killings has become the norm. The habit of killing those who are considered as undesirable elements or criminals is so common that almost every week cases are reported from various parts of the country. The usual story is that a person who has been arrested has tried to attack the police officers when being taken for discovery of some material used in crime and that the police officers by way of retaliation and self defence kill the prisoner. The investigations into these matters end quite early at the inquest stage itself where the magistrates make wording of justifiable homicide or suicides by the suspects basing themselves on the police versions of the cases. Where extrajudicial killings relate to journalists or persons belong to political opposition no effective investigations takes place at all.

**28. Adopt measures to ensure the effective implementation of legislative guarantees and programmes for the protection of witnesses and victims (Austria);**

Despite of promises to enact a Witness Protection Act by June 2008, this act has not yet been enacted. Also there is no witness protection authority. In fact, the policy line of the state party is to discourage witnesses from coming forward to make or pursue complaints. A heavy fear psychosis is maintained for this purpose. This policy line is consistent with ensuring impunity for the officers of the state accused of crimes and violations of rights. Therefore, it is most unlikely that any attempt would be made to implement this recommendation in an effective manner.

**29. Take all necessary measures to prosecute and punish perpetrators of violations of international human rights law and humanitarian law (Greece);**

The prosecution and punishment of violations of international human rights law and

humanitarian law has been refused literally in tens of thousands of cases. The clearest examples are those responsible for forced disappearances, mostly in the south in the late 1980s. The estimated official figure is around 30,000. In less than ten cases were there attempts at prosecutions despite the recommendations from these commissions that over 500 cases were recommended for prosecution. Regarding disappearances in recent times no one has been prosecuted. The central problem is that such prosecutions as seen as having a demoralising effect on the armed forces and the police. Another policy reason against prosecution is that such prosecutions will encourage further complaints which again will be a major political embarrassment for the state party. Therefore, whatever be the public declaration the actual policy of the state party is to prevent prosecutions on human rights violations.

**30. (a) Pursue the ongoing inquiries into allegations of violations of children's rights in armed conflict, such as conscriptions and abductions of children anywhere and to adopt vigorous measures to prevent such violations; and (b) take other urgent measures for the re-integration of children who have surrendered to the governmental forces asking for special protection or who are currently held in prisons (Luxembourg);**

Please see the comments in 21 – 25.

**31. Enter into further agreements with countries hosting its migrants workers (Palestine);**

Regarding migrant workers there are no known agreements in order to implement the *Vienna Convention on Consular Relations*. As a matter of official policy the state party does not provide legal assistance to migrant workers who face criminal trials abroad. Furthermore, it does not make any attempts to develop agreements with the receiving countries to provide such legal assistance to Sri Lankan migrant workers. These matters came to be highlighted in the case of Rizana Nafeek, a 17 year-old-girl at the time of leaving the country who was convicted in Saudi Arabia for the murder of an infant. She has not received any services such translations or legal counsel at the trial. After the conviction when the case was highlighted by the media the Asian Human Rights Commission made inquiries from the Ministry of Foreign Affairs, Sri Lanka as to whether it would provide fees for the legal counsel in Saudi Arabia. It was found that the government has a policy not to provide such legal assistance. The AHRC took the initiative to raise the legal fees from the public and to ensure that the migrant worker received legal counsel for her appeal. The case is still pending.

**32. Take the measures necessary to ensure the return and restitution of housing and lands in conformity with international standards for internally displaced persons (Belgium);**

**33. Take measures to protect the rights of IDPs, including long-term housing and property restitution policies that meet international standards, and protecting the rights to a voluntary, safe return and adequate restitution (Finland);**

**34. (a) Adopt necessary measures to safeguard the human rights of IDPs in accordance with applicable international standards and that particular emphasis be given inter alia to increased information sharing as well as consultation efforts to reduce any sense of insecurity of the IDPs; (b) facilitate reintegration of IDPs in areas of return and (c) take measures to ensure the provision of assistance to IDPs and the protection of human rights of those providing such assistance (Austria);**

**35. Ensure protection and security in IDP camps; and, while safeguarding the rights to return and to restitution, adopt a policy to provide IDPs with adequate interim housing solutions (Portugal);**

Due to the continuing of the war and particularly due to the recent escalation of the fighting large numbers of IDPs have been created. Some are in IDP camps and others in various places from where they have fled seeking safety. The development of durable solutions to this problem has proved difficult and there are large numbers of persons who have been in places of IDP camps for decades. The hostile policy of the state party towards the INGOs also makes the difficulty of rehabilitation and finding solutions to property and other issues difficult. At policy level there needs to be more discussion and planning to deal with this issue. As for information on the situation of IDPs there is hardly any possibility for easy access to such information. This is mostly due to the general policy of the suppression of the media relating to reporting on the war situation. This affects the information on IDPs.

Creating access to information on IDPs in a manner that humanitarian action on their behalf becomes possible is a primary obligation of the state party.

By early September the situation of IDPs in the Kilinochchi area worsened due to the escalation in the fighting. INGOs and the UN agencies, except for the Red Cross have been asked to move from the LTTE held area and they mostly done so. The question of food, water, medicine and sanitation of the civilians caught up in the conflict has become a primary concern and religious and civilian organisations have expressed their concerns strongly. The request to open a corridor for IDPs from Kilinochchi to move to Wanni

and other government held areas, providing facilities in these areas to the IDPs are among the major demands for the protection of these persons.

**36. Give special attention to the rights of women and further promote education and development and their representation in politics and public life (Algeria);**

The problems of women remain in all areas of life and the hardening of conditions of living by the escalation of prices for food, gas etc, are making lives of women of the middle and lower classes ever more difficult. Many women opt to leave for domestic employment in the middle east and other countries as they have to play the role of the breadwinner for their families. The protection afforded to these migrant women workers is limited. Younger girls of middle and lower income groups have hardship in pursuing education and improvement of their conditions. Harsh cultural attitudes extremely adverse to the women create conditions which are traumatic to women folk. Harsh sexual taboos also go into extremely repressive upbringings of women which create difficult psychological problems for them in the context of a changing society. Though there are some improvement on laws on domestic violence the implementing agencies such as the police are suffering gravely due to the crisis of public institutions experienced in the country. There seems to be no liberating trends relating to women that is being developed in order to assist the improvement of their rights. In a extremely totalitarian system where representation means little the issue of women's representation is neither encouraged nor makes much sense.

**37. (a) Pursue its programmes to develop former conflict zones in order to bring afflicted communities at par with those living in other provinces of the country;**

**and (b) seek which tangible support the international community, particularly States in a position to do so, may extend to assist Sri Lanka in bridging these gaps in order to enhance the effective realization of the full range of human rights for all Sri Lankans. (Bhutan);**

As the conflict is in progress and even escalating the issue of improving the former conflict zones in order to bring afflicting communities on a par with those living in other provinces remains illusionary. The total breakdown of the law enforcement mechanism throughout the county makes it impossible to make any improvement in areas which were formerly part of the conflict zone. The basic requirement for the improvement of these areas is to rebuild the basic legal infrastructure that has been lost almost completely during the period the conflict. However, the forces that grew during those periods of fighting were those who could manipulate a situation of lawlessness. The post conflict politics have turned out to depend on the manipulation of the situation

of the absence of the legal infrastructure. It is most likely that all attempts to rebuild the legal infrastructure would be resisted severely by the powerful sectors in these areas. On the other hand throughout the country the basic legal institutions have collapsed. Under these circumstances, the police, prosecution and judicial bodies of the country are unable to give leadership to the recreation of a legal infrastructure in these areas. Due to the situation of instability the government does not welcome international agencies participating in any development work in the region if these agencies are to insist on the improvement of law and order and human rights. Sadly the former conflict zones are likely to remain starkly lawless zones where the powerful can carry their own arms and keep control of their areas as they wish.

**38. Continue to strengthen its activities to ensure there is no discrimination against ethnic minorities in the enjoyment of the full range of human rights, in line with the comments of the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, and the Committee on the Elimination of Discrimination Against Women (Mexico);**

The only machinery that can ensure the elimination of discrimination is a strong law enforcement machinery which can respect the equality of all persons before law. Whatever machinery of the state that existed in the country prior to 1978 has now collapsed under these circumstances there is nothing to ensure the elimination of discrimination of any kind. Instead of the elimination of decimation what we are witnessing are strong ideological movements which rejects the very language of equality. To talk about discrimination is itself reduced to into a meaningless discourse. When the law is no longer binding on anyone impunity becomes a natural state of things.

**39. Take measures to safeguard freedom of expression and protect human rights defenders, and effectively investigate allegations of attacks on journalists, media personnel and human rights defenders and prosecute those responsible (Ireland);**

**40. Take measures to improve safeguards for freedom of the press (Denmark);**

**41. Adopt effective measures to ensure the full realization of the right to freedom of expression for all persons (Poland);**

Freedom of expression is the right that has suffered most, particularly since the ending of the ceasefire agreement and the escalation of the conflict the government developed an extensive machinery to undermine and to denigrate journalists and media institutions. During the last two years journalists have been literally, physically assaulted and there

have been attempted assassinations. Extremely violent reactions are being generated against journalist. Even when the attacks are glaring the government has refused to take any action regarding the violators. A well known journalists, Tissanayagham for the maintenance of website which the state earlier claimed was linked to the LTTE. However, this claim was not based on any evidence and was abandoned later. Now this journalist is being prosecuted under the Anti terrorism laws for publishing a magazine which the state claims attempted to create racial disharmony. However, there is no basis for even such a charge. This action is perceived as an attempt to intimidate journalists and publishers with the fear that they also may be prosecuted for what they write. The Sri Lankan government has come under criticism on the subject of denial of expression.

**42. Continue to work with the international community on protection of human rights, environment, disaster risk management, HIV/AIDS and capacity building. (Algeria);**

None of these things are considered priorities.

**43. Actively draw upon the assistance of the international community in the antiterrorism process and in overcoming its negative consequences (Belarus);**

Anti terrorism has become the philosophy behind which the suppression of all opposition and freedom are justified. The authoritarian rule introduced by the 1978 constitution has virtually destroyed all the basic possibilities of resistance to absolute power. Sri Lankan remains a good sample for study of the negative consequences of so-called anti terrorism

**44. Work closely with OHCHR to build the capacity of its national institutions and seeks States' assistance on counter-terrorism strategies, especially by countering terrorist fund-raising efforts in their territories and in accordance with Security Council resolutions and international conventions (Pakistan);**

The government has clearly indicated that it has no intention of allowing the strengthening of the working of the OCHR.

**45. Share its experience with regards to fighting rebellion and terrorism and how to overcome them, as well as on the measures taken to improve its social and economic development (Sudan).**

The experience that Sri Lanka has to share is the expansion of authoritarianism and the abandoning of democracy and rule of law under the guise of fighting rebellion and terrorism. In fighting the southern rebellion over 30,000 people disappeared and

there have been no attempt to acknowledge this colossal crime against humanity in the name of the suppression of a rebellion. What has happened is that terrorism has provided a convenient excuse for the expansion of the powers of the state, dismantling of institutions of democracy and the displacement of basic systems of justice by way of investigations into crimes, prosecutions followed by fair trial. In all aspects the justice system is today at its lowest ebb. It is not possible to improve social and economic development under such circumstances.

# THAILAND

## THE COUPMAKERS' SUCCESS AND ABUSE AS USUAL

Two years on since the army in Thailand launched its latest takeover of government, and the proof of its success has been in the chaotic political and social events of 2008. Parliamentary politics and public protest there have both been utterly discredited, and the generals' charter has as expected made the senior judiciary a more overt political tool than at any time in its recent history. That the parliamentary process in Thailand is at its lowest ebb since the early 1990s is exactly what the generals and their backers intended. Although the coup was aimed at removing that manager and manipulator of party politics, Pol. Lt. Col. Dr. Thaksin Shinawatra, and dismantling his network, he was just the embodiment of the main target: the party political system itself, and the possibilities that it has held for genuine social change which had not in prior decades existed. Meanwhile, the institutional features of abuse have remained, and so torture, extrajudicial killing, forced disappearance and a host of other incidents continue unabated and in all parts of the country.

### DENYING HISTORY AND DISAPPEARING CRIME

In February, not long after he had formed government, the new (now former) prime minister of Thailand outraged many by denying that an infamous massacre ever occurred, let alone that he had had any involvement in it. In two separate interviews Samak Sundaravej claimed that only one person died on 6 October 1976, when police and paramilitaries stormed Thammasat University, killing at least 46 and forcing thousands into hiding. He denied that he provoked the violence along with other rightists, saying that it is "a dirty history." In one of the two, with Al Jazeera on February 9, he also denied the facts of the Krue Se and Tak Bai massacres that occurred in southern


Samak Sundaravej on Al Jazeera

Thailand in 2004, even though these have been verified by government-ordered inquiries, medical staff and post-mortem hearings in the courts:

> There's a group of them make a violence there in the south. Thirty-two of them. And they fled to live in the mosque. And then the military asked them to come out. They doesn't come out. So the military must get in. So the mosque is a clean place, that the dirty man, any kind of weapon, cannot get in. But they just going there, so they just killing from outside. So… 32 of them die. And then that is in the Krue Se. And in Tak Bai they just come to make a shouting. To make a shouting and then any kind of thing to bring six people out from jail. So the whole day, this is the time of the, they don't eat anything, they don't eat in the daytime. So, thousands of them just going there around the police station and something like that. So they end up with the… they say that, ok, we'll let them have the preparation to bring them back, the six people, but they don't, they, in the evening time, so they make a roundup for all those people and put in the truck.
>
> **Q. Many of the families would suggest that there were very innocent people rounded up there amongst the…**

An army truck outside the Tak Bai police station loaded with detainees stacked on top of each other

> Aww, the innocent people. When that type of movement, around that thing, is innocent or not, I have no idea, but those people going fled in the truck, if they strong enough when they standing in the truck, it's ok. But they spent the whole day, doesn't eat, doesn't drink water, doesn't even swallow any kind of thing, because in the month of that thing, so, they just fall on each other. And 78 die, from so many truck, loading, running by… So that's it. It's a tragedy. It happened. Nobody intend to kill them. They die because of their physical. But they has been caught just to get into the barrack. So, so what's wrong with that?

Samak went on to claim that the 78 in the trucks at Tak Bai had "just fall(en) on each other" due to weakness caused by fasting during Ramadan, when it is known from video footage and the findings of forensic scientists that most died as a result of asphyxiation from being packed on top of each other in trucks.

(The interview can be viewed here: http://www.youtube.com/watch?v=DuoqLiLSgnI)

How is it possible for a prime minister to have made such comments without any apparent sense of shame or regard for accuracy? While Samak has a reputation for right-wing rhetoric and perversion of facts, there is an enormous difference between making offensive and patently false comments when a private citizen as opposed to when head of government. There was also much more behind the comments than a brazen personality. Rather, what they spoke to, and why they remain relevant, are the heavy enduring institutional obstacles to human rights in Thailand.

Without the maintenance of law and recording of crime, crime itself is no longer understood as crime. When the worst offences are trivialised, it not only guarantees impunity but encourages further criminality in all parts of society. If people can be killed without any consequences for the perpetrators, or even acknowledgment of the offence, the path exists for other similar acts to follow, large and small. Society is not shaken by stories of wrongdoing because the notion of crime itself has been diminished. Ordinary murders, thefts and rapes too can be made to disappear, or look like something that they are not.

Obviously, this does not mean that laws literally disappear, or along with them, judges and lawyers, but rather that the fair operation of law becomes less and less visible. There may be many crimes in the penal code, and many other laws to affirm people's rights. There may be big buildings called courts and people in them with grand titles and clothes attesting to their authority. However, when blatant crimes have been committed and are then denied there is a dramatic failure in criminal procedure. The crimes exist and are known, yet there is no acknowledgement or investigation. There is no attempt to make an authentic record of criminality, let alone prosecute it.

When the state denies responsibility to recognise and address crimes, as it has done in Thailand repeatedly in recent years, it reduces criminal prosecution to a legal ritual in most cases, or a politically-directed act in a few others. Once law is reduced to this, rationality is lost, and with it, history—not as a result of simple forgetfulness but for want of agreed references upon which it can be said that wrongs have been committed about which something must be done.

Regrettably, Samak's remarks did not give rise to much-needed deeper discussion among persons in Thailand on why after many years of effort they have been unable to build up a widespread debate on criminal justice reform with which to break down the dominant rhetoric of the perpetrators of abuses and their supporters, and to build a culture of human rights, even though the lack of an authentic narrative on the country's past is deeply connected with the long-term denial of the rule of law, the displacement of its constitutionalism and the growth of violence in Thailand. On the contrary, Samak's downfall later in the year occurred not as a consequence of his virulent outbursts or

denials of gross human rights abuses but over the technicalities of whether or not he was still employed as a television chef after taking office. Constitutionalism manifest itself in the removal of a prime minister for cooking on TV; never mind that in September 2006 when the generals took power the upper courts did as they have always done at these times: nothing. In May the following year, the coup was tacitly endorsed in a verdict of the court's successor, a military-appointed tribunal, on the simpleminded premise that as every other military takeover was legitimized through the courts, then why not this one too. Thus, the senior judges incapable of addressing the legality of a military coup were, with their responsibility reduced to the narrowest questions of fact and cleaved off from the bigger setting again able to stumble into the realm of legal absurdity.

The linkages between the disappearance of crime, the incongruities of law and the institutional blocks to a culture of human rights in Thailand can be seen clearly in innumerable cases, not least of all the outcome of the Krue Se case itself. Whereas on 28 November 2006 the Pattani Provincial Court in the postmortem inquest of Mr. Sakareeya Yusoe & 31 others (Black No. Chor 4/2547) found, on the application of the public prosecutor under section 150(5) of the Criminal Procedure Code of Thailand, that General Pallop Pinmanee, Colonel Manas Kongpan and Lieutenant Colonel Tanaphat Nakchaiya were responsible for giving the orders that caused the deaths of 28 persons inside the Krue Se Mosque at 2pm on 28 April 2004, no action is known to have been taken against any of these personnel. This is despite the fact that under section 150(11) of the code the court must return its findings to the public prosecutor, who is responsible to initiate further criminal inquiries, under orders to prosecute from the director-general of the prosecution department (section 143). It is also despite repeated calls for action on the case by rights groups in Thailand and abroad, including the Asian Human Rights Commission (AHRC) and its partner in Thailand, the Working Group on Justice for Peace (WGJP), which have closely monitored the inquests into the deaths at Krue Se and Tak Bai, as well as that into another 19 youths gunned down at Sabbayoi at the same time as those at Krue Se.

That a court can identify three senior soldiers as liable to face criminal charges for their role in the deaths of 28 people and nothing thereafter happens to those officers is a feature of the same elements of law and institutions in Thailand that allowed Samak to deny that massacres ever occurred, or that if people die unnaturally, anyone should be held responsible. It is equally a feature of the thinking and practices behind the 2003 "war on drugs" in which the then-prime minister saw nothing inappropriate in remarking that it is not unusual for bad people to die violent deaths. And it is a feature of centuries-old thinking and practices resting on imagined sacred origins, upon which the persistent cruelty that characterises state actions in Thailand depends.

## DISAPPEARING CRIMES AND DISAPPEARING PEOPLE

The disappearance of crime is also linked quite literally to the disappearance of people, and attendant gross abuses of human rights. In 2008, the AHRC together with the WGJP continued to monitor and document numerous forced disappearances, together with cases of arbitrary detention, torture and extrajudicial killing. The forced disappearances have occurred all over the country, and in all types of different conditions, from Kalasin in the far northeast to Narathiwat in the deep south. In no case of forced disappearance in Thailand has there been meaningful steps taken to investigate, in part because there is no law to prohibit the forced disappearance of a person and also because neither are there qualified personnel and agencies for this purpose. Instead, family members who speak out on behalf of the victims are themselves invariably targetted for harassment and threats.

Among those cases is the disappearance of Kamol Laosophaphant from the northeastern city of Khon Kaen in February. Kamol had been campaigning to expose corrupt council dealings over state railway land, among other things, and a group of police had almost beaten him up during the previous year during one confrontation. The 49-year-old delivery contractor told his family that he was worried for his safety and in January took out a life insurance policy but did not let up his fight. On February 7 he went to the Baan Phai station to lodge one of a dozen criminal complaints that he was preparing against local officials but never came back to his house only a few hundred meters away.

Nararat shows a photograph of her missing husband

Kamol's wife, Nararat, and brothers say that the family had contact with him until around 11pm the day he vanished. His wife missed a call from his phone shortly after—then the line went dead. They lodged a complaint with the station the next morning, but it was not taken seriously. Underscoring the point, the deputy provincial chief shortly thereafter stated that there was no evidence to implicate his boys and that he doubted that Kamol's criminal complaints were sufficient motive for kidnapping. Instead, he said, the police had pursued the idea that Kamol had run off with a woman, and then when his car mysteriously turned up outside a hospital some 20 kilometers to the north a few weeks later, that he might have been seized with the need to dump it and go to Cambodia. Despite recovery of the vehicle and the introduction of the Crime Suppression Division to the case, there has since been no progress in the investigation.

Non-investigation is a feature of most human rights cases in Thailand, and is part of the disappearing crime phenomenon. The family of disappeared human rights lawyer Somchai Neelaphaijit knows it all too well. After he vanished on 12 March 2004 the then-prime minister speculated that it was because he had argued with his wife. Later it was shown that the cause was not a marital dispute but a group of at least five men on a Bangkok road, four of them allegedly members of the same police division to which Kamol's family complained. Still, none of the five have ever been punished, four escaping conviction at the criminal trial that followed, and the fifth, Pol. Maj. Ngern Thongsuk, is reported to have accidentally drowned this September while the appeal against his conviction was still pending, although his body was not immediately recovered from the site of the accident.

But Somchai and Kamol are not typical forcibly disappeared persons. Their families consist of people who are reasonably well off, keep documents, can handle computers and government officers, and talk to the media. By contrast, the families of most victims consist of people who haven't finished school, who farm, sell vegetables and drive taxis for a living, people who are browbeaten by scornful investigators and readily threatened by the perpetrators and their agents. Their loved ones too may be troublemakers of a different type, perhaps having been accused of selling drugs or stealing motorcycles before disappearing, a type unlikely to attract public sympathy.

A victim of the border patrol gang points to an apartment where he was held for a time (Source: Matichon)

Because of this, the overwhelming number of stories of kidnapping and killing carried out at the behest of state officers in Thailand, rarely get told, let alone documented or investigated. They include the hundreds of people who became victims of abduction, extortion and torture by a Border Patrol Police gang under Pol. Capt. Nat Chonnithiwanit that was uncovered early in 2008 only after it made the mistake of targeting a businesswoman and her family, who alerted other agencies. Victims, who were set up on drugs charges under which they could not get bail, described how they were held in groups and tortured. According to one, she and her partner were taken to a bungalow where they saw at least twenty more people tied up, some hooded; a few with smashed teeth and bruised faces. Another, Juthaporn Rodnoon, claimed that she was electrocuted while pregnant, despite pleading for her baby. She gave birth in remand, awaiting a trial in which she was acquitted of any crime. Others were released after paying ransom, but many more ended up in jail, framed and penniless, and the

justice ministry was inundated with complaints from these people asking for cases that the unit had handled to be reopened.

The Border Patrol Police case was accompanied by a number of other incidents early in the year that captured all-too brief media attention where police were implicated in killings and other gross abuses. These included the alleged extrajudicial execution of three men in Ayutthaya, just north of Bangkok, apparently after they had already been arrested. The three, Akkharapol "Bank" Sampao, Mongkol Yatra, and Nakhon Kwaenkhetgun were wanted for the killing of three officers in a shootout on December 31 when police had come to arrest Akkharapol at a relative's home. Akkharapol's family had negotiated with the police for their surrender, and had made a deal that they would hand themselves over at Ban Nong Lai in Phetchabun on January 9. Instead, the three men disappeared suddenly from a restaurant in Phetchabun that day and were found dead, all shot in the back, on a road in Uthai district the following morning. The police claimed to know nothing and say that it was a case of "killing to cut the link" between criminals—the same disingenuous explanation offered for the deaths of thousands of alleged drug dealers in 2003; the family believed that it was revenge.


"Forced disappearance of individuals is forced disappearance of the justice process"
(Source; WGJP)

In response to media reports on the Border Patrol Police case, the commander of the implicated unit promptly denied that he was responsible for their actions, speaking to another feature of the endemic impunity enjoyed by police and other state officers in the country: command non-responsibility. Pol. Col. Somkiat Nuathong, head of Task Force 42 based in Nakhon Si Thammarat reportedly said that he never ordered anyone to abduct or torture Juthaporn, even though he admitted that he had set up the unit and allowed it to operate autonomously in order to crackdown on the movement of drugs in his area. He added that there had earlier been complaints made against the unit but internal inquiries had not uncovered wrongdoing.

Such denials of responsibility for subordinates' actions are routine in Thailand, where to the extent that a

notion of responsibility exists, it is not in accepting blame but rather in defending junior personnel from allegations and intimidating persons making complaints and acting as witnesses. Yet Pol. Col. Somkiat either knew what his men were doing, because he ordered it or condoned it, or he didn't, in which case he was failing to do his job as a superior officer. And given the number of officers involved and the size of their operation, it is likely that Pol. Col. Somkiat was not the only higher-up somehow connected with the case, although as there is as yet no agency established for effective investigation of police in Thailand there is not likely to be any uncovering of the key perpetrators, any more than there could be in the cases of Somchai and Kamol.

## STILL NO LAW ON TORTURE

It must also be kept in mind that whether or not Pol. Capt. Nat and his men were "only following orders" this is under no circumstances a legitimate excuse. The UN Convention against Torture, which Thailand joined in 2007, rules out the following of a superior's instructions as a defence for an act of torture. However, as Thailand has failed to enact a law against torture in accordance with the terms of the convention, for the victims of this unit that the crimes are not excusable by referring to orders from above is academic rather than legally significant. The lack of a specific law on torture means that justice remains outside the reach of torture victims and their families in Thailand.

Not only has the government of Thailand failed to introduce a law to address torture, it has also attempted to give the international community a contrary impression. At the seventh session of the UN Human Rights Council in March 2008, the ambassador of Thailand, Sihasak Phuangketkeow, said in response to a statement by the Asian Legal Resource Centre that,

> First, I wish to point out that Thailand has already acceded to the Convention against Torture and we fully intend to adhere to our commitments and obligations under the Convention. Second, I wish to state categorically that the Thai government does not in any way condone acts that constitute the use of torture, in violation of our law and our constitution. Third, the Thai government attaches utmost importance to upholding the rule of law, justice and due process... Any case of alleged wrongdoing or abuse by state authorities or personnel will not be taken lightly and will be fully investigated.

Unfortunately, all of these statements are at best only half true. As Thailand has failed to introduce a law to eliminate torture as it is supposed to do as per the provisions of the convention, it is not correct to say that torture is a violation of law in Thailand, and nor can it be correct to say that cases of abuse will be fully investigated, as at present there exists no legal or institutional means to conduct such investigations and protect, compensate and rehabilitate victims.

The funeral procession for Yapa Koseng

The AHRC and a growing number of other groups in 2008 continued to report on the widespread use of torture in Thailand. For instance, in April it issued an appeal on the case of Yapa Koseng and another man, Rayu Korkor, who alleged that in March officers from Ruesor District Police Station, Narathiwat, and military personnel of the 39th Military Task Force tortured him four times over two days, including by sticking a needle under his fingernails and toenails, beating him and hanging him upside down for extended periods. Yapa did not survive to tell the tale; his dead body was returned to his family. It was later revealed by relatives of Yapa who were detained along with him that he had been held inside a parked vehicle at the army base and had there been assaulted repeatedly. At the end of June a doctor concurred that his fatal injuries could but have been the result of torture. However, the camp commander, Major Wicha Phuthong, under testimony in court could not indicate exactly what time Yapa and his two sons, together with three other persons, had been brought to his custody, nor what time Yapa might have died, because, he said, no records were kept of any of these things, and the duty rosters for sentries are "mostly... thrown away afterwards". He also denied knowledge of the external injuries all over Yapa's body, even though he was in the same room as the examiner and public prosecutor when the autopsy was done, and he told the court that he didn't know what was written in the report afterwards. Nor, he said, was his superior interested to know.

The manner in which Yapa was taken into custody and held and tortured in a vehicle recalls another case on which the AHRC and WGJP issued an appeal during the year, the arbitrary arrest and torture of Sukrinai Loamar in the same month. On March 18, around 60 personnel from the 39th Military Task Force surrounded and shot at Sukrinai and his father-in-law Sakri as they were tapping rubber in the early morning hours, killing Sakri on the spot. They arrested Sukrinai and kept him detained in a truck with small barred windows at their camp. When his mother was able to see him the next day she was shocked to note bruises and red marks on his face. His relatives then waited outside the camp but were warned that their presence would result in Sukrinai being assaulted further and so they left. When they came again on March 20, they were told the same thing and that if they returned again Sukrinai would not be transferred to police custody but would stay where he was and be treated worse than before.

Finally on March 21 Sukrinai and other detainees were taken to Ingkayuthboriharn camp in Pattani Province. Sukrinai was then taken to Ruesor District Police Station at about

4pm, where he was able to see relatives and report that he had been tortured the night before. The torture included having his fingernails and toenails pierced with a syringe, his arms and legs scratched with syringe needles, and his back and head beaten. He was hung upside down from a tree for an extended period of time, made to grovel at the feet of the military personnel and forced to drink alcohol. His relatives said that they saw dried blood on his clothes. Then he was transferred to Tanyong Police Station, Narathiwat on March 22. According to the information available to the AHRC, since then, despite efforts by the family and local human rights defenders, neither the killing nor the alleged torture have been investigated properly.

Although the inquest into Yapa's death is continuing, there is no prospect of justice for him or the surviving victim, Rayu, for so long as Thailand does not introduce a law to address the practice of torture in accordance with international standards. Quite aside from these recent cases, the AHRC has documented and followed literally hundreds of cases of torture in Thailand during recent years and in not one case has an alleged torturer been prosecuted and imprisoned for his acts, even though many of the cases have been reported publicly, as well as directed to government and international agencies at the highest levels. This is despite many of these cases having strong evidence to link government officers to the crimes, including those resulting in death. This fact in itself speaks to the lack of seriousness with which the government of Thailand treats this issue, and, contrary to the words of its ambassador to the Human Rights Council, continues to implicitly condone the practice, as it has done for decades.

It must also be kept in mind that the incidence of torture in Thailand is extremely widespread and not particular to the parts of the country where there are special security problems, like in the south. Wherever the AHRC has studied human rights conditions in Thailand, it has uncovered cases of torture, often accompanied by cruel and inhuman treatment, such as that suffered by one person who spoke to staff of the AHRC concerning his experiences as a detainee of the police accused of dealing in drugs in Mae Ai, in the north of Thailand. The person described how he and 11 others were put together in a pit and kept chained up for almost two weeks, during which time he was brought out only for interrogation. Detainees had to urinate and defecate in the hole, and were unable to exercise, some of them being kept there for over a month. This case, which cannot be described in detail for reasons of the security of the victims, speaks to patterns of abuse in ordinary policing in Thailand, far removed from the high-conflict zones in but a few parts of the country. It is a pattern in keeping with countries in other parts of Asia, where the AHRC has found that torture is used predominantly in mundane criminal cases, and not to extract information but to get a confession, to coerce someone into doing something, or just to show who is in charge.

## CONFUSED MULTIPLICITY AND RANDOM VIOLENCE IN THE SOUTH

While the detaining and killing of Yapa and torture of Sukrinai were going on, the WGJP released a report on conditions in the southernmost provinces of Thailand, Human Rights under Attack. According to the WGJP, much of the violence in the south has been provoked by poorly trained, ill-disciplined para-military forces and civilian militias, which continue to be used in ever-larger numbers in the region. The confusing multiplicity of groups, some under the army, some under the interior ministry, some organised through provincial administrations, others recruited under the Internal Security Operations Command and under Queen Sirikit's direction, contributes to the problem. Nor is there a clear hierarchy or organised system of command among the different groups, and orders within and between the groups are either given orally or the written orders are not made available to investigators, including those making criminal inquiries. Many of the persons recruited for these groups are not screened, have little training, and in many communities are known to be local thugs and killers-for-hire. There is little information available on how, if at all, records have been kept on recruitment and numbers of weapons issued, and members of paramilitary groups are known to have sold their arms to villagers and requested new ones on various pretexts.

Injuries to Aminudin Kaji's face after his release

The consequences of this approach towards the restive southern provinces can be seen by way of an example: a raid of the Rung Roj Wittaya School, Songhkla, resulting in the arrest and detention of two teachers, one of whom also was tortured. According to the school's administrator, Nasrudin Kaji, on February 5 around 200 paramilitary rangers and Border Patrol Police raided the school, rounding everyone up and searching the buildings without explanation. One of the units proceeded to the house of the school administrator and found his wife and one year old daughter as well as Aminudin Kaji, a teacher at the school, who was arrested along with another teacher, Abdulrohman Sorman, after the latter demanded of the security forces that they explain their actions. Abdulrohman was released at 6pm the same day, but when Aminudin's relatives were told to come and get him the following afternoon they found that instead he had been transferred to Ingkayuthborihan camp, from where he was finally released on February 7 at 9am.

Following his release Aminudin described how he had been detained at the 43rd Military Task Force base in Natawee District where five men boxed his ears and attempted to force him to confess to the shooting of a teacher and to setting off bombs. When he denied the charges, the officers beat him all over his body. When he was winded by the blows and complaining about not being able to breathe the officers responded by standing on his windpipe at least three times, and held a gun to his head and a knife to his throat. He also said that one of the officers told him that, "You'll die here or you'll die outside. If you'll die outside, I'll give you a gun, then you run for it". The officers tied a blanket into a wad and hit Aminudin over the head with it over 50 times, and also put his head in a plastic bag three times while an officer wearing gloves strangulated him. The medical report confirmed that his left arm and head were swollen and that he had sustained injuries to his arms, torso and back. He suffered from headaches and ringing in both ears and the drums in both of his ears were broken.

## A ROGUE SYSTEM

The extremely widespread use of torture and lack of effective government response in Thailand point to a rogue system of law enforcement; not, as often believed and projected, some rogues within the system. Perpetrators of torture and other gross abuses in Thailand are not themselves rogues. On the contrary, they are an inevitable outcome of a deliberately dysfunctional system that demands such services, a system that insists upon inadequate disciplinary controls and little if any witness protection, prevents the establishing of independent and reliable bodies to receive complaints and investigate and prosecute officers for wrongdoing, and ensures the incapacity and unwillingness of the courts and other state agencies to challenge the perpetrators of abuse.

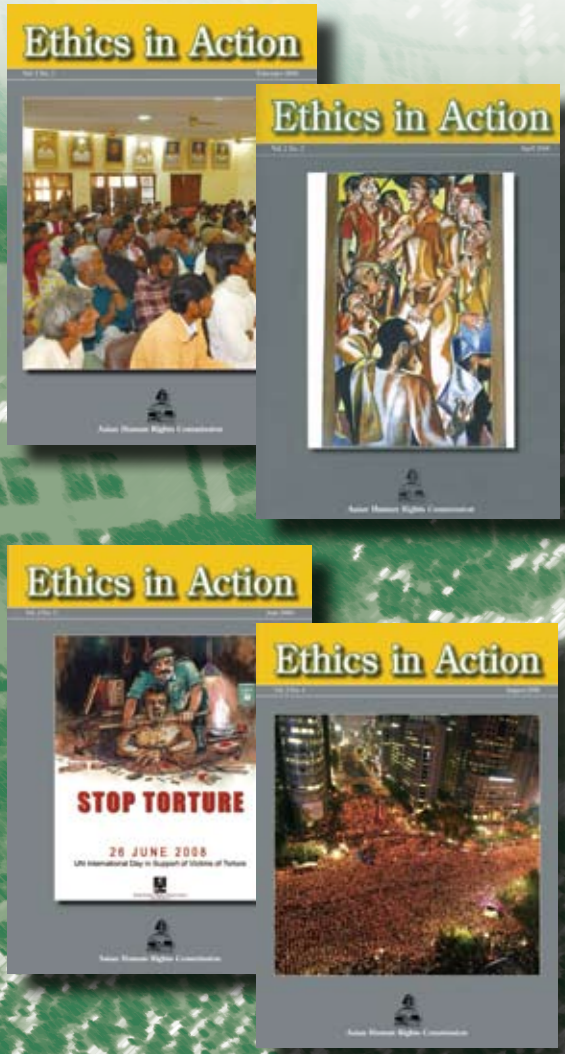
None of this is anything new. The police force that exists in Thailand today is for all intents and purposes the same one that was built by Pol. Gen. Phao Sriyanond in the 1950s. Phao, a former army general who was one of three powerful figures in the military government that emerged after a coup in 1947, saw control of the police as his personal means to power and fortune. Under him the police force was increased in size and strength to become a de facto parallel army. It took on paramilitary functions through new special units, including the border police. It ran the drug trade, carried out abductions and killings with impunity, and was used as a political base for Phao and his associates.

Successive attempts to reform the police, particularly from the 1970s onwards, have all met with failure despite almost universal acknowledgment that something must be done. As politicians and their backers are dependent upon the police for their survival, they are chary to push for changes that they inevitably meet with serious resistance from within the force. And under the government of Thaksin Shinawatra, himself a former

police colonel, police were elevated to new levels of authority in all parts of government. Although the subsequent military regime stripped them of these positions, the attempt of its caretaker prime minister to push through a new raft of structural and legal changes to the force was predictably unsuccessful.

Systemic change is nowhere easy. But the attitude that nothing can be done also is wrong. Although the police of 2008 are in many respects still the children and grandchildren of Pol. Gen. Phao, the society in which they are operating is not at all the same one as existed half a century ago. People in Thailand are today more aware and less tolerant of the sorts of excesses that have been committed by state agents pretending to act in their name for the last few generations. They are more determined to make themselves heard and insist upon their rights, contrary to the intentions of the military and bureaucratic elite. This groundswell for change was, more than any specific threats to traditional control posed by the Thaksin regime, the cause of the 2006 coup and subsequent reversals of political and legal freedoms under the army's watch.

Deep distrust of popular opinion and public action independent of state directives is what continues to restrain Thailand not only politically but also in terms of prospects for improved human rights and the rule of law. It is what makes the sort of police abuses reported in recent weeks not only likely but certain. It is also certain that if there is going to be lasting systemic change to policing in Thailand it can only be accompanied by dramatic change in other parts of social and political life. Unfortunately, with the effects of the 2006 coup still resonating throughout the country today it will be some years before spaces through which to effect such change again appear. In the meantime, the job of human rights defenders in Thailand and those working on the country from abroad will be to continue to document cases and work with victims of abuse against the negative spirit of the time.




The Asian Human Rights Commission (AHRC) is a Hong Kong-based regional human rights non-governmental organisation. This publication is a collection of reports providing information and analysis about the human rights situation in eleven Asian States in which the AHRC works, based on the cases and situations the organisation dealt with during the year. 2008 was a year in which the human rights situations in many of these countries continued to deteriorate. This report comprises an in-depth look at: the sacrificing of human rights under an illegal state of emergency in Bangladesh; the increased repression in Burma following the uprisings in 2007 and Cyclone Nargis; the increasingly authoritarian system in Cambodia; systemic failings in the rule of law in India; attacks on human rights defenders and failures to reforms in Indonesia; ongoing violations, disappearances and impunity since the elections in Nepal; the deepening human rights and security crisis in Pakistan; vigilantism and impunity in the Philippines; mass protests, repression and the retreat of human rights in South Korea under the country's new government; the intensification of violence and violations in Sri Lanka; and political upheaval, conflict and ongoing disappearances in Thailand.

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